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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: Environmental Quality Management, Inc.

File: B-402123.4; B-402123.6

Date: August 31, 2010

Brian W. Craver, Esq., and Stacey A. Mescall, Esq., Person & Craver LLP, for the protester.

Russ Gulledge, for Environmental Restoration, LLC, an intervenor.

Avital G. Zemel, Esq., Environmental Protection Agency, for the agency.

Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly provided awardees--but not protester--competitively useful information during ongoing acquisition is denied, where awardees were provided appropriate information during initial, pre-award debriefing (after their initial exclusion from the competitive range), and subsequently (after awardees' readmission into competitive range), agency conducted appropriate discussions tailored to each firm's proposal.

DECISION

Environmental Quality Management, Inc. (EQ), of Cincinnati, Ohio, protests the award of contracts to Environmental Restoration, LLC (ER), of St. Louis, Missouri, and Kemron Environmental Services, Inc., of Atlanta, Georgia, under request for proposals (RFP) No. PR-R2-08-10085, issued by the Environmental Protection Agency (EPA) for emergency rapid response services. EQ asserts that the awardees obtained an unfair competitive advantage through information furnished to them during pre-award debriefings and discussions.

We deny the protest.

BACKGROUND

The RFP contemplated the award of three contracts, including two to be awarded to small businesses and one to be awarded to a service-disabled veteran-owned small business; this protest concerns the award of the small business contracts.

Proposals were to be evaluated on the basis of non-price and price factors; all evaluation factors other than price, when combined, were approximately equal to price for award purposes. RFP at M-1 to M-2.

Nine proposals were received in response to the solicitation. As relevant here, the evaluation of the initial proposals and the amount of the independent government estimate (IGE) were as follows:

Offeror	Technical Score	Proposed Price
Offeror A	[deleted]	[\$[deleted]
Offeror B	[deleted]	[\$[deleted]
EQ	83	\$126,594,446
ER	86	\$134,771,812
Kemron	84	\$139,365,134
IGE		[\$[deleted]

Agency Report (AR), at 8, 13-14. Based on these evaluation results, the agency established an initial competitive range comprised of three proposals, including the proposals of Offeror A, Offeror B and EQ. AR, exh. 16. ER's and Kemron's proposals were excluded from the initial competitive range because, although the proposals received the highest technical scores, their proposed prices were considered too high. Id. at 57-58.

After being informed of the exclusion of their proposals from the competitive range, both ER and Kemron requested, and were provided, debriefings. The record shows that both firms were provided face-to-face debriefings in which the agency relied on a "script" with some largely identical elements. In this regard, while the technical evaluation for each proposal differed, both proposals had been eliminated from the competitive range for the same reason, namely, because of their respective high prices. Thus, the debriefing "script" for both firms contained an identical paragraph summarizing the agency's rationale for eliminating the proposal from the competitive range, which provided as follows:

In the solicitation offerors were informed that all evaluation factors other than cost or price when combined are approximately equal to cost or price. As such, our evaluation includes looking at BOTH your technical score and your proposed price, in addition to the technical scores and proposed prices of all offerors. While your technical score was fine, your proposed price was high. In light of the fact that offerors were advised in the RFP that it was the Government's intent to award without discussions, and as such should submit proposals containing their best terms from a cost or price and technical standpoint, and given the highly competitive nature of ERRS [emergency rapid response services] contract awards, we concluded that your company

did not have enough leeway from a cost standpoint to lower your proposed price significantly enough to be considered competitive.

AR, exh. 20 (emphasis in original).

Subsequently, ER and another firm that had been eliminated from the competitive range filed protests with our Office. After reviewing those protests, the agency advised our Office that it intended to include ER and Kemron in the competitive range for the small business set-aside portion of the requirement. Based on the agency's announced corrective action, we dismissed those protests as academic. (B-402123 et al., Oct. 30, 2009.)

The agency then engaged in discussions with the competitive range offerors. With respect to Kemron and ER, both firms were provided with an identical price-related discussion question which provided as follows:

As discussed in your pre-award debriefing, your proposed price was high. Please look at the composition of your proposed rates to determine if you are in the position to propose any reduced rates for this requirement. Any proposed price reduction must include a narrative regarding the correlating effect on your technical approach to perform the requirements in the Performance Work Statement.

AR, exh. 26. The agency then requested final proposal revisions (FPR) from the competitive range offerors. After evaluating these proposal revisions, the agency engaged in several more rounds of discussions and twice requested further FPRs. The third (and final) FPRs were evaluated as follows:

Offeror	Technical Score	Proposed Price
Offeror A	[deleted]	[\$deleted]
Offeror B	[deleted]	[\$deleted]
EQ	83	\$125,879,691
ER	86	\$121,773,733
Kemron	86	\$119,697,227
IGE		[\$deleted]

AR at 13-14. On the basis of these evaluation results, the agency made award to ER and Kemron, finding that their proposals represented the best value to the government, considering price and the non-price considerations. After receiving a debriefing, EQ filed this protest with our Office.

DISCUSSION

EQ asserts that the agency improperly provided both awardees competitively useful information during their pre-award debriefings, and again during discussions, and

therefore also should have provided it the same information. Specifically, the protester points out that the awardees were advised during their initial debriefings that their technical proposals were “fine” and their proposed prices were high compared to the other firms in the competition, and were again advised during discussions that their prices were high. According to the protester, it was improper for the agency not to have also provided it the same information that had been provided to the awardees, namely, that its technical proposal was “fine,” but that its price was high in comparison to the other two competitive range offerors (Offerors A and B). The protester concludes that it was improper for the agency to have advised the awardees of their relative standing among the offerors from a price and technical standpoint without also providing it the same information.

EPA’s actions in this regard were unobjectionable. First, there was nothing improper in the agency’s advising the awardees during their debriefings that their technical proposals were “fine” but that their prices were high. The Federal Acquisition Regulation (FAR) § 15.505(e)(2), expressly contemplates providing an offeror that has been eliminated from the competitive range a summary of the rationale for eliminating its proposal from further consideration, and that is all the agency did here. In effect, the awardees were advised that while their proposals contained no significant weaknesses or deficiencies from a technical standpoint that would warrant their elimination from the competitive range, their proposals instead had been eliminated from the competitive range because of their high prices. Further, consistent with the prohibition in FAR § 15.505(f), the agency did not provide the awardees any detailed information relating to the remaining competitors. For example, the agency did not advise the awardees of the number of remaining offerors or their identity; the content of the other proposals, including their proposed prices; the ranking of the remaining offerors; or point-by-point comparisons of the debriefed offeror’s proposal with those of other offerors. In summary, the agency’s actions during the preaward debriefings were unobjectionable.

Second, the agency’s actions during discussions also were unobjectionable. In a negotiated procurement such as this, discussions must be meaningful, that is, they must lead offerors into those areas of their proposals requiring amplification or revision. SERVIZI Aeroportuali, Sri, B-290863, Oct. 15, 2002, 2002 CPD ¶ 208 at 5. While offerors must be given an equal opportunity to revise their proposals and an agency cannot favor one offeror over another, discussions need not be identical; rather, the FAR contemplates that discussions will be tailored to each offeror’s particular proposal. Id. The record here shows that the agency’s discussions were tailored to each offeror’s particular proposal and otherwise complied with the FAR requirements in this area.

As noted, while there were no significant technical weaknesses or deficiencies in the awardees’ proposals that would preclude award, their respective prices were too high for the agency to consider them for award. In this regard, the awardees’ initial prices (approximately \$134.7 million and \$139.3 million) were both significantly

higher than those of the other competitive range offerors (Offeror B at \$[deleted], Offeror A at \$[deleted] and EQ at \$126.5 million) and also significantly higher than the IGE (approximately \$[deleted]). Accordingly, the agency advised the awardees during discussions that their proposed prices were high, and further advised them that any change in their respective prices had to be supported by a narrative explanation regarding how any proposed change in price would affect their technical solution to the agency's requirements. In so doing, the agency conducted meaningful discussions with the awardees regarding the areas of their proposals requiring amplification or revision.

The agency's discussions with the protester likewise were tailored to its proposal. While the protester's initial price (\$126.5 million) was higher than that of Offerors A and B, it was roughly in line with the IGE (approximately \$125.7 million) and significantly lower than the awardees' initial prices that had been deemed high (approximately \$134.7 and \$139.3 million). The agency therefore did not advise the protester that its price overall was deemed high for the simple reason that it had not been found to be high overall.

The record does show, however, that the agency provided the protester detailed discussions relating to its proposed prices where the agency identified pricing elements of the protester's offer that were found to be either comparatively high or where the protester proposed price discounts that were not adequately explained. For example, the agency inquired about a [deleted] decrease in the protester's proposed hourly rates for certain Service Contract Act wage rates in the second year of contract performance to ensure that the protester intended to propose such a decrease, and to ensure that such a decrease still allowed the protester to comply with the requirements of the Service Contract Act. AR, exh. 18. Similarly, the agency identified a number of specific contract line items where the protester's prices appeared high compared to historical prices that the agency had paid for the same requirements, advising the protester as follows:

Your proposed rates for certain Contract Line Item Numbers (CLINS) are higher than we have historically paid for this labor and equipment. We would like to discuss the composition of your proposed rates for the following CLINS: [this was followed by a table identifying some 5 labor and 7 equipment categories].

Id.

Although the protester questions the agency's failure to advise it during discussions that its technical proposal was "fine," the record shows that the agency did not identify any significant technical weaknesses or deficiencies in the protester's proposal. Accordingly, the agency did not ask the protester any questions relating to its technical proposal. From the absence of such questions, the protester should

reasonably have concluded that its proposal was “fine” from a technical standpoint. See AR, exhs. 18, 21, 23, 28, 38, 40, 48, 51.¹

We conclude that the discussions with the protester were meaningful. Although the discussions with offerors were not identical because the protester and awardees were not similarly situated, the discussions were tailored to each proposal. As such, the agency’s conduct of discussions was unobjectionable.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

¹ Although EQ was asked in the agency’s initial discussion letter to clarify an aspect of its proposed conflict of interest mitigation approach, nothing in the record shows that this was a deficiency or weakness that contributed to a downgrading of its proposal in the technical evaluation. AR, exh. 18.