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Decision

Matter of: Environmental Quality Management, Inc.

File: B-402247.2

Date: March 9, 2010

Brian W. Craver, Esq., Person & Craver LLP, for the protester.
Marvin K. Gibbs, Esq., Department of the Air Force, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency erred in not alerting protester to alleged error in protester's proposal is denied where the alleged error was material to the acceptability of the proposal and thus could be corrected only through discussions, and agency, as permitted under the solicitation, did not conduct discussions with any offerors.
 2. Protest that agency's exchanges with offerors other than the protester constituted discussions is denied where no offeror was permitted to make any material revision to its proposal.
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DECISION

Environmental Quality Management, Inc. (EQM) of Cincinnati, Ohio, protests the awards of indefinite-delivery/indefinite-quantity (ID/IQ) contracts to seven other firms by the Department of the Air Force Center for Engineering and the Environment (AFCEE) under request for proposals (RFP) No. FA8903-09-R-8374, for environmental, construction, operations, and other services.

We deny the protest.

BACKGROUND

AFCEE issued the solicitation on May 6, 2009, as a small business set-aside for environmental restoration and remediation; minor construction, demolition, and repairs; and operations and other services to be performed at Department of Defense locations throughout the world, but primarily in the continental United States. The solicitation contemplated the award of five to eight ID/IQ contracts, but reserved the

right to make fewer, more, or no awards based on the quantity and quality of the proposals received. The ceiling price for all required services set forth in the solicitation was \$350 million.

Awards were to be made on the basis of best value to the agency, and on the basis of an integrated assessment of proposals against all source selection criteria identified in the solicitation. The factors to be used in evaluating proposals were mission capability, past performance, and price, in descending order of importance. The mission capability evaluation factor also included three subfactors: corporate experience, resources, and management approach. Among these subfactors, corporate experience was more important than resources and management approach, which were of equal importance. The solicitation stated that the agency intended to make awards without discussions. RFP § M, ¶ 7.0.

As relevant here, the corporate experience subfactor under the mission capability factor included a requirement that offerors submit “projects” demonstrating their team’s ability to perform the statement of work.¹ RFP § L, ¶ 4.3(a)(1). The solicitation also specified that, under this subfactor, “[o]ne *project* must be submitted for each [*t*]eam member expected to perform 20% or more of the work on the basic contract.” *Id.* at 4.3(a)(3) (emphasis in original).²

The solicitation also identified evaluation ratings that the agency could give a proposal with regard to the subfactors under the mission capability factor. The ratings included blue/exceptional, green/acceptable, yellow/marginal, and red/unacceptable. The red/unacceptable rating was applicable to a proposal that “[f]ails to meet specified minimum performance or capability requirements. The proposal has one or more deficiencies and is not awardable.” RFP § M, ¶ 2.0.

EQM was among 30 offerors who submitted proposals by the specified closing date. In its proposal, EQM identified several team members expected to perform

¹ The solicitation stated that: “A *Project*, as submitted by the offeror for evaluation under this solicitation for basic contract award, shall consist of a SINGLE task order, delivery order or work order issued under an ID/IQ contract or any other multiple delivery type contract (includes SABER and Basic Ordering Agreements), or a stand-alone contract for a government or commercial client. A project shall have a dollar value of not less than \$100K and not greater than \$2.5M.” RFP § L, at 7.

² The solicitation stated that “the Government will consider the Offeror, teaming members, and subcontractors as a part of the team when a signed *Teaming Arrangement* (TA) or *Letter of Intent* (LOI) is provided.” RFP § L, at 7. (emphasis in original). The solicitation further provided that, to be valid under the solicitation, a TA or LOI “must commit the parties to performance under this contract, should it be awarded to the Offeror.” *Id.*

significant portions of the work under the basic contract. For example, EQM's proposal identified three team members--referred to as [deleted], [deleted], and [deleted]--expected to perform 20 percent, 15 percent, and 20 percent of the work under the basic contract, respectively. EQM Contracting Proposal, at 88. The proposal also identified four other team members expected to perform 5 percent of the work each. Id.

In its technical proposal, EQM submitted projects for several of its team members, including [deleted] and [deleted]. However, contrary to the terms of the solicitation, EQM failed to submit a project for [deleted], a team member identified to perform 20 percent or more of the work. EQM Technical Proposal at 83-85.

In the initial evaluation, the AFCEE evaluation team found errors in nearly all of the proposals received. Therefore, after the initial evaluation, members of the evaluation team met with the contracting officer to discuss the issuance of clarifications to offerors under Federal Acquisition Regulation (FAR) § 15.306(a). Under FAR § 15.306(a), where award without discussions is contemplated, offerors may still be given the opportunity to clarify certain aspects of proposals, such as the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond, or to resolve minor or clerical errors. At the meeting on the issuance of clarifications, the contracting officer decided to issue evaluation notices to 28 of the 30 offerors, relating to issues of relevance of past performance, as well as errors in the proposals that were considered minor or ministerial. Among the errors that the contracting officer found appropriate for clarification were ambiguities in an offeror's past performance references, apparently missing fringe rate information, and failures to complete Section K certifications, among others.

In contrast, with regard to EQM's failure to submit a project for a team member expected to perform 20 percent or more of the work under the basic contract, AFCEE concluded that the error was material rather than minor and thus not subject to clarification, as material revisions to proposals are allowable only when conducting discussions under FAR § 15.306(d). Accordingly, the agency did not issue an evaluation notice to EQM regarding its failure to provide a required project for its team member, and its proposal received a deficiency and a red/unacceptable rating under the corporate experience subfactor of the mission capability factor, rendering its proposal ineligible for award.

AFCEE ultimately issued contract awards to seven firms on November 6. EQM requested a debriefing, which concluded on November 25. EQM then filed this protest on November 30.

ANALYSIS

As a preliminary matter, EQM asserts that it did not submit a project for [deleted] because [deleted] was not actually expected to perform 20 percent of the work under the basic contract. Rather, EQM asserts that [deleted] and [deleted] were the team members expected to perform 20 percent of the work, while [deleted] was expected to perform only 15 percent of the work. Accordingly, EQM contends that the error in its proposal was not a failure to submit a required project, but rather the transposition of the percentages of work to be performed by [deleted] and [deleted].

Clarifications

EQM argues that its allegation that the transposition of percentages was the actual error in its proposal is supported by the fact that it did submit a project for [deleted], a firm identified in its proposal as expected to perform less than 20 percent of the work (and thus a firm for which no project submission would be required under the solicitation), and that, because the transposition error was minor and clerical in nature, it was a proper subject for clarifications. EQM argues that AFCEE's decision to allow clarification of similar errors in other offerors' proposals created an obligation to allow EQM to clarify its mistake in order to maintain fair treatment of all offerors.³

As a preliminary matter, we disagree with EQM's assertion that its alleged error of transposition of the percentages of work for [deleted] and [deleted] reasonably could have been detected by AFCEE in its evaluation of proposals. As the agency points out in its report, EQM submitted projects for several of its team members who were identified in its proposal as expected to perform less than 20 percent of the work. Thus, the fact that EQM submitted a project for [deleted], identified as being expected to perform 15 percent of the work, did not alert the agency to the potential that [deleted], and not another team member, was expected to perform 20 percent of the work. On the contrary, the only error that the agency could have reasonably

³ EQM also argues that AFCEE was obligated to give EQM the opportunity to clarify the error in its proposal, citing Griffy's Landscape Maint. v. United States, 46 Fed. Cl. 257, 260 (2000), in which the Court held that the contracting agency had a duty to permit an offeror to furnish insurance contact information missing from its proposal, an omission the Court characterized as a clerical mistake. Subsequent decisions have questioned the holding in Griffy's in the context of negotiated procurements. See Camden Shipping Corp. v. United States, 89 Fed. Cl. 433, 438 n.5 (2009); C.W. Over & Sons, 54 Fed. Cl. 514, 521 n.10 (2002). In any event, the holding in Griffy's applied only to errors that are clerical and minor in nature, which, as explained above, the error in EQM's proposal is not.

identified in EQM's proposal was the failure to submit a project for a team member expected to perform 20 percent of the work. Such an error could not reasonably be considered a minor or clerical error subject to correction through clarifications.

With regard to EQM's contention that the alleged transposition error was minor or clerical in nature, we also disagree. Minor or clerical errors subject to clarifications stand in contrast to material modifications of proposals which can occur only under the discussion process set out at FAR § 15.306(d). Here, the contribution of effort expected from each team member identified in the proposal, stated in the percentages at issue here, was a material aspect of each offeror's proposal, and affected the agency's evaluation of proposals as set forth in the solicitation. Thus, no matter how minor or clerical the transposition error may have been in its commission, it was clearly material in its effect, and as such cannot be considered subject to correction through clarifications, but only through discussions under FAR § 15.306(d). See Cooperativa Maratori Riuniti-Anese, B-294747, Oct. 15, 2004, 2004 CPD ¶ 210. Accordingly, we disagree with EQM that the error it asserts it committed, or the error AFCEE reasonably perceived, was correctable through clarifications, and we find no basis to sustain the protest based on these arguments.

Discussions

EQM contends, in the alternative, that some of the exchanges with 28 of the 30 offerors actually constituted discussions under FAR § 15.306(d), necessitating discussions with all offerors regarding the weaknesses in their proposals, including EQM's transposition error or failure to submit a project for [deleted]. Specifically, EQM points to three AFCEE clarification questions that EQM believes constituted discussions.

The first of these clarification questions related to an offeror's apparent failure to show the fringe rate applied to its direct labor rates, as required by the solicitation. RFP § L, ¶ 6.4(b)(5). In response, AFCEE issued an evaluation notice stating:

It appears the fringe rate was not applied to the direct labor for the sample task order. Clarify if the fringe rate was applied to the direct labor in the sample task order and direct us to where it is shown in the data provided under Tab 6.4(c). NOTE: The Government is not requesting a revision. Therefore, any revision to information submitted in your offer will not be accepted.

Agency Report (AR), Tab 9(g), Evaluation Notice, at 11. The offeror responded that, although its audited fringe rate was applied to the direct labor, and shown in the electronic version of the Excel worksheet submitted in Tab 6.4(c), the Excel worksheet containing the fringe rate was hidden, and did not appear in the printed

version of the spreadsheet viewed by the agency.⁴ Id. Based on that response, AFCEE determined that the issue was resolved, and considered the offeror's proposal acceptable.

In a declaration submitted by AFCEE during this protest, the price analyst for this procurement explained that he had reviewed the hard copy and electronic copy of the offeror's submittal, but could not determine the exact fringe rate. Upon receiving the offeror's clarification response, however, the price analyst again reviewed the electronic copy and found several hidden sheets, including a sheet titled "labor rates." The price analyst found that this sheet contained the offeror's hourly rate and labor burden (fringe rate). The price analyst also states that "[i]n hindsight, I should have checked for hidden sheets . . . [h]ad I checked for hidden sheets the clarification [evaluation notice] would not have been needed." Supplemental AR, Declaration, at 1.

EQM argues that this exchange constituted discussions because the rate contained in the hidden sheet was labeled "labor burden" rather than "fringe rate." According to EQM, the exchange therefore could not have been a mere confirmation of submitted information, because the offeror's true response was that the rate labeled "labor burden" was in fact the "fringe rate" sought by the agency. According to EQM, because that information was not contained in the proposal, the offeror in effect was permitted to modify its submission, and the exchange constituted discussions.

As a general rule, discussions occur where the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror an opportunity to revise or modify its proposal in some material respect. FAR § 15.306(d)(3); Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Clarifications, on the other hand, are "limited exchanges" agencies may use to allow offerors to clarify certain aspects of their proposals or resolve minor or clerical mistakes. FAR § 15.306(a)(2); Manthos Eng'g, LLC, B-401751, Oct. 16, 2009, 2009 CPD ¶ 216. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether the offeror has been afforded an opportunity to revise or modify its proposal. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. If an agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. FAR § 15.306(d)(1); International Res. Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6.

⁴ In the Excel software program, background worksheets may be "hidden" so that they do not appear. These "hidden" worksheets remain a part of the Excel file, however, and may be "unhidden" and viewed upon selection by the user.

Here, it is clear from the evaluation notice and declaration of the price analyst that the agency was not initially aware of the hidden sheets in the offeror's electronic submission, and for that reason was unable to determine if the offeror's fringe rate was applied to the labor rates, or what the fringe rate might be. The exchange between the offeror and AFCEE brought the hidden sheets in the offeror's proposal to AFCEE's attention for the first time, and allowed the price analyst to locate the necessary information in the proposal. That the information was not labeled as the "fringe rate" is immaterial. In sum, the record is clear that the exchange in question constituted a confirmation of information that was already contained in the proposal (though initially hidden), and fell within the bounds of a clarification under FAR § 15.306(a).

EQM's next two arguments that the exchanges conducted by AFCEE constituted discussions relate to evaluation notices concerning past performance information. Specifically, AFCEE issued evaluation notices to offerors regarding the dollar value of their past performance reference contracts, and their stage of completion. The solicitation required past performance reference contracts to have dollar values between \$100,000 and \$2.5 million, and to be at least 80 percent complete.⁵ RFP § L, ¶ 5.4(a).

Only one offeror received an evaluation notice regarding the dollar amount of a past performance reference contract. That offeror had submitted one contract for the past performance evaluation that it identified as having dollar value of \$2.5 million. AFCEE issued an evaluation notice to the offeror requesting that it "[c]onfirm or correct the dollar amount for this task order." AR, Tab 9c. The offeror responded that the dollar amount was not correct due to a mistake, and that the value of the contract was actually \$1.12 million. AFCEE accepted this correction and evaluated the reference. EQM argues that this exchange resulted in a modification of the offeror's proposal and constituted discussions.

We disagree. Section M of the solicitation listed the dollar value of past performance reference contracts as a consideration within the evaluation category of "past performance relevance." RFP § M, ¶ 3.0(b)(2). This provision is significant here because "the relevance of an offeror's past performance information" is given as a specific example of aspects of an offeror's proposal that can be addressed through the clarifications process. FAR § 15.306(a). Therefore, because the information involved in this exchange related to AFCEE's evaluation of the relevance of the offeror's past performance references, the offeror's correction of this information through exchanges did not constitute discussions.

⁵ The RFP measured the stage of completion of a contract based on a percentage of how many dollars had been billed by the contractor (expensed) in comparison to the contract's total dollar value.

Several offerors received evaluation notices concerning the stage of completion of their past performance reference contracts. As an example, one offeror submitted a past performance reference contract with a period of performance beginning on June 20, 2007, and ending on June 5, 2011. Accordingly, it appeared that only approximately 50 percent of the term of the contract had passed by the date the solicitation was issued. To clarify how this contract could be 80 percent expensed, AFCEE issued the offeror an evaluation notice requesting that it “[c]onfirm the percentage that was expensed as of 6 May 2009.” AR, Tab 9k. The offeror responded that this contract was for a construction project that was substantially completed and 98 percent expensed by May 6, 2009, and that the remaining contract value and period was only for groundwater sampling and report writing. AFCEE concluded that this response was acceptable, and evaluated the reference. Again, EQM asserts that the offeror was given an opportunity to modify its proposal, constituting discussions.

The solicitation did not require offerors to affirmatively demonstrate that their past performance reference contracts were 80 percent expensed by the time the solicitation was issued. Instead, the solicitation stated that the “Government will consider only performance on an effort that is *substantially complete* [80 percent] or has been completed during the past three (3) years.” RFP § L, ¶ 5.4(c) (emphasis in original). In this context, we consider submission of a past performance reference by an offeror to amount to a representation that a contract that has not been completed, is substantially complete. Thus, the evaluation notices requesting offerors to confirm the percentage expensed were seeking nothing more than a confirmation that the references met the stated criteria, and did not present a opportunity for the offerors to modify any material aspect of their proposals. Accordingly, these exchanges did not constitute discussions as alleged by EQM.

Conclusion

In sum, we first conclude that the error in EQM’s proposal, either as alleged by EQM or as perceived by AFCEE, was not minor or clerical in its effect on the proposal, and could not be corrected through the clarifications process. Second, we have examined the record and find that the evaluation notices issued by AFCEE in this procurement, though numerous, did not constitute discussions, requiring the contracting officers to discuss deficiencies in the proposal of each offeror, including EQM. As such we see no basis to object to AFCEE’s conclusion that EQM’s proposal

warranted a red/unacceptable rating under the corporate experience factor, and thus was ineligible for award.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ EQM also challenged the agency's evaluation of the management approach section of its proposal. Given our conclusions regarding EQM's first three protest challenges, EQM was ineligible for award under this solicitation and, accordingly, we need not address this argument.