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Decision

Matter of: Geo Marine, Inc./Burns & McDonnell Engineering, Inc., Joint Venture

File: B-407337.3

Date: January 22, 2014

James C. Fontana, Esq., and David B. Dempsey, Esq., Dempsey Fontana, PLLC, for the protester.

Ryan A. Black, Esq., Department of the Army, Corps of Engineers, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging adequacy of discussions is denied where record shows that agency led protester into area of its proposal requiring revision; agency was under no obligation to reopen discussions to afford protester a second opportunity to resolve a new concern in the same area first introduced in the protester's revised proposal.

DECISION

Geo Marine, Inc./Burns & McDonnell Engineering, Inc., Joint Venture (GMI) protests the rejection of its proposal under request for proposals (RFP) No. W912DY-11-R-0040, issued by the Department of the Army, Corps of Engineers, for design/build services. GMI maintains that the agency failed to engage in adequate discussions with it before rejecting its proposal.

We deny the protest.

The RFP contemplates the award of several indefinite-delivery, indefinite-quantity contracts to perform design/build services at specified locations worldwide; the estimated total program value of the requirement is \$600 million. RFP at 3. The RFP contemplates a two-phase acquisition process. During phase one, firms submitted their qualifications to be evaluated by the agency. RFP at 25. The agency evaluated the phase one submissions, selected vendors that the agency considered qualified, and afforded them an opportunity to submit phase two proposals. GMI was selected to submit a phase two proposal, and the agency's actions during phase one are not at issue in this protest.

During phase two, firms submitted responses to a sample task outlined in the RFP. The sample task involved the installation of wind turbine generators (WTGs) on Kwajalein Atoll, Republic of Marshall Islands (along with associated support systems), and connection of the turbines to the island's electrical power grid. Agency Report (AR) exh. 7, RFP Amendment No. 6, at 15. GMI timely submitted a phase two proposal.

The phase two proposals were rated on various non-price evaluation considerations. GMI's proposal was assigned a marginal rating under the RFP's non-price factors of technical approach (factor one) and specialized experience (factor two). AR, exh. 12a, GMI Initial Technical Evaluation Report, at 1, 4. The agency's ratings were based on a number of weaknesses identified in the GMI proposal. As is relevant here, the agency identified as a weakness the fact that GMI had not positioned the WTGs in the area designated in the solicitation's performance work statement (PWS), and also had included no explanation for having deviated from the RFP's requirements.

After its initial evaluation, the agency provided GMI with discussion questions. One of those questions raised with GMI the fact that it had not properly positioned the WTGs in accordance with the PWS requirements, and had provided no rationale for deviating from those requirements. AR, exh. 14, GMI Discussion Questions, at 1. In response to this discussion question, GMI did not change its proposed location of the WTGs, but it did provide some explanation regarding its decision, principally stating that it based its decision on data from the National Renewable Energy Laboratory (NREL) concerning prevailing wind direction that was different from prevailing wind direction information included in the RFP. AR, exh. 17, GMI Revised Technical Proposal, Vol. 1, at 6.

After evaluating the revised GMI proposal, the agency changed the original weakness relating to GMI's placement of the WTGs from a weakness to a significant weakness, finding that GMI's explanation--along with its reliance on data from the NREL--was incorrect and inconsistent with the PWS. Based on this finding, the agency eliminated GMI's proposal from further consideration after assigning it a marginal rating under the technical approach factor.¹

¹ The agency also had identified a weakness associated with GMI's proposed electrical connection of the WTGs to the Island power grid. That weakness was discussed and resolved by GMI in its revised proposal, although the agency advises that it was erroneously carried forward into the agency's revised evaluation findings. The agency states, however, that this error would not have changed its decision to eliminate the GMI proposal solely for the weakness associated with its placement of the WTGs. GMI has not challenged the agency's representation.

GMI essentially argues that the agency acted improperly in not reopening discussions with it concerning its placement of the WTGs. According to the protester, once the agency elevated its concern from a “weakness” to a “significant weakness” the agency was required to revisit the question with GMI during renewed discussions. The protester concludes that the discussions the agency conducted with it were not meaningful.

We find no merit to GMI’s protest. Discussions, when conducted, must identify proposal deficiencies and significant weaknesses that reasonably could be addressed in order to materially enhance the offeror’s potential for receiving award. Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11.² However, agencies are not required to reopen discussions to afford an offeror an additional opportunity to revise its proposal where a weakness or deficiency is first introduced in the firm’s revised proposal. Raytheon Co., B-403110.3, Apr. 26, 2011, 2011 CPD ¶ 96 at 7.

Here, as noted, the agency engaged in meaningful discussions with GMI relating to its original proposal weakness associated with the placement of the WTGs. Rather than allay the agency’s initial concern, GMI’s revised proposal--in effect the underlying rationale GMI provided about its placement of the WTGs--led the agency to be further concerned with GMI’s technical solution. It became evident to the agency that GMI’s placement of the WTGs was based on incorrect data that was inconsistent with information included in the RFP concerning prevailing wind direction. However, the agency was under no obligation to further discuss these new concerns with GMI, since they were introduced for the first time into GMI’s revised proposal. Raytheon Co., supra.

The protest is denied.

Susan A. Poling
General Counsel

² Although this acquisition appears to have been conducted by the agency as a traditional design/build acquisition under Federal Acquisition Regulation (FAR) part 36, the RFP specifically states that, in the event the agency engaged in discussions, it would do so in accordance with FAR § 15.306. RFP at 65. We therefore analyze GMI’s protest using the legal standard applicable to discussions conducted under FAR part 15 rather than FAR part 36.