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**Comptroller General
of the United States**

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

Decision

Matter of: Cascadian American Enterprises

File: B-412208.3; B-412208.4

Date: February 5, 2016

Ryan P. Slaughter, for the protester.

Francis X. Eugenio, Esq., Department of the Army, Corps of Engineers, for the agency.

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DIGEST

Protest is sustained where agency engaged in discussions with the awardee, permitting the awardee to provide a response that was necessary to determine the acceptability of the awardee's proposal, but failed to provide the same opportunity to the protester.

DECISION

Cascadian American Enterprises (CAE), of Puyallup, Washington, a small business, protests the Department of the Army, Corps of Engineers' award of a contract to Jimmy Church (doing business as Jim's Bobcat Service), of Kingston, Idaho, under request for proposals (RFP) No. W912DW-15-R-0030, for removal of Scot's broom, brush, and other vegetation at Joint Base Lewis-McChord, Washington. CAE argues that the agency unreasonably concluded that CAE's proposal was technically unacceptable; contends that the agency improperly held discussions with other offerors but not CAE; and unlawfully rejected its proposal for responsibility-type factors without consulting the Small Business Administration (SBA).

We sustain the protest.

BACKGROUND

On August 3, 2015, the Army posted the RFP on the Federal Business Opportunities (FedBizOps) website as a combined synopsis/solicitation under the commercial item procedures of Federal Acquisition Regulation (FAR) subpart 12.6.

RFP at 1. The solicitation, which was set aside for small business concerns, sought removal (i.e., cutting, slashing, mowing, and mulching) of Scot's broom, brush and other vegetation from specified areas of Joint Base Lewis-McChord to allow for soldier and unit maneuverability. RFP, Performance Work Statement (PWS), at 3. The solicitation provided for the award of a fixed-price contract, with a base period of 12 months, to the lowest-priced offeror whose proposal was technically acceptable considering three technical evaluation factors: (1) relevant experience, (2) key personnel, and (3) past performance. RFP at 5-6, 8-9.

With respect to the relevant experience factor, offerors were to provide at least one example (but no more than five) of a relevant project "that either individually or collectively" demonstrated experience performing unwanted vegetation, brush and small tree removal on the four terrain types specified in the RFP. RFP at 9-10. The RFP further defined relevant as "work that is comparable in nature, magnitude, and complexity to the current requirement." Id. at 8.

With respect to the key personnel factor, offerors were to "[s]ubmit only one individual" for each of the following positions: contract manager, alternate contract manager, quality control manager, and site safety and health officer. RFP at 10-11.¹ The RFP, however, stated that the quality control manager and the site safety and health officer could be the same individual, as long as that person is qualified. Id. The RFP further required that the contract manager and alternate contract manager have at least 5 years of experience in managing work for the government. Id.

The solicitation stated that the agency intended to make award based on initial offers and without discussions, which were defined as "the opportunity to resolve deficiencies or weaknesses in the proposals, based on the requirement and the evaluation factors set forth in the solicitation." RFP at 7-8. The solicitation, however, reserved the right to initiate discussions and seek revised proposals. Id. The solicitation also set forth definitions of discussions, communications, and clarifications. Id. at 8. Of relevance here, the solicitation defined clarifications as:

a limited exchange with an Offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes . . . [and which] do not give an Offeror the opportunity to revise or modify its proposal and are used, as necessary, when not opening discussions.

Id.

¹ The PWS included the following additional key personnel: equipment operators and laborers. RFP, PWS, at 8.

The Army received proposals from six offerors, including CAE and Jimmy Church. Contracting Officer Statement (COS) at 2. After contacting Jimmy Church and a second offeror with requests for further information, which the agency terms clarifications, Supp. Agency Report (AR) at 2, the agency concluded that all proposals except Jimmy Church's were technically unacceptable. The proposal submitted by CAE, which was priced at \$967,489, was deemed to be technically unacceptable under the relevant experience and key personnel factors. AR, Tab 13, Source Selection Decision Document, at 7. On September 29, the Army awarded the contract to Jimmy Church, which submitted the only proposal deemed to be acceptable, at a price of \$999,826. COS at 2; AR, Tab 14, Award Document, at 1.

