

In the United States Court of Federal Claims
BID PROTEST

Receipt number AUSFCC-6264900

DIGIFLIGHT, INC.

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 20-764 C

Judge _____

COMPLAINT

COMES NOW the Plaintiff, DigiFlight, Inc. (“DigiFlight”), and hereby submits this post-award bid protest complaint for declaratory relief and permanent injunctive relief:

NATURE OF THE ACTION

1. This post-award protest arises from Solicitation No. GS00Q-13-DR-0002 (hereinafter the “Solicitation”) issued by the General Services Administration (“GSA”) for a program known as the OASIS Small Business On-Ramp (POOLS 1, 3, & 4). GSA excluded DigiFlight’s proposal from the competition for the following reason:

Your proposal included a profit of 9% and failed to provide any rationale document with your original submission. Your failure to include this rationale document is a material omission and is not able to be cured through clarifications.

Debriefing Letter, May 29, 2020, Exhibit 1.

2. GSA's decision to exclude DigiFlight's proposal from consideration was wrongful because: (a) DigiFlight made a mistake (a clerical error) in failing to include its rationale in its proposal submission, and the GSA was aware of this mistake but then refused to allow DigiFlight to provide clarification; (b) in making his decision, the Contracting Officer relied on an erroneous conclusion of law that "failure to include this rationale document is a material omission and is not able to be cured through clarifications"; and (c) there is no coherent and reasonable explanation of exercise of discretion because the GSA never considered DigiFlight's rationale and therefore GSA never exercised discretion related to consideration of the rationale.

3. First, the GSA breached its duty to seek verification of DigiFlight's clerical error of not providing an explanation for seeking 9% profit as required by Section L.5.6(j) of the Solicitation. Section L.5.6(j) required a statement of clear and convincing rationale to support a proposed profit rate that exceeds 7%. It is beyond contention that GSA knew of DigiFlight's clerical error because GSA issued to DigiFlight a clarification request stating: "The Government is unable to identify any rationale to support the proposed 9% profit." Exhibit 2. In response to the clarification request, DigiFlight explained it was a mistake in not including its

rationale and then provided clear and convincing rationale to support its 9% profit, in an attachment entitled “Explanation Why 9% Profit Is Fair & Reasonable.”

Exhibit 3. To summarize DigiFlight’s rationale:

a. even with a 9% profit, the proposed pricing of DigiFlight, Inc. was still low – it was under the GSA’s stated fair and reasonable pricing on direct labor as set forth in the solicitation;

b. how much the United States would ultimately have to pay is the real issue (see Section M of Solicitation, M-2, p. 107 - which discusses value - profit is not even part of the evaluation criteria - price is), and DigiFlight’s pricing is still under what is stated as fair and reasonable pricing;

c. Congress has spoken on what is a fair and reasonable profit, and what DigiFlight submitted was still under what Congress has indicated is a fair and reasonable profit; and

d. The procurement places an importance on value (see Section M, M-2, p. 107) and DigiFlight’s score is high in terms of value, so the United States is getting better value and therefore DigiFlight getting more profit (9% rather than 7%) is reasonable.

Specifically, in response to the GSA’s inquiry about DigiFlight’s mistake, DigiFlight responded with Exhibit 3, and below are some extracts from that

document:

In this instance, if DigiFlight had proposed 7% profit, that amount would have been deemed “fair and reasonable” without any inquiry into DigiFlight’s competence or past performance. Now, however, a mere 2% difference is used as a basis to exclude DigiFlight’s proposal notwithstanding if the 2% is added to DigiFlight’s proposed rates, DigiFlight’s rates are still within the ceiling of J.2 for being fair and reason (*sic*).

A useful point of reference is the DoD Weighted Guidelines for fee/profit. See DFARS § 215.404-71. If the GSA has fully assessed DigiFlight’s proposal, it would have seen that cost efficiency is a forte for DigiFlight. DFARS § 215.404-71-5 identified a cost efficiency factor in which “the contracting officer may increase the pre-negotiation profit objective by an amount not to exceed 4 percent of the total objective cost.” *Id.* at (a). Under the present facts, if 7% is the total objective cost as set forth in L.5.9.(j), an additional 2% for cost efficiency is well within the additional 4% and therefore fair and reasonable.

Finally, it is noteworthy that Congress has put a 10% ceiling “for other cost-plus-fixed fee contracts.” FAR § 15.404-4(c)(4)(i)(C). Since DigiFlight’s proposal is within the statutory ceiling of 10%, it would seem that absent an explanation to the contrary by GSA, the 9% requested profit is not unreasonable.

Exhibit 3.

Other support that DigiFlight’s 9% profit request was fair and reasonable can be traced to the evaluation criteria: “The best value basis for awards will be determined by the Highest Technically Rated Offerors with a Fair and Reasonable

Price.” Solicitation at M.2.(a). Here, DigiFlight’s exceptional past performance and experience resulted in DigiFlight’s proposal receiving a higher technical score than other offerors who received awards. Hence, the better value in DigiFlight’s technical proposal supported a determination that a 9% profit was fair and reasonable.

4. Second, excluding DigiFlight’s proposal based on Section L.5.6(j) was wrongful is because, in making his decision, the Contracting Officer relied on an erroneous conclusion of law that “failure to include this rationale document is a material omission and is not able to be cured through clarifications.” Exhibit 1. Clarifying the proposal to accept the rationale that DigiFlight mistakenly omitted would not create a material change in DigiFlight’s proposal; it would not change the profit amount (9%), it would not change the pricing, or the past performance, or the overall value. There would be no material change; there would simply be a clarification. While clarifications may not provide new terms, submission of information that does not vary, alter, or revise the terms of the offer are permissible. *Level 3 Commc’ns, LLC v. United States*, 129 Fed. Cl. 487, 504-05 (2013)(determining that a “[s]ubmission of the [clearer map]” was a clarification because it “would not have varied the terms of Level 3’s offer” and was only to “confirm Level 3’s proposal”); *BCPeabody Constr. Servs. Inc. v. United States*, 112

Fed. Cl. 502, 511 (2013)(permitting clarifications that provided “essential information about a subcontractor and contractor, respectively but did not alter or revise the terms of the pertinent offers”). The Contracting Officer made an erroneous conclusion of law when he found that the mistake could not be cured by a clarification. The law is well-settled that “an agency abuses its discretion where its decision ... is based on an erroneous conclusion of law.” *Sterling Federal Systems, Inc. v. Goldin*, 416 F.3d 1177, 1182 (Fed. Cir. 1994).

5. Third, excluding DigiFlight’s proposal based on Section L.5.6(j) was wrongful is because when a procurement decision is challenged at the Court of Federal Claims, “the court must determine whether the ... agency provided a coherent and reasonable explanation of its exercise of discretion...” *FFL Pro LLC v United States*, 124 Fed. Cl. 536, 555-6 (2015). Here, GSA cannot provide a coherent and reasonable explanation for relying on L.5.6(j) to exclude DigiFlight’s proposal from the competition because no such explanation exists.

PARTIES

6. DigiFlight is a privately-held Delaware corporation with its principal place of business is Columbia, Maryland.

7. Defendant is the United States, acting by and through the General Services Administration.

JURISDICTION AND STANDING

8. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491(b), as amended by the Administrative Disputes Resolution Act.

9. DigiFlight has standing as an interested party. See 28 U.S.C. § 1491(b)(1). DigiFlight is an actual offeror who, but for the GSA's procurement errors, possessed a substantial chance of award since the scores that DigiFlight was entitled to for Pools 3 and 4 would have qualified DigiFlight proposal for awards.

STATEMENT OF FACTS

10. OASIS is an acronym for One Acquisition Solution for Integrated Services.

11. OASIS Small Business ("SB") is a family of 7 separate Government-wide Multiple Award, Indefinite Delivery, Indefinite Quantity ("MA-IDIQ") task order contracts that span 29 North American Industry Classification System ("NAICS") Codes and 6 NAICS Code Exceptions under the economic subsector 541, Professional, Scientific, and Technical Services. GSA's acquisition plan for OASIS SB is to address agencies' needs for a full range of service requirements that integrate multiple professional service disciplines and ancillary services/products with the flexibility for all contract types and pricing at the task order level. Solicitation at B.1. Within OASIS SB are seven separate MA-IDIQ task orders

contracts which are referred to as Pools.

12. On April 29, 2019, the GSA published a combined synopsis/solicitation for OASIS SB Pools 1, 3, & 4 On-Ramp. Proposals were due on June 20, 2019.

13. The evaluation criteria was “[t]he best value basis for awards will be determined by the Highest Technically Rated Offerors with a Fair and Reasonable Price. All evaluation factors, when combined, are significantly more important than cost or price.” Solicitation at M.2.

14. The technical rating was to be based on “qualities that are most important to GSA and our customers, such as Relevant Experience, Past Performance, Systems, Certifications, and Clearances.” Solicitation at p. 114.

15. For Pools 1, 3 and 4, award was to be made to the highest technically rated offers. Solicitation at p. 115. For Volume 3, Relevant Experience, a maximum of 4,000 points were available. For Volume 4, Past Performance, a maximum of 4,000 points were available. For Volume 5, Systems, Certifications, and Clearances, a total of 2,000 points were available.

16. But Solicitation Section L.5.6(j) also stated:

CAUTION: Failure to provide clear and convincing rationale to support a profit rate that exceeds 7% will result in a determination that Profit is not fair and reasonable and the Offeror would not be eligible for award regardless of their technical score.

17. DigiFlight proposed 9% profit but, by clerical error, failed to provide

its rationale for why its proposed profit was fair and reasonable.

18. The GSA contracting officer noticed the mistake and brought the clerical error to the attention of DigiFlight in the form of a limited clarification request dated March 16, 2020 stating:

- Solicitation L.5.6.(j) requires a rationale for any Profit Rate that exceeds 7%.
 - The Government is unable to identify any rationale to support the proposed 9% profit.

Clarification Request, Exhibit 2.

15. In response to GSA's clarification request, DigiFlight provided the following rationale why the 9% profit was fair and reasonable:

Explanation Why 9% Profit Is Fair & Reasonable

As explained in FAR § 15.404-4:

Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's interest. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for optimum contract performance.

Id. at (a)(3). Consistent with FAR § 15.404-4, is the observation that "Profit is the reason that the firms we rely upon exist, and we should not use profit as a cost cutting measure."¹ Hence, if the motive for rejecting the 9% profit is cost cutting, then the reasonableness of rejecting the proposed profit is suspect.

In this instance, if DigiFlight had proposed 7% profit, that amount would have been deemed "fair and reasonable" without any inquiry into DigiFlight's competence or past performance. Now, however, a mere 2% difference is used as a basis to exclude DigiFlight's proposal notwithstanding if the 2% is added to DigiFlight's proposed rates, DigiFlight's rates are still within the ceiling of J.2 for being fair and reason (sic).

A useful point of reference is the DoD Weighted Guidelines for fee/profit. See DFARS § 215.404-71. If the GSA has fully assessed DigiFlight’s proposal, it would have seen that cost efficiency is a forte for DigiFlight. DFARS § 215.404-71-5 identified a cost efficiency factor in which “the contracting officer may increase the pre-negotiation profit objective by an amount not to exceed 4 percent of the total objective cost.” *Id.* at (a). Under the present facts, if 7% is the total objective cost as set forth in L.5.9.(j), an additional 2% for cost efficiency is well within the additional 4% and therefore fair and reasonable.

Finally, it is noteworthy that Congress has put a 10% ceiling “for other cost-plus-fixed fee contracts.” FAR § 15.404-4(c)(4)(i)(C). Since DigiFlight’s proposal is within the statutory ceiling of 10%, it would seem that absent an explanation to the contrary by GSA, the 9% requested profit is not unreasonable.

1. Honorable Frank Kendall, Better Buying Power 3.0 White Paper (September 19, 2014), available at [http://bbp.dau.mil/docs/2_Better_Buying_Power_3_0\(19_September_2014\).pdf](http://bbp.dau.mil/docs/2_Better_Buying_Power_3_0(19_September_2014).pdf).

DigiFlight Explanation, Exhibit 3.

16. DigiFlight’s rationale/explanation did not seek to change the proposed profit or pricing as stated in the proposal.

17. To support that the assertion in its rationale that the addition of 2% profit did not cause DigiFlight’s proposal to exceed the price ceiling in Solicitation Table J.2, Exhibit 3 stated “if the 2% is added to DigiFlight’s proposed rates, DigiFlight’s rates are still within the ceiling of J.2 for being fair and reasonable.” *Id.* To support the assertion in its rationale that DigiFlight’s total price—even with the added 2% profit—was within the range of fair and reasonable under Solicitation J.2, DigiFlight provided the supporting calculations. See Exhibit 4.

18. Concerning DigiFlight’s response to the second clarification request,

DigiFlight was apprehensive that the GSA Contracting Officer was operating under an erroneous conclusion of law that would cause the Contracting Officer to refuse to consider the information in Exhibit 3. Specifically, DigiFlight was apprehensive that the Contracting Officer would reject as beyond being a clarification the information provided by DigiFlight to comply with Section L.5.6.(j). Accordingly, DigiFlight's response to the clarification request stated:

Rest assured that the information provided in Attachment 1 falls within the FAR § 15.306 definition of a clarification. Therefore, the contents of Attachment 1 are permissible for the GSA to consider without opening discussions. To allow you to be confident that you may access Attachment 1 without opening discussions, I have attached the United States Court of Claims' decision of *Mil-Mar Century Corp. v. United States*, 111 Fed. Cl. 508 (2013).

Exhibit 5.

19. To further assure the contracting officer that the information contained in Exhibit 2 fell within the FAR definition of being a clarification, DigiFlight provided the Contracting Officer with a copy of the Court of Federal Claims decision in *Mil-Mar Century Corp.*, 111 Fed. Cl. 508 (2013). Additionally, DigiFlight analyzed *Mil-Mar Century Corp.* so the Contracting Officer could better understand the decision in terms of what constitutes a clarification. Exhibit 5. Finally, DigiFlight informed the Contracting Officer:

The facts in *Mil-Mar Century Corp.* are conceptually similar to those involving DigiFlight's proposal. Based on *Mil-Mar Century Corp.*, the

information provided in Attachment 1 constitutes clarification because the information does not change the proposal, it only provides rationale as to the fair and reasonableness of the 9% profit.

Exhibit 5.

20. Without explanation, the Contracting Officer ignored Exhibits 3 and 5. Instead, as shown in the debriefing, the Contracting Officer made the following conclusion of law: “Your failure to include this rationale document is a material omission and is not able to be cured through clarifications.” Exhibit 1. Accordingly, DigiFlight’s proposal was removed from consideration for award.

Count I

The GSA Breached Its Duty to Seek Verification of DigiFlight’s Clerical Error of Not Providing an Explanation for Seeking 9% Profit as Required by Section L.5.6(j).

21. DigiFlight realleges and incorporates by reference the allegations of the preceding paragraphs as if fully set forth herein.

22. DigiFlight’s proposal contained a clerical error in the form of an omission of the information required by Section L.5.6(j).

23. The GSA Contracting Officer was aware of the clerical error as shown by the issuance of a clarification request dated March 16, 2020 stating:

Identify where in the submitted proposal documentation (e.g., folder name, file name, page number as appropriate), the following solicitation requirements are adequately addressed: L.5.6.(j).

Exhibit 2.

24. The GSA Contracting Officer had an obligation to seek verification of the suspected clerical error. *Caddell Construction Company v. United States*, 125 Fed. Cl. 30, 48 (2006).

25. In response to the clarification request, DigiFlight provided all the information necessary to comply with Section L.5.6.(j). Exhibit 3.

26. DigiFlight's clarification of its proposal providing the rationale that DigiFlight mistakenly left out would not create a material change in DigiFlight's proposal because it would not change the profit amount (9%), the pricing, the past performance, or the overall value. The submitted information does not vary, alter, or revise the terms of the offer.

27. Although he had the information of DigiFlight's compliance with Section L.5.6.(j) as a result of DigiFlight's response to the clarification request, the GSA Contracting Officer failed to use or consider the information.

28. By failing to consider the information provided by DigiFlight in clarification to cure the clerical error, the GSA contracting officer breached his obligation to seek verification of the suspected clerical error.

Count II

The Contracting Officer's Decision Not to Use Information That DigiFlight Provided in a Clarification Request Constituted an

Abuse of Discretion Because the Contracting Officer's Decision Was Based on an Erroneous Conclusion of Law

29. DigiFlight realleges and incorporates by reference the allegations of the preceding paragraphs as if fully set forth herein.

30. DigiFlight's proposal contained a clerical error in the form of an omission of the information required by Section L.5.6(j).

31. The GSA Contracting Officer was aware of the clerical error as shown by the issuance of a clarification request dated March 16, 2020 stating:

Identify where in the submitted proposal documentation (e.g., folder name, file name, page number as appropriate), the following solicitation requirements are adequately addressed: L.5.6(j).

Exhibit 2.

32. In response to the clarification request, DigiFlight provided all the information necessary to comply with Section L.5.6(j). Exhibit 3.

33. The GSA Contracting Officer was fully informed that the information DigiFlight provided to him as the result of the request constituted a clarification and the information in Exhibit 3 did not vary, alter, or revise the terms of DigiFlight's offer in its proposal. Exhibit 5.

34. The Contracting Officer declined to consider the information provided in response to the clarification request. Instead, the Contracting Officer concluded: "Your failure to include this rationale document is a material omission and is not

able to be cured through clarifications.” Exhibit 1.

35. In concluding that DigiFlight’s “failure to include this rationale document is a material omission and is not able to be cured through clarifications,” the Contracting Officer relied on an erroneous conclusion of law. Because the information did not vary, alter, or revise the terms of DigiFlight’s offer, the clarification by DigiFlight was not, as a matter of law, a material change. It was a clarification.

36. According to the United States Court of Appeals for the Federal Circuit, “an agency abuses its discretion where its decision ... is based on an erroneous conclusion of law.” *Sterling Federal Systems, Inc. v. Goldin*, 416 F.3d 1177, 1182 (Fed. Cir. 1994).

37. The Contracting Officer’s decision not to consider or use information that DigiFlight provided in response to a Clarification Request (e.g., an explanation why the 9% profit was fair & reasonable) constituted an abuse of discretion because the Contracting Officer’s decision was based on an erroneous conclusion of law.

Count III

The GSA Cannot Provide “a Coherent and Reasonable Explanation” for Its Exercise of Discretion to Exclude DigiFlight’s Proposal From Consideration for Award.

38. DigiFlight realleges and incorporates by reference the allegations of the

preceding paragraphs as if fully set forth herein.

39. The GSA Contracting Officer used his discretion to exclude DigiFlight's proposal from consideration for award.

40. When a procurement decision is challenged at the Court of Federal Claims, "the court must determine whether the ... agency provided a coherent and reasonable explanation of its exercise of discretion..." *FFL Pro LLC v United States*, 124 Fed. Cl. 536, 555-6 (2015).

41. The GSA cannot provide a coherent and reasonable explanation for excluding DigiFlight's proposal from consideration for award based on a proposed profit of 9% when DigiFlight's total price proposed was less than the ceiling for fair and reason as set forth in Solicitation J.2.

A. The GSA cannot provide a coherent and reasonable explanation for excluding DigiFlight's proposal from consideration for award based on a proposed profit of 9% because the GSA's justification for the removal cannot be reconciled with the FAR. FAR § 15.404-4(c)(5) states a "contracting officer shall not require prospective contractors to submit ... supporting rationale for its profit." However, DigiFlight's proposal was removed because it did not provide "supporting rational for its profit." See Section L.5.6(j). Consequently, the explanation for removing DigiFlight's proposal

was based on the GSA requiring something that the FAR prohibited.

B. The GSA cannot provide a coherent and reasonable explanation for excluding DigiFlight's proposal from consideration for award based on a proposed profit of 9% because the solicitation provides that "[a]dequate price competition at the task order level, in response to an individual requirement, establishes the most accurate, fair, and reasonable pricing for that requirement." Solicitation at B.2. Hence, if adequate price competition at the task order level is the means by which the GSA intends to achieve fair and reasonable prices, then the 7% profit threshold in Section L.5.6(j) serves no purpose thus precluding a coherent and rational explanation.

C. The GSA cannot provide a coherent and reasonable explanation for excluding DigiFlight's proposal from consideration for award based on a proposed profit of 9% because the only logical explanation for the 7% ceiling on profit is to serve as a cost cutting measure. This cost cutting measure, however, reflects flawed logic in acquisition planning by the GSA and is inconsistent with FAR § 15.404-4.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- a. A declaration that the GSA breached its duty to seek verification of DigiFlight's clerical error (e.g., not providing an explanation for seeking 9% profit.)
- b. A declaration that the Contracting Officer's decision not to use information that DigiFlight provided pursuant to a clarification request constituted an abuse of discretion because the Contracting Officer's decision was based on an erroneous conclusion of law.
- c. A determination that the GSA cannot provide "a coherent and reasonable explanation" for its exercise of discretion to exclude DigiFlight's proposal from consideration for award.
- d. A permanent injunction requiring the GSA to evaluate whether DigiFlight's proposal merits an award under Pool 3 or Pool 4 or both.
- e. Any other relief the Court deems just and proper.

Dated: June 24, 2020

Respectfully Submitted,

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Exhibits:

1. Debriefing, May 29, 2020.
2. GSA Clarification Request, March 16, 2020.
3. DigiFlight's Explanation Why 9% Profit is Fair & Reasonable.
4. DigiFlight's Calculations that Total Price with 9% Profit Does not Exceed Solicitation Table J.2.
5. DigiFlight Cover Letter to Response to March 16, 2020 CR.