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

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Decision

Matter of: International Waste Industries

File: B-411338

Date: July 7, 2015

Mehran Etemad, for the protester.

Phillip Reiman, Esq., and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.

Frank Maguire, Esq., Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency engaged in discussions with the awardee, permitting the awardee to remedy unacceptable pricing terms in its quotation, but did not engage in discussions with the protester.

DECISION

International Waste Industries (IWI), of Rockville, Maryland, a small business, protests the Department of the Air Force's award of a contract to Mahto Construction, Inc. (Mahto), of Wasilla, Alaska, under request for quotations (RFQ) No. FA5000-15-T-0010, for a solid waste incinerator for use at Wake Island. IWI contends that the agency unreasonably determined that its quotation was technically unacceptable and also engaged in unequal discussions.

We sustain the protest.

BACKGROUND

The RFQ provided for award of a fixed-price contract for a solid waste incinerator to be delivered to Joint Base Pearl Harbor Hickham, for use on Wake Island by the Missile Defense Agency. RFQ at 1; see Contracting Officer's Statement (COS)

at 2.¹ The acquisition, conducted under Federal Acquisition Regulation (FAR) Part 12, Acquisition of Commercial Items, and FAR Part 13, Simplified Acquisition Procedures, was set aside for small businesses. RFQ at 1. Award was to be made to the vendor submitting the lowest-priced technically acceptable quotation that conformed to the terms of the solicitation. RFQ at 2. The RFQ advised that to be technically acceptable, vendors must meet all of the specifications in the statement of work. Id. In this regard, the statement of work included 11 specific requirements, including, as relevant here, that the incinerator be lined with replaceable ceramic refractory material. RFQ at 9-10.

The RFQ also provided, with regard to discussions, that:

The Government intends to evaluate offers and award without discussion, but reserves the right to conduct discussions. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the contracting officer to be necessary.

Id. at 2.

The agency received 11 timely quotations in response to the RFQ, including quotations from IWI and Mahto. COS at 5. The Air Force "forwarded the quotes in order of lowest price to the customer,^[2] who evaluated each quote for technical acceptability." Id.

As relevant here, Mahto's quotation stated the following with regard to installation costs:

Mobilization to and from Jobsite by EWS technicians (air travel, taxi etc.) and Room and Board on-site. To be billed separately at \$ per diem.

Agency Report (AR), Tab 8, Mahto Quotation, at 16. In addition, with regard to "Payment Terms," Mahto's quotation listed a "Schedule of Payments" as follows:

¹ The agency advises that RFQ No. FA5000-15-T-0010 was preceded by RFQ No. FA5000-14-T-0086, Agency Report, Tab 4, which was issued on August 21, 2014, but which ultimately was cancelled when none of the quotations received met the technical requirements. COS at 2.

² The Air Force advises that the term "customer" refers to the 611th Civil Engineering Squadron (CES), and that the 611th CES "made all decisions on this acquisition." Air Force Email, June 16, 2015.

- [deleted]
- [deleted]
- [deleted]
- [deleted]

Id.

After reviewing Mahto's quotation, the Air Force contacted Mahto regarding the terms of its quotation set forth above. Specifically, the agency and Mahto engaged in the following exchanges:

[Agency Question] No. 1 - This requirement is intended to be awarded as a "Firm Fixed Price Contract." Part II; page 6; item 11 lists Per Diem rates for technicians[.] CLIN [Contract Line Item Number] 0002 of the solicitation document asked for up-front pricing in regards to training and setup/support on Wake Island. Does the price quoted for CLIN 0002 encompass all travel, per diem, lodging costs and all other associated costs with commissioning/installing this Incinerator at Wake Island?

[Mahto Answer] The price quoted in CLIN 0002 encompasses all travel, per diem, lodging costs, and all other costs associated with commissioning/installing of the incinerator at Wake Island. For greater clarity, no additional costs will be invoiced/charged beyond the amount listed in CLIN 0002 for commissioning/installation of the incinerator at Wake Island without discussion and agreement by the USAF [U.S. Air Force].

[Agency Question] No. 2 - Page 8 of the Combined Synopsis Solicitation has a fill in section for "Net Terms." Part II; page 6 of your pricing schedule lists your payment terms as a "Schedule of Payments" or progress payments. Acquisitions procured using FAR Parts 12 and 13 for the purchase of commercial items are typically paid using Net 30 Payment Terms, i.e., you would be paid within 30 days of the customer/end user accepting your invoice. The question here is do you accept Net 30 Payment Terms?

[Mahto Answer] Mahto Construction accepts a Net 30 payment term. Having stated this, we would prefer a progress payment schedule, which could be discussed/agreed-to at the time of po [purchase order] but if this is a non-starter for the contract, Net 30 terms are completely agreeable.

AR, Tab 10, Email Exchange Between Mahto and Agency, at 1 (emphasis omitted).

After conducting this exchange, the agency determined that Mahto's quotation was technically acceptable. The agency, however, evaluated IWI's quotation as technically unacceptable because, among other things, the agency found that IWI's quotation did not specifically state whether its ceramic refractory material was replaceable. AR, Tab 11, Technical Evaluation, at 2.

After evaluating quotations, the Air Force concluded that Mahto, the highest-priced vendor, submitted the only technically acceptable quotation. COS at 5. Award was made to Mahto on February 12, 2015. Id. After receiving a debriefing, IWI filed an agency-level protest on February 23, which was denied on March 9. The agency informed IWI of the denial of its agency-level protest on March 27.³ This protest followed.

DISCUSSION

IWI contends that the agency improperly held discussions with other vendors, but not with IWI. IWI argues that, had the agency conducted discussions with all of the vendors, IWI could have clarified the issues in its proposal that led to the agency's conclusion that its quotation was technically unacceptable. Protest at 2; Comments at 1, 3. In any case, asserts the protester, the agency unreasonably determined that its quotation was technically unacceptable. See Protest at 1; Comments at 2.⁴

As noted above, this procurement was conducted under the simplified procedures for evaluation of commercial items. Simplified acquisition procedures are designed, among other things, to reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR § 13.002; 41 U.S.C. § 3305. When using these procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate proposals in accordance with the terms of the solicitation. ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4.

³ The agency report does not contain any explanation for the delay from March 9, when the agency's one-page decision denying IWI's protest was finalized, to March 27, when it was furnished to the protester. The agency has informed our Office that after it reached a decision on IWI's agency-level protest, it lifted the stay of performance and has since taken delivery of the incinerator supplied by Mahto. Agency Email, June 16, 2015.

⁴ Because, as set forth below, we are sustaining the protest on the basis that the agency conducted unequal discussions, we need not resolve IWI's challenge to the agency's technical evaluation of its quotation.

Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. ERIE Strayer Co., *supra*; Russell Enters. of N. Carolina, Inc., B-292320, July 17, 2003, 2003 CPD ¶ 134 at 3. Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures. ERIE Strayer Co., *supra*, at 4.

In this regard, FAR § 15.306 describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated procurements. Clarifications are “limited exchanges” between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); American Material Handling, Inc., B-410899, March 12, 2015, 2015 CPD ¶ 106 at 8; ERIE Strayer Co., *supra*. Clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. American Material Handling, Inc., *supra*; *see eMind*, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Alliant Enter. JV, LLC, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5; *see* FAR § 15.306(d). As a general matter, when an agency conducts discussions with one offeror, it must afford all offerors remaining in the competition an opportunity to engage in meaningful discussions. *See* ERIE Strayer Co., *supra*; Strategic Analysis, Inc., B-292392, B-292392.2, Sept. 3, 2003, 2003 CPD ¶ 156 at 4. Further, it is the actions of the parties that determines whether discussions have been held and not merely the characterization of the communications by the agency. Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

The Air Force asserts that its communications with the Mahto were clarifications, not discussions. AR at 5. We disagree. Mahto was permitted to revise portions of its quotation that did not comply with the solicitation’s terms. In this regard, the RFQ did not include any provision for progress payments, and instead incorporated FAR § 52.212-4, which provides that: “Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.” FAR § 52.212-4(i); RFQ at 3. Mahto’s quotation, however, instead quoted a schedule of payments under which payments would be made in four installments at various contract milestones, [deleted]. AR, Tab 8, Mahto Quotation, at 16. When the agency communicated with Mahto about this discrepancy, Mahto altered its quotation, dropping the requirement for progress payments, and instead agreed to accept the agency’s proposed “Net 30” payment terms. AR, Tab 10, Email Exchange Between Mahto and Agency, at 1.

In addition, although the RFQ required vendors to propose a fixed price for 16 days of training, setup, and support on Wake Island, CLIN 0002, RFQ at 8, Mahto's quotation stated that the costs associated with its technicians' work on Wake Island would be "billed separately" on a per diem basis. AR, Tab 8, Mahto Quotation, at 16. Where, as here, a solicitation requests proposals on a fixed-price basis, a price offer that is conditional and not firm cannot be considered for award. See SunEdison, LLC, B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168 at 5. Thus, Mahto's statement that the costs of transporting technicians to and from the jobsite would be billed separately failed to comply with the RFQ's requirement that vendors quote fixed prices for that work.

The agency's communications with the awardee invited a response from Mahto that was necessary to determine the acceptability of Mahto's quotation and, in fact, resulted in Mahto being permitted to supplement or alter its quotation. This is quintessentially the nature of discussions, not clarifications. Kardex Remstar, LLC, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 4. Accordingly, we conclude that the Air Force, having conducted discussions with Mahto, was required to also conduct discussions with all other vendors in the competition, including IWI. We sustain the protest on that basis.

RECOMMENDATION

The Air Force has advised our Office that the incinerator has already been delivered in Hawaii. Agency Email, June 16, 2015. Further, the only CLIN not yet performed, for "training/setup support on Wake Island," represents less than 4% of Mahto's total quoted price. See AR, Tab 8, Mahto Quotation at 13. In these circumstances, where termination of Mahto's contract would not be feasible, we are unable to recommend substantive relief. Accordingly, we recommend that the agency reimburse the protester its quotation preparation costs. 4 C.F.R. § 21.8(d)(2). We also recommend that the agency reimburse the protester the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel