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Decision

Matter of: Sealift, Inc.
File: B-412041.2
Date: December 30, 2015

Timothy B. Shea, Esq., Nemirow, Hu & Shea, for the protester.
Johanna E. Crawford, Esq., and Allison M. McDade, Esq., Department of the Navy, for the agency.
Louis A. Chiarella, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's corrective action is denied where the record reflects that after a prior protest, the agency took corrective action because it found the solicitation to be ambiguous regarding the agency's tiered evaluation of offers, and where agency acted within its discretion in deciding that the identified flaws warranted cancelling and reissuing the solicitation.

DECISION

Sealift, Inc., of Oyster Bay, New York, protests the corrective action being taken in connection with request for proposals (RFP) No. N62387-15-R-3000, issued by the Department of the Navy, Military Sealift Command (MSC), for the time charter of a vessel. Sealift argues that the corrective action is unreasonable.

We deny the protest.

BACKGROUND

The RFP was issued to acquire, on behalf of the Department of the Army, the time-chartering of a container ship capable of carrying ammunition and other bulk cargo to prepositioned locations worldwide.¹ Contracting Officer's Statement, Nov. 4,

¹ The solicitation included a lengthy performance work statement (PWS) that set forth vessel specifications and performance requirements. RFP at 21-51.

2015, at 1. Relevant to the protest here, the solicitation provided for a tiered evaluation approach as follows:

In accordance with [Defense Federal Acquisition Regulation Supplement] 215.203-70, this acquisition includes a tiered evaluation. If the government receives offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery, no offers received from other than small business concerns will be considered for award. In such event, [Federal Acquisition Regulation] provision 52.219-6 (Notice of Total Small Business Set-Aside) shall be considered incorporated by reference.

If the Government does not receive offers from two or more responsible small business concerns that are competitive in terms of market price, quality, and delivery; all offers, including offers from other than small business concerns, will be considered for award.

RFP § M-1, see also § L-1 (“[a]fter the deadline for receipt of initial offers has passed, offers will be reviewed to determine whether two or more offers from responsible small business concerns have been received that are competitive in terms of market price, quality, and delivery . . .”).

Three small business concerns, including Sealift, and one large business concern (Maersk Line Limited) submitted proposals by the solicitation’s closing date.² The agency evaluated proposals and found that none of the small business proposals met all PWS requirements. Agency Report (AR), Tab 5, Contracting Officer’s Determination, Mar. 17, 2015, attach. A, Email--Initial Review for Determination of Small Business Set-Aside, at 1. The contracting officer then determined, based on the evaluation of initial proposals, there were not two or more small businesses that were competitive in terms of price, quality, and delivery, and that the procurement was now considered unrestricted.³ AR, Tab 5, Contracting Officer’s Determination, Mar. 17, 2015, at 1-2.

All offerors, including Sealift, were included in the competitive range. The agency thereafter held discussions, received final proposal revisions (FPR), and ultimately made award to Maersk. The contracting officer did not, after receipt of FPRs, reconsider her earlier determination that there were not two or more small businesses that were competitive in terms of price, quality, and delivery.

² Sealift submitted proposals for two alternate vessels.

³ The agency subsequently notified offerors, including Sealift, that it considered the procurement to be unrestricted.

On September 4, 2015, after receipt of the award notice and a debriefing, Sealift filed a protest with our Office challenging the award to Maersk. Sealift protested that the agency improperly concluded there were not two or more small businesses that were competitive in terms of price, quality, and delivery. Among other things, the protester maintained that after holding discussions and receiving FPRs, the agency possessed proposals from two or more responsible small business that were competitive, and that, under the terms of the solicitation, award should have been made to a small business. Protest, Sept. 4, 2015, at 5-6.

In response to the Sealift protest, by letter dated September 29, MSC advised that it intended to take corrective action. Specifically, MSC advised that it was cancelling the current award and solicitation, redefining its requirements, and resoliciting as a new procurement. Agency Notice of Corrective Action (B-412041) at 1. In response to the agency's corrective action, we dismissed the earlier protest as academic, without rendering a decision on the merits. Sealift, Inc., B-412041, Sept. 29, 2015 (unpublished decision). Sealift thereafter filed the instant protest with our Office.⁴

DISCUSSION

Sealift asserts that the agency's corrective action is overly broad and unreasonable given the prior protest allegations. In this regard, Sealift maintains that the agency's corrective action fails to address the mishandling of the small business tiered evaluation under the original solicitation.⁵ The agency argues that its choice of corrective action (*i.e.*, cancelling and reissuing the solicitation) was reasonable in light of its reason for taking corrective action (*i.e.*, that the RFP was ambiguous about how the tiered evaluation of proposals would be performed).

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9,

⁴ The Navy subsequently issued a new solicitation which expressly states that the agency will perform its tiered evaluation only after receipt of initial proposals, and that the decision made after review of small business initial proposals would be final. AR, Tab 20, RFP No. N32205-16-R-3501, §§ L-1, M-1. The agency also made certain minor changes to the PWS requirements in the new solicitation. Contracting Officer's Statement, Nov. 4, 2015, at 2.

⁵ Sealift essentially argues that the contracting officer's decision to take corrective action, rather than defend the tiered evaluation decision, means that the tiered evaluation was improper. Thus, the protester contends, "any corrective action taken must be reasonably related to cur[ing] that confessed error." Protest, Oct. 5, 2015, at 5.

2015, 2015 CPD ¶ 316 at 5; Bannum Inc.--Protest and Recon., B-411074.2, B-411074.3, June 12, 2015, 2015 CPD ¶ 231 at 3. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011 2011 CPD ¶ 65 at 3.

Moreover, our review is generally limited to whether the agency's corrective action is appropriate to remedy the flaw which the agency believes exists in its procurement process, see Onésimus Def., LLC, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 at 5--not whether the agency's corrective action remedies the flaws alleged in an earlier protest where no decision on the merits was issued by our Office.⁶ Where an agency discovers that a solicitation is vague or ambiguous as to how the procurement will be conducted, a proper remedy is the cancellation and reissuance of the solicitation. See *id.*; FCS Const. Servs., Inc., B-283726.2, Jan. 3, 2000, 99-2 CPD ¶ 115 at 4; SMS Data Products Group, Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 3. Further, we have recognized that the possibility that a contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in a reopened procurement because its price has been exposed. Northrop Grumman Info. Tech., Inc., *supra*.

On the record here, we see no basis to object to the agency's corrective action. As a preliminary matter, as set forth above, our Office never determined the merits of Sealift's earlier protest.⁷ Thus, our review here is limited to whether the Navy's choice of corrective action is appropriate to remedy the flaw which the agency believes exists in the procurement process. Further, as Sealift was not the original awardee for this procurement and its price was not exposed, Sealift is not at a competitive disadvantage in the reopened procurement.

⁶ It is also not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Bannum Inc.--Protest and Recon., *supra*, at 7; Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3.

⁷ We also find Sealift's reliance on our decision in Maersk Line, Ltd., B-410280, Dec. 1, 2014, 2014 CPD ¶ 359, where the agency reasonably concluded that it had received two or more offers from responsible small business concerns that were competitive in terms of price, quality, and delivery in a different procurement, to be irrelevant to the procurement here.

The agency explains how it determined that the RFP was ambiguous as to the tiered evaluation. In this regard, the agency intended that the tiered evaluation would only be conducted based on the initial proposals. Consequently, the agency did not relook its unrestricted competition decision after receipt of FPRs, even though there existed two or more small business proposals that were technically acceptable, and competitive in terms of price, quality, and delivery. The solicitation, however, was silent as to when and how the agency would conduct its tiered evaluation of offers. Having found that the procedures set forth in the RFP for making the tiered evaluation decision were ambiguous, the contracting officer determined that the solicitation required correction. In light of the passage of time--the RFP was issued in January 22, 2015, with a closing date of March 13--the contracting officer determined that the appropriate remedy was cancelling and reissuing rather than amending the earlier solicitation. Under the circumstances, we conclude that the agency reasonably determined that it should cancel the RFP and resolicit after clarifying its tiered evaluation process. In sum, although Sealift would undoubtedly prefer the Navy make award to it (as the highest rated, small business concern), or amend the prior solicitation and restrict competition to the initial offerors, we find Sealift's disagreement with the agency's rationale for cancelling and reissuing the solicitation does not provide a basis on which to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel