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Decision

Matter of: AAA Mobile Showers, Inc.

File: B-311420.2

Date: March 27, 2009

John Lukjanowicz, Esq., Law Offices of John Lukjanowicz, for the protester.
Dale A. Elevatorski, A-1 Water; Leon Hammons, Ben Porta Showers; and Tera Green, Ben Toilet Rentals, Inc., the intervenors.
Heather M. Self, Esq., Department of Agriculture, for the agency.
Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that agency misevaluated the protester's proposal by imposing evaluation criteria not set forth in the solicitation and failing to consider proposal revisions is denied where the record demonstrates that the agency's evaluation was consistent with evaluation criteria and otherwise reasonable.
2. Agency provided meaningful discussions where, after observing equipment's failure to meet all minimum equipment requirements, it informed protester orally that the equipment did not meet minimum requirements and provided written assessments from an on-site inspection identifying concerns about the equipment's drainage issues.

DECISION

AAA Mobile Showers, Inc., of Placerville, California, protests its nonselection for contracts for mobile shower facility units under request for proposals (RFP) No. AG-024B-S-07-0005, issued by the Department of Agriculture, U.S. Forest Service. AAA contends that the Forest Service's evaluation of its proposal was unreasonable and that the agency failed to conduct meaningful discussions with the protester.

We deny the protest.

BACKGROUND

The RFP was issued on February 29, 2008 and sought proposals for no more than 35 large capacity and 8 small capacity mobile shower facility units (MSFUs) for use during wildland fire and other incidents throughout the western United States. Agency Report (AR) at 23 (Contracting Officer's [CO] Statement at 1).¹ The solicitation listed 35 designated dispatch points and informed offerors that they could propose a complete MSFU for as many designated dispatch points as they wished. Id. Awardees under these contracts were expected to provide the MSFUs, supplies (such as towels and toiletries), and potable hot and cold water. Id. Awardees were also expected to provide on-site set-up of the equipment, and on-site facility managers and personnel. Id.

The RFP anticipated award of fixed-price/requirements type contracts, with a 1-year base performance period and four 1-year option periods. Id. at 78 (RFP at 1). The RFP stated that proposals would be evaluated on the basis of the following non-price factors, in descending order of importance: proposed equipment, past performance, experience, and technical approach. Id. at 169-70 (RFP at 92-93). The technical approach evaluation factor had two equally-weighted subfactors: project management and quality control plan. Id. at 171 (RFP at 94). The price and non-price factors were of equal weight. Id. at 169 (RFP at 92). The solicitation also contained a minimum equipment requirements checklist. Id. at 160-67 (RFP at 83-90). The solicitation informed offerors that these minimum requirements would be evaluated on a pass/fail basis and that any unit that failed to meet the minimum requirements would be unacceptable. Id. at 160 (RFP at 83).

The solicitation stated that award would be made to the offeror whose proposal met the minimum requirements of the solicitation and offered "the best combination of proposed equipment, past performance, experience, technical approach, and price." Id. at 169 (RFP at 92). The solicitation also advised that the award would not necessarily be made to the offeror with the lowest price. Id.

The Forest Service received proposals from 44 vendors proposing 82 mobile shower units. AAA submitted a proposal offering to provide four separate units: three large shower units--designated as units A1, A2, and A3/A4--and one small shower unit--designated as unit A5. Of relevance here, AAA proposed to provide the A1 or A2 units at four designated dispatch points in California: Corona, Merced, Porterville, and Santa Barbara.²

¹ The agency report responding to AAA's protest employed a pagination system frequently referred to as "Bates stamping"; this decision's citations to specific page numbers in the agency report refer to the "Bates stamped" numbers.

² The protester is challenging only the agency's evaluation of the A1 and A2 units.

The agency convened a technical evaluation board (TEB) to evaluate the proposals. In accordance with the solicitation, the TEB conducted on-site physical inspections of the MSFUs to determine whether the equipment met the minimum requirements checklist set forth in the solicitation, and to evaluate the condition of the equipment. Id. at 28 (CO Statement at 6). Of relevance here, one of the minimum requirements was that the dressing area of the units must “[p]rovide sufficient drainage to prevent the puddling of water.” Id. at 95, 165 (RFP at 18, 88).

In its initial evaluation, the TEB rated AAA’s A1 unit unacceptable under the proposed equipment factor—the most heavily-weighted non-price evaluation factor. This rating resulted in an overall rating of unacceptable as well. As relevant here, the TEB found that the dressing area did not provide adequate drainage to prevent the puddling of water, that the floor surface of the units was lifting up (presumably because of the inadequate drainage), and that gray water³ flowed out the door of the units and onto the ground. AR at 592-95 (TEB Consensus Report at 5-8). The TEB also noted damage to the units, maintenance issues, heating and ventilation issues, ineffective backflow prevention devices, and other problems. Id.

Similarly, the TEB rated AAA’s A2 unit as unacceptable for many of the same reasons. Again, the TEB found that the dressing area did not provide adequate drainage to prevent the puddling of water, that the floor surface of the units was lifting up (presumably because of the inadequate drainage), and that gray water flowed out the door of the units and onto the ground. The TEB also found inadequate heating and ventilation, ineffective backflow prevention devices, and other problems. Id.

During the on-site inspections, the agency held verbal discussions with each offeror whose proposal was in the competitive range. Id. at 29 (CO Statement at 7). These verbal discussions were followed by discussion letters. In its May 17 discussion letter to the protester, the agency advised the protester that, among other things, its proposal failed to adequately address all minimum equipment requirements. Id. at 446 (AAA Discussion Letter at 1). Attached to the letter was a page of handwritten notes providing further detail about the issues identified during the inspection. Id. at 448 (AAA Discussion Letter notes at 1). With regard to unit A1, the notes expressed a “concern that dressing area does not have the ability to contain all gray water.” Id. With regard to unit A2, the notes stated the “[f]loor surface in dressing area is starting to come apart. May have a drainage issue.”⁴ Id.

³ Gray water is non-industrial wastewater generated from domestic processes such as dish washing, laundry, and bathing.

⁴ The notes also detailed the other issues listed above that the TEB identified as being problematic.

The letter allowed offerors to submit revisions to their technical proposals and/or their price proposal, but stated that the technical proposal revisions must be separate from the price proposal so that the evaluations could be performed independently. Id. at 447 (AAA Discussion Letter at 2). In response, the protester submitted two documents: a revised technical proposal and a four-page cover letter. Id. at 454-583 (AAA Revised Proposal). The first two substantive paragraphs of the cover letter discussed pricing issues—*i.e.*, mileage rates, water vehicle use pricing, relocation fees, employee pay rates, and included a statement that the protester would maintain its current pricing as originally offered. However, other parts of the cover letter provided answers to some of the discussion questions concerning the protester’s technical proposal. Id. at 454-57. Because the letter began with pricing information, it was not provided to the TEB. Id. at 30 (CO Statement at 8).

After evaluating the revised proposals, the TEB again prepared an overall consensus rating of the A1 and the A2 units, which remained unacceptable. The Forest Service awarded contracts to AAA for provision of its A3/A4 unit and A5 unit at two designated dispatch points—Las Vegas, NV and Porterville, CA. Id. at 635 (Letter from Forest Service to AAA, Dec. 4, 2008, at 5). However, the sites for which AAA had proposed to provide its A1 and A2 units were awarded to Bishop Services, Inc., Ben Porta Shower, and A-1 Water. Id. at 634. In advising AAA that it had not received these awards, the agency stated that AAA had failed to provide adequate information regarding the minimum equipment requirements. Id. at 631.

After the Forest Service advised each offeror of the award decisions, it provided AAA with an oral debriefing regarding the portion of the requirements it was not awarded. Id. at 30 (CO Statement at 8). In the debriefing, the agency advised AAA that its equipment had been found to be unacceptable because it failed to meet the minimum equipment requirements in the solicitation. Id. Of relevance here, the CO specified that AAA’s equipment had been rated as unacceptable because the contractor had failed to remedy the A1 unit’s leakage of gray water and both units’ lack of drainage in the dressing area. Id. at 31 (CO Statement at 9).

