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## Decision

**Matter of:** Hamilton Pacific Chamberlain, LLC

**File:** B-411294; B-411301

**Date:** July 6, 2015

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Sean Milani-Nia, Esq., and Benjamin Kussman, Esq., Fox Rothschild LLP, for the protester.

Tyler W. Brown, Esq., Department of Veterans Affairs, for the agency.

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### DIGEST

Contracting officer's request for the submission of a surety letter does not require the agency to open discussions with all offerors where the agency intended to make award without discussions, and where the surety letter was not considered in the evaluation of the offeror's proposal.

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### DECISION

Hamilton Pacific Chamberlain, LLC (HPC), a service-disabled, veteran-owned small business (SDVOSB), of Waldorf, Maryland, protests the Department of Veterans Affairs (VA) decision to reject its proposals in response to request for proposals (RFP) Nos. VA246-14-R-0316 and VA246-14-R-0317 for construction work at various VA facilities in North Carolina.<sup>1</sup> HPC argues that the VA's rejection was improper because the agency failed to consider the protester's surety letters which were submitted at the agency's request.

We deny the protest.

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<sup>1</sup> RFP-0316 was for construction work at locations in Asheville and Salisbury, North Carolina. RFP-0316 at 1. RFP-0317 was for construction work at locations in Hampton and Richmond, North Carolina. RFP-0317 at 1.

## BACKGROUND

The VA issued the solicitations as SDVOSB set-asides on May 16, and May 20, 2014. RFP-0316 at 1; RFP-0317 at 1. The solicitations contemplated the award of up to six indefinite-delivery, indefinite-quantity (IDIQ) contracts, with a 1-year base period and four 1-year options. Id. The RFPs provided that awards would be made on a best-value basis considering the following three evaluation factors: past performance, technical, and price. Id. at 63. Non-price factors, when combined were significantly more important than price. Id.

Of relevance here, each RFP required offerors to submit a letter from their surety company addressing whether the offeror had the ability to obtain bonding, and to also provide limits of that bonding capacity. Id. at 67. The solicitations expressly stated that “[f]ailure to submit [a] surety letter or failure to have the necessary bonding capacity will disqualify an offeror for award consideration.” Id. Additionally, the RFPs expressly stated that the VA intended to evaluate proposals and award contracts without discussions with offerors. Id. at 64.

The VA received multiple proposals before the closing date established by each RFP.<sup>2</sup> Contracting Officer (CO) Statement-0316 at 1; CO Statement-0317 at 1. After receiving and reviewing both of HPC’s offers, the CO determined that the protester had not included the required surety letters, which HPC referenced in its proposals. Id.; Agency Report (AR) -0316, Tab 4, HPC Proposal, at 25; AR-0317, Tab 4, HPC Proposal, at 25. Believing that the absence of the surety letters was the result of a clerical error, the CO sent HPC an e-mail requesting the submission of the surety letters. CO Statement-0316 at 1; CO Statement-0317 at 1. The CO’s emails provided as follows:

This is a request for submission of Section 1D (Surety Letter) of the Capability and Experience portion contained in your technical proposal (Volume III) for [the] solicitation. . . . Section 1D currently references an attachment, but no attachment is provided. This mistake appears to be a clerical error and shall be submitted in accordance with FAR [§] 15.306(a)(2). Please comply with this request.<sup>3</sup>

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<sup>2</sup> The agency received 24 proposals in response to RFP-0316, which closed on September 16, 2014. CO Statement-0316 at 1. The agency received 19 proposals in response to RFP-0317, which closed on September 18. CO Statement-0317 at 1.

<sup>3</sup> The record shows that the CO’s e-mails, one for each solicitation, were nearly identical. Protest-0316, Tab 1, e-mail (Oct. 4, 2014), at 5; Protest-0317, Tab 1, e-mail (Sept. 24, 2014), at 5.

Protest-0316, Tab 1, e-mail (Oct. 4, 2014), at 5; Protest-0317, Tab 1, e-mail (Sept. 24, 2014), at 5. In response to the CO's request, HPC provided the surety letters. CO Statement-0316 at 1; CO Statement-0317 at 1.

After each RFP's closing date, but before the source selection board started its deliberations for either procurement, the agency reviewed all offers that were received due to concerns related to the surety letters submitted by several contractors. Id. During this review, the VA found that the CO erred when he concluded that the absence of HPC's surety letters was a clerical mistake that could be corrected without opening discussions. The VA reached this conclusion because the express terms of the RFPs required rejection of an offer if the surety letter was not included in the proposal. Id. at 1-2; see RFP-0316 at 67; RFP-0317 at 67. Thus, the agency decided that even though it had requested, and HPC had provided, the surety letters, the agency could not properly consider HPC's surety letter submissions.

Subsequently, the VA notified HPC on February 6, 2015, that its offers were being eliminated from consideration because its proposals did not comply with the RFP's surety letter requirements. CO Statement-0316 at 2; CO Statement-0317 at 2. In response, HPC filed these protests.<sup>4</sup>

## DISCUSSION

The protester challenges the VA's decision to reject its proposals based upon its failure to provide the surety letters. HPC asserts that the agency's requests for the surety letters were nothing more than clarifications, and it was unreasonable for the agency not to accept the letters. In the alternative, the protester argues that if the CO's requests to HPC constituted discussions, then the agency cannot disregard the information HPC submitted in response to the agency's requests.

The VA maintains that its decision to reject HPC's proposals was appropriate because consideration of HPC's surety letters would constitute discussions, not clarifications, and because the solicitations advised that failure to include a surety letter would disqualify an offeror. The VA explains that because it intended to make award without discussions, and because the CO erroneously concluded that requesting the surety letter would constitute only clarifications, its decision not to

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<sup>4</sup> HPC initially filed an agency-level protest on February 13, 2015, challenging the agency's decision to reject its proposal. CO Statement-0316 at 2; CO Statement-0317 at 2. The VA denied HPC's agency level protests on March 19. Id. These protests were filed on March 27, 2015.

consider the surety letters was an appropriate response taken to avoid opening discussions with all offerors.<sup>5</sup>

Clarifications are “limited exchanges” that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical mistakes. See FAR § 15.306(a)(2). Communications that do not permit an offeror to revise or modify its proposal, but rather request that the offeror confirm what it has already committed to do, are clarifications and not discussions. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11. 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. Id.

Here, the express terms of both RFPs indicated that an offeror’s failure to submit a surety letter would be a mandatory basis for disqualification. RFP-0316 at 67; RFP-0317 at 67. This term, in each solicitation, made submission of a surety letter a material requirement for each RFP. See The Walsh-Vaughn JV, B-407998.2, B-407998.4, May 21, 2013, 2013 CPD ¶ 134 at 7 (failure to provide an electronic version of a construction schedule, even though paper copy was submitted, is a deficiency when the electronic version is required by the RFP). Consequently, the CO’s e-mails requesting the surety letters constituted discussions since HPC’s proposals, which did not initially conform to either solicitation’s requirements, could only be made acceptable after the protester submitted the surety letters. That said, we do not agree that the agency could not remedy its misstep by belatedly recognizing that its request of the letters would constitute discussions and by returning the situation to the status quo ante by electing not to consider the submission provided by HPC.

In certain very limited circumstances, where a communication is the result of a mistake on the part of a contracting officer, an agency is not required to consider the information it requested. The Saxon Corp., B-232694.2 et al., June 13, 1989, 89-1 CPD ¶ 553 at 2-3 (even if agency asked for and refused to consider information requested, discussions need not be held where the intent was to make award on the basis of initial proposals, and where agency action did not impinge on the integrity of the competitive system). When an agency intends to make an award on initial proposals, the integrity of the competitive system would not be enhanced by requiring that revisions be solicited and considered from all offerors. See Rainbow Technology, Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66 at 4-5; The Saxon Corp., supra.

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<sup>5</sup> The agency argues that the CO’s e-mails expressly relied on the clarifications authority of FAR § 15.306(a) and provide further support that the agency had no intention of opening discussions under either RFP.

Here, the terms of the solicitations notified all offerors that the agency intended to make award on the basis of initial proposals. The record establishes that the CO's communications with the protester were not intended to be discussions. Moreover, before the VA's source selection boards started deliberations, the agency recognized that by requesting the surety letters the agency would initiate discussions, and recognized the unintended impact on these procurements. The record reflects that in order to correct this error and to ensure that the award would be made on the basis of initial proposals, as provided by the RFPs, the agency did not consider HPC's surety letters and evaluated the proposals based upon only the initial submissions. Accordingly, we find that the agency's decision to eliminate the protester from the competitions was reasonable.

The protest is denied.

Susan A. Poling  
General Counsel