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Decision

Matter of: Level 3 Communications, LLC

File: B-412330; B-412330.2; B-412330.3

Date: January 14, 2016

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DIGEST

Protest that the agency failed to evaluate quotations in accordance with the terms of the solicitation is sustained, where the awardee took exception to material solicitation requirements.

DECISION

Level 3 Communications, LLC, of Broomfield, Colorado, protests the award of a contract to BT Federal Inc., of Reston, Virginia, under request for quotations (RFQ) No. HC1021-15-T-3027/WE29JUN155726, issued by the Department of Defense, Defense Information Systems Agency (DISA), for telecommunications service. Level 3 challenges the agency's determination that BT Federal's quotation was technically acceptable.

We sustain the protest.

BACKGROUND

The RFQ, issued on August 9, 2015, provided for the award of a fixed-price, indefinite-term contract for telecommunications service between the Royal Air Force Base

Croughton, United Kingdom, and the New Kabul Compound, Afghanistan.¹ The RFQ required vendors to provide all facilities between the vendor's commercial communications interface point and the termination location. RFQ at 3.

The RFQ provided that quotations would be evaluated for technical sufficiency, ability to meet the required service date, past performance, and price. The RFQ further provided that award would be made to the vendor that has satisfactory or neutral past performance, offers the lowest-priced, technically acceptable quotation, and meets the government's service date. Id. at 8. In addition, the RFQ provided that the government would evaluate only the lowest-priced quotation unless the quotation is technically unacceptable or otherwise unawardable, in which case the government would evaluate quotations until a quotation was found to be awardable. Id. at 1. Quotations were due by September 9. RFQ, Amend. 3.

The RFQ established a required service date of September 30, 2015, and informed vendors that the "customer desires and will accept an earlier service date." Id. The RFQ required each vendor to indicate whether or not it could meet the service date, and if not, to indicate the date it could provide service. Id. at 6. The RFQ further provided that "[i]n the event that none of the quotes meets [the] required service date, [the] government may consider quotes that agree to provide service on a date later than [the] required service date." RFQ at 8.

The RFQ included other provisions to which vendors were required to affirmatively respond. As relevant here, the RFQ included Standard Provision 8, Alliance Long Lines Activity (ALLA) Procedure, which stated:

One or more end points of this circuit terminate in NATO countries that have National Long Lines Agencies (NALLAs) and NALLA accredited Telecommunication Providers (TPs). As a member and signatory in North Atlantic Treaty Organization (NATO), the U.S. Department of Defense acquires its military telecommunication services in accordance with NATO requirements specified in Alliance Long Lines Activity (ALLA) handbook. Therefore, only TPs accredited by NALLAs of respective NATO countries will be eligible to receive any Order or Circuit Demand resulting from this Inquiry, for NATO country portions of this circuit. Additionally, only NALLA accredited TPs can be used as subcontractor TP in NATO countries. In NATO countries having no NALLA and/or no NALLA accredited TP, quotes from TPs possessing authorization to provide communication services from appropriate national authority will be considered. Quotes shall identify portions of service that will be provided using TP's own facilities as well as those that will be provided by subcontractor TPs,

¹ The RFQ contemplated an estimated 24-month period of performance, with a minimum service period of 1 month. RFQ at 9.

and shall identify all subcontractor TPs. Additionally, quotes shall provide evidence TP and all subcontractor TPs possess required NALLA accreditations or national authority authorizations for countries where this circuit terminates. Evidence of such NALLA accreditation and national authority authorizations for TP and all subcontractor TPs is a definitive responsibility criterion.

ACCEPTABLE TELECOMMUNICATIONS PROVIDER (TP)
RESPONSE: "UNDERSTAND," and identify all portions of service provided by TP and all portions of the service provided by subcontractor TPs, plus provide evidence that TP and all subcontractor TPs possess required NALLA accreditations and national authority authorizations.

RFQ at 7 (emphasis added).

DISA received timely quotations from Level 3 and BT Federal.² Both vendors proposed two solutions. As relevant here, BT Federal's primary solution proposed using a [DELETED] between an interim location it terms the "Kabul2 point of presence" and the New Kabul Compound termination point.³ AR, Tab 3, BT Federal's Quotation, at 1. While BT Federal's quotation states that it takes no exception to the solicitation requirements and standard provisions, id., Cover Letter and at 1, it also states that the service date for its primary solution depends on site access to the base, which it indicated could take as long as 6 to 8 weeks. Id. at 1. BT Federal's quotation further stated, in relation to the RFQ statement that the customer wanted an earlier service date, that "BT Federal will undertake all reasonable efforts to provide the earliest possible service delivery date following receipt of an award." Id. at 3. BT Federal's quotation also included the following:

BT Federal notes that the above specified service date is very close to this proposal's submission date. BT Federal will undertake all reasonable efforts to meet the earliest possible service date following receipt of award, and subject to immediate site access being made available. Note: The standard delivery timeframe is 6-8 weeks from an award. BT is incumbent on an existing circuit that is being phased out on October 2, 2015. BT will leverage this circuit to meet the early service date, since we can keep the route up and re-route the

² A third offeror submitted an untimely quotation. Agency Report (AR), Tab 6, Price Negotiation Memorandum (PNM), at 2.

³ The "Kabul2 point of presence" is defined in the quotation of BT Federal, which states that "The commercial communications interface point at the [DELETED]." AR, Tab 3, BT Federal's Quotation, at 1. The quotation further explains that the Kabul2 location is approximately [DELETED] from the Kabul Compound Termination Point. Id.

accesses shortly after the 2nd October [sic] when we cease the existing service.

Id. at 5.

With respect to Standard Provision 8, BT Federal's quotation explained that it was an accredited supplier duly authorized to offer ALLA services in the United Kingdom. The quotation also indicated that Afghan Telecom was its teaming partner, and was authorized to provide services in Afghanistan. AR, Tab 3, BT Federal's Quotation, at 12.

BT Federal's quotation also proposed an alternate solution that, as relevant here, assumed the use of U.S. government fiber from the Kabul2 point of presence to the New Kabul Compound termination point. Id. at 1. Specifically, BT Federal's quotation stated the following:

We have provided an Alternate Option solution to meet the service date. The Commercial communications interface point at the [DELETED] PoP [point of presence] at [DELETED]. We assume that there is Government fiber on the base from this PoP location to the Kabul Compound Termination Point (about [DELETED]). We have assumed the use of this fiber [government furnished equipment] (GFE)."

AR, Tab 3, BT Federal's Quotation, at 1 (emphasis added).

BT Federal quoted a price of \$6,674,800 for its primary solution, and \$10,564,632 for its alternate solution. Id. at 32, 33. Level 3 also offered two alternatives, and quoted a price of \$12 million for its first alternative and \$12,408,000 for its second alternative. AR, Tab 6, PNM, at 2.

Because BT Federal's primary solution was the lowest-priced, the evaluators first evaluated that solution, but found it unacceptable. The evaluators then evaluated BT Federal's alternate solution and found it acceptable. See AR, Tab 4, Technical Evaluation, at 3. The contract specialist, however, after reviewing the technical evaluation form, instructed the evaluators to revise the form to show that BT Federal's primary solution was technically acceptable. As relevant here, the contract specialist stated that the proposed use of [DELETED] technology was acceptable, given a solicitation amendment informing vendors that the customer would accept microwave technology. See RFQ Amend. 0004. The contract specialist further concluded that BT Federal's inability to meet the September 30 service date also was not a valid reason for finding BT Federal's primary solution to be technically unacceptable. AR, Tab 4, Technical Evaluation, at 3. Consequently, on September 17, the contracting officer concluded that award should be made to BT Federal for its primary solution. AR, Tab 6, PNM, at 3. Upon learning of the resulting October 5 award to BT Federal, and after receiving a debriefing, Level 3 filed this protest with our Office.

DISCUSSION

Level 3 raises multiple challenges to the technical acceptability of BT Federal's quotation. For example, Level 3 argues that BT Federal's primary solution was technically unacceptable for failure to meet the service date requirement. Level 3 also argues that BT Federal failed to provide evidence of Afghan national authority authorization in accordance with RFQ Standard Provision 8, and that BT Federal's alternate solution also failed to meet the solicitation requirements.

As explained below, we sustain Level 3's challenge to the technical acceptability of BT Federal's quotation based on the failure of its primary solution to meet the required service date, and the improper reliance of BT Federal's alternate solution on use of government-furnished equipment. We deny Level 3's remaining protest grounds. While our decision here does not specifically address each and every protest argument, we have considered all of Level 3's arguments, but address only the more significant ones.

BT Federal's Primary Solution

Level 3 argues that DISA improperly waived the RFQ requirement that quotations meet the September 30 service start date when it made award to BT Federal. In this regard, Level 3 contends that by stating that a "standard delivery timeframe is 6-8 weeks from an award," BT Federal's quotation took exception to the required September 30 service date, a material solicitation requirement. Second Supp. Protest at 6-7.

In reviewing protests challenging an agency's evaluation of quotations, we will not conduct a new evaluation or substitute our judgment for that of the agency; rather we will examine the record to determine whether the agency's judgment was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Synovate, Inc., B-404689, Mar. 29, 2011, 2011 CPD ¶ 80 at 5. A quotation that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. JRS Mgmt., B-405361 et al., Oct. 3, 2011, 2011 CPD ¶ 201 at 3.

Here, the record shows that BT Federal's primary solution failed to meet a material solicitation requirement. The RFQ established a service date of September 30, 2015, and included the ability to meet the required service date as an evaluation criterion. In this regard, the RFQ provided that only in the event none of the quotations met the required service date would the agency consider quotations that offered a later service date. RFQ at 8. While BT Federal's quotation stated that it was taking no exceptions to the RFQ requirements, other language in the quotation indicated that BT Federal did not expect to meet the required service date. For example, BT Federal's quotation stated that, while it would make "reasonable efforts" to meet the service date, it also advised that the standard delivery time is 6 to 8 weeks from award. BT Federal also indicated that the circuit it planned to use would not become available until October 2, that is, two days after the required service date. AR, Tab 3, BT Federal's Quotation, at 5.

DISA acknowledges that the BT Federal quotation did not meet the September 30 service date requirement, and argues that it waived the service date requirement for all vendors because it did not make award until after the service date had passed. DISA further argues that Level 3 was not prejudiced by the waiver of the requirement. Second Supp. AR at 2-3.

An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Unfair competitive prejudice from a waiver or relaxation of the terms and conditions of the solicitation for one offeror exists where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. Vocus Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 6. Our Office will sustain a protest that an agency improperly waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. Datastream Sys., Inc., B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

In response, Level 3 contends that, had it known that DISA would relax the service date requirement, it could have utilized more cost effective alternative technology and routes, or negotiated lower prices with other telecommunications service providers. Level 3 Second Supp. Comments at 11. Hence, Level 3 has shown that it was prejudiced by DISA's waiver of the requirement. Consequently, because Level 3 was prejudiced by DISA's waiver of the service date requirement, we sustain this protest ground.

Level 3 also argues that BT Federal's quotation did not meet the requirements of Standard Provision 8, which according to Level 3 required each vendor to provide evidence of national authority authorization for its circuit terminating in Afghanistan. In support of its position, Level 3 relies on two sentences in Standard Provision 8 that require vendors to provide evidence that vendor and all subcontractor telecommunication providers possess required NALLA accreditations or national authority authorizations for countries where the circuit terminates. Protest at 3. Level 3 argues that Afghan Telecom--the only carrier authorized by the Afghanistan government to terminate circuits in Afghanistan--entered into an agreement to provide service only for Level 3, and therefore BT Federal cannot meet the requirement. Id. at 4.

DISA maintains that Standard Provision 8 only applies to NATO member countries, and does not apply to Afghanistan as it is not a member of NATO. DISA also notes that, even if Standard Provision 8 applied to the termination point in Afghanistan, BT Federal also proposed using Afghan Telecom as its service provider in Afghanistan. Thus, according to DISA, Level 3 was not prejudiced by BT Federal's failure to provide evidence of national authority authorization as Level 3 also did not provide evidence of national authority authorization for Afghanistan. AR at 2.

Where a dispute exists as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that

gives effect to all its provisions; to be reasonable, an interpretation of a solicitation must be consistent with such a reading. One Largo Metro LLC; Metroview Dev. Holdings, LLC; King Farm Assocs., LLC, B-404896 et al., June 20, 2011, 2011 CPD ¶ 128 at 11 n.16; The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 35.

In reading the solicitation as a whole, we find that the agency reasonably concluded that Standard Provision 8 only applies where a circuit terminates in a NATO country, and thus did not require a national authority authorization for the termination point in Afghanistan. In this regard, we note that Standard Provision 8 provides for national authority authorization for NATO countries having no NALLA and/or no NALLA accredited telecommunications provider. See RFQ at 7 (“In NATO countries having no NALLA and/or no NALLA accredited TP, quotes from TPs possessing authorization to provide communication services from appropriate national authority will be considered.”). Therefore, in our view, subsequent references in Standard Provision 8 to vendors providing evidence of national authority authorization can most reasonably be read to refer to NATO countries, not non-NATO countries such as Afghanistan. Further, the RFQ did not include Standard Provision 9, which specifically requires national authority authorization for end points terminating in non-NATO countries. DISA Dismissal Request, Attach. 4, Standard Provisions. Had the agency intended to require national authority authorization for end points terminating in non-NATO countries, it could have included this provision.

In any event, even if we were to agree with Level 3’s interpretation of Standard Provision 8, we would conclude that Level 3 is not prejudiced by DISA’s alleged waiver of the requirement for evidence of national authority authorization. In this regard, the record indicates that neither Level 3 nor BT Federal provided evidence of national authority authorization as required by the RFQ, but instead simply proposed using Afghan Telecom as the service provider in Afghanistan. See, e.g., AR, Tab 2, Level 3’s Proposal, at 6 (responding to Standard Provision 8). Thus, to the extent that the agency waived a requirement in this regard, both vendors were treated and benefited equally.

BT Federal’s Alternate Solution

Level 3 also challenges the technical acceptability of BT Federal’s alternate solution. Level 3 argues that BT Federal’s proposed use of government furnished equipment--i.e., pre-existing government fiber cable--was inconsistent with the terms of the RFQ. Second Supp. Protest at 9-10. In this regard, Level 3 argues that the RFQ required end-to-end service because the solicitation provided that “all facilities between the vendor’s commercial communications interface point and termination location shall be provided by vendor.” Id. at 10, citing RFQ at 2.

DISA argues that BT Federal’s quotation explicitly stated that it took no exception to any solicitation requirement. DISA also asserts that BT Federal’s statement that it assumed there was approximately [DELETED] of existing fiber on the base and its stated assumption that it could use the fiber, did not mean that BT Federal’s alternate solution was contingent on the availability of the fiber. Second Supp. AR, at 3-4. We disagree.

An agency may accept a quotation's representations regarding compliance with a solicitation requirement where there is no significant countervailing evidence reasonably known to agency evaluators that should create doubt that the vendor will or can comply with the requirement. Spectrum Sys., Inc., B-401130, May 13, 2009, 2009 CPD ¶ 110 at 3; see also TransAtlantic Lines, LLC, B-296245, B-296245.2, July 14, 2005, 2005 CPD ¶ 147 at 3.

Here, the record shows that BT Federal's quotation took exception to the solicitation's requirement by proposing to use GFE, despite its general statement that it was taking no exceptions. The RFQ required vendors to provide "all facilities between vendor's commercial communications interface point and termination location."⁴ RFQ at 3. BT Federal's quotation, however, included the following statement with respect to its proposed alternate solution: "We assume that there is Government fiber on the base from this PoP location to the Kabul Compound Termination Point (about [DELETED]). We have assumed the use of this fiber (GFE)." AR, Tab 3, BT Federal's Quotation, at 1. Moreover, in response to the above solicitation requirement that vendors provide all facilities, BT Federal responded, "NOTED, please see our note earlier about the Government fiber." Id. at 7. In light of these specific statements in BT Federal's proposal indicating that it was relying on the use of government fiber, we conclude that, notwithstanding BT Federal's general statements of taking no exception to the solicitation requirements, BT Federal in fact took exception to the requirement to provide all facilities. We therefore also sustain the protest on this ground.

RECOMMENDATION

We recommend that DISA reevaluate quotations in a manner consistent with this decision and the terms of the RFQ. In this regard, in view of the fact that the service date established in the RFQ has passed, we recommend that DISA reevaluate its requirements and amend the solicitation to establish a new service date, obtain and evaluate revised proposals, and make a new award decision. If BT Federal is not selected for award, we further recommend that DISA terminate its contract for convenience and award the contract to the vendor that submits the lowest-priced, technically acceptable quotation that is otherwise acceptable. We also recommend that the agency reimburse the protester its costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R.

⁴ According to the American National Standard Telecom Glossary 2000, a "facility" is defined as "a fixed, mobile, or transportable structure, including (a) all installed electrical and electronic wiring, cabling, and equipment and (b) all supporting structures, such as utility, ground network, and electrical supporting structures." <http://www.atis.org/glossary/definition.aspx?id=7876> (last visited Jan. 11, 2016).

§ 21.8(d). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel