

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: NCS Technologies, Inc.

File: B-406306.3

Date: September 17, 2012

Thomas K. David, Esq., and Kenneth D. Brody, Esq., David, Brody & Dondershine, LLP, for the protester.

David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr LLP, for Intelligent Decisions, Inc., the intervenor.

Lisa L. Baker, Esq., United States Marine Corps, for the agency.

Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated proposed prices is denied where the agency's evaluation conformed to the terms of the solicitation; in any case, any ambiguity in the price evaluation method announced in the solicitation was patent, and protester was required to file before the closing time for receipt of proposals.

DECISION

NCS Technologies, Inc., of Gainesville, Virginia, protests the United States Marine Corps' award of a contract to Intelligent Decisions, Inc., of Ashburn, Virginia, and CDW-Government, of Vernon Hills, Illinois, under request for proposals (RFP) No. M67854-11-R-4051, for hardware and logistics support. NCS asserts that the agency unreasonably evaluated its price proposal.

We deny the protest.

BACKGROUND

The Marine Corps Common Hardware Suite (MCHS) program seeks to obtain commercial-off-the-shelf (COTS) servers, desktops, laptops, storage solutions, and rugged computing equipment for the Marine Corps. The COTS hardware will deploy with Marines worldwide and will be required to operate in varying conditions. MCHS is charged with ensuring that the procured equipment is provided with sufficient logistical support to meet the Marine Corps' demanding requirements.

The MCHS uses Logistic Support Requirements (LSR) to provide a detailed description of the warranty and warranty services required of its vendors. An LSR has two parts. Part I contains mandatory support provisions that are not individually offered or priced and are applicable to all assets procured under a contract. Marine Corps Common Hardware Suite Logistics Support Requirements for Commercial Off-the-Shelf Computer Platforms, May 1, 2011 at 5. Part II provides support enhancements to the standard warranty, which are itemized in the contract by Contract Line Item Number (CLIN) and individually priced.¹ These optional CLINs may be selected by the customer at the time of purchase. Vendors must offer these options, although the customer may or may not select any of the Part II CLINs. Id. at 16.

The current RFP contained 24 submodules. Offerors could propose hardware that met the requirements for one or more of those submodules. Each award was to include a base period and an option period. The RFP contemplated that for 22 of the submodules the agency would issue multiple award, indefinite-delivery, indefinite-quantity (ID/IQ) contracts, and for two submodules (1(a) and 4(b)) the agency would issue single award requirements contracts. RFP, Amend. 8 at 5-6. The hardware component of both single award requirements submodules was laptops. Id. at 5.

Award was to be made to the offeror or offerors whose proposal or proposals represented the best value to the government considering four evaluation factors: technical, management plan, past performance, and price. With respect to price, the RFP provided as follows:

The Government will evaluate offers for award purposes by adding the base configuration for the base year period and the option period. The quantities listed in Attachment 1 are the notational quantities in which the Government will calculate the total evaluated price. In addition the Government will evaluate the pricing for the base configuration option items and LSR Part I and LSR Part II pricing and may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of the options shall not obligate the Government to exercise the option(s).

RFP, Amend. 9, § M.1.1. Price. The only estimated quantities in the RFP were the “notational quantities” for laptops referenced above.

¹ LSR Part II services included, for example, faster assistance response times, quicker shipment, and an extension of the base warranty period.

During the evaluation, the agency deleted two of the ID/IQ submodules. Of the remaining 20 ID/IQ submodules, NCS was an awardee for 19. The agency awarded the two requirements contract submodules, 1(a) and 4(b), to CDW-Government and Intelligent Decisions, respectively. NCS' protest of the award of submodules 1(a) and 4(b) followed.

DISCUSSION

The protester challenges the agency's price evaluation, asserting that it was unreasonable for the agency's total evaluated price to include the price for LSR Parts I and II.² According to the protester, "nowhere in the solicitation does the Agency state or even imply that an offeror's proposed LSR prices will be part of their total evaluated price." Protest at 8.

The Marine Corps disagrees. According to the agency, because it was required by the terms of the RFP to purchase LSR Part I support for each laptop purchased under the contracts,³ see RFP, Amend. 8 at 9 (noting that "[t]he LSR Part I is mandatory"), and because RFP § M.1.1 discussed together the evaluation of LSR Parts I and II, the only reasonable interpretation of the RFP was that the total evaluated price would include both LSR Parts I and II prices. For that same reason, the agency argues, the protester's contention that neither LSR Part price should be included in the price evaluation is unreasonable. As explained below, we agree with the agency that it was reasonable to include LSR Parts I and II prices in the total evaluated price.

