



Decision

Matter of: S2 Analytical Solutions, LLC

File: B-422281.3

Date: December 20, 2024

Stephen D. Tobin, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for the protester.

Joseph A. Buitron, Esq., and Maurice Griffithe, Esq., Department of Defense, for the agency.

Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the terms of a solicitation as contemplating the unequal treatment of vendors by permitting the agency to conduct exchanges with only the vendor identified as the “best-suited” (*i.e.*, the apparent successful contractor) is denied where the protester does not demonstrate the challenged provision violates statute or regulation.

DECISION

S2 Analytical Solutions, LLC, a veteran-owned small business of Herndon, Virginia, protests the terms of request for quotations (RFQ) No. 832266761, issued by the Department of Defense, Defense Information System Agency (DISA) for technology architecture governance services. S2 Analytical contends that the amended solicitation contemplates the unequal treatment of vendors by permitting the agency to conduct discussions with only the vendor identified as the “best-suited” contractor.

We deny the protest.

BACKGROUND

DISA issued the RFQ on February 3, 2023, pursuant to the General Services Administration’s federal supply schedule (FSS) program under Federal Acquisition Regulation (FAR) subpart 8.4, seeking quotations for technology architecture governance services. Contracting Officer’s Statement and Memorandum of Law

(COS/MOL) at 3; Agency Report (AR), Tab 2, RFQ at 2.¹ The RFQ contemplates the establishment of a single award blanket purchase agreement (BPA) with a 1-year base period and up to four 1-year options. *Id.*

The RFQ advises that DISA intends to establish a BPA with the vendor whose quotation “is determined to represent the overall best value to the [g]overnment using a best value trade-off evaluation process” that considers the following evaluation factors: (1) technical approach; (2) management approach; and (3) price. RFQ at 4. The non-price evaluation factors, when combined, are more important than the price factor. *Id.* at 7. The RFQ further establishes a two-phase procurement. *Id.* at 4; COS/MOL at 3. Under phase one, DISA will evaluate vendors’ technical approaches on a pass/fail basis, and if a vendor’s quotation receives a rating of fail, it will not be further evaluated. RFQ at 4-5. Under phase two, DISA will evaluate vendors’ management approaches and price. *Id.* at 5.

On December 22, 2023, DISA initially informed S2 Analytical that it had selected the firm for the establishment of the BPA. Protest at 6; COS/MOL at 4. Two post-award protests of the agency’s selection decision were subsequently filed with our Office, to which the agency responded by filing notices of corrective action. COS/MOL at 4. Our Office dismissed the protests as academic on February 1, 2024. *Patriot Strategies, LLC*, B-422281, Feb. 1, 2024 (unpublished decision); *Open SAN Consulting, LLC*, B-422281.2, Feb. 1, 2024 (unpublished decision).

As part of its corrective action, DISA issued an amendment to the terms of the RFQ and established a new deadline for receipt of quotations of 2:00 p.m. Central Time on September 13, 2024. RFQ at 1-2. The RFQ was amended to include the following language:

The [g]overnment anticipates selecting the best-suited contractor from initial responses, without engaging in exchanges with contractors. Offerors are strongly encouraged to submit their best technical solutions and price in response to this RFQ. Once the [g]overnment determines the contractor that is best-suited (i.e., the apparent successful contractor), the [g]overnment reserves the right to communicate with only that contractor to address any remaining issues, if necessary, and finalize a task order with that contractor. These issues may include technical and price and can require revisions to either the technical or price quotations. If the parties cannot successfully address any remaining issues, as determined pertinent at the sole discretion of the [g]overnment, the [g]overnment reserves the right to communicate with the next best-suited contractor based on the original analysis and address any remaining issues. Once

¹ The agency amended the solicitation 14 times for various reasons. All citations to the RFQ are to the final amended version unless otherwise indicated. All page number citations are to the Adobe Acrobat PDF versions of the documents submitted by the parties.

the [g]overnment has begun communications with the next best-suited contractor, no further communications with the previous contractor will be entertained until after the BPA and initial call order has been awarded. This process shall continue until an agreement is successfully reached and a call order is awarded.

RFQ at 8. S2 Analytical timely filed its protest of the amended terms of the solicitation on September 13, prior to the deadline for receipt of quotations established by the RFQ.²

DISCUSSION

S2 Analytical argues that the language added to the RFQ by amendment 14 permits DISA to hold exchanges with only one vendor and allows that vendor to revise its quotation, while not affording the same opportunity to other vendors. Protest at 8. The protester argues that this therefore allows the agency to treat vendors unfairly and unequally. *Id.* More specifically, the protester contends that the amended RFQ language expressly permits the vendor identified as the best-suited to revise its quotation as a result of exchanges with the agency, and that this amounts to discussions. *Id.* at 8-9. The protester argues that if the agency holds discussions by permitting quotation revisions from one vendor, it is required to afford the same opportunity to all vendors. *Id.* at 9.

DISA contends that the challenged solicitation language does not “violate[] an applicable procurement law or regulation[,]” and further argues that the language at issue is appropriate for use in a procurement conducted under the procedures of FAR subpart 8.4, as opposed to the procedures of FAR part 15. COS/MOL at 5-6. In this regard, and citing several of our Office’s previous decisions, the agency argues that our Office has “repeatedly found that it is appropriate for agencies to communicate solely with the best-suited (i.e., the apparent successful contractor) exactly as contemplated by the RFQ [here].” *Id.* at 6. The agency also contends that the RFQ language ensures all quotations are fairly considered, as required by the FAR, because each vendor’s quotation would receive a “fair and equal evaluation” to determine the best-suited contractor. *Id.* at 13. The agency argues that it is only after this determination is made that the agency can engage in communications with the best-suited vendor, and that there is thus no unfair or inequitable treatment of vendors. *Id.*

Where, as here, an agency conducts a procurement using the procedures of FAR subpart 8.4, the rules governing discussions, which are set forth in FAR subpart 15.3, do not apply. *NextGen Federal Systems, LLC, B-420456 et al.*, Apr. 14, 2022, 2022 CPD ¶ 99 at 16. Where an agency chooses to conduct exchanges with vendors in a FAR subpart 8.4 procurement, the exchanges, like all other aspects of such a

² S2 Analytical’s protest was filed with our Office at 10:14 a.m. Eastern Time, prior to the 2:00 p.m. Central Time deadline established by the RFQ. Electronic Protest Docketing System No. 1.

procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in making this determination. *Aurotech, Inc.*, B-413861.4, June 23, 2017, 2017 CPD ¶ 205 at 10. In this regard, FAR part 15 defines clarifications as “limited exchanges” that agencies may use to allow offerors to clarify certain aspects of their proposals (or in this case, quotations), or to resolve minor clerical mistakes. See FAR 15.306(a)(1),(2); *Sky Solutions, LLC*, B-421139.2, B-421139.3, June 30, 2023, 2023 CPD ¶ 184 at 6. In contrast, under FAR part 15, discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal or quotation or provides the offeror with an opportunity to revise or modify its proposal or quotation. *Innovative Mgmt. & Tech. Approaches, Inc.*, B-418823.3, B-418823.4, Jan. 8, 2021, 2021 CPD ¶ 18 at 8.

Our Office has resolved post-award protests involving similarly worded solicitation provisions that allowed the agency to address any issues, including technical or price, with only the vendor it determined to be the best-suited contractor in procurements conducted under procedures others than those found at FAR part 15. See, e.g., *Sky Solutions, LLC, supra* at 6-7 (denying protest ground alleging that the agency conducted unequal discussions pursuant to a similar solicitation provision in a FAR subpart 8.4 procurement); *VariQ-CV JV, LLC*, B-418551, B-418551.3, June 15, 2020, 2020 CPD ¶ 196 at 18-20 (denying the same challenge in a FAR subpart 16.5 procurement).

In those decisions, which were protests challenging an agency’s conduct of exchanges, we denied protest grounds alleging the agency conducted unequal discussions primarily on the basis that the agency’s actions in holding exchanges were consistent with the terms of the solicitation, while also noting that the procurements at issue were conducted under FAR procedures other than those found at FAR part 15. See *Sky Solutions, supra* at 7; *VariQ-CV JV, LLC, supra* at 20. Our decisions further noted that to the extent the protesters were challenging the propriety of the scope of the exchanges contemplated by the solicitations, these were untimely challenges to the solicitation language allowing these exchanges that had to be filed prior to the deadline for submission of proposals. See *Sky Solutions, LLC, supra* at 7 n.9; *VariQ-CV JV, LLC, supra* at 20-21. Our prior decisions have not had occasion to resolve a challenge to the terms of a solicitation providing for exchanges with only the best-suited vendor.

Here, S2 Analytical timely challenges this precise issue in the terms of this solicitation--namely, that the RFQ improperly permits DISA to broadly conduct exchanges that amount to discussions with only one vendor, and that in doing so, the RFQ contemplates agency action that is unfair and inequitable, in violation of FAR subpart 8.4. See Protest at 10. We disagree with the protester that the solicitation contemplates unfair or inequitable agency action and find no basis on which to sustain the protest.

As discussed above, the RFQ here was issued under the FSS program provisions of FAR subpart 8.4. The FSS program is directed and managed by GSA and provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. FAR 8.402(a). As previously stated,

there is no requirement for agencies to conduct exchanges or discussions in procurements conducted under FAR subpart 8.4; rather, in utilizing these simplified procedures, the FAR requires more broadly that the agency treat vendors fairly. See FAR 8.405-3(b)(2) (stating that, for agencies seeking to establish a BPA that requires a statement of work, “[t]he ordering activity contracting officer shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ”). We find a solicitation provision like the one at issue here, which contemplates the selection of a best-suited vendor (*i.e.*, the apparent successful contractor) with which the agency may engage in exchanges, is reasonable and does not violate procurement statute or regulation.

The protester has not identified any statutes or regulations that explicitly prohibit the agency from including this provision in the solicitation. Rather, the protester asserts that if a vendor is permitted to revise its proposal following exchanges with the agency, then these exchanges are “analogous to discussions under FAR Part 15.” Comments at 8. As a result, according to the protester, if the agency conducts discussions with one offeror it is required to conduct discussions with all offerors remaining in the competition. *Id.* at 9.

However, the procedures of FAR part 15 governing contracting by negotiation--including those concerning exchanges with offerors after the receipt of proposals--do not govern competitive procurements under the FSS program. *SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov't, Inc.*, B-413220.4 *et al.*, May 19, 2017, 2017 CPD ¶ 173 at 18. Accordingly, the provisions of FAR part 15 do not prohibit the type of solicitation language at issue here in a FAR subpart 8.4 procurement and therefore do not provide a basis to sustain the protest. See *also* FAR 1.102-5(e) (“If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited.”).

Moreover, we note that FAR section 15.306 permits agencies to establish a competitive range “of all of the most highly rated proposals[,]” and then conduct exchanges, or “discussions,” with only those offerors in the competitive range. FAR 15.306(c), (d). Furthermore, and as we have stated in previous decisions, there is nothing inherently improper in a competitive range of only one offeror. *Enterprise Services, LLC*, B-414513.2 *et al.*, July 6, 2017, 2017 CPD ¶ 241 at 12. Accordingly, FAR part 15 permits an agency to conduct discussions with some offerors--that is, only those offerors with proposals determined to be most highly rated and selected for the competitive range--while not requiring the agency to conduct discussions with other offerors.

The solicitation provision at issue here contemplates a situation that is analogous to the situation described above--where, in a FAR part 15 procurement, an agency establishes a competitive range of one and conducts exchanges with only that offeror. We have determined that an agency may reasonably establish a competitive range of one and then conduct exchanges with only that offeror, so long as the agency otherwise

reasonably excluded other offerors from the competitive range on the basis that their proposals were not the most highly rated. *See, e.g., Sigmatech, Inc., B-419565 et al.*, May 7, 2021, 2021 CPD ¶ 241 at 29-30.

Here, the solicitation contemplates DISA determining a “best-suited contractor” based on its consideration of vendors’ technical approaches, management approaches, and price. RFQ at 4-8. As long as the agency reasonably and fairly evaluates vendors’ quotations pursuant to these factors, we find the solicitation provision permitting the agency to then conduct exchanges with only the “best-suited contractor” does not amount to unfair and inequitable treatment of vendors.³ Essentially, once the agency has identified the best-suited contractor, it has established a competitive range of that one vendor, with which it can enter into exchanges. Thus, the challenged provision is not contrary to any procurement statute or regulation governing the FSS program, under which this procurement is being conducted.

Our decision is also consistent with the policies underlying FAR subpart 8.4, which is to provide agencies with a simplified process for obtaining commercial supplies and services while ensuring “all quotes received are fairly considered.” FAR 8.405-3(b)(2). Where the purpose of the FSS program is to provide agencies with a comparatively simplified acquisition process, we decline to find that agencies have less flexibility when conducting exchanges with vendors under FAR subpart 8.4 procurements than they have when conducting discussions with offerors under FAR part 15 procurements. In other words, in certain situations FAR part 15 permits agencies to conduct exchanges with a limited number of offerors; procurements conducted under FAR subpart 8.4 should not have stricter limitations than those conducted under FAR part 15. Furthermore, nothing in our decision here precludes a potential protester from challenging, for example, an agency’s selection of a particular firm as the best-suited contractor.

In sum, the challenged solicitation provision is not improper because it does not treat vendors unfairly and it is not inconsistent with the regulations governing FAR subpart 8.4 procurements.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

³ While under the procedures of FAR part 15 an agency is not required to conduct discussions with offerors excluded from the competitive range, the solicitation here prescribes that the agency “reserves the right to communicate with the next best-suited contractor” in the event that the agency and the original best-suited contractor “cannot successfully address any remaining issues, as determined pertinent at the sole discretion of the [g]overnment.” *See* FAR 15.306(c), (d); RFQ at 8.