

ADDITIONAL OFFERING

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In a Department of Commerce (“DOC”) procurement for technology services for a traffic coordination system, the non-selected contractor (Kayan Space Corp.) protested at the Government Accountability Office (“GAO”) that the awardee (Kayhan) imposed an impermissible condition upon the agency, making its proposal non-awardable. The GAO held that Kayhan had merely offered an “additional offering” that would not modify the requirements in the solicitation. There were other issues, but this blog only discusses the “additional offering issue”.

The solicitation (a request for proposal) sought technology services for a one year base period and four option periods. Award was to be made to the best value proposal. Slingshot’s price was \$14.7 million, and Kayhan’s price was \$18.1 million. Technical scores were relatively similar. Apparently, Slingshot’s proposal included in its offer, a matter (redacted) that would ensure lower software costs in the long run and offered the most cost efficiency.

The DOC made award to Slingshot, stating its proposal was technically superior and offered a lower price, making a tradeoff analysis unnecessary.

Kayhan protested that the evaluation was unreasonable because it placed an impermissible condition on the agency—stating that while Slingshot met the requirement to provide software licenses for each period of the contract, its additional offering if all four option periods was an unacceptable condition.

The GAO denied the protest, noting that Kayhan based it on FAR 14.404-2(d) (sealed bidding), which states that “A bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation...” However, this procurement was issued pursuant to FAR Part 15 (negotiated procurement) and this FAR part was not applicable. But, the GAO noted that even if this regulation applied, the language of FAR 14.404-2(d) refers to conditions “that would modify the requirements” of the solicitation, not offerings made *beyond* the requirements. In its offer, the agency was not required to exercise all four options in order for Slingshot to meet the requirements of the contract, but rather only it chooses to take advantage of the additional offering. The protest therefore had no merit in this regard.

Takeaway. If you propose something that is not in the RFP—something “additional”—be sure that it does not modify any RFP requirements.

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