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Decision

Matter of: Aneon Brilliant, LLC

File: B-421906.6

Date: April 8, 2024

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Damon A. Brown, Esq., Department of Health and Human Services, for the agency.
Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision not to amend the solicitation and permit the submission of revised proposals is denied where the protester fails to demonstrate competitive prejudice.

DECISION

Aneon Brilliant, LLC, an 8(a) small business concern of Reston, Virginia, protests the decision of the Department of Health and Human Services, Food and Drug Administration (FDA) not to amend request for proposals (RFP) No. 75F40123R00069 and allow the submission of revised proposals. The protester contends that there was a material change to the requirements of the solicitation, which is for professional, administrative, and consulting services (PACS), and that the agency therefore should have amended the RFP and permitted offerors to submit revised proposals.

We deny the protest.

BACKGROUND

On April 21, 2023, the FDA issued the subject solicitation in accordance with Federal Acquisition Regulation (FAR) part 15 as a set-aside for 8(a) small businesses.¹ Agency Report (AR), Tab 1a, Contracting Officer's Statement (COS) at 1. The solicitation contemplated both the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract in support of the FDA's PACS requirements, and the issuance of an initial task order under that contract to provide digital communications support to FDA's Office of External Affairs. AR, Tab 2e, RFP, Attach. B, IDIQ Statement of Work (SOW) at 1; AR, Tab 2i, RFP, Attach. D, Task Order SOW at 3.² To that end, the solicitation included both an IDIQ SOW and a task order SOW. AR, Tab 2e, RFP, Attach. B, IDIQ SOW; AR, Tab 2i, RFP, Attach. D, Task Order SOW. The period of performance for the IDIQ contract is five years, consisting of five 12-month ordering periods and one 6-month ordering period. AR, Tab 2e, RFP, Attach. B, IDIQ SOW at 9. The period of performance for the task order is also five years, consisting of a 1-year base period, followed by four 1-year option periods. AR, Tab 2i, RFP, Attach D, Task Order SOW at 11.

The solicitation provided for the evaluation of proposals in two phases; the due date for phase one proposals, as amended, was May 12, 2023. COS at 3; AR, Tab 2g, RFP, Attach. C, Instructions and Evaluation at 1. The evaluation of proposals was based on the following evaluation criteria: (1) demonstrated prior experience, (2) key personnel, (3) management approach to task order, (4) relevant past performance, and (5) labor categories and pricing worksheet. AR, Tab 2g, RFP, Attach. C, Instructions and Evaluation at 3. The solicitation provided for the evaluation of demonstrated prior experience during phase one; the remaining factors were to be evaluated during phase two. *Id.*

For demonstrated prior experience, offerors were to describe their ability to comply with limitations on subcontracting as well as demonstrate their prior experience managing similar IDIQs or blanket purchase agreements. *Id.* at 4. Offerors also were to describe their prior experience identifying highly qualified staff and responding to task order requirements. *Id.* For key personnel resumes, the solicitation required offerors to provide resumes for a project manager, visual information specialist/graphic designer, and video producer. *Id.* at 7. For the management approach to task order factor, offerors were to describe the processes, tools, and organization for transitioning in and

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance of those contracts through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

² On May 5, 2023, the agency issued an amendment to the RFP, which--among other things--amended attachments A, C, and D. Citations in this decision are to the amended versions of the attachments.

managing the work of the initial task order; address how the offeror would ensure the delivery of high-quality work products; and mitigate identified risks. *Id.* at 7-8. Offerors also were to address their approach to compliance with section 508³ accessibility standards and describe proposed subcontracting arrangements, if any. *Id.* at 8. For relevant past performance, the solicitation required offerors to submit information on references described under the demonstrated prior experience factor. *Id.* For labor categories and pricing, offerors were to complete both an IDIQ labor category pricing worksheet providing fully burdened hourly rates for each government-provided labor category for each ordering period and a task order pricing worksheet providing labor categories and rates for the task order work. AR, Tab 2d, RFP, Attach. A, Labor Categories and Pricing Worksheet.

The solicitation provided that the agency would evaluate the non-price evaluation factors to assess its level of confidence that the offeror would successfully perform all requirements.⁴ AR, Tab 2g, RFP, Attach. C, Instructions and Evaluation at 4, 7-8. The solicitation provided for award on a best-value tradeoff basis where the evaluation factors were listed in descending order of importance, and the non-price factors when combined, were significantly more important than price. *Id.* at 10.

Initial Award and Protest

The agency received sixty phase one proposals by the solicitation’s closing date of May 12, 2023, including one from the protester. COS at 3. The agency informed the protester on June 5 that its proposal was among the most highly rated proposals and afforded the protester the opportunity to submit a phase two proposal. *Id.* The protester submitted its phase two proposal on June 23. *Id.* The agency informed the protester on August 14 that its proposal was not selected for award. *Id.* The evaluation results for phase one and phase two proposals for the protester and the awardee were as follows:

	Aneon	Awardee
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³ While not at issue in this protest, section 508 of the Rehabilitation Act of 1973, as amended, generally requires that agencies’ electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

⁴ As relevant here, a rating of high confidence for the first three factors indicated that the agency had high confidence that the offeror will be successful in performing all requirements with little or no government intervention. Protest, exh. 12, Aneon Debriefing Letter--Initial Evaluation at 170. (Citations are to the Adobe PDF page numbers provided by the parties.) A rating of high confidence for past performance indicated that the offeror understood the requirement, proposed a sound approach, and would be successful in performing the contract with little or no agency intervention. *Id.* at 171. A rating of neutral for past performance indicated that the offeror lacked relevant past performance or information on past performance was not available. *Id.*

Demonstrated Prior Experience	High Confidence	High Confidence
Key Personnel	High Confidence	High Confidence
Management Approach	High Confidence	High Confidence
Past Performance	High Confidence	Neutral
Total Task Order Price	\$3,260,303	\$2,332,667

Id. at 169-170. Aneon filed a protest with our Office on August 22, challenging the agency’s evaluation and award decision. COS at 3. In response to the protest, the agency informed our Office that it intended to take corrective action. *Id.* We dismissed the protest as academic on September 20. *Aneon Brilliant, LLC*, B-421906.2, Sept. 20, 2023 (unpublished decision).

