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Decision

Matter of: ITility, LLC

File: B-422638

Date: September 5, 2024

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DIGEST

Protest challenging the terms of solicitation as irrational and reflecting bias against the protester is denied where the agency reasonably exercised its discretion to establish evaluation criteria.

DECISION

ITility, LLC, of Chantilly, Virginia, protests the terms of fair opportunity proposal request (FOPR) No. FA564124R0006, issued by the Department of the Air Force for technical and analytical services. The protester contends that the agency improperly changed the criteria for award without a rational basis.

We deny the protest.

BACKGROUND

On April 5, 2024, the agency issued the FOPR to holders of the Air Force's Advisory and Assistance Services V (A&AS V) indefinite-quantity, indefinite-delivery (IDIQ) multiple-award contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 16. Agency Report (AR), Tab 30, Initial FOPR, Cover Letter at 1.¹ The solicitation seeks to procure support services to assist the Air Force's mission as a component of the United States European Command and United States

¹ Citations are to Adobe PDF page numbers.

Africa Command in the planning, integration, and execution of command and control; integrated air and missile defense; intelligence, surveillance and reconnaissance; international relations and political/military advisory; and coalition / partner training. AR, Tab 60, Performance Work Statement (PWS) at 7-8. The agency refers to the solicited services as Consolidated Mission Support (CMS). *Id.* at 1. The FOPR contemplates the issuance of a single task order with cost-plus-award-fee, cost reimbursable, and fixed price line items, with a period of performance of 5 years and 2 months, inclusive of a phase-in period and all options. AR, Tab 89, FOPR amend. 5, Cover Letter at 1.

The solicitation provides for award to the highest technically rated offeror with a realistic and reasonable price. *Id.* at 1. The agency's source selection will be based on the offerors' self-scoring, using an agency-provided scoring table. AR, Tab 85, FOPR amend. 4, Evaluation Criteria at 4-5. The scoring table allows offerors to claim points based on up to five "work samples (contracts/task orders) which demonstrated their past technical experience." AR, Tab 90, FOPR amend. 5, Instructions to Offerors at 7. At least two of the work samples must be from the offeror itself performing as a prime contractor or major subcontractor; the remaining work samples may be from proposed subcontractors. *Id.* Under the scoring table, offerors can claim up to 17,000 points across the following four categories: (1) the number of work samples where the offeror provided a minimum of eight different functional skillsets; (2) the number of work samples where the offeror provided direct engineering and technical support; (3) the number of positions (referred to as contractor man-year equivalents or CMEs) managed under the largest work sample; and (4) the number of mission partners supported on a work sample. AR, Tab 85, FOPR amend. 4, Evaluation Criteria at 5. Relevant here, the offeror can claim the maximum number of points from the third category, for managing 90 or more CMEs on a single effort. AR, Tab 52, FOPR amend. 1, Self-Scoring Matrix.

The FOPR also identifies two tiebreakers to be used in the event of a tie for the highest technical score after self-scores are evaluated and validated by the agency. Each tiebreaker is coupled to one of the four self-scoring categories. AR, Tab 85, FOPR amend. 4, Evaluation Criteria at 2. The first tiebreaker, connected to the third category, looks to the largest number of CMEs managed on a single work sample.² *Id.* at 2.

The agency amended the FOPR three times before receiving multiple offers by the May 20, 2024, deadline for receipt of proposals. Contracting Officer's Statement (COS) at 9. On May 29, the agency issued amendment 4 to the solicitation, revising the instructions to offerors and evaluation criteria. AR, Tab 82, FOPR amend. 4 at 1-2. Specifically, as relevant to the protest, the agency revised the first tiebreaker to specify that the work sample (from self-scoring category three) used to break a tie must come from the prime offeror itself.³ AR, Tab 85, FOPR amend. 4, Evaluation Criteria at 2.

² The second tiebreaker is not relevant to this protest.

³ In the same way, the agency updated the third category's criteria for awarding points to correspond with the language of the revised tie-breaker. AR, Tab 84, FOPR amend. 4, Instructions to Offerors at 10.

The agency established a deadline of June 3 for submission of revised proposals.⁴ AR, Tab 82, FOPR amend. 4 at 2. Before that deadline, ITility filed this protest.⁵

DISCUSSION

ITility's protest raises a single issue: the agency's change to the criteria for the first tiebreaker. Comments at 2-12. ITility assessed itself with the maximum 17,000 points according to the scoring table, and the agency has confirmed that two other offerors did the same. See AR, Tab 96, ITility's Self-Scoring Matrix; AR, Tab 112, Offeror B's Self-Scoring Matrix; AR, Tab 113, Offeror C's Self-Scoring Matrix. The first tiebreaker is therefore likely necessary for the agency to select the awardee.

Initially, the FOPR defined the tiebreaker as follows: "The first tie-breaker shall be demonstrated experience with the largest number of Contractor Man-year Equivalents (CMEs) on a single" contract or task order (TO) with the Department of Defense (DOD). AR, Tab 54, FOPR amend. 1, Evaluation Criteria at 2. It specified that the tiebreaker was based on the points for number of CMEs on the largest DOD contract or task order under category three. *Id.* (referring to Objective Criteria 2.2.2.3, Number of Contractor Man-year Equivalents (CMEs) on largest DOD Contract/TO). According to ITility, under this definition, it would have been credited as having 16,252 CMEs based on the work sample of one of its proposed subcontractors. Comments at 1 n.1; AR, Tab 101, ITility Revised Proposal Work Sample 3 at 4.

As amended, the tiebreaker now reads: "The first tie-breaker shall be demonstrated experience of the Prime Offeror for CMS with the largest number of Contractor Man-year Equivalents (CMEs) on a single DOD Contract/TO where the Prime Offeror for CMS was the prime on the effort." AR, Tab 85, FOPR amend. 4, Evaluation Criteria at 2. Again, it refers to the points awarded under category three for number of CMEs on the largest DOD contract or task order. *Id.* With this limitation to work samples of the offeror itself, according to the protester, it will be credited with only 124 CMEs for the tiebreaker. Comments at 1 n.1; AR, Tab 99, ITility Revised Proposal Work Sample 1 at 3.

The protester requests that our Office "recommend that the agency cancel Amendment 4 to the Solicitation" and proceed with award based on the tiebreakers as initially

⁴ After ITility filed this protest, the agency issued FOPR amendment 5, extending the deadline for submissions to June 6 and specifying that offerors should submit new complete proposals. AR, Tab 89, FOPR amend. 5, Cover Letter. Amendment 5 did not make other changes to the FOPR.

⁵ The task order has an expected value exceeding \$25 million, and is therefore within our jurisdiction to review protests related to the issuance of orders under multiple-award IDIQ contracts issued under the authority of Title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(b); see *also* Protest at 2; COS at 15.

defined. Comments at 12. According to ITility, the agency had no rational basis to revise the tiebreaker, and appears to have made the revision only to avoid awarding to ITility. *Id.* at 11-12.

The agency responds that “[t]he Government’s intent from the very beginning of this procurement was to only review . . . prime contractor work samples for evaluation criterion 2.2.2.3, as well as for the subsequent tie-breaker.” COS at 15. The Air Force explains, “[s]hortly after the technical team began their initial evaluation and validation process on the offerors’ proposals, it determined that offerors, including ITility, had not” interpreted the solicitation’s scoring provisions in the way that the agency intended. Memorandum of Law at 5. That is, the agency wanted offerors to score themselves for the CMEs points category based on the largest work sample performed by the offeror itself as a prime contractor rather than, as some offerors had, based on work samples performed by subcontractors. See COS at 9. According to the Air Force, the experience of the offeror as a prime contractor for this element of the scoring was important:

The reason the Government requested A&AS V prime contractors’ past technical experience was based on the magnitude of the CMS requirement – approximately \$300M – and the large number of CMEs that the successful offeror would have to manage thereunder – approximately 189 professional A&AS service CMEs with the possibility of more CMEs over the life of the TO – supporting a minimum of nine different mission partners and many locations across [U.S. Air Force-Europe]. A contractor without experience managing a workforce in a DOD environment presents risk to the Government of potential mission failure during contract transition and performance.

Id. at 15. The agency therefore issued amendment 4 to clarify that self-scoring for category three--the category related to the number of CMEs managed--should be based on a work sample where the offeror performed as a prime. *Id.* at 15-16. In the same amendment, the agency also updated the first tiebreaker to reflect the same requirement as the revision to self-scoring category three, specifying that the tie would break in favor of the offeror that had, itself, managed the most CMEs on a DOD contract or task order as a prime. *Id.*

Recognizing that the agency has identified a basis for amending the tiebreaker provision, the protester now argues that the agency’s stated basis is not rational and questions the agency’s true motivations for the change. Comments at 2-11. According to ITility, limiting the tiebreaker to work samples submitted by the offeror for work performed as a prime, conflicts with other parts of the solicitation, ignores how offerors will perform the requirements, and is unsupported by the agency’s stated rationale. *Id.* As a result, and because the change was made “after the technical team ha[d] begun review of proposals,” the protester argues that the only apparent reason for the change is to avoid award to ITility. *Id.* at 11-12.

Based on our review of the record, we do not find that the protester has established the agency's amendment to the tiebreaker criterion was irrational or otherwise violated law or regulation. We address the protester's arguments in turn below.

Our Office has stated consistently that the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them. *Sterisyn, Inc.*, B-418366 *et al.*, Apr. 1, 2020, 2020 CPD ¶ 114 at 7. Thus, it is the protester's obligation to establish the solicitation violated applicable procurement laws or regulation. *Id.* Moreover, in the context of a task order competition under an IDIQ contract, pursuant to FAR section 16.505(b)(1)(ii), contracting officers "may exercise broad discretion in developing appropriate order placement procedures."

First, we do not find that the change to the tiebreaker creates an inconsistency in the solicitation. Our review of the FOPR confirms that--for three of the four self-scoring categories--the solicitation has always allowed offerors to rely generally on five work samples, including up to three work samples performed by proposed subcontractors rather than the offeror itself. AR, Tab 84, RFP amend. 4, Instructions to Offerors at 7. This means that the offeror may claim points for the work samples of itself and for proposed subcontractors under, for example, self-scoring category one--the category for the number of work samples requiring a minimum of eight different functional skillsets. AR, Tab 85, RFP amend. 4, Evaluation Criteria at 5.

One of the four self-scoring categories, however, has always been different. For self-scoring category three--the category for number of CMEs on the largest work sample--the scoring has always been based on just the largest work sample "administered as a prime" contractor. See AR, Tab 65, FOPR amend. 3, Instructions to Offerors at 10; AR, Tab 84, FOPR amend. 4, Instructions to Offerors at 10. When the agency amended the FOPR to update this category--and the associated tiebreaker--these evaluation provisions remained unique as compared to the other self-scoring categories because they are still based on a single work sample rather than the work samples of the team overall. Thus, we do not find that the agency created a new inconsistency or abandoned the initial evaluation approach by amending the FOPR to limit self-scoring category three (and the tiebreaker) to only the work performed by the offeror, itself, as a prime contractor. See *Worldwide Language Res., Inc.*, B-420900, Oct. 21, 2022, 2022 CPD ¶ 265 at 7 (denying protest challenging agency's "exercise of its broad discretion in deciding what factors to evaluate in issuing this task order"). Nor do we have any basis to find the agency's exercise of its discretion, in this instance, to be unreasonable. *Id.*

Second, we find unpersuasive the protester's contention that this change to the tiebreaker means that the agency can "ignore the benefits of ITility's proposal and how ITility and its team members would actually perform the task order." Comments at 7. In this regard, the protester's argument, essentially, is that the agency's needs would be better met by breaking a tie between high-scoring offerors based on the performance of the offerors' teams, as a whole, rather than the offeror's performance only as a prime contractor. A protester's disagreement, however, with the agency's judgment

concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. *Chenega Fed. Sys., LLC*, B-414478, June 26, 2017, 2017 CPD ¶ 196 at 3.

Finally, with regard to the agency's decision to revise self-scoring category three and the associated tiebreaker criterion, the protester appears to question the Air Force's motivation. According to ITility, the agency's stated concern about performance risk is "illogical and contradicted by the record." Comments at 8. Specifically, ITility contends that the agency does not really have concerns about performance risk stemming from an inexperienced prime contractor. *Id.* Instead, ITility points to the timing of the agency's update to the tiebreaker--after receiving initial proposals--to imply that the agency appears to have made the change just to avoid awarding to ITility. *Id.* at 11-12.

We do not find that ITility has made the requisite showing to establish that the agency is misrepresenting its motives or acting out of bias against the protester. In this regard, a protester's contention that contracting officials are motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suspicion. *Veterans Healthcare Supply Sols., Inc.*, B-411904, Nov. 12, 2015, 2015 CPD ¶ 354 at 8. This is because government officials are presumed in good faith. *Id.* Where, as here, a protester provides no evidence supporting its allegations beyond the timing of the agency's amendment to the tiebreaker criterion, we will not sustain the protest on the basis of these allegations. See *Nexagen Networks, Inc.*, B-411209.7, June 20, 2016, 2016 CPD ¶ 164 at 4-5.

The protest is denied.

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General Counsel