



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Woodcrest Ace Hardware-MSI Industrial Supply Company

File: B-401417.4; B-401417.5

Date: July 12, 2010

Joseph P. Hornyak, Esq., and Megan Mocho Jeschke, Esq., Holland & Knight, for the protester.

Anne B. Perry, Esq., Jonathan S. Aronie, Esq., Keith R. Szeliga, Esq., and Alexander W. Major, Esq., Sheppard Mullen Richter & Hampton LLP, for W.W. Grainger, Inc., an intervenor.

Adele Ross Vine, Esq., General Services Administration, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably concluded that team member under proposal for western region that previously had been issued blanket purchase agreement (BPA) for eastern region would be responsible for supplying more than 50 percent of hardware items in western region, and that team therefore was not eligible to receive purchase agreement for western region under terms of solicitation
 2. Agency provided protester with meaningful discussions where it informed protester of proposal deficiency that would render it ineligible to receive blanket purchase agreement, and provided opportunity to submit revised proposal.
-

DECISION

Woodcrest Ace Hardware/MSI Industrial Supply Company (ACE/MSI), of Riverside, California (Ace), and Melville, New York (MSI), protests the issuance of a blanket purchase agreement (BPA) to W.W. Grainger, Inc., of Lake Forest, Illinois, under solicitation No. 6FLS-A6-08999-MAS-I, issued by the General Services Administration (GSA) to provide hardware products to three U.S. Marine Corps bases in the western U.S. region. ACE/MSI asserts that GSA improperly determined that it was ineligible for award and failed to hold adequate discussions.

We deny the protest.

GSA intended to issue two BPA's for hardware for the Marine Corps--one covering all web-based orders and brick-and-mortar stores at three bases in the eastern region of the U.S., and a second covering brick-and-mortar stores at three bases in the western region. This protest concerns the BPA for the western region. Among other things, proposals were evaluated based on their breadth of product line (BPL), that is, the number and variety of the products available to stock the stores. Solicitation (Sol.) at 21. The solicitation allowed firms to submit proposals as a team, but advised that an offeror awarded a contract for one region could only be a team member for the other region if it would not supply more than 50 percent of the hardware items for the second region. Sol. at 20, Response to Question 10, 14.

MSC received the BPA for the eastern region. ACE teamed with MSC to submit a proposal for the western region. GSA determined that MSC would provide more than 50 percent of the hardware in the western region based on attachment A to the ACE-MSD teaming agreement (included with its proposal), which showed that more than [DELETED] percent of the items on the two firms' BPLs were attributed to MSC, and a statement in the teaming agreement that "The parties agree to supply the required products according to . . . Addendum A." Contracting Officer's Statement (COS) at 3. Accordingly, the agency rejected ACE/MSD's proposal.

ELIGIBILITY

ACE/MSD asserts that GSA improperly based its eligibility determination on the division of items ACE and MSD indicated they had available on their respective BPLs, rather than on the number of items each would be responsible for stocking in the brick-and-mortar stores, as it claims was provided for in the solicitation.

ACE/MSD's interpretation of the solicitation is based on its reading of language in amendments Nos. 2 and 3, concerning section 6.0 of the statement of work (SOW). Amendment No. 2 provided, in relevant part, that for purposes of the socio-economic program support factor a small business partnering with a large business would not be deemed small if the large business would provide "more than 50 percent of the products under the BPL" Amend. No. 2 at 4. ACE/MSD contrasts this language with amendment No. 3, which provided that a small business teaming with a large business "may be classified as a Large Business for evaluation purposes [if] the large business [will] provide more than 50% of the products in the brick and mortar store" Sol. at 20. According to ACE/MSD, since amendment No. 3 changed the relevant reference from "more than 50 percent of the products under the BPL" to "more than 50 percent of the products in the brick and mortar stores," the agency could not base its eligibility determination on the firms' BPLs. ACE/MSD claims that its proposal otherwise showed that it would satisfy the 50 percent requirement, and that it therefore should not have been found ineligible for award.

The agency responds that it assessed team member eligibility by reviewing the BPLs to determine the percentages of products each team member would provide for stocking the brick-and-mortar stores.

We do not agree with ACE/MSC's interpretation of the solicitation. Rather, we think the solicitation was unclear as to how the agency intended to make the 50 percent determination for eligibility purposes where the BPA recipient for the eastern region was a team member. The solicitation included an evaluation provision concerning socio-economic program support that explained how a small business concern could receive evaluation credit, Sol. at 24, and ACE/MSC's argument is based on amendments affecting that provision. However, since that provision and its amendments did not address the 50 percent calculation for purposes of the team member eligibility determination, the language of the amendments provides, at best, limited support for the protester's position. Further, the protester's argument ignores other language in section 6.0 of the SOW, unaffected by the amendments, that addressed another aspect of eligibility, stating that "The offeror who is awarded the Eastern Region with at least 50% of supplies/services (as defined by Breadth of Product Line [BPL]) will not be eligible to compete for the Western Region BPA." Thus, for purposes of this aspect of eligibility, the determination was to be based on the BPL, not the percentage of products in the brick-and-mortar stores. Since, unlike amendment No. 3, this language specifically addressed the matter of eligibility for award, we think it actually is more probative of the agency's intended approach to determining team member eligibility than the amendment language.

In any case, the solicitation is at least ambiguous as to the intended methodology for determining team member eligibility. That is, since the solicitation does not specify an approach and refers to both the BPL and brick-and-mortar store percentages, there was no basis for the protester to proceed on the assumption that the product mix in the BPLs would not play a part in the eligibility determination. Having ignored this patent ambiguity, the protester may not now assert that its interpretation was the only reasonable one. See Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 5. Since the agency's approach--reliance on the BPL as indicative of the brick-and-mortar store percentages--was not inconsistent with any solicitation terms or provisions, there is no basis for us to object to that approach. Id. Further, based on that approach, the agency reasonably determined that MSC would provide more than 50 percent of the brick-and-mortar store items, and that ACE/MSC therefore was ineligible for award.

DISCUSSIONS

ACE/MSC maintains that the agency failed to provide it with meaningful discussions regarding the eligibility question. In this regard, on July 30, after reviewing ACE/MSC's proposal, GSA sent ACE/MSC an e-mail to schedule a conference call to discuss weaknesses and deficiencies in its proposal. The e-mail indicated that it

contained topics of discussion and, under the heading “ACE/MSC Clarification Points,” noted, among other things, as follows:

. . . Page 11 of the ACE/MSC proposal indicates that ACE Hardware “will perform at least 51% of the work” and MSC will perform the remainder.

However, the two page table at the end of Attachment A to the ACE/MSC proposal appears to reflect the greater percentage of products being provided by MSC [DELETED]. Please clarify your intended approach. You must be able to convince GSA that ACE will “provide at least 50 percent of all products in the brick and mortar storefronts” under the Western Region to be considered further for award of the Western Region BPA.”

Para. 6.0 of the SOW states: The offeror who is awarded the Eastern Region BPA with at least 50% of supplies/services (as defined by Breadth of Product Line), will not be eligible to compete for the Western Region BPA.

NOTE: MSC was awarded the Eastern Region with 100% of supplies/services, therefore award cannot be made to MSC. ACE: Your proposal MUST address the role of MSC as a teaming partner, providing no more than 50% of the products in the Western Region stores. As it is written currently, it seems as though you are both equal, working in parallel, not as teaming partners, with MSC as the lead.
Question 1.

GSA and ACE/MSC discussed this and the other listed items during a conference call on August 5, and ACE/MSC was advised that it could address its proposal shortcomings in writing by August 11. Agency Report at 10; COS at 5. In its written response, ACE/MSC stated that

ACE Hardware shall. . . be responsible for more than 51% of all products within the Brick & Mortar stores. . . . The outlined product breakdown within the ACE/MSC Team Proposal (Attachment A) is intended to represent a broad commodity-by-commodity-divide between the members of the team and not what will be supplied within each Brick and Mortar store. When it comes to stocking each location, ACE, as Team Lead, will ultimately define the SKU separations in order to meet GSA’s requirements.

Response to Question 1. The agency found that there was nothing in this response that clearly demonstrated that ACE would supply more than 50 percent of the products in the brick-and-mortar stores, leading to its determination that ACE/MSC was ineligible for award.

ACE/MSC asserts that the e-mail and subsequent telephone conference did not constitute adequate discussions because the agency did not issue a formal written request for final proposal revisions (FPR), and failed to inform ACE/MSC that it could revise its entire proposal. In this regard, according to ACE/MSC, GSA only invited ACE/MSC to submit written responses to the issues that were raised in the e-mail. ACE/MSC states that, given the opportunity, it would have revised the distribution of products in its BPL between ACE and MSC.

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. Federal Acquisition Regulation (FAR) § 15.306(d)(3); Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. In order for discussions to be meaningful, they must lead an offeror into the areas of its proposal requiring amplification or revision.

Here, the agency determined that there was a fatal deficiency in ACE/MSC's proposal with respect to the percentage of products each of the vendors would supply. GSA brought this issue to ACE/MSC's attention and provided the protester an opportunity to address it in writing. Consequently, discussions occurred and they were legally sufficient. Whether ACE/MSC understood that other changes could be made to its proposal, it clearly was provided an opportunity to respond to the eligibility issue. Since the agency found its response inadequate—we find no basis to question this determination—and this rendered ACE/MSC ineligible for award, any other alleged flaws in the discussions are academic.¹

The protest is denied.

Lynn H. Gibson
Acting General Counsel

¹ ACE/MSC asserts that the ineligibility determination constituted a nonresponsibility determination (applicable to ACE, a small business) that GSA was required to refer to the Small Business Administration. However, the eligibility requirement was clear from amendment No. 2. Thus, this issue is untimely, and will not be considered, since it was not raised prior to the closing time for receipt of proposals established by amendment No. 2. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010).