Reevaluation and Second Protest

In accordance with the agency’s notice of corrective action, it reevaluated proposals and made a new award decision. COS at 3. The results of the reevaluation were as follows:

	Aneon	Awardee
Demonstrated Prior Experience	High Confidence	High Confidence
Key Personnel	High Confidence	High Confidence
Management Approach	High Confidence	High Confidence
Past Performance	Neutral	High Confidence
Total Task Order Price	\$3,260,303	\$2,332,667

Protest, exh. 15, Aneon Debrief Letter at 186-187. As shown above, the evaluation results were mostly unchanged except the agency now assigned the protester’s proposal a rating of neutral under past performance and assigned the awardee’s proposal a rating of high confidence under past performance. *Id.* The protester filed a protest with our Office on November 14, challenging the agency’s reevaluation and award decision. COS at 4. In response, the agency took corrective action, stating that it intended to reevaluate proposals and make a new award decision. *Id.* We dismissed the protest as academic on December 14. *Aneon Brilliant, LLC*, B-421906.5, Dec. 14, 2023 (unpublished decision).

On December 15, the protester requested that the agency allow offerors within the competitive range to submit revised proposals. COS at 4. The contracting officer responded that “if the agency determines it to be appropriate to allow for new proposals, it will let all offerors know.” *Id.* On December 18, the contracting officer requested that all offerors in phase two of the evaluation extend the validity of their original phase two proposals through February 13, 2024. *Id.* In response, the protester filed an agency-level protest on December 18 where it argued that it was improper for the agency to request that offerors extend the validity of their proposals due to a “materially shorter base period.” Protest, exh. 11, Agency Level Protest at 165. The protester argued that given the “greater price certainty gained through the more than half year of decreasing inflation pressures,” the agency should permit offerors to submit revised pricing. *Id.*

Prior to receiving a response from the agency, the protester filed a protest with our Office raising protest grounds similar to the arguments raised in its agency-level protest.⁵ COS at 4.

DISCUSSION

The protester contends that the agency’s decision not to amend the solicitation and allow the submission of revised proposals violated FAR section 15.206(a). Protest at 11. For the reasons discussed below, we deny the protest.⁶

Section 15.206(a) of the FAR provides that “[w]hen, either before or after receipt of proposals, the [g]overnment changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.” In this regard, our Office has explained that a contract’s period of performance is generally a material solicitation requirement and if that requirement changes, the agency must issue an amendment and afford all offerors an opportunity to compete for its changed requirements. *Lumen Techs. Gov’t Sols., Inc.*, B-420945 *et al.*, Nov. 16, 2022, 2022 CPD ¶ 301 at 12. Our Office will not sustain a protest of an agency’s decision not to amend a solicitation to incorporate a material change, however, unless the protester demonstrates a reasonable possibility of competitive prejudice. *Id.*

Here, the protester asserts that the FAR required the agency to amend the solicitation and allow the submission of revised proposals because the agency has materially changed its requirements by shortening the period of performance for the initial task order. Protest at 11. According to the protester, if the agency amended the solicitation to allow the submission of revised proposals, the protester would submit pricing for the initial task order that is lower than the current awarded price. Protest, exh. 14, Decl. of

⁵ The agency informed the protester that it would not issue a decision on the agency-level protest because of the protest filed with our Office. COS at 4.

⁶ Although we do not address every argument raised by the protester, we have considered them and find none to be meritorious.

Senior Director at 182. In this regard, the protester's senior director contends that, given the opportunity, the protester would revise its task order pricing by [DELETED]. *Id.* The revised task order pricing, according to the senior director, would be [DELETED], which is lower than the awarded price. *Id.*

Without conceding that its requirements have changed,⁷ the agency responds that this *post-hoc* price adjustment fails to demonstrate competitive prejudice. Memorandum of Law (MOL) at 9. Specifically, the agency argues that “[w]hat the [p]rotester demonstrates is only that if provided a second bite at the apple, it would change its originally proposed personnel and further discount its pricing in attempts to circumvent the awardee’s known lower pricing.” *Id.* at 10.

Based on the record, we conclude that the protester has failed to demonstrate competitive prejudice as argued. The protester does not reasonably explain how the protester is competitively harmed by the agency’s refusal to amend the contract’s period of performance. The protester’s general statement that it would [DELETED] does not explain why the agency’s refusal to change the contract’s period of performance has competitively harmed the protester. In this regard, the protester makes no effort to explain how the reductions it identifies directly relate to a potential reduction in the base period of performance. There is no explanation of how the removal of the [DELETED] tracks to any potential reduction in the scope of the base performance period. Similarly, the purported reductions in hourly labor rates are untethered to any shortening of the base period of performance. All that is clear from the protester’s submission is that it seeks an opportunity to revise its price to a level below that of the prior awardee given its significant price disadvantage in the competition. Based on this record, we have no basis to conclude that the protester has demonstrated competitive prejudice from the agency’s decision not to reopen the competition as part of its corrective action.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁷ The agency asserts that “despite the [p]rotester’s claims, the [a]gency has not changed or relaxed its requirements or the terms and conditions of the solicitation, and the [a]gency is not required to amend the solicitation and accept revised proposals.” MOL at 7.