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**Comptroller General
of the United States**

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

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Decision

Matter of: Piquette & Howard Electric Service, Inc.

File: B-408435.3

Date: December 16, 2013

John M. Manfredonia, Esq., and James Petersen, Esq., Manfredonia Law Offices, LLC, for the protester.

Michael P. Sams, Esq., and Adam C. Ponte, Esq., Kenney & Sams, P.C., for Monument Construction, LLC, the intervenor.

Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated the awardee's proposal and improperly conducted discussions with the awardee is sustained where the record reflects that the agency's reevaluation depended on a post-evaluation exchange with the firm that constituted discussions, not clarifications. The awardee was permitted to materially revise its technical proposal, to the protester's prejudice, because the agency improperly failed to request final proposal revisions from all competitive range offerors.

DECISION

Piquette & Howard Electric Service, Inc. (P&H), of Plaistow, New Hampshire, a small business, protests the award of a contract to Monument Construction, LLC, of Nashua, New Hampshire, by the Department of Veterans Affairs (VA) under request for proposals (RFP) No. VA241-13-R-0016 for replacement of fire alarm systems at the Bedford VA Medical Center in Bedford, Massachusetts. P&H argues that the VA miscalculated Monument's proposal, conducted unequal discussions, and failed to request final proposal revisions.

We sustain the protest.

BACKGROUND

The RFP, issued on February 1, 2013, as a set-aside for service-disabled veteran-owned small businesses, sought proposals for a fixed-price construction contract. The RFP's specifications and drawings provided for the contractor to replace portions of the fire alarm systems in certain buildings with a specified system. Among other things, the contractor was required to plan its work "so as to interfere as little as possible with the normal functioning of [the] Medical Center as a whole, including operations of . . . fire protection systems and any existing equipment . . ." RFP Specifications at 8 (§ 1.6.F). With respect to the existing fire alarm system in each building, the specifications also provided that the "[c]ontractor shall maintain in operating condition existing fire protection and alarm equipment." Id. at 10 (§ 1.6.J.2).

Award was to be made to the firm submitting the lowest-priced, technically acceptable proposal. Technical acceptability was to be assessed under two factors: technical and past performance. The technical factor consisted of five subfactors: ability to adhere to construction schedule, understanding of project scope and intent, construction safety plan, record of safe performance, and infection control procedures. In order to be rated acceptable under the technical factor, the proposal had to be rated acceptable under all five technical subfactors. RFP at 19.

On March 25, the VA received proposals from P&H, Monument, Ironclad Services, Inc., and five other offerors. The agency found that Monument's proposal was the lowest-priced, with an evaluated price of \$2.1 million, but was technically unacceptable. Agency Report (AR), Tab H-1, Consensus Evaluation Worksheet, at 1. The consensus evaluation cited such evaluator comments as "[v]ery general submission," "nothing specific to project," and "[a]pproach to project is not described." Id. The record shows that these comments concern deficiencies identified under the understanding of project scope and intent subfactor, as well as the construction schedule subfactor. AR, Tab E, Monument Evaluation, at 7, 14, and 21. The agency found that P&H's proposal, the second lowest-priced with an evaluated price of \$2.2 million, was also technically unacceptable because it proposed to perform work at buildings not specified in the RFP and omitted buildings listed in the RFP, and because the proposal did not show experience with the alarm system identified on the VA's construction plans. AR, Tab H-1, Consensus Evaluation Worksheet, at 1.

Initially, award was made to Ironclad, as the lowest-priced, technically acceptable offeror with an evaluated price of \$2.7 million. AR, Tab M, Source Selection Decision, at 1. After a debriefing, P&H filed a protest in this Office in which it argued that the VA misevaluated its lower-priced proposal. The VA subsequently announced that it would take corrective action by reevaluating the proposals and making a new source selection decision. Our Office dismissed the protest as academic.

On June 18, the VA reevaluated the lower-priced proposals, including those of Monument and P&H. The evaluators were instructed to rate as technically acceptable proposals that clearly met the minimum requirements of the solicitation. Second Contracting Officer's Statement at 1.

Reevaluation of P&H

During the reevaluation of P&H's proposal, the agency found the proposal acceptable under all subfactors except one. That subfactor, "record of safe performance," directed offerors to provide relevant information regarding any safety accidents or violations and corrective actions taken, and to demonstrate that they had "no more than three serious, or one repeat, or one willful OSHA [Occupational Safety and Health Administration] . . . violation(s) in the past three years." RFP at 20-21 (§ 2.14.2.4). The RFP directed offerors to respond by filling out a Pre-Award Contractor Evaluation Form for Safety. Id. at 21. The evaluators initially found that P&H's proposal was unacceptable because P&H omitted the required explanation of its OSHA violation. AR, Tab J, P&H Consensus Reevaluation, at 10.

On June 20, the contracting officer sent an e-mail to P&H, informing it that "[t]he board would like clarification . . . on the OSH[A] violation referenced in your proposal." AR, Tab L, E-mail from Contracting Officer to P&H Vice President, June 20, 2013, at 1. The e-mail went on to state that there was "no explanation of the violation," and then quoted RFP § 2.14.2.4.1 in full. Id. Again, this paragraph required offerors to provide information regarding safety accidents or violations "and corrective action taken," and to "demonstrate that the company has no more than three serious, or one repeat, or one willful" OSHA violation in the past three years. RFP at 20-21. On June 21, P&H provided the details of the violation and the specific corrective actions taken. AR, Tab K, Letter from P&H Vice President to Contracting Officer, at 1. The evaluators reconvened to review P&H's submission and revised its initial view, concluding that the firm's proposal, and its safety record as clarified, was acceptable. AR, Tab G, P&H Reevaluation Rating, June 28, 2013, at 1.

Reevaluation of Monument

In contrast, the consensus reevaluation for Monument concluded that the firm's proposal was acceptable under each technical subfactor and overall. AR, Tab J, Monument Reevaluation Forms, at 37. However, the individual evaluator forms underlying the consensus document reached different conclusions. For example, one evaluator appears to have rated Monument's proposal "not acceptable" under the construction schedule subfactor; although the word "not" was crossed out, the evaluator continued to assess a deficiency because Monument "[s]ubmitted a

sample schedule for a different project.” Id. at 19.¹ The chair of the source selection evaluation board (SSEB) explained that even though Monument’s proposal “seem[ed] to lack the typical details that one would see in a proposal such as planning methodology for shutdowns, and specific plans and methods for implementation,” and the proposal was not “ideal,” these observations were “not citable as a deficiency.” AR, Tab G, Monument Reevaluation Rating Form, June 28, 2013, at 1.

On July 30, the contracting officer met with the SSEB chair, legal counsel, and the VA construction manager. The contracting officer explains that the SSEB chair identified an “error” in Monument’s proposal because the proposal indicated that the firm would disconnect the existing alarm system and then install and test the new system, which, in the contracting officer’s view, was “so obviously wrong” it could not have been what Monument intended. Second Contracting Officer’s Statement at 2. As a result of this meeting, and the identified “error,” the VA decided to seek what it described as a clarification from Monument. AR, Tab M, Source Selection Decision Document (undated), at 2.

On August 2, the VA sent an e-mail to Monument that first quoted from RFP § 2.14.2.2.1 (“Specific details should also be addressed in the narrative to demonstrate sequence of work to be performed in a realistic fashion . . .”) and then explained that the VA was seeking clarification of Monument’s sequence of work. AR, Tab L, E-mail from Contracting Officer to Monument Managing Member, at 1. The e-mail posed two questions, as follows:

1. Is this the sequence you will use for this project?
2. If not, what differences do you anticipate for this project?

Id.

On August 6, Monument responded with a “2-page amendment to the sequence of work for the referenced project.” AR, Tab L, Transmittal E-mail from Monument Marketing Director to Contracting Officer, Aug. 6, 2013, at 1. The response stated “below is a narrative amending Monument’s original itemized sequence of work,” and that “upon further review, there are several changes . . . to said sequence in order to make it more comprehensive and give it a greater likelihood for success.”

¹ Another evaluator rated Monument “non accept” (i.e., unacceptable) under the construction schedule, crossed out the word “non,” and assessed a deficiency because the schedule was “based on another project different scope”--although the word “cleared” is also written to the side of that deficiency. Id. at 33. A third evaluator rated Monument unacceptable under the safety plan factor, and unacceptable overall. Id. at 8.

AR, Tab K, Letter from Monument Marketing Director to Contracting Officer, Aug. 6, 2013, at 1. In the course of that narrative, Monument explained that its “original technical proposal itemized a sequence that seemed to [allude] to a single phase/single building, which of course is not the case, but also leaves a lot to question.” Id.

Monument went on to state that it planned to use a “multiple-building, zone-by-zone phases” approach, which it described as being

largely unchanged with the exception of rectifying one unfortunate sequential error: in our original technical proposal, we wrote that [DELETED] would precede [DELETED]. This was an unfortunate error on our part, and we cannot emphasize enough that it was strictly a clerical one in the authoring of the proposal itself--not simply poor technical sequencing. In fact the [DELETED] would precede the process of [DELETED] so that downtime in migration is minimized. Beyond this . . . [DELETED] measures [would also be implemented by Monument].

Id. at 1-2. The letter concluded by describing the rest of Monument’s plan.

The source selection decision noted that Monument’s clarification had addressed the agency’s “key concern in sequencing” appropriately, and had thus “allay[ed] any concerns regarding technical abilities and approach.” AR, Tab M, Source Selection Decision Document (undated), at 3. The decision expressly cites Monument’s response as significant to the determination that its proposal was acceptable:

Based on the clarification received from Monument, and based on a better understanding by the board of what is required for a proposal to be minimally acceptable, the board determined Monument Construction to be the lowest-priced technically acceptable proposal and the [contracting officer, who was also the source selection authority] agreed.

Id. at 2.

The contracting officer then selected Monument’s proposal for award as the lowest-priced technically acceptable offer, with an evaluated price of \$2.1 million. Id. at 2-3. This protest followed.

ANALYSIS

P&H argues that the VA unreasonably evaluated Monument's proposal as technically acceptable under the technical approach subfactor prior to considering the firm's response to the agency's "clarification" request.² P&H contends that the "clarification" constituted improper discussions with only one offeror, Monument, whereas the "clarification" sent to P&H did not constitute discussions. The protester also asserts that, even if P&H did receive discussions, they were not meaningful because the firm was not permitted to submit a revised proposal.

As set forth in detail below, our review of the record leads us to conclude that the agency's evaluation of Monument's proposal as technically acceptable ultimately relied on the post-evaluation exchange with the firm. As a result, we find that the agency conducted discussions, and not clarifications, with Monument, but improperly failed to request revised final proposals from any offeror. Since P&H contends that it would have lowered its price if it had been afforded an opportunity to submit a final revised proposal, we conclude that the protester was prejudiced by the agency's improper actions and sustain the protest.

Technical Evaluation

P&H argues that it was unreasonable for the agency to conclude during its reevaluation that Monument's proposal, as submitted, was technically acceptable under the technical approach subfactor. Protest at 11. P&H maintains that when the evaluators initially reviewed Monument's proposal, they identified deficiencies due to a failure to address the specific requirements of the RFP, and that these deficiencies were not corrected until the agency's post-evaluation exchange with Monument.

A contracting agency has the primary responsibility for determining its legitimate needs and for determining whether an offered item will satisfy those needs, since it is the agency that is most familiar with the conditions under which the supplies or services will be used, and that must bear the burden of difficulties incurred by reason of a defective evaluation. Park Sys. Maint., Inc., B-252453, B-252453.2, June 16, 1993, 93-1 CPD ¶ 466 at 3. In reviewing protests challenging an agency's evaluation, our Office will not reevaluate proposals; rather, our review of an agency's

² Although P&H also challenges other aspects of the evaluation of Monument's proposal, it does not challenge the technical acceptability of Monument's proposal as amended as a result of "clarifications." In light of our conclusion that the VA only resolved its concerns by holding discussions with Monument, while failing to request final proposal revisions, we need not consider any remaining challenges to the evaluation of Monument's proposal.

evaluation is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation. Id.

The technical approach subfactor required offerors to provide five categories of information. Among other things, offerors were to provide “[s]pecific details . . . in the narrative to demonstrate sequence of work to be performed in a realistic fashion. . .” RFP at 20.

The section of Monument’s proposal headed “Sequence of Work” consists not of any narrative, but a list of 25 bulleted items. Reading down the list of bulleted items--and following the tenth bullet (“[p]ull permit”)--the list included “[**DELETED**],” followed by “[**DELETED**],” and then several more steps for [**DELETED**] new system. AR, Tab D, Monument Proposal, at 30-31. The contracting officer explains that, at a meeting on July 30, the SSEB chair noted that Monument’s proposal indicated that it would disconnect the existing alarm system before connecting the new system. Second Contracting Officer’s Statement at 2. She explained that the SSEB concluded that this was “so obviously wrong that they were confident that this was not what Monument intended.” Id. After consultation with counsel, she decided to request clarification from Monument, notwithstanding its rating of technically acceptable, “to give Monument the opportunity to acknowledge the error,” and possibly avoid another protest by P&H. Id.

The record shows that, notwithstanding that the evaluators rated Monument’s proposal as technically acceptable in June, at the July 30 meeting, the SSEB chair identified an aspect of Monument’s proposal that brought its technically acceptable rating into question. The fact that this aspect of the proposal prompted the agency to send the firm a “clarification” item quoting the RFP’s requirement to demonstrate a sequence of work performed in a “realistic fashion,” and asking the firm to either confirm the sequence in its proposal or explain any differences in its sequence, is evidence of the VA’s concern that Monument’s sequence was not realistic.³ The record also shows that the source selection decision relied on Monument’s resulting proposal revision in finding the firm’s proposal technically acceptable. As quoted above, the decision expressly states that, “[b]ased on the clarification received from Monument, and . . . a better understanding by the board of what is required for a proposal to be minimally acceptable, the board determined Monument . . . to be the lowest-priced technically acceptable proposal . . .” AR, Tab M, Source Selection Decision Document, at 2. As a result, the record shows that the agency’s evaluation

³ Again, contractors were required to execute work so as to interfere as little as possible with normal functioning of Medical Center as a whole, including fire protection systems. RFP Specifications at 8 (§ 1.6.F). When a building was turned over to the contractor, the firm was expressly required to “maintain in operating condition” the existing fire protection and alarm equipment. Id. at 10 (§ 1.6.J.2).

of Monument's proposal as technically acceptable ultimately relied on the post-evaluation exchange with the firm.

Discussions

P&H argues that the post-evaluation exchange between the VA and Monument constituted discussions, and not clarifications. We agree.

Section 15.306 of the Federal Acquisition Regulation (FAR) describes a range of exchanges that may take place when an agency decides to conduct exchanges with offerors during negotiated procurements. Clarifications are limited exchanges between an agency and an offeror that may occur where, as here, contract award without discussions is contemplated. FAR § 15.306(a). An agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. Id. However, clarifications may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or revise the proposal. Superior Gunitite, B-402392.2, Mar. 29, 2010, 2010 CPD ¶ 83 at 4. 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. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; see FAR § 15.306(d). When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range.⁴ Gulf Copper Ship Repair, Inc., supra, at 6. Finally, at the conclusion of discussions, the agency must request final proposal revisions. FAR § 15.307(b); Raytheon Technical Servs. Co., B-404655.4 et al., Oct. 11, 2011, 2011 CPD ¶ 236 at 7.

Ultimately, it is the actions of the parties that determine whether discussions have been held, not the characterization of those communications by the agency. Id. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. Id. Communications that do not permit an offeror to revise or modify its proposal, but request that the offeror confirm what the offeror has already committed to do in its

⁴ We recognize that, because the VA denies that it conducted discussions, it also does not appear to have formally established a competitive range, although the record suggests that the reevaluation included only the four lowest-priced offerors. In any event, the record confirms that P&H's proposal was rated technically acceptable when the VA conducted discussions with Monument.

proposal, are clarifications and not discussions. Environmental Quality Mgmt., Inc., B-402247.2, Mar. 9, 2010, 2010 CPD ¶ 75 at 7.

We find that the exchange with Monument constituted discussions. The proposal amendment Monument provided in response to the exchange constituted a material revision to its proposal. The amendment replaced the sequence of work in Monument's proposal with a different sequence, and provided the missing narrative that was required by the solicitation. Monument's response did not, in fact, confirm what it had already committed to do in its proposal, but committed to doing something else.⁵ The materiality of the revision is underscored by the fact that the source selection decision relies on it in finding the proposal technically acceptable. Again, as quoted above, the decision expressly states that, "[b]ased on the clarification received from Monument, and . . . a better understanding by the board of what is required for a proposal to be minimally acceptable, the board determined Monument . . . to be the lowest priced technically acceptable proposal" AR, Tab M, Source Selection Decision Document, at 2.

Prejudice

All of the parties dispute whether P&H was prejudiced even if the exchange with Monument constituted discussions. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 14; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Nevertheless, we resolve doubts regarding competitive prejudice in favor of the protester; thus, where the protester has shown a reasonable possibility that it was prejudiced by the agency's action, we will sustain its protest. Coburn Contracting, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230 at 5.

The VA argues that, even if it held discussions with Monument, "it is unclear how this was unfair to P&H" because P&H was allowed to supply information about its OSHA violation and, in any case, the VA properly limited any proposal revisions to that issue.⁶ VA Response to GAO Questions, Nov. 26, 2013, at 2. Monument argues

⁵ Indeed, had Monument's response confirmed what it had committed to do in its proposal--using a sequence of work that was "obviously wrong"--it is hard to imagine the VA finding the firm's proposal technically acceptable.

⁶ The VA and Monument also argue that it would have been unfair to the original awardee to permit offerors to revise their prices, which could have resulted in an auction. We disagree. The FAR does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of requesting revised price proposals even where, as here, the original awardee's bottom-line price has
(continued...)

that the communications with P&H were also impermissible discussions, and therefore no corrective action is appropriate. Monument Response to GAO Questions, Nov. 26, 2013, at 3-4 (citing Standard Commc'ns, Inc., B-406021, Jan. 24, 2012, 2012 CPD ¶ 51 at 3). Finally, P&H argues that the VA correctly characterized its communication with P&H as a clarification because it addressed the firm's safety record for a pass/fail assessment. P&H Response to GAO Questions, Nov. 26, 2013, at 6 (citing Kilgore Flares Co., B-406139, Feb. 2, 2012, 2012 CPD ¶ 63 at 3). P&H further argues that, even if its post-evaluation exchange constituted discussions, those discussions were not meaningful because it was not permitted to submit a revised proposal. Id. at 6-7 (citing FAR § 15.307(b)).

We view all of these arguments as raising the same question: whether discussions with Monument were prejudicial to P&H in light of the fact that the VA also allowed P&H to augment its proposal with respect to its OSHA violation.

Generally, discussions should be meaningful, equitable, and not misleading. Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 49. When an agency conducts discussions with one offeror, it must conduct discussions with all competitive range offerors, and provide all those offerors an opportunity to submit revised proposals. University of Dayton Research Inst., B-296946.6, June 15, 2006, 2006 CPD ¶ 102 at 8; FAR § 15.307(b) (at the conclusion of discussions, each offeror still in the competitive range shall be provided an opportunity to submit a final proposal revision). In this regard, in response to an agency request that discussions be opened or reopened, offerors generally may revise any aspect of their proposals they see fit--including portions of their proposals which were not the subject of discussions. American K-9 Detection Servs, Inc., B-400464.6, May 5, 2009, 2009 CPD ¶ 107 at 7.

In our view, P&H's final argument on prejudice is the one that resolves the dispute. Even if the exchange between the VA and P&H is properly characterized as "discussions," when the agency conducted discussions with Monument it was required to permit all competitive range offerors--including P&H--to submit final revised proposals. Here, P&H contends that, if it had been allowed to submit a revised proposal, it would have lowered its price because the firm intended to perform [**DELETED**], and thus had the ability and intention to lower its price below Monument's price. Declaration of P&H President, Nov. 5, 2013, at 1. If P&H had so lowered its price, the record shows that the firm would have had a substantial chance of receiving the award. See, e.g., Good Food Serv.--Recon., B-252490.2, Nov. 30, 1993, 93-2 CPD ¶ 289 at 2 (reconsideration denied in sustained protest

(...continued)

been disclosed. See Jackson Contractor Group, Inc., B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3. In addition, the previous FAR prohibition against auctions was deleted in 1997. 62 Fed. Reg. 51224 (Sept. 30, 1997) (FAR Part 15 Rewrite).

where agency failed to allow protester to submit a revised price through meaningful discussions). As a result, we conclude that P&H was prejudiced by the agency's failure to request final proposal revisions.

RECOMMENDATION

We recommend that the VA, in accordance with the FAR, establish a competitive range, reopen discussions with all offerors in that range, request final proposal revisions, perform a proper proposal evaluation, and make a new source selection decision. If the VA selects another offeror for award, it should terminate its contract with Monument. We also recommend that P&H be reimbursed the costs of filing and pursuing its protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2013). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel