



Decision

Matter of: eTouch Federal Systems, LLC

File: B-404894.3

Date: August 15, 2011

Jonathan D. Shaffer, Esq., John S. Pachter, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester.

David M. Nadler, Esq., David Y. Yang, Esq., and Andrew E. Smith, Esq., Dickstein Shapiro LLP, for Accenture Federal Services LLC, an intervenor.

Jonathan D. Tepper, Esq., and Lori R. Larson, Esq., Internal Revenue Service, for the agency.

Kenneth Kilgour, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency was not required to provide protester, which represented itself as a small business concern in its proposal, with an opportunity to submit a revised proposal where, post-award, the Small Business Administration found the protester to be other than a small business, and the agency elected to reevaluate proposals.

2. Protest that agency improperly evaluated protester's proposal is denied where the record establishes that the proposal failed to comply with the solicitation requirements.

DECISION

eTouch Federal Systems, LLC (EFS), of Newark, California, protests the award of a contract to Accenture Federal Services, LLC, of Reston, Virginia, under request for proposals (RFP) No. TIRNO-09-R-00051, issued by the Internal Revenue Service (IRS) for the Enterprise Managed Web Portals Program. EFS alleges that the agency improperly evaluated its proposal as unacceptable under the small business participation factor for its failure to submit a small business subcontracting plan.

We deny the protest.

On January 15, 2010, the IRS issued the RFP, contemplating the award of an indefinite-delivery/indefinite-quantity contract with a 5-year base period, plus five 1-year options, and a total contract ceiling of \$320 million, for the redesign,

development, implementation and management of three IRS web portals. According to the RFP, award was to be made to the offeror representing the best value as determined by an integrated assessment and tradeoff between technical and price.

As it relates to the protest, small business participation was one of four non-price, technical evaluation factors. The RFP provided six possible adjectival ratings for that factor, including, as relevant here, “unacceptable.” RFP § M.6.2 If the offeror classified itself as a small business, it was exempt from this requirement, and this factor was evaluated as “not applicable.” *Id.* For the purpose of evaluating the small business participation factor, the RFP instructed large business offerors to include a small business subcontracting plan at Tab A, Volume IV of their proposals. *Id.* at § L.13.1. As established by the RFP, the submitted plan was to include the following: small business subcontracting goals for each type of small business, expressed as a percentage of total proposed subcontracting dollars; goals for small business subcontracting dollars, again broken out by type of small business; and a description of the method used to identify the percentage goals. See RFP at § I.2 (incorporating by reference Federal Acquisition Regulation (FAR) § 52.219-9(c)).

According to the RFP, an offeror’s proposal would be evaluated as “unacceptable” under the small business participation factor if the

Offeror’s subcontracting plan proposed is below Treasury’s subcontracting goals, the record demonstrates that it did not meet its small business subcontracting goals, and in at least one area, did not make a good faith effort to meet those goals for the associated contracts, and the [individual subcontract reports (IRs) and summary subcontract reports (SSRs)] were not submitted accurately and timely, if at all.

RFP § M.6.2. The RFP stated that “[t]he Government will not award a contract to any Offeror with an Unacceptable rating in **any** factor or subfactor.” RFP § M.1.2.

Four offerors, including the protester and the awardee, submitted proposals. EFS identified itself as a small business and did not include a small business subcontracting plan in its proposal. Ultimately, after conducting discussions with the offerors, receiving revised proposals, and completing its evaluation, the agency made award to EFS. Upon learning of the award to EFS, Accenture filed a size protest with the Small Business Administration (SBA) challenging the size status of EFS; Accenture also filed a protest with this Office. The SBA made a formal size status determination that EFS was “other than small.”¹ Based on the SBA’s size

¹ The protester has appealed the size status ruling to the SBA Office of Hearings and Appeals (OHA). At the time of contract award, that appeal was pending, and any decision rendered by OHA now would be inapplicable to this procurement. 48 C.F.R. § 19.302(i).

decision, the IRS notified the GAO that it would take corrective action in response to Accenture's protest, which we then dismissed. See Accenture Fed. Servs. LLC, B-404894, B-404894.2, Apr. 8, 2011.

The IRS's corrective action included canceling the award to EFS and reevaluating EFS's proposal under the small business participation factor, knowing that SBA had found EFS to be other than a small business. Based on this reevaluation, the agency rated EFS unacceptable under the small business participation factor since EFS had not submitted a small business subcontracting plan. The agency conducted a new best-value determination and made contract award to Accenture. This protest followed.

EFS argues that the agency improperly evaluated its proposal as unacceptable under the small business participation factor for failure to submit the required small business subcontracting plan. According to EFS, given "the equities of the present situation"—the fact that "it believed in good faith that it qualified as a small business" when it submitted its proposal and that the requirement for EFS to submit a small business subcontracting plan only arose as a consequence of the SBA's post-award determination that EFS was other than small—the agency should have reopened discussions and allowed EFS to revise its proposal to submit a small business contracting plan. In the alternative, EFS asserts that its proposal, as initially awarded, included the relevant subcontracting information, and that the agency unreasonably evaluated its proposal as unacceptable under the small business participation factor. Both of the protester's contentions are without merit.

It is well-settled that once an agency has received final offers, it is not legally required to reopen discussions to permit a single offeror to demonstrate the merits of its proposal. Federal Elec. Corp., B-232704, Jan. 9, 1989, 89-1 CPD ¶ 18 at 6. The fact that EFS's alleged "good faith" size status representation in its proposal was invalidated by a post-award size status ruling from SBA, and thereby rendered EFS's proposal unacceptable, is of no consequence. EFS represented itself as a small business in its proposal and to the extent this representation ultimately proved to be legally incorrect, as determined by SBA, EFS bore the risk associated with the error, not the agency. As a consequence, the IRS was under no obligation to reopen discussions in order to provide EFS with an opportunity to revise its proposal in accordance with the SBA's size status ruling.²

² The protester cites TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 for the proposition that the agency was required to reopen discussions. Our decision in TYBRIN is inapposite. In TYBRIN, the agency had provided offerors with an erroneous memorandum regarding the solicitation's small business subcontracting limitation requirements, and the offerors had relied on the memorandum in preparing their proposals. Given the agency's introduction of the error, when we sustained the protest on other grounds, we recommended that the agency reopen discussions with offerors to allow them an opportunity to submit

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In addition, EFS's contention that its proposal included the relevant subcontracting information is without merit. The evaluation of technical proposals is generally a matter within the agency's discretion, and our Office will not disturb an agency's judgments regarding the relative merits of competing proposals absent a showing those judgments are unreasonable or inconsistent with the RFP's evaluation criteria. See, e.g., METAG Insaat Ticaret A.S., B-401844 , Dec. 4, 2009, 2010 CPD ¶ 86 at 4.

The record is clear that EFS' proposal did not include a small business subcontracting plan at Tab A, Volume IV of its proposal, as required. The protester's assertion that the relevant information was scattered throughout the proposal is unpersuasive for two reasons.³ First, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See International Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. Having failed to submit the small business subcontracting plan, the protester cannot reasonably require the agency to assemble the plan itself from various disparate portions of the proposal. Second, in any event, the record simply does not support the protester's assertion that the required information could have been found in its proposal, if the agency had undertaken the search. We therefore find nothing unreasonable in the agency's evaluation of the protester's proposal as unacceptable under the small business participation factor and thus ineligible for award.⁴

The protest is denied.

Lynn H. Gibson
General Counsel

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revised proposals based on a correct understanding of the solicitation's requirements. Here, the agency introduced no such error. Nor does the record support EFS's contention that the agency's discussions were otherwise misleading regarding the small business plan submission provisions since all IRS communications with EFS on this matter were consistent with the terms of the solicitation as well as EFS's representation in its proposal that it was a small business.

³ The protest lists 10 separate references across three volumes that it asserts contain the information required by the RFQ. Protest at 12.

⁴ It is well-settled that a final offer that does not comply with the required terms of the solicitation may properly be rejected as technically unacceptable. Federal Elec. Corp., supra.