U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Harper Construction Company, Inc.

File: B-415042; B-415042.2

Date: November 7, 2017

Richard B. Oliver, Esq., J. Matthew Carter, Esq., Mary E. Buxton, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.
R.J. Pinto, Esq., Robert J. Marks, Esq., for Straub Construction, Inc., the intervenor.
Deana Jaeger, Esq., Department of the Navy, for the agency.
Robert T. Wu, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency unreasonably found the protester's proposal to be unacceptable under the experience factor is sustained where there was a latent ambiguity in the terms of the solicitation.

DECISION

Harper Construction Company, Inc., of San Diego, California, protests the award of a task order to Straub Construction, Inc., of Fallbrook, California, by the Department of the Navy, Naval Facilities Engineering Command, under request for proposals (RFP) No. N62473-15-D-2434-X007 for construction services at Marine Corps Air Station, Yuma, Arizona. Harper challenges the evaluation of the firm's proposal and argues, in the alternative, that its proposal should not have been rejected because the solicitation is latently ambiguous.

We sustain the protest.

BACKGROUND

The RFP, issued on March 31, 2017, sought proposals for construction services from holders of the agency's indefinite-delivery, indefinite-quantity (IDIQ), unrestricted multiple award construction contract (MACC) for new construction and renovation of commercial and institutional building construction projects at various government installations located in Arizona, California, Colorado, Nevada, New Mexico and Utah. Agency Report (AR), Tab 12, IDIQ MACC, at 1. The project included the construction of

an aircraft maintenance facility; an aircraft maintenance apron; the expansion of water, sewer, electrical, and communication utilities; a wash rack; security fencing; and other infrastructure. AR, Tab 1, RFP, at 3.

The resulting contract was to be awarded on a lowest-price, technically-acceptable (LPTA) basis, considering price and three non-price factors: airfield paving experience (factor 1); managing construction concurrent with airfield operations and military technical training activities experience (factor 2); and past performance (factor 3). Id. at 7. For factor 1, offerors were required to submit a minimum of two, and a maximum of three, relevant construction projects that best demonstrated experience in construction of air field pavement. Id.

Under the RFP, the term project was defined as "a construction project performed under a single task order or contract." Id. For multiple award and IDIQ contracts, the RFP explained that the "contract as a whole should not be submitted as a project; rather Offerors should submit the work performed under a task order as a project." Id. In order to be found acceptable, offerors were required to have at least two projects that met all of the following criteria for concluding that the project was relevant: (1) paving was placed for at least 10 consecutive working days when the ambient temperature was equal to or greater than 90 degrees Fahrenheit, humidity was lower than or equal to 50 percent, and where American Concrete Institute 350R-10 "Guide to Hot Weather Concreting" requirements were employed; (2) Department of Defense airfield pavement constructed of Portland cement concrete with foreign object debris controls in place; (3) size: minimum 15,000 cubic yards of "PCC" pavement; and (4) complexity: slipform paving technique. Id. at Amendment 0003.

Finally, as relevant to this protest, the RFP instructed:

> The Offeror may utilize experience of a subcontractor that will perform major or critical aspects of the requirement to demonstrate construction experience under this evaluation factor. The Offer[or] must provide a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of this contract.

Id. at 7.

After receipt of proposals, Harper's proposal was evaluated by the Technical Evaluation Team (TET), which assigned an unacceptable rating to the firm's proposal under the first evaluation factor. In this regard, the TET found the following:

> For Factor 1, paving construction experience, the Offeror provided documentation that did not [meet] the requirements of the RFP. . . . [Harper] will be the General contractor, but will not self-perform the air field portion of the scope. The proposal DID NOT include a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of this contract. Therefore, the

> Board assigned a rating of UNACCEPTABLE for Factor 1, Airfield Paving Construction Experience.

AR, Tab 4, TET Findings, at 5. Harper received acceptable ratings under the other two non-price factors. Id. at 6-8. The firm's proposed price was $37,365,153.80. Consolidated Protest at 6.

The agency decided to issue a task order to Straub in the amount of $37,968,000.00, or $602,846.20 higher than the price offered by Harper. AR, Tab 5, Post Negotiation Memorandum (PNM), at 7. The PNM noted that Harper received an overall technical rating of unacceptable because it received an unacceptable rating under the first evaluation factor. Id. at 6. Supporting this finding, the PNM states:

> Per the RFP, if the contractor intended to utilize experience of a subcontractor for [factor 1], then a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of the contract was required. Harper submitted three relevant construction projects which they were the prime contractor on, but did not perform the airfield pavement portion of the work. Harper was utilizing experience of a subcontractor for this factor, and DID NOT include a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of this contract, as required by the RFP. Therefore, the Board found Harper to be deficient for Factor 1, Airfield Paving Experience, and assigned a rating of "Unacceptable".

Id. at 3. After Harper received a debriefing, this protest followed.[1]

DISCUSSION

Harper essentially argues that the Navy's evaluation was unreasonable because "the agency failed to recognize that Harper properly relied upon its own experience in airfield pavement construction, rather than its subcontractor's experience, and therefore Harper was not required to submit a letter of commitment and an explanation of the meaningful involvement that its subcontractor will have in performance of this contract." Consolidated Protest at 7. In this regard, Harper argues that the RFP did not limit experience to work that an offeror self-performed on reference projects. Instead, the protester read the RFP to mean that it would receive credit for all work performed under reference projects, even if the particular work was performed by one of Harper's subcontractors.[2] Id. at 9.

[1] The task order at issue is valued in excess of $25 million. Accordingly, our Office has jurisdiction to consider Harper's protest. 10 U.S.C. § 2304c(e)(1)(B).

[2] Harper also argues in its protest that the agency unreasonably assigned weaknesses to the firm's proposal for not including sufficient information with respect to three of its (continued...)

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶ 263 at 2. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id.

As discussed above, the agency found Harper's proposal to be unacceptable because the agency concluded that Harper was relying on the experience of a subcontractor, yet did not submit a letter of commitment, and did not submit an explanation of the meaningful involvement that the subcontractor would have in performance of this contract, which the agency asserts was required by the terms of the solicitation. See AR, Tab 4, TET Findings, at 5; Tab 5, PNM, at 3. Thus, the record presents a dispute as to the requirements of the solicitation.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 3. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous, our inquiry ceases. Id. An ambiguity, however, exists where two or more reasonable interpretations of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation then it is a patent ambiguity; a latent ambiguity is more subtle. Id. Where there is a latent ambiguity, both parties' interpretation of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Id. Here, we conclude that the disputed terms of the solicitation were latently ambiguous because the terms appear to be susceptible to two reasonable interpretations.

(...continued)
reference projects. Protest at 18-23; Comments at 19-26. However, the record shows that the basis for the agency's determination that Harper's proposal was technically unacceptable was the firm's failure to include letters of commitment and explanation of the meaningful involvement of its subcontractor, and not the assignment of the challenged weaknesses. AR, Tab 5, PNM, at 3. As such, we need not resolve this protest challenge because the record shows that it was not relevant to the agency's award decision. BAE Systems, B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 at 29-30 (declining to resolve other protest issues, while sustaining protest on other grounds).

The RFP instructed that offerors "may utilize experience of a subcontractor that will perform major or critical aspects of the requirement to demonstrate construction experience under this evaluation factor." RFP at 7. However, if an offeror relied on a subcontractor's experience, the offeror "must provide a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of this contract." Id. The RFP is silent on whether submitted experience was required to be self-performed by the offeror, as the agency argues was the case, or the offeror could claim experience as a prime contractor where the actual relevant work was performed by a subcontractor, as the protester asserts.[3] See generally id.

Harper cites to our Office's decision in ITT Corporation, Systems Division, B-310102.6 et al., Dec. 4, 2009, 2010 CPD ¶ 12 at 8-9, for the proposition that an agency may properly credit the prime contractor with experience involving functions performed, even if the particular work was actually performed by a subcontractor under the prime contractor's supervision. Consolidated Protest at 13-14. In ITT Corporation we discussed this general rule as being premised on the fact that a prime contractor under a government contract is responsible for the performance of its subcontractors. ITT Corp., supra, at 9; see also Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 21-22. Absent any language constraining the type of experience acceptable under the RFP, the protester adopted this interpretation in submitting reference projects where it served as the prime contractor, while the actual relevant work was performed by a subcontractor. Consolidated Protest at 9. Harper also asserts that it understood that for offerors who had not performed prime contracts involving airfield paving experience, the "may utilize" solicitation language allowed, but did not require, the offeror to propose the airfield paving experience of a subcontractor. Id.

In reading the solicitation as a whole, our review of the RFP's language leads us to conclude that Harper's interpretation of the disputed terms was unobjectionable. In this regard, absent any language limiting the type of experience acceptable to the agency, Harper reasonably interpreted the term "perform" to include reference contracts where it served as the prime contractor, even though the relevant scope of work was actually performed by a subcontractor. Harper also reasonably interprets the solicitation language that the offeror "may utilize the experience of a subcontractor" as permissive, even where that subcontractor "will perform major or critical aspects of the requirement" in meeting the evaluation requirements of factor 1. RFP at Amendment 0003. Thus, under the terms of the RFP, Harper could properly rely on its own relevant airfield

[3] The RFP included a reference sheet to be used by offerors for the submission of projects for evaluation under factor 1. RFP at Exhibit A. Block 8 of the reference sheet included the following language, "[p]ercentage of work your firm self-performed (see definition) . . . . Provide a detailed description of the relevant (airfield pavement) work your firm self-performed on this project." Id. (emphasis in original). However, there is no corresponding language in the evaluation factor as to how the agency would evaluate the information collected in Block 8.

paving experience to satisfy the requirements of factor 1, even where it intended to subcontract the work under the resulting contract.

As discussed above, the agency interpreted the terms of the solicitation more narrowly with respect to the performance that was acceptable to meet the requirements of factor 1. In this regard, the award decision states, "Harper submitted three relevant construction projects which they were the prime contractor on, but did not perform the airfield pavement portion of the work." AR, Tab 5, PNM, at 3. Thus, the agency did not credit Harper's work as a prime contractor, and instead found that the relevant work was performed by the protester's subcontractor. In this regard, the agency explains that, "[t]he airfield paving portion of this project is of such importance that the Government needed to evaluate the experience of the actual contractor who would be performing the airfield paving on this contract. Harper did not provide the required 2-3 projects demonstrating its own experience in physically laying airfield paving. . . ." Declaration Task Order Evaluation Board Member dated Oct. 13, 2017.

While the term "perform" is susceptible to be interpreted in the narrower fashion ascribed by the agency, Harper's more expansive definition is also reasonable given the terms of the RFP. Moreover, we conclude that the RFP did not contain any language that was obvious, gross, or glaring, such that the ambiguity was patent on the face of the solicitation, and that the ambiguity in the disputed RFP language is latent.

Finally, we address the issue of prejudice, which is an element of every viable protest. See Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4. Here, the parties disagreed as to the interpretation of the disputed language in the RFP. The differing interpretations led Harper to submit a proposal that the agency found did not conform to the terms of the RFP, and consequently resulted in Harper's proposal being found to be technically unacceptable. Had Harper known the agency's interpretation of the solicitation, it could have submitted a different proposal to conform to the agency's understanding of the disputed language. We resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.--Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. As such, we conclude that Harper was prejudiced by the latent ambiguity found in the solicitation. Moreover, because the ambiguity was latent, the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Colt Def., LLC, supra.

RECOMMENDATION

We recommend that the Navy amend the solicitation to clarify the requirement for performance of reference contracts under factor 1, afford offerors an opportunity to submit proposals based on the clarified requirement, reevaluate proposals and make a new award decision. In the event a proposal other than Straub's is found to represent the best value to the government, Straub's contract should be terminated for the convenience of the government and award should be made to the successful offeror in

accordance with the terms of the RFP. We also recommend that the agency reimburse Harper for the firm's costs of filing and pursuing its protest challenging the award to Straub, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). Harper's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the Navy within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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General Counsel