

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Latvian Connection, LLC; Solution Managers International--USA, LLC

File: B-408182.3, B-408182.4

Date: August 13, 2013

Keven L. Barnes, Latvian Connection, LLC; Jai Ganesh, Solution Managers International--USA, LLC, for the protesters.

Tina Pixler, Esq., Department of the Army, for the agency.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency acted reasonably in amending a solicitation for energy-efficient shelters, rather than canceling and reissuing the solicitation, where the nature and scope of the changes were not so substantial as to warrant the cancellation and reissuance of the solicitation.

DECISION

Latvian Connection, LLC, of Kuwait, City, Kuwait, and Solution Managers International--USA, LLC, of St. Tampa, Florida, protest the decision of the Department of the Army, Army Contracting Command New Jersey, to amend, rather than cancel, Request for Proposals (RFP) No. W15QKN-12-R-0070, for energy-efficient, rigid-walled shelters. The protesters, neither of which submitted proposals in response to the solicitation, assert that the changes made to the solicitation by the amendment are so substantial that the agency must cancel the solicitation and issue a new one to afford all potential offerors an opportunity to compete for the contract.

We deny the protests.

BACKGROUND

On October 12, 2012, the Army, on behalf of the U.S. Army Logistics Innovation Agency, issued the solicitation as a small business set-aside, for single-story and two-story energy-efficient shelters for the Kuwait Energy Efficient Project (KEEP)

at Camp Buehring, Kuwait. The RFP contemplated the award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract, with fixed-price line items, with a two-year performance period. The estimated total value of the program was \$29,429,017. RFP at 6.

The solicitation advised that proposals would be evaluated based on three evaluation factors: technical, price, and past performance. RFP at 70. For purposes of award, the technical factor was considered significantly more important than the price factor, which was considered more important than the past performance factor. Id. The two non-price evaluation factors, when combined, were considered significantly more important than the price factor. Id. To be considered for award, a proposal was required to receive a rating of at least acceptable for the technical factor, including all subfactors. Id.

The agency received proposals from sixteen offerors by the November 26 closing date. Neither Latvian nor Solution Managers submitted proposals. The agency evaluated the proposals, and on March 15, 2013, awarded the contract to Technology and Supply Management.

Initial Protests at GAO

On April 8 and April 9, respectively, two of the unsuccessful offerors, Sea Box, Inc., and Relyant, LLC, protested the Army's evaluation under the solicitation and decision to award to Technology and Supply Management.¹ One of the protesters argued, among other things, that the agency improperly failed to consider life cycle costs in its evaluation as required by Section 368 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81) and Defense Federal Acquisition Regulation Supplement (DFARS) § 215.101-70. Contracting Officer's Statement, Latvian Protest (Latvian COS) at 3; COS, Solution Manager's Protest (Solution COS) at 3. Another protest ground alleged that the agency improperly used an unstated evaluation scheme in its price evaluation by abandoning the weights listed in the RFP's sample pricing table. The agency decided to take corrective action in response to the protests, and on April 22, our Office dismissed the protests as academic.

Amendments 0008 and 0009

As corrective action, the agency terminated the award to Technology and Supply Management, and amended the solicitation to permit submission of revised proposals from those offerors that had submitted proposals in response to the solicitation's original November 26, 2012, due date for receipt of proposals. Latvian COS at 3 ¶ 11; Solution COS at 3 ¶ 11. On May 23, 2013, the agency

¹ These protests were docketed as B-408182 and B-408182.2.

issued amendment 0008 to the solicitation, which advised offerors of the following changes and instructions:

1. All offerors are required to resubmit their Technical and Price Volumes based on the changes to the PWS and this solicitation Offerors that resubmit are cautioned to carefully review all the changes from this amendment and to submit their Volumes in accordance with this amended solicitation's Section L and Section M. Offerors are advised to resubmit new Technical and Price Volumes, not changes, as a new evaluation will be conducted in the Technical and Price Factors.
2. The guaranteed minimum has been changed to \$10,000,000.00.
3. "Life Cycle Costs" has been added as a fourth sub-factor under the Technical Evaluation Factor. Offerors must address this subfactor in their resubmission of the Technical Proposal.
4. Attachment 0001, "Performance Work Statement" [PWS] dated 25 October 2012, has been replaced in its entirety with the "Performance Work Statement" dated 14 May 2013.
5. CLIN 0007, Electrical Components Documentation, has been added in its entirety. . . .
6. There is no change to the Past Performance Factor, therefore, no new evaluation will be performed.
7. As of January 2013, a brand new Uniform Facilities Code (UFC) 1-201-01, has been published to govern the use of Non-Permanent DoD Facilities in Support of Military Operations. UFC 1-201-01 is one of two UFC's that have been reflected in this requirement. Offerors must carefully read this amendment and the updated PWS to ensure their resubmission of Technical and Price are in accordance with the changes.

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10. All other terms and conditions remain unchanged.

RFP amend. 0008 at 2. The deadline for the submission of revised proposals was June 12.

On June 5, the Army issued amendment 0009, which responded to questions raised in response to amendment 0008 and clarified the requirement based on those questions. Latvian COS at 5; Solution COS at 5; Agency Report (AR), Tab V,

Amendment Questions/Answers (June 5, 2013).² The deadline for revised proposals remained June 12.

On June 6, Latvian requested, via email, that the contracting officer extend the deadline for receipt of proposals until June 28 because the current closing date did not provide it with sufficient time to prepare a proposal for submission. AR, Tab S, Email from Latvian to Agency (June 6, 2013). The contracting officer responded that the “amendment is for vendors that proposed before the original solicitation close date in November 2012.” AR, Tab S, Email from Agency to Latvian (June 6, 2013).

On June 7, Latvian filed its protest with our Office, followed by Solution Managers, on June 10.

DISCUSSION

The protesters assert that the changes made to the solicitation by amendments 0008 and 0009 are so substantial that the agency must cancel the solicitation and issue a new one to afford all potential offerors, including them, an opportunity to compete for the contract. As discussed below, we find the agency reasonably decided to amend, rather than cancel and reissue, the solicitation.

Federal Acquisition Regulation (FAR) § 15.206(e) states that a contracting officer should cancel a solicitation under the following circumstances:

If, in the judgment of the contracting officer, . . . an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

Our review of agency decisions about whether an amendment to a solicitation requires cancellation is limited to whether the exercise of agency discretion is reasonable. See Government Contract Servs. Co., B-294367, Oct. 25, 2004, 2004 CPD ¶ 215 at 4; The New Jersey & H St. Ltd. P’ship, B-288026, B-288026.2, July 17, 2001, 2001 CPD ¶ 125 at 4.

The protesters assert that the changes made to the RFP and PWS by amendments 0008 and 0009 are so substantial³ that the agency is required to cancel the

² The Army submitted identical documents in response to both protests; citations to documents in the AR are to both versions.

solicitation. The protesters' initial protest filings, however, consist of nothing more than catalog listings of the revisions made to the solicitation and PWS by amendment 0008. The protesters argue that the substantiality of these revisions are demonstrated by the fact that the amendment requires the resubmission of new technical and price volumes, not just changed pages, and replaces the previous PWS in its entirety with a new PWS.

The agency asserts that the changes are minor, and simply highlight or clarify requirements already in the original solicitation. In its response to the protests, the agency provides point by point refutations as to why the changes to the solicitation and PWS are not substantial. As discussed below, we agree with the agency that amendments 0008 and 0009 merely clarify the RFP's original requirements, and do not constitute changes in scope that obligated the agency to cancel the solicitation. Although we do not address each change to the solicitation, we have reviewed all of the arguments raised by the protesters and find no basis to sustain the protest.

First, amendment 0008 clarified the basis of the price evaluation by stating that the agency would not use the weights listed in the RFP's sample price table as part of its price evaluation.⁴ Prior to the issuance of the amendment, an offeror questioned whether the weights listed in the sample price table were used during the evaluation.⁵ The agency explains that it amended the RFP because it did not intend to use these weights during its evaluation. Latvian COS at 6; Solution COS at 6.

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³ The protesters also argue that the changes to the solicitation should be considered substantial or "material" if they would have "more than a negligible impact on price, quantity, quality or delivery," citing Skyline ULTD, Inc., B-297800.3, Aug. 22, 2006, 2006 CPD ¶ 128 at 3. See Latvian Comments at 2; Solution Comments at 5-6. We note, however, that the materiality standard cited in Skyline addresses whether an offeror must acknowledge a solicitation amendment; it is not appropriate for determining whether a solicitation amendment is "substantial" and thus requires the agency to cancel the solicitation. See FAR § 15.206(e); Government Contract Servs. Co., supra.

⁴ The revised language reads: "NOTE TO OFFEROR: The unit prices and weights contained in the sample above were fabricated for demonstration purposes only and in no way reflect the unit prices the Government expects to pay or the weights the Government shall use during the evaluation." RFP, amend. 0008 at 13 (emphasis in original).

⁵ The Army made this change in response to the protest ground that alleged that the price evaluation under the initial solicitation was improper because it used an unstated evaluation scheme by not using the weightings listed in the RFP's sample price table.

Similarly, amendment 0008 clarified the Army's regulatory obligation to consider life cycle costs as part of its evaluation by adding life cycle costs as a fourth technical subfactor.⁶ The agency explains that this change is not substantial because the life cycle cost information was included in the original PWS requirements, and the Agency was required by regulation to consider it during its evaluation. Latvian COS at 7; Solution COS at 7. However, to clarify this issue, the agency amended the solicitation's evaluation criteria to reflect its regulatory obligations in this regard.⁷ Id.

Next, with regard to the revisions to the PWS, the agency explains that it replaced the original October 25, 2012, PWS in its entirety with the revised PWS in order to avoid confusion by the offerors. Latvian COS at 8; Solution COS at 8. The agency explains that the changes to the PWS either involve clarifying or adding illustrative examples and references about requirements already included in the previous PWS.⁸ For example, the prior PWS required offerors to comply with all UFC requirements, while the revised PWS added references to specific UFC provisions to highlight an offeror's responsibility to adhere to the particular requirements that applied to the RFP.⁹ See MIL-STD-3007F (Dec. 13, 2006).

⁶ DFARS § 225.7002-1(a)(3)(i) states that “[w]hen acquiring tents or other temporary structures for use by the Armed Forces, the contracting officer shall award contracts that provide the best value” and that “[d]etermination of best value includes consideration of the total life-cycle costs of such tents or structures, includes the costs associated with any equipment, fuel, or electricity needed to heat, cool, or light such tents or structures”

⁷ This issue was also raised to the agency during the previous protests of this procurement before our Office.

⁸ For example, PWS § 2.0 (Applicable Documents) was changed to add Army Pamphlet 385-26. Revised PWS at 3. This document requires that electrical components be listed or qualified by an Occupational Safety and Health Administration (OSHA) recognized testing laboratory. This was already a requirement in the previous PWS. See Initial PWS § 3.3.7 at 7 (“Electrical equipment shall carry an independent laboratory listing or qualification by an [OSHA] recognized testing laboratory.”). The agency explains that this language was added to the applicable documents section in the revised PWS as an additional reference of this requirement for offerors ease. Latvian COS at 8; Solution COS at 8.

⁹ For example, PWS § 2.0 (Applicable Documents) was revised to reference the specific Uniform Facility Criteria (UFC) that applies to this requirement, rather than a more generic reference to the UFC. In the previous PWS, section 2.0 included the “Uniform Facility Criteria (UFC)” as an applicable document, see Initial PWS at 2, whereas the latest PWS includes the specific UFCs with which the shelters need to comply. See Revised PWS at 3. The agency explains that this is not a substantial

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As for the change in the minimum guaranteed dollar value, the agency explains that this adjustment was based on a change in the anticipated amount of two-story shelters to be delivered under Delivery Order 0001, from 120 shelters to 80 shelters. Latvian COS at 6-7; Solution COS at 6-7. The agency notes, however, that the RFP's overall requirement has not changed from the initial solicitation--to deliver up to 230 two-story shelters and up to 50 single-story shelters. The agency contends that this change is insignificant as the offerors are not required to propose anything for Delivery Order 0001, and that, in fact, the anticipated amount of shelters to be delivered under Delivery Order 0001 is subject to change again based on the successful offeror's proposal and shelter design. Id.

In response to the agency's detailed point-by-point explanations, the protesters' comments merely reiterate the catalogue of changes to the solicitation that were listed in their protests, and reassert generally that these changes must be substantial because the agency replaced the PWS and is requiring revised technical and price proposals. The protesters do not explain why any of the changes to the RFP and PWS were substantial, or even how the changes altered the requirement in any way.¹⁰ In this regard, the protesters fail to meaningfully refute the agency's position or demonstrate that the agency's position is unreasonable.

As discussed above, the FAR requires a contracting officer to consider whether the amendment is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them. FAR § 15.206(e). Here, we conclude that the record supports the contracting officer's decision that the amendment was not substantial. As the agency notes, amendments 0008 and

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change to the requirement as offerors were already required to comply with the UFCs under the previous PWS. See MIL-STD-3007F (Dec. 13, 2006).

¹⁰ Although Solution Managers asserts that it should be allowed to submit a proposal in response to a new solicitation because it "has added several different professional engineers and AutoCAD professionals to the staff since this new solicitation and PWS came out," Solution Managers Comments at 4, we do not judge the magnitude of the changes contained in an amendment on the basis of an individual prospective offeror's perception of the effect of the changes on its own ability to meet the needs of the RFP. See Afftrex, Ltd., B-231033, Aug. 12, 1988, 88-2 CPD ¶ 143 at 10. Here, apart from the fact that Solution Managers considers a later proposal submission date to be significant to its ability to compete for the award in light of the fact that it has hired additional staff, the protester has failed to show that the Army's decision to amend, rather than cancel the RFP, was unreasonable.

0009 merely clarify requirements already in the initial solicitation, and the magnitude of the changes are not beyond what reasonably could have been anticipated. While amendment 0008 required offerors to submit new technical and price proposals, and involved replacing the previous PWS with a revised PWS, as well as implemented other revisions, the fact of revision, in itself, is not the prerequisite under the regulation which requires cancellation of the solicitation and reprocurement. Rather, the magnitude of the change in relation to the original RFP governs whether a solicitation should be canceled and reissued. See Alamo Aircraft Supply, Inc., et al., B-278215.4, Mar. 11, 1998, 98-1 CPD ¶ 76 at 4-5 n.5 (discussing similar circumstances concerning a solicitation amendment and noting that the result would be the same under FAR § 15.206(e)).

In light of the Army's reasonable judgments concerning the solicitation amendments, and the protesters' failure to provide support for their arguments or otherwise meaningfully respond to the agency report, we find no basis to sustain the protests.¹¹

The protests are denied.

Susan A. Poling
General Counsel

¹¹ The protesters also challenged the contracting officer's refusal to allow them to submit proposals in response to the amended solicitation. In response to this argument, the agency asserted that the protesters are not interested parties under the instant solicitation because they were neither actual nor prospective offerors when amendment 0008 was issued, and under FAR § 15.206(c), "[a]mendments issued after the established time and date for receipt of proposals shall be issued to all offerors that have not been eliminated from the competition." The protesters here were interested parties to challenge whether amendments 0008 and 0009 were so substantial as to require the agency to cancel, rather than amend, the RFP, since they could have competed if we had agreed with the protesters that the agency must cancel and reissue the solicitation. However, in light of our conclusion that the amendments were not substantial, in conjunction with the fact that the protesters chose not to submit proposals in response to the original RFP, the protesters have no further direct economic interest in this procurement, and therefore, are not interested parties with regard to the original RFP. 4 C.F.R. §§ 21.0(a)(1), 21.1(a); see The New Jersey & H St. Ltd. P'ship, supra (finding that the agency was not required to provide the protester with an opportunity to submit a proposal in response to the amended solicitation where the protester had been eliminated from the competition, and thus was no longer considered an offeror under the original solicitation).