On October 1, two disappointed offerors filed protests of the award with our Office. These protests were subsequently dismissed after the agency notified our Office that it was taking corrective action. See CMEC, Inc., B-412208, Oct. 14, 2015 (unpublished); Cascadian American Enterprises, B-412208.2, Oct. 14, 2015 (unpublished). After reevaluating proposals, and again concluding that only Jimmy Church's proposal was acceptable, the agency again awarded the contract to Jimmy Church. COS at 3; see AR, Tab 22, Source Selection Evaluation Board (SSEB) Supp. Report, at 9-10; AR, Tab 24, Award Document, at 1. This protest followed.

DISCUSSION

CAE challenges the agency's determination that its proposal was unacceptable under the key personnel and relevant experience factors, and asserts that, in any case, the agency improperly failed to conduct discussions with it and improperly failed to refer the matter to the SBA for consideration under its certificate of competency (COC) procedures. Protest at 2-3, 5-9, 13; Comments, Nov. 30, 2015, at 16, 18; Comments, Dec. 2, 2015, at 6; Comments, Dec. 6, 2015, at 6. We have considered CAE's arguments and find that they furnish a basis to sustain the protest.

Key Personnel

CAE challenges the evaluation of its proposal as unacceptable under the key personnel factor. Protest at 3; Protest Supp., Nov. 16, 2015, at 5. In this regard, offerors were to "[s]ubmit only one individual" for several key personnel positions, including the contract manager, alternate contract manager, quality control manager, and site safety and health officer, but the quality control manager and the site safety and health officer positions were allowed to be filled by the same individual. RFP at 10-11. CAE's proposal described one employee as "Project Manager/QCM [Quality Control Manager]/SSHO [Site Safety and Health Officer]"; one as "QCM/SSHO"; one as "Assistant Project Manager"; one as "Alternate Project Manager"; one as "Alternate Project Manager/Equipment Operator"; and another as

“Equipment Operator/Alternate Site Safety Health Officer/Alternate Quality Control Manager.” AR, Tab 10, CAE Proposal, at 5-13. The Army concluded that the protester’s key personnel approach was unacceptable because it “did not use the correct Key Personnel titles or identify personnel to solely serve as a contract manager or alternate contract manager,” AR at 2, and several employees were to perform more than one function notwithstanding that the RFP stated that only the quality control manager and site safety and health officer could be the same individual. AR, Tab 12, SSEB Report, at 7.

CAE explains that its proposed project manager is the contract manager specified in the solicitation and its proposed assistant project manager is the specified alternate contract manager; and that only one person was to perform the required key personnel jobs, but multiple people were trained and capable of performing different positions if the need arose. Protest at 5; Comments, Nov. 30, 2015, at 10, 17-19. Further, the protester argues that the agency improperly engaged in discussions about key personnel with certain offerors, including the awardee, but did not afford it a similar opportunity to clarify its proposed approach. Comments, Nov. 30, 2015, at 16, 18; Comments, Dec. 2, 2015, at 6.

We need not determine whether CAE’s proposed key personnel approach was properly found to be unacceptable since, as set forth below, we agree with the protester’s related contention that the agency held discussions regarding key personnel with other offerors, but not with CAE. Our review of the record indicates that during the evaluation, the agency contacted the awardee, Jimmy Church, because its proposed alternate contract manager “was initially evaluated as unacceptable” by two members of the evaluation team because it was not clear he had the required minimum 5 years of experience. AR, Tab 12, SSEB Report, at 10 (emphasis added). During its conversation with Jimmy Church, the agency was informed that the proposed alternate contract manager “had six years experience and authority working in the capacity as Alternate Contracting Manager on Federal Contracts for the company when Jim Church was not available.” Id. As a result of this conversation, the “SSEB determined that [the individual proposed] was qualified and acceptable as the Alternate Contract Manager.” Id. Therefore, the evaluators concluded that Jimmy Church’s proposal was “**ACCEPTABLE**” for Factor B, key personnel, and the overall proposal was evaluated as “**ACCEPTABLE.**” Id. (emphasis in original).

FAR § 15.306 describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated acquisitions.²

² Agencies may use the policies prescribed in FAR Part 12, Acquisition of Commercial Items, in conjunction with the policies and procedures prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate. FAR § 12.203. Here, the procurement
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Res Rei Dev., Inc., B-410466.7, Oct. 16, 2015, 2015 CPD ¶ 320 at 10; Int'l Waste Indus., B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5; ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4; see also RFP at 7-8. Clarifications are limited exchanges between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); RFP at 8; Int'l Waste Indus., supra; ERIE Strayer Co., supra. Clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. Res Rei Dev., Inc., supra; Int'l Waste Indus., supra.

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. FAR § 15.306(d); RFP at 7-8; Int'l Waste Indus., supra; Alliant Enter. JV, LLC, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5. As a general matter, when an agency conducts discussions with one offeror, it must afford all offerors remaining in the competition an opportunity to engage in meaningful discussions. Int'l Waste Indus., supra; ERIE Strayer Co., supra. Further, it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. Int'l Waste Indus., supra; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

Thus, the agency's communications with the awardee invited a response that was necessary to determine the acceptability of its proposal. This is quintessentially the nature of discussions, not clarifications. Int'l Waste Indus., supra, at 6; Kardex Remstar, LLC, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 4. Although the agency argues that "[n]o revisions were needed for [Jimmy Church] and no revisions were offered, permitted, or considered by the SSEB", Supp. AR at 4, we find this argument unconvincing since, as the record shows and the agency itself notes, only after the conversation with Jimmy Church was the offeror found to be technically acceptable for the relevant experience factor. AR, Tab 12, SSEB Report, at 10; Supp. AR, at 4.

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was conducted pursuant to FAR Part 12, RFP at 1, and utilized the procedures in FAR Part 15. See RFP at 13 (use of FAR § 15.305(a)(2)(iv) on past performance ratings and use of FAR § 15.404-1 to determine price reasonableness). Further, the RFP expressly reserved the right to conduct discussions and set forth definitions for discussions, communications, and clarifications similar to the definitions set forth in FAR § 15.306. See RFP at 8.

Likewise, the Army also contacted another offeror because it found that its proposed quality control manager had “no credential demonstrated”; there “was no [site safety and health officer] listed in the Key personnel as required by the solicitation”; and it was confusing as to which individual the offeror proposed as the contract manager. AR, Tab 12, SSEB Report, at 6. Specifically, the proposal listed two people as a project manager, and indicated that one of the project managers would be a contract manager and the other would be a quality control manager. Supp. AR, Offeror Proposal, at 3-4. The proposal further indicated that the alternate contract manager was also the “contract officer”. Id. at 3. As a result, the agency contacted the offeror “in regard to clarification of the key personnel and their proposed role on the project,” and explained that “there was confusion in the roles and responsibilities of the proposed team identified in the proposal.” Id. Thus, as with Jimmy Church, the agency contacted an offeror to obtain information necessary to determine the acceptability of the proposal under the key personnel factor. Accordingly, we conclude that the Army, having conducted discussions with Jimmy Church and another offeror, was required to also conduct discussions with all other offerors in the competition, including CAE, and provide them an opportunity to address deficiencies and significant weaknesses in their proposals.

Relevant Experience

The protester also argues that the agency, in evaluating its proposal under the relevant experience factor, improperly failed to consider its recent experience performing similar work, and should have considered the experience provided in its proposal as relevant. In any case, argues the protester, the agency should have referred the matter to the SBA for issuance of a COC. Protest at 2, 5-9, 13; Comments, Dec. 6, 2015, at 1-2. The Army responds that the projects provided as experience were not similar in magnitude or complexity to the work identified in the solicitation, and that therefore the agency properly found that CAE’s proposal was unacceptable under the experience factor and thus ineligible for award. AR, Tab 22, SSEB Supp. Report, at 8.³

Under the SBA’s COC program, authorized pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7), and implementing regulations, 13 C.F.R. § 125.5, see also FAR subpart 19.6, agencies must refer a determination that a small business is not

³ The RFP defined the term relevant to mean “work that is comparable in nature, magnitude, and complexity to the current requirement” and included prior experience performing unwanted vegetation, brush and small tree removal on the four terrain types specified in the RFP. RFP at 8-9; RFP, PWS, at 3. The agency concluded that the five projects submitted by CAE were significantly smaller in size and magnitude and that the “work more resembled herbicide application, which is not the type of work contemplated by the PWS.” AR, Tab 22, SSEB Supp. Report, at 8.

responsible to SBA if the determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. In this regard, the Small Business Act provides that it is the SBA's duty to certify to government procurement officers with respect to all elements of responsibility (including capability, competency, capacity, credit, integrity, perseverance, and tenacity) of any one or a group of small business concerns to receive and perform a specific government contract. 15 U.S.C. § 637(b)(7)(A). Further, SBA's regulations specifically require a contracting officer to refer a small business concern to SBA for consideration for a COC when the contracting officer:

Refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)

13 C.F.R. § 125.5(a)(2)(iii); see Joanell Labs., Inc.; Nu-Way Mfg. Co., Inc., B-242415.8 et al., Apr. 15, 1992, 92-1 CPD ¶ 369 at 6; Sanford & Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266 at 2-3. Where, however, an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility, as well as responsibility-related ones, referral to the SBA is not required. Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., B-409326 et al., March 11, 2014, 2014 CPD ¶ 97 at 12; Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248 at 4.

Here, the Army evaluated the small business offerors on an acceptable/unacceptable basis, as opposed to a comparative basis, with respect to relevant experience, a responsibility-type evaluation factor, and found CAE's proposal to be unacceptable under that factor. See 13 C.F.R. § 125.5(a)(2)(iii).⁴ As such,

⁴ While the agency evaluated CAE's proposal as unacceptable under the experience factor, it evaluated the proposal as acceptable under the past performance factor. AR, Tab 12, SSEB Report, at 10-11; Tab 22, SSEB Supp. Report, at 8. In its supplemental agency report, the agency for the first time asserts that the "SSEB erred and should have found Cascadian American Enterprise past performance not relevant and therefore technically unacceptable." Supp. AR at 6. This is a post-protest reevaluation, rather than subsequently-prepared documentation of an analysis performed prior to award. We accord greater weight to contemporaneous source selection materials rather than documents that are prepared in response to protest contentions. See Alliant Techsystems, Inc.; Olin Corp., B-260215.4, B-260215.5, Aug. 4, 1995, 95-2 CPD ¶ 79 at 11 n.8; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In any case, the FAR requires that, "[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is (continued...)

rejection of CAE's proposal based on its rating of unacceptable under the experience factor, without first referring the matter to the SBA for a COC determination, was improper. While CAE's proposal was also found to be unacceptable under the key personnel factor based on its approach to staffing the key personnel positions, as discussed above, the agency improperly failed to afford CAE the discussions regarding key personnel that it provided other offerors, including the awardee.⁵ In these circumstances, where CAE might have been in line for award had it been afforded an opportunity to address the agency's concerns regarding the acceptability of its key personnel approach, we find that there was a reasonable possibility that CAE would have been the successful offeror but for the agency's improper actions and sustain the protest on this basis. See Alliant Techsystems, Inc.; Olin Corp., *supra*, at 9.

Recommendation

We recommend that the agency conduct discussions with offerors affording them an opportunity to address any evaluated deficiencies and significant weaknesses in their proposals, reevaluate proposals, and make a new selection decision. If, in reevaluating proposals, the agency determines that CAE would be in line for award except for the fact that its proposal is evaluated as unacceptable under a responsibility-type factor, the agency should refer the matter to the SBA for a COC. If an offeror other than Jimmy Church is selected, the agency should terminate the contract awarded to Jimmy Church and award a contract to the successful offeror. We also recommend that CAE be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified

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not available, the offeror may not be evaluated favorably or unfavorably on past performance." FAR § 15.305(a)(2)(iv).

⁵ CAE also argues that the agency acted in bad faith and was biased against it. Protest at 1, 4-5; Comments, Nov. 30, 2015, at 4, 32-33. Government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Sygnetics, Inc., B-405138 et al., Aug. 22, 2011, 2011 CPD ¶ 163 at 6. Where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but must also show that this bias translated into action that unfairly affected the protester's competitive position. Global Integrated Sec. (USA) Inc., B-408916.3 et al., Dec. 18, 2014, 2014 CPD ¶ 375 at 14. CAE has not provided any credible evidence of bias nor does the record otherwise show that the agency's award decision was motivated by bias or bad faith.

claim, detailing the time expended and costs incurred, directly to the Army within 60 days of receiving this decision. Id. § 21.8(f)(1).

The protest is sustained.

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General Counsel