During the debriefing process, the CO realized that AAA’s four page cover letter submitted with its revised technical proposal was intended to address both pricing and technical issues, and recognized that the letter had not been provided to the TEB. Id. In her statement, she explained that offerors had been instructed to separate their technical and price proposals, and that because the cover letter began by addressing pricing issues, it was initially believed to be a part of the price proposal, and was not given to the TEB. Id.

After discovering this error, the CO and the chairperson of the TEB reviewed AAA’s cover letter and concluded that the concern regarding drainage in the dressing area of both units and the A1 unit’s leakage of gray water remained unaddressed. Therefore, the CO determined that the award decision would not change. Id. at 31 (CO Statement at 9). This protest followed.

DISCUSSION

The protester argues that the agency's award decisions were flawed in several respects. AAA contends that the evaluation was not consistent with stated evaluation criteria because the agency imposed new requirements that were not contained in the solicitation: the requirement of floor drains in the dressing area and the requirement that shower units contain all gray water. AAA also argues that the agency failed to conduct meaningful discussions and failed to consider the technical information contained in the cover letter submitted with the protester's proposal revisions. We disagree.

Requirement of Drainage in Dressing Area

As discussed above, the solicitation required that dressing areas "[p]rovide sufficient drainage to prevent the puddling of water. Id. at 95 (RFP at 18). The agency concluded that the protester's equipment was unacceptable, in part, because AAA failed to satisfy this requirement for drainage. The protester contends that it met the requirement, and that the agency improperly downgraded its proposal because the units did not contain floor drains in the dressing area. Specifically, AAA contends that its offered units met the drainage requirements in three ways: (1) the unique design of its glass door shower stalls prevent spillage of water on the dressing room floors; (2) as a general practice, individual patrons usually use a disposable towel as a floor mat in the dressing area, which prevents puddling; and (3) the dressing areas are swept or mopped regularly. Protest at 10. Thus, AAA contends that it should not have been downgraded for failing to provide drainage.

The agency agrees that units were not required to have floor drains in the dressing area. Id. at 48 (Memorandum of Law at 11). Rather, it acknowledges that offerors were free to propose any design aspects, or combination of design aspects, capable of providing sufficient drainage to prevent puddling in the dressing area. Id. However, the agency argues that none of the protester's proposed methods to address the need for drainage were sufficient to comply with the terms of the solicitation. Id. at 49 (Memorandum of Law at 12). Further, the agency contends that none of these methods of preventing puddling are effective. As set forth below, we think the agency's conclusion on this issue is reasonable.

With regard to the shower doors, the agency noted during its on-site inspection that not all of the shower doors closed properly, resulting in additional water spilling into the dressing area. Id. at 448 (AAA Discussion Letter notes at 1). In addition, the agency noted that, even if all shower doors did close properly, there are several other ways for water from the shower to spill into the dressing area (e.g., from a user's failure to close the shower door completely, from a user opening and closing the shower door while the shower is running, or from a user tracking water from the shower into the dressing area). Agency Supp. Report at 6.

With regard to the use of towels as a floor mat, the agency correctly points out that the solicitation requirement is for the equipment to drain itself, not for the users to ensure that they do not drip water onto the floor. In this regard, the agency concluded that AAA's units did not satisfy the requirement of providing sufficient drainage. AR at 35 (CO Statement at 13).

Finally, with regard to the regular sweeping and mopping of the units, we again agree with the agency that these practices do not constitute drainage, as required by the solicitation. Thus, we deny this basis of protest.⁵

Requirement for Containment of Gray Water

The protester next appears to argue that the solicitation did not require the containment of gray water, and that the agency improperly downgraded its proposal because the A1 unit leaked gray water onto the ground when it was evaluated during the on-site inspection. Protest at 10.

We note that the RFP required that vendors provide a minimum enclosed gray water storage capacity of 2,500 gallons. AR at 163 (RFP at 86). It is unclear what the protester believed was the purpose of the gray water storage container, if not to contain gray water. Given that the vendor was to be responsible for all aspects of operating the MSFUs, we think that the requirement of providing gray water containment was reasonably encompassed in the requirement that the vendor provide a gray water storage container.⁶

⁵ To the extent that AAA believes that puddling of water in the dressing area could be prevented using a method other than drainage, its post-award protest is untimely and will not be considered. Our Bid Protest Regulations require that protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals, must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2008); Plasma-Therm, Inc., B-280664.2, Dec. 28, 1998, 98-2 CPD ¶ 160 at 3.

⁶ The agency also noted that an MSFU's leakage of gray water would likely constitute a violation of the Clean Water Act, 33 U.S.C. § 1311, unless the vendor obtains a permit under the Act to allow for the discharge of gray water. Under the solicitation, vendors are required to comply with any federal, state, and municipal laws applicable to their performance of the work. The protester has given no indication that it intends to apply for a permit to allow for the leakage of gray water. This lends further support to the agency's conclusion that the containment of gray water was reasonably encompassed by the solicitation's requirements.

Discussions

AAA next argues that the Forest Service never advised the company that its dressing area drainage was insufficient, and therefore the agency failed to conduct meaningful discussions regarding this perceived deficiency in its units. Protest at 15.

In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range. Federal Acquisition Regulation § 15.306(d)(1). Agencies are not required to afford offerors all-encompassing discussions. Reflectone Training Sys., Inc.; Hernandez Eng'g Inc., B-261224; B-261224.2, Aug. 30, 1995, 95-2 CPD ¶ 95 at 10. Although discussions must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to “spoon-feed” an offeror as to each and every item that could be revised or addressed to improve its proposal. Comprehensive Health Serv., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 7.

Here, as noted above, the agency conducted oral and written discussions with AAA, during which it noted the apparent problems with drainage in the dressing area. In the handwritten notes attached to the May 17 discussion letter, the Forest Service expressed a “concern that [the] dressing area does not have the ability to contain all gray water” and that the units “may have a drainage issue.” AR at 448 (AAA Discussion Letter Notes at 1). As evidenced by the record here, the agency clearly communicated its concerns that the dressing area drainage was deficient. Also, it is clear from the protester’s cover letter—discussed in greater detail below—that it was aware of these issues from the discussions. AR at 455-56 (AAA’s Cover Letter to its Final Proposal, May 29, 2008 at 2-3). Therefore, we deny AAA’s contention that discussions in this area were inadequate.

Proposal Revisions Contained in Cover Letter

Finally, AAA argues that the evaluation of its proposal was flawed because the TEB failed to consider certain revisions to its technical proposal that were contained in its cover letter. As set forth above, because the cover letter began by discussing pricing issues, it was believed to be the protester’s revised price proposal and was therefore not provided to the TEB. Id. at 30 (CO Statement at 8). Upon discovering the cover letter during the debriefing process, the CO and the TEB chairperson reviewed all of AAA’s proposal documents, including the cover letter, and concluded that the TEB’s concerns regarding drainage in the dressing area, and the A1 unit’s leakage of gray water, remained unremedied. Id. Therefore, the CO concluded that the award decision would have remained the same. Id. at 31 (CO Statement at 9).

While the protester is correct that the Forest Service initially overlooked the technical portions of AAA’s cover letter, the agency reviewed the letter when its

error was discovered. Nonetheless, the agency concluded that the information contained therein would not have changed the award decisions.

Based on our review of the letter, we agree. The RFP here required that units provide “sufficient drainage to prevent the puddling of water.” *Id.* at 95, 165 (RFP at 18, 88). The cover letter, at best, argued that AAA did not need to provide drainage in its dressing areas because its units employed other methods of preventing the puddling of water—*i.e.*, the use of pivoting shower doors rather than shower curtains, the use of towels as floor mats, and frequent sweeping or mopping. We note that these are essentially the same arguments we have considered and denied during the course of this protest. Indeed, nowhere in the cover letter did AAA state that it could or would alter its equipment to provide drainage in the dressing area.

Under these circumstances, we do not think that AAA was prejudiced by the TEB’s failure to review the cover letter, and we believe that the agency’s award decisions were reasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel