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Decision

Matter of: SMARTnet, Inc.

File: B-400651.2

Date: January 27, 2009

Thomas David, Esq., David, Brody & Dondershine, LLP, for the protester.
Captain Robert T. Wu, Department of the Army, for the agency.
Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against solicitation requirement that telecommunications equipment be certified by the Joint Interoperability Test Command at the time of submission of quotations is sustained where the record does not establish that the requirement for such certification at the time of quotation submission is necessary to meet the agency's needs.

DECISION

SMARTnet, Inc., of Frederick, Maryland, protests the terms of request for quotations (RFQ) No. RFQ286120, issued by the Department of the Army, Medical Research Acquisition Activity, for communications equipment for the agency's Defense Medical Logistics Center (DMLC) at Fort Detrick, Maryland. Specifically, SMARTnet objects to the requirement that the equipment be Joint Interoperability Test Command (JITC) certified and that vendors satisfy this requirement at the time of quotation submission.¹

¹ JITC is part of the Department of Defense's (DOD) Defense Information Systems Agency (DISA) and provides testing and certification of information technology systems/equipment. See www.disa.mil/services/index.html?panel=9#A_Services. JITC certification is intended to ensure that a system meets the joint interoperability requirements of its users, such that the system can effectively exchange all required information with all pertinent systems. See Agency Report (AR), Tab 11, *Joint Interoperability Certification*, DEFENSE AT&L (Acquisition, Technology, and Logistics) Magazine, Mar./Apr. 2006, at 1.

We sustain the protest.

The RFQ provides for the award of a contract for the acquisition, installation, configuration, testing, and turn-over of communications equipment for the DMLC, a new facility that is being constructed and will be occupied by different groups of medical logisticians from the Army, Air Force, and Navy.² Vendors were informed that this includes all equipment required to establish a link between data and telephone networks outside the facility and the data and telephone cabling (provided by the vendor) inside the facility. RFQ, Performance Work Statement (PWS), at 1. The RFQ, which was issued on the General Services Administration e-Buy website, includes the following three attachments: the PWS, “DMLC Network Equipment Functional Requirements,” and “Evaluation Factors for Award.”

Included with the PWS are two appendices, one of which is Appendix B, entitled “Network Equipment Functional Requirements.”³ Appendix B, like RFQ attachment “DMLC Network Equipment Functional Requirements,” describes the requirements for the communications equipment. Both this appendix and the RFQ attachment reference the JITC-certification process. Specifically, Appendix B informs vendors that “[e]quipment procured for this PWS must be Joint Interoperability Test Command (JITC) certified.” Appendix B at 3. The RFQ attachment states that “all equipment considered for deployment under this PWS must be Joint Interoperability Test Command (JITC) certifiable and approved by the US Army Information Systems Engineering Command, Technology Integration Center (TIC), Fort Huachuca, AZ.” DMLC Network Functional Requirements Attachment at 3. The RFQ was amended six times. The third amendment made a number of changes to the solicitation, including that “the fun[c]tional requirements pages are hereby deleted.” RFQ amend. 3.

The Army received quotations from SMARTnet and three other vendors. SMARTnet quoted its “[~~deleted~~]” equipment, which SMARTnet described as being “capable of becoming JITC certifiable (per RFQ Attachment B–Network Functional

² Although the solicitation identified itself as an “RFQ,” the term “proposal,” as opposed to “quotation,” appears repeatedly throughout both the solicitation and the agency’s procurement record, and the solicitation expressly provides for the award of a contract. For the sake of consistency, our decision adopts the terminology associated with an RFQ.

³ Appendix A, “Quality Assurance Surveillance Plan for DMLC Communications Equipment,” also included with the PWS, provides contract quality assurance requirements. Among other things, vendors were informed that the contractor would be required to provide the “DISA JITC Approval Letter/Memo” to show compliance with the requirement for JITC certification. See Appendix A at 3.

Requirements).” SMARTnet stated in its quotation that, although it did not “currently have JITC certification,” its quoted equipment was on the Army TIC approved products list and was certified to work with a different system. SMARTnet Quotation at 1. In this regard, SMARTnet also stated that it was “looking to partner with [DMLC] to be our sponsor for JITC testing to get this testing accomplished.”⁴ Id.

The quotations were evaluated by the agency’s source selection evaluation board. SMARTnet was requested to clarify whether it was offering to furnish equipment with a current JITC certification, or whether it was in the process of being JITC approved (and if so, when its equipment had been submitted to JITC for certification).⁵ SMARTnet responded that its equipment “will comply,” and that it was “[**deleted**] intent to have all products on the [approved products list] and we will work closely with JITC to accomplish this process” Contracting Officer’s Statement at 4. SMARTnet subsequently informed the agency that the firm was also in the process of obtaining another type of certification, which SMARTnet characterized as being more stringent than the JITC certification.

Award was made to World Wide Technology, Inc., and SMARTnet protested to our Office, arguing that the agency had not conducted meaningful discussions with SMARTnet and that the agency had applied an unstated evaluation factor. Prior to submitting its report in response to the protest, the Army took corrective action, stating that it would clarify the agency’s requirements, conduct discussions with vendors whose quotations were found to be within the competitive range, obtain and evaluate revised quotations, and make a new selection decision. In particular, the Army stated that it would

clarify that The Functional Requirements Attachment to the RFQ (which contained the requirement that equipment provided must be JITC certifiable) was deleted in Modification 3. We will clarify that the Government’s requirement, as expressed in the PWS and its Attachment B [sic], is for equipment that complies with all applicable DOD Directives and Instructions and is JITC certified at time of proposal submittal.

⁴ The first step in the JITC certification process is for the “acquiring or sponsoring activity [to] submit telecommunications switches to DISA (JITC) for [joint interoperability certification]. The DISA (JITC) shall test the switch, with acquiring or sponsoring activity, sponsorship and involvement.” DOD Instruction (DODI) 8100.3, Jan. 16, 2004, at 18.

⁵ The Army did not consider these exchanges with vendors to be discussions.

AR, Tab 8, Contracting Officer's Corrective Action Statement, Oct. 20, 2008, at 1.⁶ Because the corrective action rendered SMARTnet's protest academic, we dismissed it. SMARTnet, Inc., B-400651, Oct. 29, 2008.

On October 31, SMARTnet filed this protest, arguing that the solicitation "as constructively revised" by the agency's corrective action unduly restricts competition and that JITC certification is unnecessary for the type of equipment being procured here (that is, data networking as opposed to voice networking equipment). Protest at 1, 3. In addition, the protester challenged the time at which the certification was now being required, stating that "it is truly impossible for any vendor to obtain the requested certification of their proposed network equipment at the time proposals are submitted or even by the time an award is made."⁷ Id. at 4. SMARTnet also protests, as unduly restrictive, the requirement in Appendix B that "any proposed solution of this solicitation . . . work seamlessly with the existing Cisco based infrastructure and management strategy," arguing that this favors vendors providing Cisco-based products. Id. at 3.

The Army argues that SMARTnet's protest is untimely. Specifically, the agency asserts that the solicitation has always required that the equipment be JITC certified and that the equipment work seamlessly with the existing Cisco-based infrastructure. In this regard, the Army argues that RFQ amendment 3 was intended to delete the "DMLC Network Equipment Functional Requirements" attachment, which provided that the vendor's equipment must be JITC "certifiable," because this requirement "conflicted" with the Appendix B requirement that the vendor provide JITC "certified" equipment. Moreover, the Army argues that the RFQ, as issued, required the JITC certification at the time of quotation submission. Agency's Dismissal Request, Nov. 13, 2008.

SMARTnet disagrees that the RFQ, as originally issued, contained a requirement for JITC certification or that such certification was required at the time of quotation submission. In this regard, SMARTnet contends, as it argued in its prior protest, that RFQ amendment 3 deleted only Appendix B, which required vendors to furnish

⁶ The day after the Army informed our Office and the protester of the intended corrective action, the agency's contract specialist informed SMARTnet by email that RFP amendment 3 "removed the requirement that equipment proposed be JITC certifiable" and informed SMARTnet that equipment proposed must be JITC certified at time of award. AR, Tab 9, Army Email to SMARTnet, Oct. 21, 2008. This email was "rescinded" the next day. AR, Tab 9, Army Email to SMARTnet, Oct. 22, 2008.

⁷ SMARTnet is in the process of obtaining JITC certification for its equipment, which SMARTnet states it expects to receive in late spring of 2009. Comments at 2.

JITC-certified (as opposed to JITC-certifiable) equipment.⁸ Protester's Response to Dismissal Request, Nov. 19, 2008.

