



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: June 16, 2015

CBCA 4671

ENTERPRISE INFORMATION SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Alexander J. Brittin of Brittin Law Group, P.L.L.C., McLean, VA, counsel for Appellant.

Charles K. Bucknor, Jr., Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **WALTERS**, and **LESTER**.

DANIELS, Board Judge.

In this appeal, we are asked to interpret provisions of the contract awarded by the Department of Homeland Security (DHS) to Enterprise Information Services, Inc. (EIS) under the agency's EAGLE II program. The question presented by the parties is whether the contract precludes a contractor like EIS, which is a prime contractor under the program, from performing as a subcontractor in a different functional category from the one in which it holds a prime contract. We agree with EIS that the contract does not preclude such performance.

Findings of Fact

Through the EAGLE program, DHS intends to create a “portfolio of broad scope, multiple award IT [information technology] support services contracts that are available throughout DHS.” Exhibit 2, Acquisition Plan at 8. (All exhibits are contained in the appeal file.) The contracts are of the indefinite delivery/indefinite quantity (IDIQ) variety. *Id.*, Request for Proposals (RFP) at 91 (¶ L.3). The EAGLE II acquisition is the second generation of this program. *Id.*, Acquisition Plan at 3.

DHS issued its solicitation for proposals for EAGLE II contracts on November 1, 2010. The solicitation envisioned the award of contracts in three separate functional categories (FCs): FC1 (service delivery, including integration, software design/development, and operations and maintenance); FC2 (information technology program support services); and FC3 (independent verification and validation (IV & V)). Exhibit 2, cover letter at 1. DHS explained in the solicitation, “The scope of each individual IDIQ contract will be based upon the functional category for which the Contractor proposed and is selected with specific tasks to be set forth in the TOs [task orders].” *Id.*, RFP at 10 (¶ C.1.2). DHS also told prospective offerors that “[t]here will be two award tracks: Small Business and Unrestricted.” *Id.*, cover letter at 1.

Almost two weeks before the solicitation was issued, a DHS contracting officer (CO), with the concurrence of other agency personnel, had penned a memorandum to an agency procurement official expressing concern about the potential for conflicts of interest among EAGLE II contractors. Exhibit 58. In this memorandum, the CO said that she had –

determined that any firm awarded an EAGLE II contract would have a significant potential for organizational conflict of interest, if the same firm also performed work in multiple functional categories within the vehicle because its objectivity and impartiality would be impaired. Firms providing IT activities in more than one functional category would be in a position to influence the extent and nature of follow-on IT activities.

Id. at 4. The memorandum recommended that the solicitation “clearly inform[] offerors via a provision that will specifically prohibit contractors, including team members and/or subcontractors in one functional category[,] from being eligible for award in this procurement in other functional categories.” *Id.* at 5.

The solicitation contemplated the formation of teaming arrangements at the contract level. Teams could be composed of a prime contractor, up to four core team members, and subcontractors. Exhibit 2, RFP at 46-48 (¶¶ H.18, H.19). The solicitation defines the terms

“prime contractor” and “core team.” “*Prime Contractor*” as used within the EAGLE II teaming relationship means the principal member proposing for the team who will be responsible for performance of the contract, and who will be the Government’s single POC [point of contact] and representative for the team following award, including all TOs.” “A ‘*Core Team*’ is any combination of a Prime contractor, plus up to four (4) core team members submitting a proposal for an IDIQ award, and identifying themselves as a collective resource for contract performance.” *Id.* at 46 (¶ H.18). The solicitation provides that a core team member could not be substituted after contract award, save for exceptional cases and with prior approval by a contracting officer. *Id.* at 46-47. A “core team” member is not a subcontractor; subcontractors are treated in a different solicitation provision. *Id.* at 47-48 (¶ H.19). A contractor could add or remove subcontractors without contracting officer consent if certain conditions were met. *Id.*

Offerors were “not . . . permitted to submit proposals (participate as a prime or a core team member) in more than one (1) Functional Category.” Exhibit 2, RFP at 95 (¶ L.10.1). Prospective offerors were cautioned, “*If an Offeror is found to be in more than one functional category, the proposals will be deemed unacceptable and will not be evaluated further. This includes any proposals in which the Offeror is included as a prime or a core team member.*” *Id.* at 95-96 (¶ L.10.1); *see also id.*, Frequently Asked Questions at 2 (#6). Plainly, by limiting the restriction to primes and core team members, this caution was not the recommended “clear[] inform[ation to] offerors . . . that [would] specifically prohibit contractors, including . . . subcontractors in one functional category[,] from being eligible for award in this procurement in other functional categories.” *See* Exhibit 58 at 5.

On December 22, 2010, DHS sent a “Notice to Potential Offerors” which stated that the agency anticipated issuing, in January 2011, RFP amendments answering questions which had been submitted. The notice additionally said that:

[t]he Government also anticipates issuing the following change and clarification as an amendment to the RFP:

. . . .

(b) *Section L.10.1 Offerors may **not** submit – be a part of – proposals in more than one functional category, either as a prime offeror, core team member or subcontractor. . . .*

. . . [A]ll RFP sections affected by the above clarification and change as well as the responses to RFP questions will be amended and will be a part of the amendment mentioned above to be issued on January 14, 2011.

Exhibit 30, Claim at 2; Exhibit 59. Such an amendment was never made, however.

Prospective offerors were told that “questions concerning this solicitation or requests for clarification shall be made in writing to the CO” and “will be answered via amendment.” Exhibit 2, RFP at 91-92 (¶ L.5.1). Further, “[a]s soon as an Offeror is aware of any problems or ambiguities in interpreting the specifications, terms or conditions, instructions or evaluation criteria of this solicitation, the CO shall be notified.” *Id.*

On January 10, 2011, DHS issued amendment 2 to the EAGLE II solicitation, listing more than a thousand questions posed by prospective offerors and providing responses to those questions. The questions and responses cited by the parties include the following:

102. Question: Is a wholly owned subsidiary of an Offeror, which has an independent corporate structure, considered an independent contracting entity such that the prohibitions against awards across functional categories would not apply?

Response: If an offeror’s parent organization is submitting an offer under one functional category, subsidiaries of offerors will be restricted from submitting a proposal under another functional category. Offerors may not submit or be a part of proposals in more than one functional category, either as a prime contractor or core team member. The same restriction applies to affiliated business units of an offeror. This clarification will be provided in a forthcoming amendment.

Exhibit 4 at 6.

430. Question: Ref: [sic] If an Offeror is found to be in more than one functional category, the proposals will be deemed unacceptable . . . [.] This includes any proposals in which the Offeror is included as a prime or a core team member. Q2: Does the inclusion here extend to proposals in which the Offeror is included as a SUBCONTRACTOR?

Response: See response to question 102.

Id. at 22.

520. Question: We’re a small business currently on two EAGLE II small business teams; one as a NON-Core teammate and as a Core teammate

on the other – both under FC2. And, we’re being courted by larger companies going on the Unrestricted Track – under FC2 as well.

Two questions:

1. Small business: Will we run amuck with DHS if we’re on two Small Business teams under the same FC2 – one being a Core and one being NON-Core Teammate? (aka: Can we remain on both Small Business teams??)

2. Large Business: Can we still team with a larger company going on the Unrestricted Track – under FC2 as well? (which would be our third team)?

I do understand that offerors (small or large) may not submit under more than one functional category.

Response: Yes to both questions, an offeror can propose or be proposed on multiple teams in the same functional category – whether under the Small Business track or the Unrestricted track.

Id. at 25.

633. Question: The RFP states: “Unrestricted offerors will not be permitted to submit proposals (participate as a prime or a core team member) in more than one (1) Functional Category [sic] (FC).” Question: Is an offeror allowed to prime in the Unrestricted track in one FC and participate as a non-core teammate (sub-contractor) in the Small Business Track in a different FC?

Response: See response to question 102.

Id. at 30.

648. Question: Is an offeror Priming in one Unrestricted Functional Category allowed to participate as a non-core-team member in another Unrestricted FC? I.e. Prime Unrestricted FC2 but part of another team, as a non-core, in Unrestricted FC1?

Response: See response to question 102.

Id. at 31.

On January 18, 2011, DHS issued amendment 3 to the solicitation, again listing more than a thousand questions by prospective offerors and providing responses. The questions and responses cited by the parties include the following:

912. Question: What are the restrictions after award on on-the-fly teaming? We presume that a company not on any Eagle Awarded team can join any team in either track in any FC as a Request for TO Proposal dictates. However, can a Prime, Core, or non-Core company join another team in a different FC or track as the RTOP [request for task order proposal] might require?

Response: On-the-fly teaming is permissible. However, the limitations on Prime Contractors and Core Teams being permitted to only perform in the functional category in which they have an award will apply for all future subcontracting under the EAGLE II contract.

Exhibit 5 at 60.

998. Question: We know that the ability of small business to grow and diversify is dependent upon an acquisition environment that allows utmost flexibility for small businesses as subcontractors. Recognizing that offerors may not submit proposals in more than one functional category, either as a prime or a core team member, can a small business, or other “subcontractor” (ie, non-core team member) be a part of proposals in more than one functional category?

Response: Yes, however, due to potential conflict of interest issues, subcontractors must abide by the clauses in I.4 [“Organizational Conflict of Interest”] and I.5 [“Limitation of Future Contracting”] at the task order level.

Id. at 67.

1167. Question: Ref: [sic] If an Offeror is found to be in more than one functional category, the proposals will be deemed unacceptable . . . [.] This includes any proposals in which the Offeror is included as a prime or a core team member. Q2: Does the inclusion here extend to proposals in which the Offeror is included as a SUBCONTRACTOR?

Response: See response to question 998.

Id. at 80.

On January 21, 2011, DHS issued amendment 4 to the solicitation. The first two pages of this amendment include the following:

The purpose of this amendment is to provide changes and clarifications to the solicitation:

1. The RFP has been amended. Track changes of the pages affected are attached, as well as a conformed version of the RFP through Amendment 000004. The areas of the amendment include the following:

....

d) Section L.10.1 - Volume I, Tab D has been revised to include information regarding past performance questionnaire submittal date.

e) Section L.10.1 - Tab E and Section M.3.3, have been modified to reflect that the EVMS [Earned Value Management System] requirement is applicable to Functional Category 1 only.

....

4. The language in the RFP takes precedence over any other documentation, including answers to questions, briefings, etc.

5. All other terms and conditions remain unchanged.

Exhibit 6 at Standard Form 30 & Optional Form 336.

On February 16, 2011, EIS submitted an EAGLE II proposal to be a prime contractor on the unrestricted track for Functional Category 2. EIS took no exception to any of the terms, conditions, and provisions of the solicitation and the amendments thereto. Exhibit 33. EIS was also part of a joint venture, MBC Eagle II JV, which submitted an EAGLE II proposal as a prime contractor for FC2. Exhibit 34 at B-25. In July 2013, DHS awarded an EAGLE II contract to EIS. Exhibit 21. This contract contains most of the provisions of the solicitation, but it does not contain section L of that document or any of the questions and responses included in solicitation amendments. According to DHS's proposed finding of fact ¶ 54, the agency awarded an EAGLE II contract to MBC Eagle II JV in May 2013.

On November 19, 2013, DHS issued to EAGLE II contractors a “news alert” which contained four “answers and clarifications.” The first of these was as follows:

Can an EAGLE II Prime Contractor or Core Team member perform work as a subcontractor in a Functional Category (FC) in which they [sic] did not receive an EAGLE II contract award?

EAGLE II Prime Contractors can only perform as subcontractors in the FC in which they have an award. Thus, Prime Contractors cannot “cross” FCs under the EAGLE II Contract.

Core Team members may perform as subcontractors across all EAGLE II FCs.

Exhibit 24.

On November 25, 2013, EIS wrote to the DHS contracting officer for the EAGLE II program, objecting to the statement in the news alert that “Prime Contractors cannot ‘cross’ FCs under the EAGLE II Contract” as subcontractors to other prime contractors. EIS maintained that the statement “is contrary to any document and/or information posted . . . under the referenced solicitation and the awarded EAGLE II Prime Contract.” Exhibit 25 at 1. EIS asked “that all EAGLE II Prime Contractors be notified that there are **no** cross functional category bidding prohibitions, subject to the restrictions detailed in Section I.4 of the Prime Contract.” *Id.* at 2.

DHS responded on December 18, 2013, rejecting EIS’s contention that the statement in the news alert was contrary to the solicitation and contract. The agency pointed to question and response 912 of amendment 3 as supporting its position. In response 912, DHS had said, “[T]he limitations on Prime Contractors and Core Teams being permitted to only perform in the functional category in which they have an award will apply for all future subcontracting under the EAGLE II contract.” Exhibit 27.

On March 4, 2014, EIS – joined by three other EAGLE II prime contractors – wrote another letter to the contracting officer. These companies said that they believed that the restriction against prime contractors being permitted to serve as subcontractors in different functional categories –

imposes an arbitrary restriction upon prime contractors and affords a windfall in the form of an unfair competitive advantage to core team subcontractors and other subcontractors over prime contractors. It imposes an unfair financial hardship on us simply because of our status as prime contractors. This

restriction is unnecessary since clauses I.4.4 and I.4.5 of the prime contract provide adequate protection in the form of an organizational conflict of interest restriction that applies to the entire program. . . . We respectfully request that the Agency reconsider its decision by removing the limit imposed upon EAGLE II prime contractor's [sic] ability to participate as subcontractors in all FCs.

Exhibit 28, Letter at 1. The prime contractors maintained further that the news alert

contains two material changes to the agreed upon contracts. First, instead of relying upon the contract restrictions found in clauses I.4.4 and I.4.5, the News Alert appears to be announcing a blanket prohibition against prime contractors performing as subcontractors in different functional areas. Second, the News Alert contains a material change by allowing Core Team members the right to perform as subcontractors without regard to clauses I.4.4. and I.4.5.

Id. at 2. The prime contractors said that they had “planned to bid as subcontractors [evidently, in response to requests for task order proposals] in different FCs” and that “there was never a clear statement in the RFP or any amendment that it would be prohibited.” *Id.* at 3.

DHS responded to this letter on August 21, 2014, insisting that question and response 912 of amendment 3 made clear that, as stated in the news alert, prime contractors “cannot ‘cross’ functional categories under the EAGLE II contract.” The agency noted that 912 made the same rule applicable to core team members. Exhibit 29.

By letter dated January 28, 2015, EIS submitted to a DHS contracting officer a “non-monetary claim seek[ing] the final decision of the Contracting Officer with respect to an adjustment or interpretation of contract terms or other relief.” EIS requested that “the Contracting Officer make . . . the following determination: EIS is able to participate as a subcontractor in all functional categories of the EAGLE II procurement.” Exhibit 30, Letter at 1. EIS asked for speedy resolution of its claim, since “[p]roposals will soon be due for EIS contract opportunities in FC1 and FC3.” *Id.* at 5.

The contracting officer denied the claim by letter dated April 7, 2015. He concluded:

The proposal guidance and instructions in [the] RFP . . . , its Cover Letter, all subsequent Amendments, and the News Alert support the fact that, in the post award environment, EIS or any EAGLE II Prime Contractor would not be

allowed to perform work under a task order as a subcontractor in an FC other than the FC for which they [sic] received an award.

Exhibit 1 at 4.

EIS appealed this decision to the Board on the same date that the decision was issued.

Discussion

This case comes to us pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012). For the purposes of this Act, a “claim” is “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to the contract.” *Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013); *Parsons Global Services, Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (all referencing the definition prescribed in the Federal Acquisition Regulation). The case presents a claim of the second variety, the interpretation of contract terms.

The question posed by the parties is whether the contract precludes a company which is a prime contractor under DHS’s EAGLE II program from performing as a subcontractor in a different functional category from the one in which it holds a prime contract. Appellant, EIS, urges a negative response; respondent, DHS, contends that an affirmative answer is required.

We note that the contract itself says nothing about the matter at issue in this case. Everything that DHS stated about the matter, in the documents cited above, was contained in the solicitation’s section L and questions and responses which were printed in solicitation amendments. Although much of the solicitation was incorporated into the contract, neither section L nor the amendments was so incorporated. This is all we really need to know in order to answer the question posed. *See KDI Development, Inc. v. Johnson*, 495 F. App’x 84, 88 (Fed. Cir. 2012) (solicitation language not incorporated into contract not considered in interpreting contract). Because the contract does not state that a prime contractor in one FC may not be a subcontractor in another FC, the contract cannot be read to preclude EIS, a prime contractor in FC2, from performing as a subcontractor in FC1 or FC3.

The parties have not considered that we might reach this conclusion. They appear to agree that the provisions of the solicitation and the amendments thereto govern performance under the contract. As DHS notes, EIS took no exception to any of the terms, conditions, and provisions of the solicitation and its amendments thereto. To address the parties’

contentions, we continue our analysis under the assumption that the solicitation (including amendments) must be interpreted as governing actions under the contract. Even considering the solicitation and its amendments, the result does not change.

The solicitation requested proposals to provide services in three different functional categories. Proposals were to be submitted by teams consisting of three varieties of members – a prime contractor, core team members, and (optionally) subcontractors. We have no doubt that some DHS procurement officials intended that the solicitation restrict any company – no matter which variety of member it was – from receiving an award in more than one FC. Indeed, a memorandum written prior to the issuance of the solicitation specifically recommended this. The objective was not achieved, however.

The solicitation as originally issued contained a section L paragraph which told prospective offerors that they were “not . . . permitted to submit proposals (participate as a prime or a core team member) in more than one (1) Functional Category.” Yet the solicitation did not define the term “core team” as including subcontractors. Accordingly, the paragraph said nothing about restricting participation of companies as subcontractors. In the month after the solicitation was issued, DHS notified prospective offerors that it anticipated issuing an amendment to section L which would bring subcontractors within the ambit of the restriction already applicable to prime contractors and core team members. No such amendment was ever issued, however.

Instead, in January 2011, in solicitation amendments 2 and 3, DHS recited thousands of questions posed by prospective offerors and provided responses to those questions. None of the responses in amendment 2 addressed the question now before us. In response 102, DHS reiterated the directive that an offeror could not be a part of proposals, as a prime contractor or core team member, in more than one FC; the agency clarified that this “restriction applies to affiliated business units of an offeror.” When asked more pointedly, in questions 430, 633, and 648, whether a company could be a prime or core team member in one FC and a subcontractor in another, DHS merely referred to its response 102 – effectively not answering the question.¹

In amendment 3, DHS gave two rather different answers to questions. In response 998, the agency stated that a subcontractor could be a part of proposals in more than one

¹ DHS calls to our attention question and response 520, as well as the questions and responses cited in this paragraph. We do not consider response 520 to be relevant to the issue before us, since it says only that “an offeror can propose or be proposed on multiple teams in the same functional category,” a matter which is not in dispute.

functional category, provided that doing so did not run afoul of potential conflicts of interest. In response 1167, the agency referenced that answer with regard to a question about whether a company which made an offer as a prime or core team member in one FC could also be a subcontractor on a proposal in another FC – meaning that as long as a conflict of interest problem was not implicated, the company could do so. In response 912, DHS appeared to have come to a contrary conclusion by stating that a prime or core team member could join another company’s team through on-the-fly teaming, but “only [to] perform in the functional category in which [it has] an award.”

If the responses in amendment 3 were inconsistent, DHS maintains, they were patently ambiguous, and that created a duty on EIS’s part to inquire as to which response was correct. Failure to do so, DHS continues, would cause EIS’s interpretation to fail. *See NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1162 (Fed. Cir. 2004). Solicitation amendment 4 makes unnecessary our addressing this contention. This is because amendment 4 substituted for the original solicitation a new, conformed version, and announced that the new version “takes precedence over any other documentation, including answers to questions.” The conformed solicitation includes some changes to section L, but these do not affect the portion of that section which restricts offerors from submitting proposals in more than one FC only in the capacity of prime contractor or core team member. To the extent that any answers to questions – such as the response to amendment 3 question 912 – might be construed to be inconsistent with any part of the conformed version of the solicitation, those answers were invalidated by amendment 4.

After EAGLE II contracts were awarded to EIS (as a prime contractor both on its own and as a part of MBC Eagle II JV), DHS procurement officials discussed how to deal with the issue of contractors participating in teaming arrangements that covered more than one FC. The agency issued a “news alert” to EAGLE II contractors which announced that a prime contractor could not perform as a subcontractor in a FC other than the one in which it held an award, but that a core team member could so perform. DHS maintains that this announcement simply restated what had been the rule since contract award; EIS contends that the announcement contained “two material changes to the agreed upon contracts.”

We conclude that the announcement in the “news alert” is inconsistent with the solicitation’s restriction on participation by companies in EAGLE II FCs. Even if solicitation amendment 3 response 912 could be deemed to be in effect – which it cannot, due to the language of solicitation amendment 4 – the “news alert” contains an inconsistency with prior direction: it treats prime contractors differently from core team members, something which was not done in solicitation section L, response 912, or any other previous agency statement. More importantly for the purpose of the interpretation which we are asked to provide, the

“news alert” imposes a restriction on prime contractors like EIS which is not present in the conformed solicitation.

We do not agree, however, with the characterization of the “news alert” as having made changes to EIS’s contract. A “[c]ontract modification,” according to the Federal Acquisition Regulation (FAR), is “any written change in the terms of a contract (see [FAR] 43.103).” 48 CFR 2.101 (2013). Any such modification must be in writing and signed by a contracting officer. *Id.* 43.103(a-b), .102(a); see *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 867-68 (Fed. Cir. 1987) (as to bilateral modifications); *Danac, Inc.*, ASBCA 30227, et al., 90-3 BCA ¶ 23,246, at 116,637 (as to unilateral modifications). The FAR directs contracting officers to use Standard Form 30, “Amendment of Solicitation/Modification of Contract,” to accomplish a modification. 48 CFR 43.301(a). Purported contract modifications that do not comport with these requirements are not effective. See, e.g., *SCM Corp. v. United States*, 595 F.2d 595, 597-98 (Ct. Cl. 1979); *Sigma Construction, Inc. v. United States*, 113 Fed. Cl. 13, 20-21 (2013); *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142, 152-53 (1991). Contracts therefore may not be modified through “news alerts” or other similar devices.

Thus, even if the solicitation and its amendments – which are not part of the contract between EIS and DHS – are considered to govern contract performance, they permit EIS, as a prime contractor in FC2 of the EAGLE II program, to participate as a subcontractor to another prime contractor in a different functional category within the program. The agency’s “news alert” did not change the contract and therefore has no effect on it.

This decision does not prevent DHS from modifying the contract to preclude this FC2 contractor from participating as a subcontractor in a different FC. We hold only that the agency has not to this point in time included such a restriction in the contract. Nor does the decision prevent the agency from precluding EIS from participating as a subcontractor in a different FC, in a particular proposed arrangement, for valid reasons such as a rationally perceived conflict of interest. The contract as it currently exists does not include a complete bar to such participation, however.

Decision

The appeal is **GRANTED**.

STEPHEN M. DANIELS
Board Judge

We concur:

RICHARD C. WALTERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge