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# Decision

**Matter of:** ACADEMI Training Center, LLC dba Constellis

**File:** B-415416

**Date:** December 18, 2017

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David S. Cohen, Esq., John J. O'Brien, Esq., Daniel J. Strouse, Esq., Cohen Mohr LLP, for the protester.

Mark R. Gleeman, Esq., Winthrop & Weinstine, PA, for the intervenor.

Morgan L. Cosby, Esq., Dennis J. Gallagher, Esq., and John W. Cox, Esq., Department of State, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest that agency improperly rejected protester's task order proposals is denied where the protester proposed prices exceeding the prices established in its indefinite-delivery, indefinite-quantity contract, contrary to the solicitation.

2. GAO will not review a protester's assertion that an agency abused its discretion by failing to conduct discussions when the solicitation expressly advised that the agency intends to make award without discussions.

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## DECISION

ACADEMI Training Center, LLC dba Constellis (ACADEMI), of Moyock, North Carolina, protests the issuance of two task orders to DECO, Inc., of Champlin, Minnesota, by the Department of State under request for proposals (RFP) No. SAQMMA17R0163 for antiterrorism training to foreign law enforcement and civilian government officials worldwide. The protester contends that the solicitation contained a latent ambiguity that resulted in the agency unreasonably finding its task order proposals ineligible for award. The protester further argues that the agency abused its discretion by failing to conduct discussions.

We deny the protest.

## BACKGROUND

On March 13, 2017, the agency issued the RFP to simultaneously award up to seven indefinite-delivery, indefinite-quantity (IDIQ) contracts, and seven task orders covering six geographic regions and its Special Programs Embassy Augmentation Response (SPEAR) program.<sup>1</sup> Agency Report (AR), Tab 2, RFP at 6. The six geographical regions for which task orders were awarded are: AF-Africa; EAP-East Asia Pacific; EUR-Europe; NEA-Near East Asia; SCA-South Central Asia; and WHA-Western Hemisphere. Id. at 41. Each IDIQ contract, comprised of a 1-year base period and four 1-year option periods, contemplates the issuance of both fixed-price and cost reimbursement task orders. Id. at 6. The IDIQ contracts establish, among other prices, fixed prices for 69 standard training courses; the course prices are predicated on daily instructor labor rates and an allocation of program management office (PMO) costs.<sup>2</sup> Id. at 6-7. The purpose of the PMO is to manage the instructor pool, deploy international mobile training teams, coordinate training and manage material, among other things. Id. at 15.

Regarding the submission of price proposals for the IDIQ contracts, the RFP instructed offerors to complete a price proposal workbook, consisting of multiple worksheets, to depict the development of course prices and daily instructor rates proposed for the base and option periods. RFP at 95. To this end, the RFP specifically instructed:

In the event that the Offeror captures, reports and applies costs in a different [manner] than depicted in this worksheet the formula can be modified accordingly. The Offeror shall include a discussion that specifically addresses what indirect costs are included in each provisional rate pool and enumerate the application and any changes made to the worksheet formulas needed to correctly depict the generation of these indirect cost pools in the Price Proposal Notes.

Id.; see also AR, Tab 2a, RFP attach. 22, Price Proposal Workbook. As relevant here, the workbook included a PMO worksheet and instructed offerors to “provide a discussion of the allocation base... [to] show the allocation base and the calculations used for spreading the per course PMO allocation[.]” RFP at 96.

The price proposal workbook also included course price worksheets. The RFP advised offerors not to modify or change any of the formulas or calculations in the course price

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<sup>1</sup> The RFP was amended five times. All citations to the RFP are to the conformed copy provided by the agency.

<sup>2</sup> The IDIQ contracts also establish fully burdened instructor daily rates and the contractor’s provisional indirect rates (i.e., overhead, fringe, general and administrative expenses) and fee to provide a basis to price non-standard courses, as well as other cost reimbursement line items (i.e., travel, other direct costs, and insurance). RFP at 6.

worksheets because they were fully automated for self-calculation, and would generate the course prices based on the offerors' inputs to the other pricing detail worksheets. RFP at 98. The RFP further stated that the fixed prices for the 69 standard courses would be incorporated in the IDIQ contracts awarded, and that the "fixed course prices will become the ceiling prices for any task order pricing awarded." Id.

With respect to the task order price proposals, the RFP provided separate price proposal workbooks for each of the seven task orders, and advised offerors that proposed course prices "cannot exceed the ceiling prices in the base contract award." Id. at 103. As relevant here, the RFP also stated that offerors "shall price a Program Management Office in accordance with the requirements enumerated in [the RFP] for the regions, respectively." Id. at 104.

Regarding the evaluation of price, the RFP stated that, for both the IDIQ contracts and task order awards, "[t]he principal basis for evaluating price as a factor for award under this solicitation will be an evaluation of the Offerors' respective Grand Total, base year and all option years combined." RFP at 110. The RFP advised that the agency would use a best-value tradeoff source selection process, with all evaluation factors other than price, when combined, significantly more important than price, and make award to responsible offerors whose proposals conformed to the solicitation requirements and whose proposals were determined to provide the best value to the government. Id. at 106-107. Specifically, the RFP stated:

To be eligible for award, Offerors are required to meet all solicitation requirements and submit a proposal in accordance with the instructions listed in Section L. Failure to comply with all solicitation requirements may result in the Offeror being removed from award consideration.

Id. at 107. In addition, the RFP advised that the government intended to make award without discussions on the basis of initial proposals received. Id.

The agency awarded six IDIQ contracts, including awards to ACADEMI and DECO, and evaluated the awardees' task order proposals. See AR, Tab 4, Task Orders Award Determination Memorandum, at 2-3. For the EAP task order, ACADEMI's total price was \$135,323,981, and DECO's total price was \$138,068,471. AR, Tab 3, Task Orders Cost/Price Evaluation Report, at 10. The agency found that ACADEMI and four other offerors had proposed course prices higher than the course prices established in their IDIQ contracts for all courses in the base and option years. Id. at 10-12. All offerors' proposed prices were determined to be fair and reasonable, however, all offerors other than DECO were determined to be ineligible for award because they had proposed fixed course prices that exceeded the proposed prices in their IDIQ contracts, contrary to the solicitation, and therefore DECO was selected for award as the lowest-priced conforming offer. Id. at 12-13.

For the SPEAR task order, ACADEMI's total price was \$132,633,379, and DECO's total price was \$134,601,228. AR, Tab 3, Task Orders Cost/Price Evaluation Report,

at 23. The agency found that ACADEMI and three other offerors had proposed course prices higher than the course prices established in their IDIQ contracts for all courses in the base year, and several had proposed higher prices for all courses in the option years. Id. at 23-25. All offerors' proposed prices were determined to be fair and reasonable, however, since only two offerors proposed task order prices in accordance with the solicitation, award was made to DECO as the lowest-priced conforming offeror. Id. at 25. For both the EAP and SPEAR task order proposals, the agency found that ACADEMI and other offerors' proposed course prices exceeded their respective IDIQ contract prices because they had increased the PMO allocations included in the task orders' proposed fixed course prices. Id. at 10-12, 23-25.

By letters sent on September 20, the agency advised ACADEMI that it had not been selected for award of the EAP and SPEAR task orders. See AR, Tab 9, Unsuccessful Offeror Letters for EAP and SPEAR. On September 25, ACADEMI was provided with a written debriefing, and this protest followed.<sup>3</sup>

## DISCUSSION

The protester argues that the agency's rejection of its lower-priced proposals for award of the EAP and SPEAR task orders on the basis that its proposed course rates exceeded the ceiling rates in its IDIQ contract is unreasonable. Protest at 6-8. ACADEMI further argues that rejection of its proposals was improper because the RFP contained a latent ambiguity regarding the IDIQ contract course ceiling prices and the PMO allocation. Id. at 9-12. Specifically, ACADEMI asserts that in its price proposal for the IDIQ contract, it aggregated its PMO costs for the courses across all regions. ACADEMI explains, however, that PMO costs vary by region, and it was not clear at the time it prepared its price proposals that it would have to choose between following the task order solicitation instructions to propose PMO costs appropriate for the region and proposing prices that did not exceed its contract ceiling prices. Id. at 11. The protester asserts that its latent ambiguity argument is bolstered by the fact that the agency concluded that 4 of the 6 offers for the SPEAR task order and 5 of the 6 offers for the EAP task order were ineligible for award because the offerors' proposed course prices exceeded their IDIQ contract ceiling prices as a result of increasing their PMO allocation costs. Comments at 5.

The agency argues that the RFP is unambiguous and left no doubt that offerors could not exceed the ceiling prices established in their IDIQ contracts when they proposed pricing for task orders. Contracting Officer Statement (COS) at 12-13; Memorandum of Law (MOL) at 12-15. The agency explains that this provision served multiple purposes, one of which was to ensure that offerors would not circumvent competition by offering

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<sup>3</sup> The awarded value of the task orders exceeds \$10 million. Accordingly, this procurement is within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

artificially low course rates for the IDIQ contract and then raise them in subsequent task orders. COS at 2. The agency further asserts that by failing to comply with the express terms of the solicitation, the ACADEMI task order proposals were ineligible for award, and the agency reasonably eliminated them from further consideration for award. COS at 10-12; MOL at 8-11.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2. An ambiguity exists where two or more reasonable interpretations of the terms or specification of the solicitation are possible. Sygnetics, Inc., B-414649, Aug. 2, 2017, 2017 CPD ¶ 253 at 2. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals, when it is most practicable to take effective action against such defects. Id.; 4 C.F.R. § 21.2(a)(1).

As noted, the RFP permitted offerors to propose a PMO allocation different from the PMO allocation presented in the formula included in the RFP worksheet when proposing prices for both the IDIQ contract and the various task orders, and to provide a discussion showing the calculations used for spreading the per course PMO allocation. RFP at 95-96, 104. Regarding the PMO allocation in the evaluation of offerors' price proposals, the contracting officer explains:

In reviewing and evaluating the offerors' price proposals I found that several had followed this instruction and adjusted their calculations to reflect their company's business practices and risk decisions as it related to the PMO calculation and allocation. All of the approaches varied and could be considered viable corporate business choices. At the base IDIQ contract level, Protester chose to average its PMO rates across all courses. This too seems to be a viable business decision as it spreads the risk of receiving higher or lower cost regional task orders and it spreads the risk of which courses will in fact be ordered/delivered since not all courses are guaranteed to be ordered.

COS at 13. Although offerors could propose different PMO allocations, the RFP explicitly stated that the fixed prices for the 69 standard courses would be incorporated in the IDIQ contracts awarded, and that the "fixed course prices will become the ceiling prices for any task order pricing awarded." RFP at 98. The RFP also provided separate price proposal workbooks for each of the seven task orders, and advised offerors that proposed course prices "cannot exceed the ceiling prices in the base contract award." Id. at 103. We see no reason, and the protester does not explain why, the ability to propose different PMO allocations at the task order level prevented it from complying

with the solicitation's explicit limitation of task order course prices to the ceiling prices established in its IDIQ contract.

On this record, and in reading the solicitation as a whole, it is not apparent that any ambiguity exists regarding the fact that offerors were not to exceed the ceiling prices established in their IDIQ contracts when submitting task order proposals. However, to the extent that the ability to propose a PMO allocation at the task order level different from the PMO allocation proposed for the IDIQ contract created any ambiguity, such ambiguity was patent, that is, apparent from the face of the solicitation, and thus, required to be protested before the due date for the submission of proposals. Alluviam, LLC, supra; 4 C.F.R. § 21.2(a)(1). This is especially so since it should have been apparent to ACADEMI at the time it simultaneously submitted its proposal for both the IDIQ contract and task orders that its proposed prices for the EAP and SPEAR task orders exceeded the course prices proposed for its IDIQ contract. See AR, Tab 7, Comparison of ACADEMI's IDIQ Contract and EAP and SPEAR Task Order Proposed Course Prices. The protester's failure to timely protest this patent ambiguity provides no basis for relief here.

In the absence of a timely challenge to the RFP, we review the agency's evaluation to determine whether it was consistent with the agency's interpretation of the terms of the solicitation. Anders Constr., Inc., B-414261, April 11, 2017, 2017 CPD ¶ 121 at 6. An offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. Sygnetics, Inc., supra, at 2. Here, the agency reviewed offerors' task order price proposals to determine, among other things, whether they complied with the ceiling prices established in the offerors' IDIQ contracts. COS at 8. Offerors whose proposed task order prices exceeded the prices established in their IDIQ contracts were considered unacceptable for award. Id. The RFP stated that to be eligible for award, offerors were required to meet all solicitation requirements and failure to comply with all solicitation requirements could result in the offeror not being considered for award. RFP at 107. A proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and may not form the basis for award. See Sealift, Inc., B-409001, Jan. 6, 2014, 2014 CPD ¶ 22 at 6. Since ACADEMI failed to comply with the RFP's provisions establishing that proposed course prices in an offeror's task order proposals could not exceed the prices established by the awarded IDIQ contract, we find reasonable the agency's decision to exclude it from consideration for award of the EAP and SPEAR task orders.

The protester also argues that the agency abused its discretion by failing to conduct discussions. Protest at 12-13; see also Comments at 7-9. The solicitation, however, expressly advised that the agency contemplated making award without discussions. RFP at 107 ("The Government intends to make award without discussions on the basis of initial proposals received."). An agency's decision not to initiate discussions is a

matter we generally will not review. Tribalco, LLC, B-414120, B-414120.2, Feb. 21, 2017, 2017 CPD ¶ 73 at 6. Accordingly, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong  
General Counsel