We agree with the Army that SMARTnet's challenge to the requirements that vendors furnish JITC-certified equipment and that the equipment work seamlessly with an existing Cisco-based infrastructure is untimely. Although RFQ amendment 3 did not clearly identify which functional requirements pages were being deleted from the solicitation, we agree with the Army that the solicitation amendment could not have removed all of the functional requirements pages, given that Appendix B and the "DMLC Network Equipment Functional Requirements" attachment (which, as noted above, contain nearly identical language) provide critical information necessary for the preparation of quotations and performance of the contract. Both of these documents reference the requirements for JITC certification and integration with Cisco-based equipment.

Moreover, with respect to the JTIC certification requirement, other parts of the RFQ informed vendors that they would be required to provide the agency with the "DISA JITC Approval Letter/Memo" to show compliance with the requirement for JITC certification. See Appendix A at 3. Also, vendors were required to provide, with their quotations, proof of compliance with DODI 8100.3 and DOD Directive 4630.05. See PWS at 5. The Instruction provides for JITC testing and certification and states that it is DOD's policy that telecommunications switches leased, procured, or operated by DOD components, and connected, or planned for connection, to the Defense System Network shall be joint interoperability certified by JITC.⁹ See DODI 8100.3, Jan. 16, 2004, at 3, 17. The Directive provides that "[j]oint interoperability certification testing [for information technology (IT) and national security systems (NSS)] shall be as comprehensive as possible, while still being cost effective, and shall be completed prior to fielding a new IT and NSS capability or upgrading to existing IT and NSS." DOD Directive 4630.05, May 5, 2004, at 4. Finally, RFQ amendment 6 provided vendors with the following question and answer from the

⁸ In response to the agency's dismissal request in the prior protest, SMARTnet argued that solicitation amendment 3 deleted only Appendix B, and not the RFQ's "DMLC Network Equipment Functional Requirements" attachment. In this regard, SMARTnet noted that the attachment provides requirements information that is critical for the preparation of quotations, and that a subsequent solicitation amendment (RFQ amend. 6) provided information discussing the "DMLC functional requirements set forth in the DMLC Network Equipment Functional Requirements document," demonstrating its continued presence in the solicitation. Protester's Response to Dismissal Request, B-400651, Oct. 14, 2008, at 4-5.

⁹ Although SMARTnet contends that DODI 8100.3 is not applicable to the requirement here, SMARTnet did not timely challenge the RFQ requirement that vendors show compliance with this instruction.

pre-proposal conference site visit: “Q: Must all switches be JITC approved? A: Yes.” RFP amendment 6 at 1; Contracting Officer’s Statement at 3.

The record shows that SMARTnet recognized that JITC certification was required for its equipment. As noted above, before its prior protest and in response to the Army’s request for clarification concerning whether SMARTnet’s equipment was JITC certified or was being certified, SMARTnet informed the agency that its equipment “will comply,” and that it was its “intent to have all products on the [approved products list] and [that it would] work closely with JITC to accomplish this process.” See Contracting Officer’s Statement at 4. In its prior protest, SMARTnet did not contend that JITC certification was not required or was unnecessary. See Protester’s Response to Dismissal Request, B-400651, Oct. 14, 2008, at 5.

We conclude from this record that SMARTnet knew, or should have known, from the RFQ as originally issued, the basis of its argument that the requirement for equipment that was JITC certified and for equipment that would integrate seamlessly with the existing Cisco-based equipment was unduly restrictive of competition.¹⁰ Accordingly, to be timely, these objections to the solicitation should have been protested before the closing date for submission of quotations, and not after SMARTnet was informed that another vendor had received award. 4 C.F.R. § 21.2(a)(1) (2008). These protest grounds are dismissed.

We find timely, however, SMARTnet’s protest of the requirement that vendors’ proposed equipment be JITC certified at the time of quotation submission. Although, as noted above, the RFQ informed vendors that the agency sought JITC-certified equipment, the solicitation did not state when that certification was required. This is so whether we give weight to Appendix B, which states that vendors must provide JITC-certified equipment but does not state when the certification must be obtained, or to the “DMLC Network Equipment Functional Requirements” attachment, which requires vendors to provide “certifiable” equipment. In this regard, we disagree with

¹⁰ At best, SMARTnet’s arguments concerning whether the RFQ required vendors to provide equipment that was JITC certified indicate that the solicitation was patently ambiguous. Where a solicitation contains a patent ambiguity, an offeror has an affirmative obligation to seek clarification prior to the first due date for responding to the solicitation following introduction of the ambiguity into the solicitation. See 4 C.F.R. § 21.2(a)(1); Dix Corp., B-293964, July 13, 2004, 2004 CPD ¶ 143 at 3. Where a patent ambiguity is not challenged prior to such submissions, we will dismiss as untimely any subsequent protest assertion that is based on an alternative interpretation. Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8; Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10. Our rule that protests of patent ambiguities must be filed prior to responsive submissions is intended to facilitate clarification of legitimate questions prior to preparation of submissions.

the Army that the solicitation requirement that vendors provide “[p]roof of compliance” with DODI 8100.3 and DOD Directive 4630.05 at the time of quotation submission clearly established that vendors’ proposed equipment must be JITC-certified at that time; in particular, the Directive specifically provides that verification of interoperability should be completed prior to fielding.¹¹ Vendors could reasonably understand the requirement to show compliance with the Instruction and Directive in their quotations to mean that vendors were to demonstrate in their quotations their ability to satisfy the JITC-certification and interoperability requirement at time of fielding their equipment.

We find from our review of the record that SMARTnet learned this basis of its protest—challenging the requirement that proposed equipment be JITC certified at the time of quotation submission—from the Army’s corrective action in response to the firm’s prior protest. The time for obtaining the JITC certification was not clearly specified in the RFQ initially. In fact, some solicitation language indicated that the certification was required only prior to fielding of the equipment. Because the requirement for certification at the time of quotation submission was subsequently incorporated into the solicitation by the agency’s corrective action, SMARTnet’s protest of this requirement, to be timely, was required to be protested by next closing time for receipt of quotations. 4 C.F.R. § 21.2(a)(1). SMARTnet’s protest to our Office satisfies this timeliness requirement.

With respect to the merits of SMARTnet’s challenge that requiring JITC certification at the time of quotation submission is unduly restrictive of competition, procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies’ legitimate needs (or as otherwise authorized by law). 10 U.S.C. § 2305(a)(1)(A)(i), (B)(ii) (2006); CHE Consulting, Inc., B-297534.4, May 17, 2006, 2006 CPD ¶ 84 at 2. Where a protester challenges a specification as unduly restrictive, the agency must establish that the requirement is reasonably necessary to meet its needs; we will examine the adequacy of the agency’s position to ensure that it is rational and can withstand logical scrutiny. Container Prods. Corp., B-280603.2, Nov. 4, 1998, 98-2 CPD ¶ 106 at 3.

Here, SMARTnet contends that the agency does not need to have proof of certification before the time of installation, and that requiring JITC certification at the time of quotation submission essentially restricts the procurement to those firms that had this certification at the time the solicitation was issued. This is so, SMARTnet argues, because the JITC-certification process is only performed at two

¹¹ The Army provided an article from Defense AT&L (Acquisition, Technology, and Logistics) Magazine to explain the JITC certification requirement. This article indicates that certification is required before the system is “fielded.” See AR, Tab 11, *Joint Interoperability Certification*, DEFENSE AT&L Magazine, Mar./Apr. 2006, at 1.

sites in the United States and is time-consuming. Protest at 4. In this regard, SMARTnet states that its equipment “is currently in the process of achieving final JITC certification which is being sponsored by the Department of the Army and is scheduled to be achieved later this Spring in time for the apparent equipment installation.” Comments at 2.

In response, the agency variously argues that its requirement is for “an immediate networking solution,” that the tenants of DMLC should not be made to wait for vendors to obtain the necessary certification, and that the agency should not bear the risk that it would have to conduct another procurement if SMARTnet’s equipment failed to become certified in time to satisfy the project’s needs. Legal Memorandum at 10.

We do not find that the Army’s concerns here, which all relate to the agency’s need to have JITC-certified equipment at the time of equipment installation, support the solicitation’s requirement for JITC certification at the time of quotation submission. An agency’s otherwise legitimate requirements regarding an offeror’s demonstrated ability to meet contract requirements may not be required prior to when such qualifications become relevant. See LBM Inc., B-286271, Dec. 1, 2000, 2000 CPD ¶ 194 at 4. The Army has simply not explained why the apparent purpose behind the certification requirement—to ensure that a system be certified prior to the time it must be fielded—requires that evidence of certification be provided as early in the process as the time at which quotations are submitted. In short, the Army has not shown its requirement that vendors’ proposed equipment be JITC certified at the time of submission of quotations is reasonable.

The protest is sustained.

We recommend that the Army amend the RFQ to represent its actual needs concerning when JITC certification is required. We also recommend that SMARTnet be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys’ fees, with regard to the protest issue we sustained. 4 C.F.R. § 21.8(d)(1). SMARTnet should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the Army within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel