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Decision

Matter of: Enterprise Resource Performance, Inc.

File: B-420714

Date: June 7, 2022

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DIGEST

Protest challenging the tiered set-aside evaluation approach of a task order solicitation is dismissed as untimely because the solicitation for the underlying indefinite-delivery, indefinite-quantity contract established use of the challenged approach as mandatory for all future task order solicitations.

DECISION

Enterprise Resource Performance, Inc. (ERPi), of Fairfax, Virginia, protests the terms of task order request for proposals (RFP) No. 36C10X22R0023, issued by the Department of Veterans Affairs (VA or agency) for supply chain and logistics support services. The protester challenges the solicitation’s evaluation methodology.

We dismiss the protest as untimely.

BACKGROUND

In 2016, the VA issued its Veteran Enterprise Contracting for Transformation and Operational Readiness (VECTOR) solicitation. Req. for Dismissal at 1. The VECTOR solicitation was intended to provide the VA with “a department-wide vehicle for a broad range of general management and business support services and solutions” organized into the following six “service groups”: (1) management and improvement; (2) analysis; (3) training; (4) outreach; (5) supply chain; and (6) human resources and staffing.

Agency Report (AR), Tab 4, VECTOR RFP at 211.¹ The VECTOR solicitation contemplated award of approximately ten indefinite-delivery, indefinite-quantity (IDIQ) contracts per service group under which task orders would be issued on either a fixed-price or labor-hour basis. *Id.* at 211, 257. The solicitation provided that the base IDIQ contracts would be awarded on a best-value tradeoff basis considering technical capability and price, and that the evaluations and best-value determinations would “be completed for each Service Group, independent of the other groups.” *Id.* at 257.

Additionally, the VECTOR IDIQ solicitation established that the agency would evaluate proposals under the technical capability factor using a tiered approach. VECTOR RFP at 258. This approach essentially was a tiered set-aside, also sometimes referred to as a cascading set-aside. The set-aside tiers were: Tier 1 - service-disabled veteran-owned small businesses (SDVOSBs) that team or subcontract exclusively with other SDVOSBs and veteran-owned small businesses (VOSBs); Tier 2 - SDVOSBs that team or subcontract with small businesses (other than SDVOSBs or VOSBs), and joint ventures that include small businesses; and Tier 3 - SDVOSBs that team or subcontract with large businesses, and joint ventures that include large businesses. *Id.*

The VECTOR IDIQ solicitation provided that the agency would evaluate Tier 1 proposals first, and “if a number of awards can be made that will support adequate competition in a service group, no additional tiers will be reviewed.” VECTOR RFP at 258. Only if additional awards were needed to support competition in a particular service group after the agency made awards based on Tier 1 proposals would the agency then evaluate any proposals submitted by Tier 2 offerors. *Id.* Similarly, only if additional awards were still needed after the agency made awards based on Tier 1 and 2 proposals would the agency then evaluate any proposals submitted by tier 3 offerors. *Id.* In response to a question from a potential offeror, the agency explained that this tiered evaluation approach “may result in awards to only Tier 1 offerors, or it [may] result in awards from multiple Tiers.” *Id.* at 165.

The solicitation further set forth that while each task order solicitation issued to VECTOR IDIQ contract holders would “have a unique evaluation approach” detailed in its individual solicitation, the tiered set-aside evaluation approach set forth in the VECTOR solicitation would “be mandatory for all subsequent Task Orders Proposal Requests.” VECTOR RFP at 119, 165, 258. Specifically, the VECTOR IDIQ solicitation provided that in future solicitations for orders the agency would evaluate Tier 1 proposals first, and that “if an award [could] be made in accordance with the evaluation criteria in the [task order], no additional tiers [would] be reviewed.” *Id.* at 119. Additionally, a VECTOR IDIQ contract holder that becomes large during the period of performance of its IDIQ contract--as ERPi has done here--either will be “off-ramped,” that is, no longer eligible to receive orders under the VECTOR IDIQ contract or, if “not

¹ Accompanying its request for dismissal the agency submitted a partial report responding to the protest. Our citations are to the Adobe PDF pagination of the documents in the agency’s report.

immediately off-ramped, the contractor will be evaluated in Tier 3 for the remainder of its contract ordering period.” VECTOR RFP at 209; AR, Tab 6, TO 88 RFP at 737.

The time set for receipt of proposals under the VECTOR IDIQ solicitation was October 17, 2016. Req. for Dismissal at 1. ERPi submitted a proposal, and, in 2017, was awarded a VECTOR IDIQ contract for service groups 2, 5, and 6. *Id.* at 1. At the time of its VECTOR IDIQ contract award, ERPi was evaluated as a Tier 1 SDVOSB offeror. ERPi also subsequently competed for and, in August 2019, was issued VECTOR task order (TO) 19 titled “Veterans Health Administration (VHA) Supply Chain & Logistics, Office of Procurement & Logistics Program and Project Management Support Services.” *Id.* at 2. At the time of issuance of TO 19, ERPi was still a Tier 1 SDVOSB offeror and was evaluated as such under the TO 19 solicitation. *Id.* Subsequent to issuance of TO 19, however, ERPi’s small business size status changed to “other than small” as reflected in the firm’s System for Award Management (SAM) registration. *Id.* As established in the VECTOR IDIQ, ERPi’s status change to other than small means it will be evaluated as a Tier 3 offeror for the remainder of its IDIQ contract period.

On April 1, 2022, the VA issued a solicitation for TO 88, a “follow-on” requirement to TO 19. TO 88 RFP at 1; Req. for Dismissal at 2. The solicitation provided that TO 88 would be awarded on a best-value tradeoff basis considering the following factors, listed in descending order of importance: (1) technical capability; (2) past performance; and (3) price. TO 88 RFP at 717. Additionally, the solicitation established that proposals would be evaluated using the mandatory tiered set-aside evaluation approach established in the VECTOR IDIQ solicitation. *Id.* at 718-719. Specifically, the solicitation set forth that the agency would evaluate Tier 1 proposals first, and “if an award [could] be made that [could] be determined a best value to the Government, no additional tiers [would] be reviewed.” *Id.* at 718. “If a best value determination [could not] be supported to make an award in Tier 1, the Government [would] evaluate Tier 2 proposals for award.” *Id.* Similarly, only if a best-value determination supporting award still was not possible at tier 2 would the agency then evaluate proposals from Tier 3 offerors. *Id.* at 718-719.

ERPi filed this protest on April 29, 2022, before the time set for receipt of proposals under the TO 88 solicitation.²

DISCUSSION

ERPi protests the terms of the TO 88 solicitation, arguing that the solicitation’s tiered set-aside evaluation approach conflicts with the use of a best-value tradeoff process because it “restricts the Agency from evaluating all proposals under the stated

² ERPi represents, and the agency does not dispute, that the protested task order has an estimated value in excess of \$10 million. See Protest at 3, 3 n.1. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(B)(2).

evaluation factors.” Protest at 6. ERPi contends that “no rational ‘best value’ award can be determined where some--perhaps most--proposals are not evaluated *at all* under the stated evaluation factors,” and asks our Office to find unreasonable the terms of the TO 88 solicitation. *Id.* ERPi asserts that it “does not challenge the Agency’s utilization of a tiered-evaluation approach generally; rather, it challenges the Agency’s ability, under the terms of this specific [TO solicitation], to perform a best value tradeoff.” *Id.* at 7.

The agency requests that we dismiss ERPi’s protest as untimely because it challenges the tiered set-aside evaluation approach that the VECTOR IDIQ solicitation established as mandatory for all future TO solicitations. Req. for Dismissal at 6. ERPi responds that its protest is timely because it “is not challenging the tiered evaluation scheme, but rather, the best value tradeoff evaluation[,] which was introduced for the first time” in the solicitation for TO 88. Resp. to Req. for Dismissal at 2. ERPi maintains that it would have been premature for it to protest the tiered set-aside evaluation approach set forth in the VECTOR IDIQ solicitation because it “did not know at the time of the IDIQ solicitation that the Agency might use a best value evaluation, or, more specifically a tradeoff evaluation, on future task order procurements.” *Id.* at 4. ERPi hypothesizes that had the agency chosen to use a lowest-price, technically acceptable (LPTA) award methodology “it would be entirely consistent and rational for the VA to confine its evaluation to Tier 1 proposals--to the exclusion of all other tiers--because the agency had made a decision to potentially pay a premium for an acceptable SDVOSB proposal.” Protest at 6. Here, however, ERPi argues such a tiered set-aside evaluation approach is not rational in the context of a best-value tradeoff award methodology. *Id.*

Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the time set for receipt of proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). As noted above, the evaluation methodology used by the agency for award of the underlying VECTOR IDIQ contracts was a best-value tradeoff coupled with the tiered set-aside evaluation approach about which the protester now complains. Yet at the time it competed for, and won award of a VECTOR IDIQ contract, ERPi apparently had no issue with the agency’s application of its tiered set-aside evaluation approach in the context of a best-value tradeoff award methodology. Accordingly, we find wholly unpersuasive ERPi’s present contention that it could not conceive of a solicitation for a future task order pairing a best-value tradeoff methodology with the mandatory tiered evaluation approach--when that was exactly how the VECTOR IDIQ solicitation was structured.³

³ This contention is even more unconvincing in light of the fact that ERPi had previously competed (and won) under the TO 19 solicitation--a solicitation that employed the same best-value tradeoff methodology and tiered evaluation approach as the one present in the TO 88 solicitation. TO 88 RFP at 717-718; AR, Tab 5, TO 19 RFP at 124-125. At the time the solicitation for TO 19 was issued in August 2019, ERPi did not challenge the evaluation methodology with our Office when the firm was eligible to compete as a Tier 1 vendor.

The integrity of the protest process does not permit a protester to espouse one position during the procurement, and then argue during a protest that the position is unreasonable or otherwise improper. See e.g., *Logistics Health, Inc.--Adv. Op.*, B-416145.7, Mar. 2, 2021, 2021 CPD ¶ 184 at 16 n.12 (noting that protester's argument that the agency should have evaluated the size of past performance reference contracts in a certain way would not have provided a basis to sustain the protest when, had the agency employed the evaluation methodology advocated by the protester, some of the protester's own reference contracts would have been deemed not relevant).

Further, while ERPi's protest is styled as a challenge to the tiered set-aside as applied to the TO solicitation's evaluation methodology, we find this characterization unavailing in light of the plain language of the VECTOR IDIQ solicitation. As discussed above, the VECTOR IDIQ solicitation explained that future TO solicitations would have their own unique evaluation criteria and award methodologies. The solicitation, however, also made clear that the tiered set-aside evaluation approach set out in the VECTOR IDIQ solicitation would "be mandatory for all subsequent Task Orders" solicitations, regardless of the evaluation criteria and award methodologies used by the future TO solicitations. VECTOR RFP at 119, 165, 258. Thus, ERPi was on notice in 2016 that, regardless of whether a future TO solicitation used an LPTA, best-value tradeoff, or some other award methodology, the agency would first evaluate proposals from Tier 1 offerors to see if it could make an LPTA, best-value tradeoff, or other type of award, and if award could be made, no proposals from Tier 2 or 3 offerors would be evaluated. Accordingly, ERPi's challenge to the TO 88 solicitation's best-value tradeoff methodology incorporating the mandatory tiered set-aside evaluation approach is untimely. See e.g., *Intelligent Waves LLC*, B-416169, B-416169.2, June 12, 2018, 2018 CPD ¶ 211 at 6 (dismissing as untimely an IDIQ contract holder's 2018 challenge to the past performance methodology included in a task order solicitation when the methodology to be used in task order competitions was disclosed to all IDIQ contract holders in April 2017).

In any event, even were we to find ERPi's challenge timely--which we do not--its contention that it is impossible for the agency to make a rational best-value determination without comparing all proposals across all tiers is without merit. There is nothing inherently irrational about a best-value tradeoff that is based on a consideration of proposals within a given pool of competitors. What ERPi is really challenging is the number of proposals that the agency will consider as part of the best-value tradeoff, which pertains to the scope of the competition. Through the use of the tiered approach, the agency is effectively implementing a set-aside for small businesses. The Federal Acquisition Regulation (FAR), however, expressly provides contracting officer's with the discretion to limit competition for task orders by setting them aside for small business concerns. Specifically, the FAR states that "[i]n accordance with [15 U.S.C. § 644(r)], contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in [FAR] 19.000(a)(3)." FAR 16.505(b)(2)(i)(F); see also 13 C.F.R. § 125.2(e)(6). Moreover, ERPi does not cite to any procurement law or regulation prohibiting the use of a tiered or cascading set-aside in combination with a best-value tradeoff methodology, nor are we aware of any such prohibition. In this

regard, we note the FAR expressly recognizes that “if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.” FAR 1.102(d); *Herman Miller, Inc.*, B-407028, Oct. 19, 2012, 2012 CPD ¶ 296 at 5.

The protest is dismissed.

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General Counsel