HASTE MAKES WASTE: LATENT SOLICITATION AMBIGUITIES

Sometimes, for the best of reasons, a contracting officer ("CO") decides to charge ahead with a procurement when his or her own staff strongly advise otherwise. The result is usually a wasteful procurement and a bid protest that could have (and should have) been avoided. *RELI Group, Inc.*, B-412380, Jan. 28, 2016 is an example of well-intentioned contracting officer who made a big mistake in source selection.

RELI was a procurement by the Food and Drug Administration ("FDA") for operation, maintenance and modernization of an FDA portal for reporting problems associated with products that the FDA regulates. The solicitation required the submission of past performance questionnaires, and stated:

> A maximum of 2 of 3 past performances may be for the sub-contractor. A minimum of 1 past performance shall be for the prime contractor. Only 3 past performance questionnaires will be accepted by the government.

Six days before proposals were due, RELI asked the FDA to confirm that the solicitation "also allows for a maximum 3 of the three relevant projects be for the offeror's subcontractor." FDA never responded to the question.

RELI's proposal listed one contract RELI performed as a subcontractor to another firm and two contracts performed by RELI's proposed subcontractor, in the role of prime contractor, and provided the relevant past performance questionnaires.

Enter the FDA evaluation team. While performing the evaluation, the team concluded that the instructions for the relevant experience technical factor were "so unclear that the team required additional guidance about how to interpret the instructions in order to proceed…. [T]he instructions were not clear as to whether two of the three relevant experience submissions had to be for the main offeror, without regard for the role in which the main offeror performed the past effort, or for the main offeror, performing in the capacity of prime contractor." (Note: GAO used the term "main offeror" to indicate the prime offeror of a proposal under this solicitation).

Enter the CO: Observing that the current contracts for these services were about to expire in the near future, the CO "decided not to amend the RFP to clarify this matter, which would have required allowing offerors time to respond to any revised instructions." Instead, the CO determined that the "most generous interpretation" was that two of the three relevant experiences had to be from the main offeror, and since offerors could submit no more than three examples, only one experience for a subcontractor would be evaluated. The contracting officer instructed the FDA evaluation team to evaluate the proposals in accordance with her determination.

Even though the FDA evaluation team said it needed clarification in order to evaluate, it went ahead anyway, resulting in RELI's protest of the source selection.

The GAO applied its normal rules, noting that an ambiguity exists where there are two or more reasonable interpretations of the solicitation. The ambiguity is patent when it is obvious, gross or glaring, while it is latent where the ambiguity is more subtle. The GAO concluded that the lack of guidance on the meaning of "prime" and "subcontractor" permitted at least two reasonable interpretations: (1) whether prime or subcontractor refers to the position for which the entity *was being proposed* or (2) the position in which it performed under the contract identified to show relevant past performance. And, the GAO held this was a latent ambiguity since it only came to light in the context of the agency's evaluation, and couldn't be ascertained prior to that.

Where there is a latent ambiguity, the correct course of action for an agency is to clarify the solicitation and permit offerors to submit revised proposals. But this CO, knowing well of the ambiguity, refused to do so. GAO sustained the protest because the latent ambiguity prevented the offerors from competing intelligently on an equal basis. The CO's interpretation resulted in a downgrade to RELI's technical proposal, which GAO deemed unfair, and sustained the protest.

In the end, what could have been accomplished through a simple amendment to the solicitation and perhaps a 5-15 day delay in the procurement resulted in a protest, a likely a stay of performance, and a GAO recommendation that the agency go back and amend the solicitation to clarify the ambiguity and obtain revised proposals.

The contracting officer could have easily extended the existing contracts using FAR 52.217-8, Option to Extend Services (up to 6 months at current rates). Although not a mandatory clause for service contracts, most contracting officers insert this clause in service contracts for just this type of contingency. Alternatively, the contracting officer could have justified a sole source "bridge" contract for 30-45 days, in order to finish this procurement. This is precisely the kind of situation where a bridge contract is warranted.

The one thing that stands out here is the insensitivity of the CO, who acted tone-deaf when she heard the "pitch" of her FDA evaluation team warning her that her solicitation was terribly ambiguous. She was obviously concerned about a delay in the procurement, but when your own team says "we cannot evaluate the proposals because of a defect in the solicitation," a CO shouldn't ignore them and proceed anyway.

Finally, we must point out that RELI should have styled its question about the past performance requirement as an "informal agency protest" by saying, "this is ambiguous; please correct it," instead of requesting confirmation of its interpretation. That would have immediately placed the CO on notice that there was a significant problem.