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Decision

Matter of: Acciona CMS JV, LLC

File: B-422744.2

Date: December 19, 2024

Casey J. McKinnon, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for the protester.
Courtney Rahn-Warner, Esq., Department of the Navy, for the agency.
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DIGEST

1. Protest challenging the solicitation’s requirement that all offerors register with the Spanish Ministry of Finance to obtain certification regarding their financial and technical capability is denied where protester expressly acknowledges that the solicitation provision is required by the U.S.- Spain Agreement on Defense Cooperation.
2. Protester’s assertion that the solicitation fails to provide adequate time to comply with the registration requirements is denied where the agency has granted multiple extensions of the deadline for compliance and protester delayed its efforts to comply with the requirement.

DECISION

Acciona CMS JV, LLC, of Bargersville, Indiana, protests the terms of request for proposals (RFP) No. N62470-24-R-0002, issued by the Department of the Navy, for a task order to build an explosive ordnance disposal facility at the U.S. Naval Station in Rota, Spain. See Agency Report (AR), Exh. 2, Initial RFP at 3.¹ Acciona asserts that the terms of the solicitation, as amended, improperly require that U.S. firms register with the Spanish Ministry of Finance, maintaining that this requirement is “unduly restrictive,” “arbitrary, capricious, and contrary to law.” Protest at 2. Alternatively, Acciona asserts that the terms of the solicitation fail to provide adequate time to comply with the registration requirement. *Id.* at 12-13.

¹ The page numbers referenced in this decision are the Adobe PDF page numbers rather than the page numbers appearing on the face of the documents submitted.

We deny the protest.

BACKGROUND

On April 8, 2024, pursuant to the “fair opportunity” provisions of section 16.505 of the Federal Acquisition Regulation (FAR), the Navy issued the solicitation to seven contractors that, in June 2021, were awarded indefinite-delivery indefinite-quantity (IDIQ) contracts for construction projects to be performed in “Rota, Spain and Worldwide.”² AR, Exh. 1, IDIQ Contract at 4. There is no dispute that United States government construction contracts performed in Spain are subject to the requirements of the U.S.-Spain Agreement on Defense Cooperation (ADC),³ along with associated directives issued by the U.S.-Spain Permanent Committee, which was created to implement the ADC and is comprised of members from Spain and the United States.⁴ See Protest at 4. More specifically, at the time the initial solicitation was issued, the procurement was subject to the provisions of Office of Defense Cooperation (ODC) Policy Directive No. 400.4, dated October 4, 2013. MOL/COS at 3; Protest at 6.

The solicitation (both as initially issued and as amended) contains provisions requiring an offeror to submit various certifications to demonstrate its financial and technical capability to perform the type of work that will be required.⁵ At the time the initial solicitation was issued (and consistent with the then-applicable ODC Policy Directive No. 400.4) the solicitation provided alternative procedures for offerors to demonstrate their financial and technical capabilities--depending on the nationality of the offeror. For example, Spanish companies were required to “acquire a listing in the Register of Bidders Contractors of the Spanish Ministry of Finance,” while a non-European Union firm (such as the protester) was permitted to demonstrate its financial and technical solvency by obtaining a “certification, issued by the contractor’s respective Spanish Permanent Diplomatic Mission or Consular office.” AR, Exh. 2, Initial RFP at 9.

On May 30, the U.S.-Spain Permanent Committee issued a joint memorandum, titled “Contracting in Spain: Contracts for Works/Construction.” AR, Exh. 5, Joint

² The seven IDIQ contracts were awarded to six Spanish companies and the protester; the protester is a joint venture comprised of Acciona Construction S.A. (a Spanish company) and CMS Corporation (a U.S. company). Protest at 3.

³ The ADC is “applicable to all United States (U.S.) contracting officers engaged in procurement of services or construction to be performed, in whole or in part, at the Spanish bases where the U.S. Forces are granted support installations under the [ADC].” Memorandum of Law and Contracting Officer’s Statement (MOL/COS) at 3.

⁴ The United States representation on the Permanent Committee “is comprised of representatives from the U.S. Office of Defense Cooperation, Spain.” Protest at 4.

⁵ The solicitation provides that the required information will be considered by the agency in assessing an offeror’s responsibility. AR, Exh. 2, Initial RFP at 9.

Memorandum. The joint memorandum eliminated the alternative methods for offerors to demonstrate their capabilities,⁶ stating, among other things:

Each contracting company and its subcontractors shall be responsible for assuring, upon submission of a bid for a contract of 500,000 euros or more, that they are registered at the Register of Bidders Contractors of the Spanish Ministry of Finance with the classification applicable to the type of project to be performed.^[7]

Id. at 3.

On June 26, the Navy issued RFP amendment 0009, which unambiguously incorporated the provisions of the joint memorandum into the solicitation. AR, Exh. 7, RFP amend. 0009. Specifically, the amendment repeated, verbatim, the portion of the joint memorandum quoted above, and provided an attachment that offerors were directed to submit with their proposals certifying that they had successfully completed the registration and classification process with the Spanish government. *Id.* at 5. Additionally, the amendment extended the closing date for submission of proposals from June 28 to July 10, 2024.

On July 2, in response to questions from Acciona, the agency issued RFP amendment 0010, reiterating that “[a]ll offerors” must comply with the revised solicitation requirements. AR, Exh. 8, RFP amend. 0010 at 2.

On July 9, Acciona filed its first protest with our Office, asserting that the solicitation requirement that all offerors register with the Spanish Ministry of Finance was unduly restrictive, arbitrary, capricious, and contrary to law, and also complaining that the amended solicitation failed to provide adequate time for Acciona to comply with the registration requirement. AR, Exh. 9, First Acciona Protest at 11-13.

In response to Acciona’s protest, the Navy conducted market research to determine a reasonable period of time necessary for an offeror to comply with the revised requirements. Based on its research,⁸ the agency concluded that successful compliance with the registration requirement could take from 3 to 10 weeks. AR, Exh. 10, Market Research at 2.

⁶ More specifically, the joint memorandum “revoked” and “superseded” ODC Policy Directive No. 400.4. AR, Exh. 6, Revoked ODC Policy Directive.

⁷ The joint memorandum also noted that, pursuant to the ADC, construction projects such as the one at issue here “must be authorized by Spanish authorities.” AR, Exh. 5, Joint Memorandum at 2.

⁸ The agency’s research considered information from “private consultants web pages.” AR, Exh. 10, Agency’s Market Research.

On July 29, the Navy advised our Office and the protester that it was taking corrective action in response to Acciona's July 9 protest. In this context, the agency stated that its corrective action would "includ[e] revision of the solicitation." Agency Notice of Corrective Action at 1. Thereafter, we dismissed Acciona's July 9 protest. *Acciona CMS JV LLC, B-422744*, Aug. 6, 2024 (nondigested decision).

On August 6, the agency issued RFP amendment 0011. That amendment revised the solicitation by extending the due date for proposal submission by more than two months--from July 10 to September 17. AR, Exh. 11, RFP amend. 0011.

On September 16 (the day before the extended closing date), Acciona filed this protest, asserting that the solicitation's requirement that all offerors register with the Spanish Ministry of Finance is "unduly restrictive," "violates CICA [the Competition in Contracting Act of 1984]," and "does not allow for full and open competition."⁹ Protest at 11. Further, Acciona complains that, despite the agency's extensions of the proposal closing date, the period for compliance is "woefully insufficient" and "impermissibly restricts the ability of U.S. Firms to compete." *Id.* at 12-13.

On September 20, pursuant to the provisions of 4 CFR § 21.3(d),¹⁰ the agency requested that Acciona produce various documents, including "any communications with the Spanish Government, consultants, and/or any third party related to Protester's efforts and attempts to secure certification as required [by RFP] Amendment 9." Agency Document Requests at 1.

In response, Acciona asserted that it had been "working diligently" since issuance of RFP amendment 0009 to address the new requirements. Protester's Response to Document Requests at 3. Nonetheless, Acciona's response included an August 9 email from Acciona to a representative of the Spanish government, stating:

Earlier this year, you provided us with some information . . . about the possibility of obtaining a reciprocity certificate for my company. *At the time, we decided not to pursue this option.* Now, we would like to review the full set of requirements to obtain the Reciprocity Certificate or Registration. [Emphasis added.]

Acciona Response to Document Request, exh. 5., Email from Protester to Representative of Spanish Government at 1.

⁹ As noted above, this procurement is being conducted pursuant to the "fair opportunity" provisions of section 16.505 of the FAR and, as such, is not subject to the "full and open" competition requirements of CICA. See, e.g., *Technica Corp.*, B-416542, B-416542.2, Oct. 5, 2018, 2018 CPD ¶ 348 at 5.

¹⁰ Section 21.3(d) of GAO's Bid Protest Regulations authorizes an agency to request that a protester produce relevant documents "that are not in the agency's possession."

Following Acciona's September 16 protest, the agency again extended the closing date for submission of proposals--from September 17 to October 17. See AR, Exh. 13, RFP amend. 0012. The agency has declined to further extend the closing date.

Overall, the record establishes that the agency provided in excess of three and one-half months for Acciona to comply with the RFP amendment 0009 requirements, extending the closing date for submission of proposals from June 28 to October 17, 2024.

DISCUSSION

In its protest, Acciona challenges the solicitation requirement that, as a U.S. joint venture (comprised of a Spanish company and a U.S. company), it must register with the Spanish Ministry of Finance and, alternatively, complains that the period of time for compliance is inadequate. Protest at 11-12. As discussed below, we find no merit in either allegation.

Requirement to Register with Spanish Government

Acciona first argues that the solicitation's requirement for all offerors to register with the Spanish Ministry of Finance and obtain certification regarding their technical and financial capability "impermissibly restricts competition," was imposed "without justification," and specifically "restricts the ability of U.S. firms to compete." Protest at 11-13.

In response, the agency notes that the solicitation requirements "apply equally to all [IDIQ contractors]" and "do not discriminate by country of origin." MOL/COS at 8. The agency further responds that, rather than issuing RFP amendment No. 0009 "without justification," the agency was obligated to issue the amendment based on the U.S.-Spain Agreement on Defense Cooperation as implemented by the U.S.-Spain Permanent Committee. *Id.* at 8-9.

In its comments responding to the agency report (after reviewing the Navy's basis for the amended requirements), Acciona acknowledges that the Navy "has no choice but to include the restrictive terms found in Amendment 0009" and "was required to revise the RFP requirements to mirror [the] language found in the May 30, 2024 Joint Memorandum." Acciona Comments on AR at 1.

Where a protester challenges the requirements of a solicitation as "unduly restrictive," the procuring agency has the responsibility to establish that the requirements are necessary. See, e.g., *Louis Berger Services, Inc.*, B-410024, Oct. 10, 2014, 2014 CPD ¶ 303 at 3-5. In this context, an agency's compliance with the requirements of a host foreign nation--specifically including the requirements of the U.S.-Spain Agreement on Defense Cooperation discussed here--constitute a reasonable basis for a solicitation requirement. *Id.*

Here, as noted above, the record in this matter includes Acciona's post-protest acknowledgment that, based on the provisions of the U.S.-Spain Agreement on Defense Cooperation and the implementing joint memorandum, the Navy "has no choice but to include the restrictive terms found in Amendment 0009," and "was required to revise the RFP requirements to mirror [the] language found in the May 30, 2024 Joint Memorandum." Accordingly, Acciona's protest assertions to the contrary are without merit.

Reasonable Period of Time to Comply

Next, Acciona asserts that, notwithstanding the validity of the registration requirement--as well as the agency's multiple extensions of the proposal closing date--the solicitation fails to provide adequate time for Acciona to comply with the requirement. Protest at 12-13.

The agency responds by first pointing out that RFP amendment 0009 was issued on June 26, 2024 and, in response to Acciona's protests and communications with the agency, the deadline for complying with that requirement was extended by nearly four months (approximately 16 weeks) to October 17. The agency further references its documented market research, from which it concluded that 3 to 10 weeks was a reasonable period of time for offerors to comply with the registration requirement, and maintains that Acciona has failed to provide any reasonable basis for disputing the agency's research.¹¹ Finally, the agency points out that, although Acciona asserts that it retained Spanish counsel in July (shortly after issuance of RFP amendment 0009) and, at that time, also sought information from the Spanish government regarding compliance with the registration requirement, Acciona "decided not to pursue this option [until August 9]." Acciona Response to Document Request, exh. 5, Email to Spanish Government Representative. Accordingly, the agency maintains that Acciona has been given more than a reasonable period of time to comply with the registration requirement. We agree.

As noted above, this procurement is being conducted pursuant to the "fair opportunity" provisions of FAR section 16.505. Those provisions require that all contractors under an IDIQ contract be given a fair opportunity to be considered for issuance of task orders, including "a reasonable response period." FAR 16.505(b)(1)(iv)(B).

Here, based on the record discussed above, it is clear that Acciona has been given approximately 16 weeks (from issuance of RFP amendment 0009 on June 26 to the October 17 extended closing date) to comply with the registration requirements. The record further reflects the basis for the agency's assessment that a reasonable period to comply with the registration requirement was from 3 to 10 weeks. Although Acciona has expressed disagreement with the agency's assessment in that regard, Acciona has

¹¹ The agency also notes that, since Acciona is a joint venture that includes a Spanish company, that Spanish company "should be able to assist [the protester] in navigating the [registration] process." MOL/COS at 10 n.8.

failed to demonstrate that the agency's assessment was unreasonable. Finally, the record indicates that Acciona chose to delay meaningful efforts to comply with the registration requirements until August 9--more than 6 weeks after RFP amendment 0009 was issued. On this record, we reject Acciona's assertion that the agency has failed to provide a reasonable period of time for Acciona to comply with the amended solicitation requirements, and its protest in that regard is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel