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Decision

Matter of: Avaya Government Solutions, Inc.

File: B-409037; B-409037.2; B-409037.3

Date: January 15, 2014

Michael R. Golden, Esq., Michael A. Hordell, Esq., Robert T. Leahy, Esq., and Craig A. Schwartz, Esq., Pepper Hamilton LLP, for the protester.
Joseph G. Billings, Esq., Miles & Stockbridge P.C., for the intervenor.
Christopher Tiroff, Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated awardee's proposal is denied where record shows that the agency's evaluation was reasonable and in accordance with the terms of the solicitation and applicable statutes and regulations.

DECISION

Avaya Government Solutions, Inc., of Fairfax, Virginia, protests the issuance of a task order to American Systems Corporation (ASC), of Chantilly, Virginia, under request for proposals (RFP) No. VA118-13-R-0369, issued by the Department of Veterans Affairs (VA) for an enterprise interactive voice response (IVR) system. Avaya maintains that the agency improperly found the proposal of ASC technically acceptable.

We deny the protest.

BACKGROUND

The RFP contemplates the issuance of a fixed-price task order to provide an IVR system during the base year of performance, along with up to two 1-year options to provide maintenance and technical support for the system.¹ The IVR is a call

¹ The RFP was issued to contractors previously awarded contracts under the General Services Administration's Connections II government wide acquisition

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deflection and self-service solution that essentially will provide an automated response to incoming calls placed to the agency's various service centers; the object of the system is to reduce the number of rejected calls and also to reduce the long wait time experienced by callers. RFP at BATES 40.² The RFP also included two optional requirements that would allow the agency to purchase additional software licenses. Award was to be made on a "best value" basis, considering price, technical, past performance, and veterans' involvement. RFP at BATES 110. In terms of the relative importance of the evaluation criteria, the RFP provided that the technical factor was significantly more important than the past performance factor, which was slightly more important than the price factor which, in turn, was significantly more important than the veterans' involvement factor. RFP at BATES 110-11. Overall, the RFP provided that the non-price considerations were, collectively, significantly more important than price. Id.

The agency received a number of proposals in response to the RFP, including those of the protester and the awardee. The agency evaluated the proposals and assigned both the protester's and awardee's proposals acceptable ratings under the technical factor, and low risk ratings under the past performance factor. Agency Report (AR), exh. 8, Source Selection Decision, at BATES 602. Additionally, the agency gave the protester's proposal no credit under the veterans' involvement factor, and gave the awardee's proposal a rating of some consideration under that factor. Id. The protester proposed a price of \$17,023,207, while the awardee proposed a price of \$14,251,958. Id. On the basis of these evaluation results, the agency issued a task order to ASC without engaging in discussions. Id. at BATES 604. After being advised of the agency's selection decision and receiving a debriefing, Avaya filed the instant protest.

PROCEDURAL ISSUES

As an initial matter, we note that Avaya's protest includes numerous allegations that we decline to consider for procedural reasons. We discuss these first before turning to the issues on the merits.

(...continued)

contract (GWAC), a multiple-award, indefinite-delivery, indefinite-quantity (ID/IQ) contract. The task order issued to ASC was valued at \$14,251,958. As the value of this task order is in excess of \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award ID/IQ contracts. 41 U.S.C. § 4106(f)(1)(B).

² All of our citations to the record refer to the BATES numbering system the agency used in preparing its report.

Untimely Allegation

In its first supplemental protest filed on November 14, 2013, Avaya contended that this requirement was being fulfilled using the offerors' Federal Supply Schedule (FSS) contracts, and that many of the items listed on a bill of materials submitted with ASC's proposal were not included on its FSS contract. In response to this allegation, the agency correctly noted that the requirement was not being fulfilled using the offerors' FSS contracts, but, instead, was being fulfilled using the offerors' GSA Connections II GWAC contracts. The agency therefore took the position that it was unnecessary for all of the items being provided to be on ASC's FSS contract, and that, to the extent the items were not on the firm's GWAC contract, that underlying contract permitted contractors to add such items.

In response to the VA's position, Avaya argued for the first time in its December 2, 2013 comments responding to the agency report that the agency erroneously failed to perform a "scope determination" to evaluate whether items not included on ASC's GWAC contract were within the scope of that contract. We dismiss this aspect of Avaya's protest as untimely. Avaya was provided a copy of ASC's price proposal--which included the bill of materials--on November 4. That document contained all the information necessary for Avaya to raise this allegation, since it included all of the materials being proposed by ASC, and ASC's Connections II GWAC contract pricelist--which includes all items available under the contract--is publicly available. See <http://www.americansystems.com/Contracts/Documents/ConnectionsIIContractBTablesFile2of3.pdf>. Avaya did not raise this allegation until more than 10 days after having all of the information necessary to advance the contention, as it was required to do under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (2013). We therefore dismiss this aspect of Avaya's protest.

Abandoned Issues

After receiving the agency report in response to its initial and first supplemental protest, Avaya filed a second supplemental protest. In that filing, Avaya raised a large number of specific allegations relating to the contents of the ASC proposal. In particular, Avaya alleged that the ASC proposal failed to meet five specific solicitation requirements.³ Avaya Second Supplemental Protest, Dec. 2, 2013, at 5-6. Avaya also included a table in that submission that listed an additional eight specific instances where, according to the protester, the ASC proposal failed to meet material solicitation requirements. Id. at 7-8.

The VA filed a report in which it provided detailed responses to all of Avaya's supplemental protest arguments. AR, exh. 19, Agency Supplemental Report, Dec.

³ One enumerated allegation, that the VA allegedly improperly allowed ASC to use software licenses owned by the agency, was included in Avaya's original protest.

9, 2013. In its comments responding to the agency's supplemental report, Avaya provided no substantive response in connection with 10 of the 13 allegations it originally made.⁴

We dismiss these contentions as abandoned. In this connection, where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3; see also Israel Aircraft Indus., Ltd.--TAMAM Div., B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7 (where protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the originally-raised allegation abandoned).

PROTEST

Technical Evaluation

Avaya contends that the agency improperly failed to find the ASC proposal technically unacceptable for several reasons. We have reviewed all of Avaya's contentions and find them without merit. We note at the outset that, in considering protests relating to an agency's evaluation, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's disagreement with the agency's evaluation conclusions does not provide a basis for our Office to object to the evaluation. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6.

Avaya maintains that the ASC proposal fails to meet the solicitation's requirements relating to the provision of a firewall capability. According to the protester, ASC impermissibly shifted the responsibility to provide a firewall capability to the agency.

In response to this assertion, the agency explains that the solicitation does not require offerors to provide an independent firewall capability, but simply requires that the proposed solution be in compliance with applicable VA firewall and security

⁴ The remaining three issues--Avaya's assertions that ASC improperly relied on software licenses owned by the agency; that ASC improperly failed to meet the solicitation's firewall requirements; and that ASC failed to meet the solicitation's requirements for system administrators and supervisors to be able to manually delete personally identifiable information--are discussed below.

policies and guidelines. Supplemental Agency Report, at BATES 752. The agency further explains that federal government firewall guidelines are dictated by the Department of Homeland Security; that the proposed solution here will reside within VA firewalled sites; and that the successful contractor will not be permitted to access the VA or Homeland Security firewall or security gateway systems. Id.

The protester has offered no meaningful response to the agency's position other than to continue to insist that the RFP included an independent requirement for the contractor to provide a firewall capability. A review of the RFP, however, and, more specifically, the provisions cited by the protester, demonstrates that the VA's position is correct that the RFP simply requires that any proposed solution be in compliance with VA policies and standard operating procedures pertaining to system security. In this connection the RFP provides as follows:

The Contractor shall ensure adequate LAN/Internet, data, information, and system security in accordance with VA standard operating procedures and standard PWS language, conditions, laws, and regulations. The Contractor's firewall and web server shall meet or exceed VA minimum requirements for security. All VA data shall be protected behind an approved firewall. Any security violations or attempted violations shall be reported to the VA Program Manager and VA Information Security Officer as soon as possible. The Contractor shall follow all applicable VA policies and procedures governing information security, especially those that pertain to certification and accreditation.

RFP at BATES 74, 211. Elsewhere, the RFP provides as follows: "The Contractor/Subcontractor's firewall and Web services security controls, if applicable, shall meet or exceed VA minimum requirements. VA Configuration Guidelines are available upon request." RFP at BATES 80, 217 (emphasis supplied).

The RFP therefore did not require the offerors to provide an independent firewall capability, but only that any proposed solution (which may or may not include a separate, contractor-provided firewall capability) be in compliance with VA policies and procedures pertaining to information or data security. We point out as well that the protester did not offer an independent firewall capability in its proposal;⁵ the record thus also shows that the protester understood that the RFP did not require such a capability in connection with its proposed solution. We therefore deny this aspect of Avaya's protest.

Avaya next argues that the agency impermissibly accepted ASC's proposed solution that included use of certain agency-owned software licenses, specifically,

⁵ In fact, the protester's proposal does not even use the word "firewall."

something referred to as VMWare application software. According to Avaya, the VMWare software was not included in the list of government furnished property, and it was improper for the agency to permit ASC to propose what the parties describe as a “virtualized” solution that incorporated this software, without also affording all offerors an opportunity to propose on that basis as well.

The VA responds that this is a performance-based solicitation that did not dictate a particular solution, and that use of the VMWare software was a permissible solution to the agency’s requirements. The VA also notes that the cost of the software--which the agency estimates at approximately \$50,000--would not have affected its source selection decision because the protester’s proposal (which the agency found technically equivalent to the awardee’s proposal) was approximately \$3 million higher in price than the awardee’s proposal. Finally, the agency points out that, despite its protest contention, Avaya also offered to provide--as an alternate solution--use of the VMWare software, and that the protester’s proposal also stated that such an alternate solution would not affect its proposed price.

Avaya has given us no basis to sustain this portion of its protest. Even if, as the protester alleges, it was improper for ASC to have offered a proposed solution that used the VMWare software, there is no basis for our Office to conclude that Avaya was prejudiced by the agency’s acceptance of the ASC proposal. In this regard, prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency’s actions arguably were improper. ITT Corp.-Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 7.

First, nothing in the RFP prevented firms from offering a solution that included the VMWare software. As the VA correctly points out, the solicitation includes a performance-based statement of work that states the agency’s requirements in terms of performance capabilities rather than design requirements. Simply stated, the RFP did not require any particular hardware or software configuration to provide a solution that satisfies the agency’s requirements.

Second, as noted, the agency has quantified the potential cost advantage that ASC might have enjoyed by virtue of having proposed to use the agency’s VMWare software licenses (approximately \$50,000). Avaya has not challenged the agency’s estimate, which is relatively insignificant in relation to the approximately \$3 million price difference between the two offers.

Third, and most importantly, the record shows that Avaya also considered the VMWare software as a possible solution. Although the protester’s proposal did not provide the agency with sufficient detail regarding its use of the software for the agency to completely evaluate it as an alternative solution, nonetheless the protester’s proposal provided as follows:

[delete]

AR, exh. 4, Avaya Proposal, at BATES 438 (emphasis supplied). Avaya's proposal elsewhere provided as follows:

[delete]

AR, exh. 4, Avaya Proposal, at BATES 432 (emphasis in original). The record therefore is clear that, despite its current protest allegation, Avaya recognized that using the VMWare software to achieve a virtualized solution was permissible under the terms of the RFP, and that the software licenses could be made available to an offeror as a part of its proposed solution. The record also is clear that proposing on that basis would not have affected Avaya's price which, as noted, was approximately \$3 million higher than ASC's price. We therefore deny this aspect of Avaya's protest.⁶

Finally, Avaya maintains that the ASC proposal did not meet the RFP's requirement that system administrators and supervisors be able to manually delete personally identifiable information. In response to this allegation, the VA states that this was a minor element of its requirements having no material impact on the overall acceptability of the ASC proposal, and that the agency currently does not need this performance capability in any event.

As with Avaya's allegation relating to the VMWare software licenses, Avaya has not asserted or demonstrated how it may have been prejudiced by the agency's acceptance of the ASC proposal with this minor deviation from the RFP requirements. Avaya has not alleged or shown that it would have changed either its price or its technical approach had it been aware that the agency would be willing to waive this minor requirement. In the absence of such prejudice, we have no basis to sustain this aspect of Avaya's protest, even if it is correct. ITT Corp.-Electronic Sys., supra.

⁶ In a related allegation, Avaya asserts that, because the VMWare software licenses are owned by VA rather than ASC, ASC cannot meet the RFP's "uptime" requirement because ASC does not control the licenses. In this connection, the RFP requires that the proposed system meet an annual availability of 99.99 percent. RFP at BATES 204. The agency explains, however, that the only risk associated with the VMWare software licenses in terms of meeting the uptime requirement of the RFP would be if the licenses lapsed because VA did not pay the cost associated with maintaining them. VA notes that, because it uses the licenses for reasons independent of this acquisition, there is no risk that this will occur. In light of the agency's explanation, Avaya has given us no basis to sustain aspect of its protest.

Price Evaluation

Avaya asserts that the agency miscalculated the ASC price proposal. According to the protester, the ASC price proposal included a bill of materials that had inconsistent or ambiguous prices for various hardware elements that will be furnished by ASC. The protester therefore maintains that the ASC price proposal overall was ambiguous and should not have been accepted by the agency.

We find no merit to this aspect of Avaya's protest. As an initial matter, nothing in the RFP required offerors to submit a bill of materials with their proposals. (Avaya did not include a bill of materials with its proposal.) The bill of materials included in the ASC proposal was, according to the express terms of the proposal, only included to provide the VA with additional detail regarding what materials were being furnished in connection with the ASC solution. AR, exh. 5, ASC Proposal, at BATES 492.

In addition, regardless of pricing information that may have been included in the bill of materials, the RFP provided that the agency would calculate the offerors' proposed prices solely by adding the prices for all contract line items, including all options. RFP at BATES 110. In this respect, the RFP included a pricing matrix that the offerors were required to submit with their proposals. RFP at BATES 26-38. It is the prices included in this matrix that the agency used to calculate ASC's proposed price. Avaya does not allege that there are inconsistencies or ambiguities

in the ASC pricing matrix, or that the agency was led to calculate an incorrect price for ASC. Under the circumstances, we have no basis to sustain this aspect of Avaya's protest.

The protest is denied.

Susan A. Poling
General Counsel