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Decision

Matter of: eMind

File: B-289902

Date: May 8, 2002

Jon W. van Horne, Esq., Greenberg Traurig, for the protester.

Richard W. Oehler, Esq., W. Hartmann Young, Esq., and Suzette W. Derrevere, Esq., for MicroMash, an intervenor.

Donald M. Suica, Esq., and David K. Barnes, Esq., Internal Revenue Service, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under request for proposals (RFP) for off-the-shelf computer training courses, which advised offerors that for their proposals to be determined technically acceptable, they must meet or exceed all of the training course requirements listed in the RFP schedule, protester's submission of omitted course descriptions after the closing date for receipt of proposals was not an allowable clarification because the course descriptions were required to determine the technical acceptability of the proposal.

DECISION

eMind protests the rejection of its proposal as technically unacceptable and the award of a contract to MicroMash under request for proposals (RFP) No. TIRNO-02-R-00005, issued by the Internal Revenue Service (IRS) for off-the-shelf computer-based accounting and tax law training courses for IRS employees. eMind contends that the IRS improperly refused to consider clarifying information pertaining to its proposal that it furnished after the RFP closing date.

We deny the protest.

The RFP, which was issued pursuant to commercial item procedures, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base and 4 option years. The solicitation schedule identified 78 required training courses,

described each course's required content in detail,¹ and furnished an estimated quantity for each course; offerors were instructed to identify comparable training courses that they offered, describe the courses' content in sufficient detail to demonstrate compliance with the specified requirements, and furnish unit prices.² The RFP advised offerors that for their proposals to be determined technically acceptable, they must meet or exceed all of the training course requirements listed in the schedule. In addition to the completed schedule and discussion of course content, offerors were instructed to submit as part of their technical proposals sample training modules in disk format for eight specified courses, ordering procedure information, past performance information, and samples of management reports.

The RFP provided for award to the offeror whose proposal represented the best value to the government, price and other factors considered. RFP, § IV.2.(a). The solicitation identified the following seven evaluation factors in descending order of importance:

1. Fulfillment of Statement of Work Minimum Requirements
2. Variety, quantity, and quality of [continuing professional education] training modules
3. Ease of online access, technical support, and detail of administrative procedures
4. Current and Past Performance

¹ For example, line item 0001 described the required content of a course focusing on the Alternative Minimum Tax as follows:

A course dealing with Alternative Minimum Tax (AMT) should be based on the Internal Revenue Code, regulations, court cases, and pronouncements by the IRS. It should also be updated to include the most current provisions effective under the Economic Growth and Tax Relief Reconciliation Act of 2001. Upon successful completion of this course, the IRS tax law student's understanding of AMT shall be enhanced regarding topics such as: tax preferences and adjustments that trigger the AMT, the alternative elections that are available for reducing the AMT for certain preference and adjustment items and AMT credit concepts.

² In addition to the line items corresponding to the 78 required courses, the schedule contained line items providing for the customization of and development of training materials to address IRS needs; a line item for additional courses developed by the vendor in response to new and/or updated tax law; and multiple line items for vendors to offer additional related courses of possible value to the IRS.

5. Small Business and Small Disadvantaged Business Subcontracting Plan
6. Compliance with the Electronic and Information Technology Accessibility Standards
7. Cost/Price

Id. The RFP advised offerors that the agency intended to evaluate offers and award a contract without discussions. Id. § III.1 (incorporating by reference Federal Acquisition Regulation (FAR) § 52.212-1).

Three offerors submitted proposals prior to the November 23, 2001 closing date. On November 27, the contracting officer notified eMind via telephone that some of the course names listed in its proposal schedule did not match the course names in the course catalogue section of its proposal.³ eMind responded by e-mailing the contracting officer the correct course names. Later the same day, eMind sent the contracting officer a second e-mail message in which it furnished six course descriptions omitted from its proposal.

After reviewing eMind's technical proposal, the agency's evaluators assigned it a rating of "fail" under the most significant evaluation factor, Fulfillment of Statement of Work Minimum Requirements. The evaluators noted that eMind had failed to provide course descriptions for thirteen line items,⁴ leaving them with no basis upon which to determine whether the offered courses met the agency's requirements. The evaluators further noted that while eMind had furnished course descriptions for six of the line items via its e-mail message of November 27, the information had been sent after the closing date for receipt of proposals and accordingly constituted an improper proposal revision.

³ The parties disagree as to the precise content of the contracting officer's telephone call. According to the protester, in addition to notifying it that the course names did not match, the contracting officer informed it that some course descriptions appeared to be missing from the proposal, and that she needed further clarification from eMind. Protest at 2. The contracting officer confirms that she notified eMind of the discrepancy regarding course names, but makes no mention of having also notified the protester of missing course descriptions; further, she states that she requested that eMind take no further action until its proposal had been more fully reviewed and any additional problems identified. Contracting Officer's Statement of Facts at 7.

⁴ While the evaluators noted in their memorandum that eMind had failed to furnish course descriptions for 13 line items, the agency reported to us in the memorandum of law furnished in connection with this protest that eMind had failed to furnish course descriptions for 10 line items. The agency has provided no explanation for the discrepancy.

In addition to the foregoing, the evaluators determined that the majority of the course descriptions furnished by eMind failed to demonstrate compliance with the agency's stated requirements. Memorandum of Technical Evaluations, Nov. 29, 2001, at 2. For example, line item 0018 requested an Oil and Gas Taxation course meeting the following requirements:

An oil and gas taxation course shall provide the student with the details regarding the tax treatment of expenses incurred to acquire mineral rights, geological and geophysical expenditures, intangible drilling costs, cost and percentage depletion deductions, and the "pool of capital theory" which undergirds the tax-free sharing arrangements used in putting deals together. Upon successful completion of this course, the IRS tax law student shall have an enhanced understanding of Acquisition of Mineral Properties, Unit of Property and Pre-Drilling Exploration Costs, Intangible Drilling and Development Costs, Depreciation and Depletion, Subleases and Sales, and Production Payments and Sharing Arrangements.

eMind responded by offering its course entitled Financial Accounting Standards--Specialized Areas, which it described as follows:

[deleted]

eMind Proposal at 7, 27. The evaluators found that the eMind course did not meet the RFP's requirements in that:

{The} Training Course Requirement is for a course specifically pertaining to Oil and Gas Taxation. [The] offeror's course does not cover the required subjects.

Comparison of Training Course Requirements and eMind Course Offerings at 10.

The evaluators also found the proposal of the third offeror technically unacceptable. The agency determined that MicroMash's proposal, which was the only one that it found technically acceptable, represented the best value to the government. On January 29, 2002, the IRS awarded a contract to MicroMash.

The protester argues that the agency should have considered the course descriptions that it furnished via e-mail on November 27. eMind contends that the information constituted an allowable clarification of its proposal since the course descriptions were taken directly from its website and were not developed or modified after the proposal closing date. eMind further argues that the "[o]ther alleged deficiencies [in its proposal] appear to be related to the contracting officer's unwillingness to review all material in eMind's proposal." Protest at 3.

First, regarding the protester's argument that it merely clarified its proposal by furnishing missing course descriptions, the fact that the course descriptions existed prior to the closing date does not mean that the protester's submission of them after the closing date may be viewed as a clarification. Clarifications are limited exchanges between the government and offerors that may occur when award without discussions is contemplated. FAR § 15.306(a)(1). Such communications with offerors are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. Omega World Travel, Inc., B-283218, Oct. 22, 1999, 2002 CPD ¶ 5 at 6. In other words, a clarification may not be used to furnish information required to determine the technical acceptability of a proposal. The course descriptions here, regardless of when written, were required to determine the acceptability of eMind's proposal; accordingly, they cannot properly be termed clarifications. Moreover, to the extent that the protester is suggesting that the availability of the course descriptions on its website was sufficient to place the agency on notice of them, agencies may evaluate proposals only on the basis of the information presented in them. Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 6-7. The record shows that eMind did not incorporate or otherwise reference information from its website in its proposal.

Furthermore, even assuming that the agency could have considered the protester's e-mail message of November 27 furnishing the six course descriptions a permissible clarification of its proposal, there remained other deficiencies in the proposal rendering it technically unacceptable. In this regard, the evaluators found that course descriptions other than those furnished by eMind in its November 27 e-mail were missing and that a majority of the course descriptions that eMind did submit failed to demonstrate compliance with the solicitation's requirements. While eMind asserted generally in its initial protest that these deficiencies appeared to be related to the contracting officer's unwillingness to review all material in its proposal, it has not further elaborated on, or furnished support for, this assertion, *i.e.*, it has not explained where in its proposal it furnished the course descriptions that the agency believes to be missing or that demonstrate compliance with the listed requirements. Because the protester has furnished no factual support for its allegation that the evaluators failed to consider its proposal in its entirety, we will not further consider the allegation.

In commenting on the agency report, eMind raised two new arguments: that the agency should have conducted discussions with it to resolve any questions regarding the content of eMind's proposed courses, and that the requirement for a description of each course's content demonstrating compliance with the RFP's requirements was inappropriate because it essentially required offerors to parrot the agency's requirements.

Both of these arguments are untimely. The protester was notified at its debriefing that a majority of its course descriptions failed to demonstrate compliance with the solicitation's requirements; thus, eMind was on notice of the information providing the basis for its argument that the agency should have conducted discussions regarding the content of its courses as of the date of the debriefing, i.e., January 31. Accordingly, it had 10 days from that date, i.e., until February 10, to raise the argument. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2002). Because the protester instead delayed raising the argument until it filed its comments on the agency report on March 25, this ground of its protest is untimely. In any event, the agency was under no obligation to conduct discussions with the protester since the RFP provided for award without discussions. Carlson Wagonlit Travel, B-287016, Mar. 6, 2001, 2001 CPD ¶ 49 at 8.

eMind's objection to the requirement for course descriptions demonstrating compliance with the specified requirements is also untimely because it is essentially an argument that the RFP contained an impropriety. As such, to be timely, the argument should have raised prior to the closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

The protest is denied.

Anthony H. Gamboa
General Counsel