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## Decision

**Matter of:** Estrategy, Inc.

**File:** B-406419

**Date:** May 9, 2012

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Lee Dougherty, Esq., and Katherine A. Straw, Esq., General Counsel P.C., for the protester.

William E. Hughes, III, Esq., Whyte Hirschboeck Dudek S.C., for NEIE Medical Waste Services, LLC, an intervenor.

Kate Gorney, Esq., Department of Veterans Affairs, for the agency.

Linda C. Glass, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest of an agency's award of a contract is denied where the agency reasonably found that the awardee complied with the solicitation's licensing requirements.

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### **DECISION**

Estrategy, Inc., of North Kansas City, Missouri, protests the award of a contract to NEIE Medical Waste Services, LLC, of Quinton, Virginia, under request for proposals (RFP) No. VA-261-11-RP-0108, issued by the Department of Veterans Affairs (VA) for hazardous waste disposal services for the agency's Sierra Nevada Health Care System. The protester contends that the awardee's proposal was not technically acceptable.

We deny the protest.

### **BACKGROUND**

The RFP, issued as a service-disabled veteran-owned small business (SDVOSB) set-aside, provided for the award of a fixed-price, indefinite-quantity contract to the

offeror that submitted the lowest-priced, technically acceptable proposal.<sup>1</sup> RFP at 23.

The RFP provided that proposals would be evaluated for technical acceptability, past performance, and price. Id. With respect to technical acceptability, which was to be evaluated on a pass/fail basis, the RFP provided the following:

(i) Assessment: The offeror's proposal shall, as a minimum, address each of the technical proposal criteria as they apply to the SOW. During evaluations of each proposal, the Government will assess each area of the Technical Proposal to ensure the offeror meets or exceeds the standards of the contract. The Government will evaluate the technical proposal based on the evaluation criteria described in Section A through C below, which are tailored to specific principal tasks in the SOW. The Government will infer from the offeror's responses to these specified evaluation criteria the offeror's capability to perform to the requirements of the entire SOW. In order to be considered for award, the offeror must demonstrate the ability to provide adequate and qualified staff and expertise to satisfy the statement of work requirements by describing or providing the information requested below:

- a. Contractor shall submit medical waste and license permits.
- b. Contractor shall provide an organization chart, listing of superintendent and other key staff members and appropriate competency level training that demonstrates the contractor's ability to process each waste stream in accordance with Federal and State Laws.
- c. Contractor shall provide proof of ability to provide online real time waste stream data via documentation demonstration or online demonstration.

RFP at 23-24.

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<sup>1</sup> As originally issued, the RFP stated that the solicitation was a total set-aside, but failed to identify what type of set-aside. Subsequently, the solicitation was amended to provide that the RFP was set aside for SDVOSBs. The RFP did not incorporate or include, however, Federal Acquisition Regulation § 52.219-27, "Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside."

VA amended the RFP on December 22, 2011. This amendment revised the statement of work (SOW) but did not revise the evaluation criteria. As is relevant here, with respect to the licenses requirement, the SOW was amended as follows:

5.7. Contractor shall also have an assigned U.S. Environmental Protection Agency (EPA) authorization and identification number, necessary Department of Transportation permits, insurance prior to transport and/or disposal of subject waste. If contractor requires additional information, they may contact U.S. EPA regional office.  
**Copy of all licenses shall be provided to Contracting Officer upon contract award.**

RFP amend. 2, at 8 (emphasis in original).

With respect to past performance, the RFP stated that the agency would assess how offerors performed on recent contracts (within the past 3 years) of similar size and scope along with the customer ratings. RFP at 24.

VA received three proposals, including the protester's and NEIE's. NEIE stated in its proposal that all "[r]egulated Medical Waste will be properly processed and disposed of in strict accordance with all established Department of Environmental Protection Agency regulations." See Agency Report (AR) Tab 3, NEIE's Technical Proposal, at 4. With respect to the license requirements, NEIE stated that waste facility permits and current insurance certificates would be provided upon contract award. *Id.* The protester provided copies of its licenses with its proposal. The proposals were evaluated by the agency's technical evaluation team (TET) as follows:

	NEIE	ESTRATEGY	OFFEROR A
Technical Acceptability	Pass	Pass	Fail
Past Performance	Significant Confidence	Neutral	Little Confidence
Price	\$83,518.12	\$312,915.20	\$96,588.72

Contracting Officer's Statement at 1; TET Consensus Evaluation Report, Jan. 30, 2012.

As relevant here, NEIE's proposal was found to be technically acceptable based on its representation that permits and licenses would be provided at contract award and its adequate description of the firm's proposed organization and ability to provide online, real-time waste stream data. Consensus Evaluation Report, Jan. 30, 2012, at 2. NEIE received award as the lowest-priced, technically acceptable offeror. See AR, Tab 4, Source Selection Decision, at 5. This protest followed a debriefing.

## DISCUSSION

Estrategy argues that NEIE's proposal is not technically acceptable because NEIE did not submit copies of all required licenses with its proposal, as Estrategy argues is required by the RFP.<sup>2</sup> In this regard, the protester contends that the RFP provision that, "in order to be considered for award," offerors "shall submit medical waste and license permits," was a definitive responsibility criterion which had to be satisfied prior to contract award. Comments at 3.

The agency responds that the RFP, as originally issued, allowed offerors to describe or submit license permits, and did not require that license permits be submitted with the offers. The agency further notes that the RFP was amended to specifically provide that licenses were required upon contract award.

We do not agree with Estrategy that the RFP required the submission of permits and licenses prior to contract award. Rather, as noted above, the RFP was amended to specifically provide that copies of licenses were to be provided to the contracting officer after award. See RFP amend. 2, at 8.

To the extent that the protester argues that there is a conflict between this provision in the amendment and the solicitation's evaluation criteria, this is a patent ambiguity in the RFP that Estrategy was required to protest prior to the closing date for receipt of proposals. Under our Bid Protest Regulations, protests of apparent alleged solicitation improprieties must be filed prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2011). Where a patent ambiguity is not timely challenged, we will not accept a protester's subsequent interpretation. See Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8; Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10. Estrategy may not now assert that the only permissible interpretation of the solicitation's licensing requirements is its own.

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<sup>2</sup> The protester also appears to object to the agency's evaluation of NEIE's proposal under the past performance evaluation factor based on negative information provided in an agency-level protest concerning another procurement that Estrategy alleges demonstrates that NEIE was not registered to do business in the state of New York. However, there was no requirement in the RFP for the agency to consider this information in its past performance evaluation under the current solicitation. Moreover, the record shows that NEIE has successfully performed a contract in the state of New York and its performance of that contract was rated excellent. TET Consensus Report at 6.

Here, the VA determined that NEIE's promise to comply with all licensing requirements was acceptable.<sup>3</sup> The record provides no basis to object to this determination.

Estrategy also protests that based upon NEIE's low price, the awardee may not be performing 51 percent of the work as required by FAR § 52.219-27. Protest at 4. Estrategy's protest, however, fails to include a citation to any such requirement in the solicitation, nor does the record indicate that this clause was incorporated or included in the RFP. Accordingly, this allegation is factually and legally insufficient, and we will not consider it.<sup>4</sup> 4 C.F.R. §§ 21.2(c)(4), 21.5(f); Excalibur Laundries, Inc., B-405814, B-405814.2, Jan. 3, 2012, 2012 CPD ¶ 1 at 6.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>3</sup> Furthermore, where an agency evaluates a responsibility related evaluation factor, such as a license requirement, on a pass/fail basis rather than comparatively, the rejection of a small business offeror as unacceptable is tantamount to a nonresponsibility determination, which must be referred to the Small Business Administration for consideration under that agency's certificate of competency procedures. Joanell Labs., Inc.; Nu-Way Mfg. Co., Inc., B-242415.8, et al., Apr. 15, 1992, 92-1 CPD ¶ 369 at 6.

<sup>4</sup> In any event, there is nothing on the face of NEIE's proposal that evidences that the firm cannot and would not comply with the limitation of subcontracting provisions of FAR § 52.219-27.