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 if a specification is susceptible to more than one reasonable

² NCS also asserts that the RFP failed to inform offerors of threshold requirements for two pieces of hardware. However, the agency evaluated the protester's proposal as meeting those requirements, and there is no basis upon which to conclude that the protester was in any way prejudiced by this alleged RFP defect. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996) (competitive prejudice is a necessary element of any viable bid protest).

³ The RFP implements the MCHS requirement that information technology vendors "perform all tasks identified in [LSR] Part 1." Marine Corps Common Hardware Suite Logistics Support Requirements for Commercial Off-the-Shelf Computer Platforms, May 1, 2011, at 5.

interpretation that is consistent with the solicitation, when read as a whole. Poly-Pacific Techs., Inc., B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error (e.g., where solicitation provisions appear inconsistent on their face), while a latent ambiguity is more subtle (e.g., where the ambiguity is first identified in the context of an evaluation). Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. Where a patent ambiguity is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent protest assertion that is based on an alternative interpretation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2012); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

The solicitation clearly provides that for each laptop purchased under either contract, the customer will be required to purchase LSR Part I support. RFP, Amend. 8 at 9 (noting that “[t]he LSR Part I is mandatory”). As noted above, the protester’s interpretation of the disputed RFP language nevertheless would preclude the agency’s evaluation of the price that the customer will pay for the required LSR Part I. According to the protester, given the absence of a specific solicitation provision including the price of the LSR Part I in the total evaluated price, the agency’s price evaluation was to be restricted to only the price of the computers themselves. In our view, however, an interpretation of the RFP that precludes consideration of the price of a required item would be inconsistent with the RFP read as a whole, which required purchase of LSR Part I support with each laptop. In this regard, agencies are required to use a method to evaluate cost or price that, to the extent possible, accurately measures the cost to be incurred under competing proposals. See Eurest Support Servs., B-285813.3 et al., July 3, 2001, 2003 CPD ¶ 139 at 7; Lockheed, IMS, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180 at 6. Were the solicitation interpreted as asserted by NCS to preclude consideration of the price of a required item, LSR Part I support, the solicitation would be defective for failure to accurately measure the cost to be incurred by the government under competing proposals. Id.

Furthermore, even if we were to assume that section M language--that “the Government will evaluate offers for award purposes by adding the base configuration for the base year period and the option period,” RFP, Amend. 9, § M.1.1 Price--could reasonably be read to set forth an evaluation scheme that considered only the price of the laptops and precluded the consideration of the LSR Part I price, the contradiction between that paragraph and the rest of the RFP would create a patent ambiguity. An RFP term that provided for the evaluation of total price, without regard to the price of LSR Part I, would conflict on its face with the requirement that LSR Part I be procured with every laptop. A protest of such a patent ambiguity in the RFP would be timely only if filed prior to the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

As noted above, the agency asserts that, because it was required by the terms of the RFP to purchase LSR Part I support for each laptop purchased under the contracts, and because RFP § M.1.1 discussed together the evaluation of LSR Parts I and II, the only reasonable interpretation of the RFP was that the total evaluated price would include both LSR Parts I and II prices. We agree.

The protester argues that including the LSR Part II prices in the total evaluated price unreasonably included duplicative LSR Part II options in the total price, including, for example, LSR Part II task number 5, field service support, and task number 6, enhanced field service support, which includes all of the support available under task number 5, plus upgraded services. The basis for this allegation was known at the time the protester received its debriefing. Comments on AR at 10 (noting that “[i]t was not until the debriefing that NCS was aware that the Agency had implemented [§] M.1.1 in a manner that was . . . opposite” to the protester’s interpretation of the RFP). Because this allegation was not raised with 10 days of when the basis of protest was known, it is untimely. 4 C.F.R. § 21.2(a)(2).

In addition, the protester asserts that the price evaluation was unreasonable because the RFP failed to include the agency’s best available estimate of the quantity of LSR Part II services that would be ordered. See [InfraMap Corp.](#), B-405167.6, Feb. 6, 2012, 2012 CPD ¶ 66 at 3 (when an agency solicits offers for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best information available). Where a protester fails to challenge an obviously flawed evaluation scheme prior to the time for receipt of initial quotations, we will dismiss a post-award challenge to the scheme as untimely. Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 5; 4 C.F.R. § 21.2(a)(1).

The protest is denied.

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General Counsel