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Decision

Matter of: McCann-Erickson USA, Inc.

File: B-414787

Date: September 18, 2017

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DIGEST

Protest challenging agency's elimination of proposal from consideration is sustained where record shows that proposal was eliminated based on considerations not contemplated by solicitation's evaluation criteria.

DECISION

McCann-Erickson USA, Inc. (ME), of New York, New York, protests the elimination of its proposal from consideration under request for proposals (RFP) No. W9124D-16-R-0046, issued by the Department of the Army for advertising services. ME argues that the agency unreasonably eliminated its proposal without meaningfully evaluating it.

We sustain the protest.

BACKGROUND

The RFP contemplates the award of a hybrid¹ indefinite-delivery, indefinite-quantity contract to provide the Army with a full array of advertising and marketing services for a 5-year base period and two successive option periods of, respectively, 3-years and 2-years, for a total possible period of performance of 10 years. The ceiling value of the

¹ The solicitation includes fixed-price contract line items, as well as a variety of cost reimbursement type contract line items.

acquisition is \$4 billion. Firms were advised that the agency would make award on a best-value basis, considering cost/price, along with several non-cost/price evaluation criteria. The evaluation criteria were listed in descending order of importance as follows: technical, cost/price, and small business participation, with technical deemed significantly more important than cost/price and more important than small business participation. RFP at 156.² In addition, the RFP stated that the non-cost/price factors, in combination, were deemed significantly more important than cost/price, but that the importance of cost/price could increase to the extent that proposals were found to be relatively equal in technical merit. Id. The RFP also provided for the evaluation of past performance on a pass/fail or acceptable/unacceptable basis. RFP at 155.

For cost/price purposes, the RFP provided that the agency would evaluate proposals to ensure that the offerors' proposed cost/price was fair and reasonable, realistic (based upon performance of a cost realism evaluation), and balanced. RFP at 160-161.

For source selection purposes, the RFP advised offerors that the agency intends to use two methods, evaluation of past performance on a pass/fail basis without considering it in connection with a cost/technical tradeoff, and the conduct of a cost/technical tradeoff between cost/price and the remaining non-cost/price evaluation criteria. RFP at 155.

In addition to these considerations, the RFP stated that the agency would perform a two-phase evaluation of proposals. During phase one, written proposals would be evaluated, and during phase two, any firm whose proposal was evaluated as at least acceptable would be invited to make an oral presentation. RFP at 155-156. The RFP advised that the phase one evaluation contemplated a substantive evaluation of written proposals considering cost/price and the non-cost/price evaluation factors with a focus on the adequacy of the offerors' response--and the feasibility of their approach--to fulfilling the requirements of the RFP. RFP at 157. For purposes of evaluating proposals, the RFP advised that the agency would assign adjectival ratings of outstanding, good, acceptable, marginal or unacceptable under the technical and small business participation factors, and ratings of either acceptable or unacceptable under the past performance factor. RFP at 160, 162, 163. Each of the adjectival ratings included a narrative description or definition of the rating. Id.

In response to the solicitation, the agency received [deleted] proposals, including the proposal submitted by ME. The record shows that, rather than evaluate the proposals as described above, the agency performed what it has termed a "compliance review." On the basis of that compliance review, the agency eliminated [deleted] proposals submitted. As is pertinent to the protest, the record shows that the agency eliminated the ME proposal for certain informational deficiencies (discussed in detail below). After being advised that its proposal was no longer under consideration, ME requested and

² All references to the RFP are to the conformed RFP provided by the agency at exhibit 3 to the agency report (AR).

received a debriefing from the agency. ME subsequently filed an agency-level protest with the Army, which was denied. This protest followed.

PROTEST

ME argues that the agency unreasonably failed to evaluate its proposal meaningfully and instead eliminated it from consideration based on a superficial review that only considered whether or not the firm had followed the solicitation's proposal preparation instructions. ME further argues that, to the extent that its proposal did, in fact, suffer from the informational deficiencies identified by the agency, those informational deficiencies were minor in nature and can be cured through clarifications to its original proposal.

The agency argues that it reasonably eliminated the ME proposal from consideration based on the firm's failure to follow the proposal preparation instructions. The agency further contends that it has not established a competitive range at this time and, consistent with the terms of the solicitation, is not required to conduct discussions, which the agency maintains would be necessary in order for the ME proposal to be found compliant with the instructions for submission of proposals included in the RFP.

In reviewing protests challenging an agency's evaluation of proposals, we do not independently evaluate proposals. Rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Metis Solutions, LLC et al., B-411173.2 et al., July 20, 2015, 2015 CPD ¶ 221 at 4. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. Id.

We conclude that the agency's review of ME's proposal was not consistent with the terms of the solicitation's evaluation criteria. The record shows that the agency performed only a superficial, perfunctory review of the ME proposal to identify instances where ME allegedly did not fully comply with the instructions for proposal preparation. However, the agency did not meaningfully evaluate the substance of the ME proposal, as required by the solicitation's evaluation criteria.³

As an initial matter, we point out that nothing in the RFP's evaluation criteria advised offerors that the agency would perform a preliminary, pass/fail compliance check of

³ As discussed below, the agency also performed no meaningful review of ME's cost/price proposal because it was not submitted in the format requested by the solicitation's instructions. As with the agency's evaluation of its non-cost/price proposal, there was nothing in the solicitation evaluation criteria that advised offerors that the agency would simply not evaluate their cost/price proposal based on a failure to comply strictly with the solicitation's proposal preparation instructions.

proposals to determine whether the offerors had complied strictly with the solicitation's proposal preparation instructions. Agencies are required to evaluate proposals exclusively based on the evaluation factors stated in the solicitation. While a solicitation may establish additional informational, technical, administrative, or other requirements in the instructions for proposal preparation, those requirements may not properly be considered in connection with the evaluation of proposals--and correspondingly may not provide a basis for eliminating a proposal from consideration--unless those additional requirements also are specified as a basis for proposal evaluation. Metis Solutions LLC. supra. at 5 n. 6; Veterans Evaluation Services, Inc., et al., B-412940, et al., July 13, 2016, 2016 CPD ¶ 185 at 16 n. 21.

Here, the record shows that the agency exclusively identified only instances where ME allegedly failed to comply strictly with the solicitation's proposal preparation instructions as a basis for finding the proposal unacceptable. See AR, exh. 15, Contracting Officer's Compliance Checklist; exh. 16 Cost Price Analyst Review Memorandum; exh. 17, Contract Specialist's Compliance Memorandum; exh. 18, Source Selection Authority's Clearance Memorandum, Noncompliance Briefing, and Memorandum for the Record. However, as noted, nothing in the solicitation's evaluation criteria advised offerors that the agency would perform a preliminary pass/fail compliance check to determine whether the firms had prepared their proposals in strict conformance with the solicitation's proposal preparation instructions.⁴

The agency argues that the solicitation's evaluation factors did, in fact, advise offerors of (and contemplate) the compliance review performed by the agency. In this connection, the agency points to the following language included in the solicitation:

Award will be made to a single Offeror who is deemed responsible, whose proposal conforms to the solicitation requirements (to include all stated terms, conditions, representations, certifications, and all other information required by Section L and Section M of this solicitation), and whose proposal represents the most advantageous offer to the Government.

RFP at 154. While this language generically describes the basis for the agency's award decision, it does not describe the evaluation factors that the agency would use to evaluate proposals, and, in fact, appears under the heading "Basis for Contract Award."

⁴ In contrast, the RFP did advise offerors that the agency would evaluate past performance on a pass/fail or acceptable/unacceptable basis. RFP at 161. Thus, the RFP itself shows that the agency distinguished between its evaluation methodology for past performance (pass/fail), versus its evaluation methodology for the other non-cost evaluation factors, which were to be evaluated using a sliding adjectival scale based on a meaningful, substantive assessment of the proposal's content. RFP at 157-160, 162-163. Similarly, the RFP advised that proposed cost/price would be meaningfully evaluated for reasonableness, fairness, realism and balance. RFP at 160-161.

That clause is followed by another section of the solicitation entitled “Evaluation Criteria” which is where the actual evaluation factors are described. Notwithstanding this distinction, neither the “Basis for Contract Award” section, nor the evaluation criteria, advised offerors that their proposals could be rejected for failure to adhere to the proposal preparation requirements.

We also find that the informational concerns identified by the agency either were based on errors made by the agency in its cursory review of the ME proposal, or related to minor matters that easily were correctible through clarifications. We discuss three examples for illustrative purposes.

First, the agency claims that it was confused as to the identity of the offeror based on its review of the ME proposal, as well as its inability to locate the firm’s representations and certifications in the system for award management (SAM) database using the contractor and government entity (CAGE) code provided with the proposal. A review of the firm’s proposal, however, shows no ambiguity regarding the identity of the offeror, and the agency’s inability to locate ME’s profile in the SAM database was an unexplained error on the part of the agency.

The Standard Form (SF) 33 submitted with the ME proposal identifies the offeror as “McCann-Erickson USA, Inc.” and provides a CAGE code of 6ZU04.⁵ AR, exh. 11, ME Proposal, Volume 1, General, at 12. The ME proposal makes reference to two other business names, “[deleted],” and “McCann Worldgroup.” However, these differing names are explained in the ME proposal. Specifically, the ME proposal states: “Please note that [deleted] McCann-Erickson USA, Inc., d/b/a McCann Worldgroup.” AR, exh. 10, ME Proposal, Past Performance Volume, at 88.

In addition, the ME proposal includes subcontractor authorization letters from [deleted] subcontractors authorizing ME to disclose and discuss each firm’s past performance information, along with teaming agreements executed between ME and its respective teaming partner. AR, exh. 10, ME Past Performance Proposal, Section A. Each of these documents identifies ME as “McCann Erickson USA,” the offeror identified on the SF 33. The record therefore clearly shows that the offeror is McCann-Erickson USA, and that the other references in the firm’s proposal to “[deleted]” and “McCann Worldgroup” are [deleted], as explained in the proposal.

⁵ As the protester correctly notes, CAGE codes are assigned to discrete business entities by the Defense Logistics Agency and are used to dispositively establish the identity of a legal entity for contractual purposes. Federal Acquisition Regulation (FAR) § 4.1801; Raymond Express International, LLC, B-409872.3 et al., Sept. 11, 2015, 2015 CPD ¶ 265 at 6. Given that the ME proposal includes only this single CAGE code identifying the offeror, the agency’s inquiry concerning the identity of the offeror could have ended there.

The record also shows that the agency apparently was unable initially to locate the firm's representations and certifications in the SAM database. AR, exhs. 25, 26 SAM database Search Results, March 21, 2017.⁶ However, a subsequent search of the SAM database conducted by the agency located the information in question. AR, exh. 26, SAM Database Search Results, May 5, 2017.⁷ There is no explanation in the record concerning the agency's initial failure to locate ME's SAM database representations and certifications.

The record therefore shows that, based on a fair and comprehensive reading of the protester's proposal, there is no question regarding the identity of the offeror, and that its representations and certifications (included in its SAM database profile) were complete and accurate. In any event, to the extent that the agency was confused about the identity of the offeror, it could have clarified the question without any revision to the firm's proposal simply by asking ME to explain the relationship between the names used in its proposal. In addition, to the extent that a firm's proposal (or its SAM database entry) did not include all of the required representations and certifications, such a lack of information relates to the responsibility of the firm rather than to the acceptability of its proposal. See JRS Staffing Services, B-409360 et al., Mar. 27, 2014, 2014 CPD ¶ 105 at 6-7; see also Veterans Constr. of S.C., LLC, B-401723.2, Jan. 21, 2010, 2010 CPD ¶ 36 at 2 (bid was responsive despite absence of valid representations). We therefore conclude that these considerations did not provide a reasonable basis to reject the proposal.

As a second example, the record shows that the agency found the ME proposal unacceptable for failing to include attachment 5 of the RFP with its proposal, concluding that the protester's alleged failure to include this document with its proposal hindered

⁶ The record shows that, before conducting its searches in March (referenced above), the agency performed a search of the SAM database in February, 2017, using the company name "McCann Worldgroup, Inc." with a CAGE code of 1V1F4. AR, exh. 24, SAM Database Search Results, February 14, 2017. That search was conducted on the same date that ME submitted the past performance volume of its proposal, which the RFP required to be submitted earlier than the remainder of the firm's proposal. Apparently the agency performed that search believing that the offeror was "McCann Worldgroup, Inc.," the predecessor contractor for the agency's requirements, notwithstanding that the ME past performance volume clearly identified the offeror as "[deleted]" and explained that [deleted] of McCann-Erickson USA d/b/a McCann Worldgroup. AR, exh. 10, ME Proposal, Past Performance Volume, at 1, 88.

⁷ The agency contends that in ME's SAM representations and certifications, ME represented that it did not have any federal government contracts valued at \$10 million or more, and that this amounts to a misrepresentation in its SAM records intended to mislead the agency, given that ME is the current incumbent for the agency's requirements on a contract valued at \$1.3 billion. However, as noted above, the incumbent business entity (which does have such contracts) is not the current offeror.

the proposal evaluation process. AR, exh. 17, Contract Specialist's Compliance Review Memorandum, at 4. Attachment 5 is a document entitled "Preadward Survey of Prospective Contractor Accounting System Checklist" that is to be provided to the Defense Contract Audit Agency (DCAA) to enable that agency to review the adequacy of the offeror's accounting system. AR, exh. 3, attach. 5.

The record shows that the protester did not include attachment 5 to the RFP because it is a business entity that currently does not have an approved accounting system, and that ME followed the solicitation's instructions in light of these circumstances. In this connection, the RFP instructed as follows:

Offerors, including Joint Ventures, without an adequate accounting system shall email the Contracting Officer to initiate an accounting system review by DCAA. This request shall be submitted immediately upon receipt of this RFP. Offerors are encouraged to initiate this process immediately.

RFP at 148-149. The record shows that ME followed these instructions, and e-mailed the contracting officer on February 14, the same date it submitted the past performance volume, but prior to the deadline for submitting the remainder of its proposal. Protester's Comments, exh. A, E-Mail Exchange Between ME and the Contracting Officer, February 14, 2017. ME's e-mail specifically states that the firm desired to have its accounting system reviewed and validated by DCAA and asked the contracting officer whether she wanted ME to contact DCAA directly, or whether she wanted DCAA to be contacted by government representatives. Id. at 2. In response to ME's e-mail, the contracting officer advised as follows:

We are the responsible party to notify DCAA Cognizant Office of a request for audit.

When we reach the appropriate point in our acquisition process, we will send a request to DCAA on behalf of said Offerors.

There is no need for you to take any action at this point in time.

Id. at 1 (emphasis supplied).

The record therefore shows that ME specifically followed the solicitation's instructions concerning any effort required by it to have its accounting system reviewed by DCAA. Notwithstanding its efforts and the contracting officer's explicit direction that there was no need for ME to take any action at the time, the agency improperly found its failure to include attachment 5 of the RFP a basis to reject ME's proposal, despite the solicitation's express instructions quoted above.

We note as well that, regardless of any other consideration, questions relating to the adequacy of a firm's accounting system in the context of a cost-reimbursement type contract generally are a matter of the firm's responsibility rather than a matter relating to the acceptability of the firm's proposal. Lockheed Martin Corp., B-410329 et al., Dec.

11, 2014, 2015 CPD ¶ 7 at 12-13. To the extent that the agency had concerns relating to the adequacy of ME's accounting system based on its review of the firm's proposal, the agency could have sought and obtained information from ME (including, for example, attachment 5 of the RFP), since obtaining such information does not constitute discussions, provided that the additional information obtained does not result in a revision or modification to the firm's proposal.⁸ Id. In view of these considerations, we conclude that the agency unreasonably found the ME proposal unacceptable for not including attachment 5 of the RFP.

As a third and final example, the record shows that the agency rejected ME's proposal for submitting its cost/price proposal in the wrong format. In particular, the record shows that the agency rejected ME's proposal for submitting its cost/price proposal as a portable document file (pdf) rather than as a Microsoft Excel spreadsheet. AR, exh. 15, Contracting Officer's Compliance Checklist, at 2. The record shows that the agency did not substantively evaluate the ME cost/price proposal, choosing not to calculate the firm's total evaluated cost/price; performing no meaningful cost realism evaluation; and not evaluating the proposal for balance, fairness or reasonableness, as specifically contemplated by the solicitation's cost/price evaluation factor. RFP at 160-161. The agency also did not afford ME an opportunity to submit its cost proposal as a Microsoft Excel file.

We find the agency's rejection of the ME proposal for this reason unreasonable. As discussed above, the solicitation's evaluation criteria did not place offerors on notice that the agency simply would reject proposals without first performing a substantive evaluation. In addition, the record does not establish why the Army is unable to evaluate ME's cost/price proposal using the pdf version of the proposal that it submitted, as opposed to a Microsoft Excel version of the cost/price proposal.⁹ Although a

⁸ Attachment 5 of the RFP would not provide ME an opportunity to revise or modify its proposal. The document only solicits information relating to the offeror's accounting system and does not provide an opportunity to revise or modify any portion of the cost/price or technical proposal submitted.

⁹ In Herman Construction Group, Inc., B-408018.2, B-408018.3, May 3, 2013, 2013 CPD ¶ 139, we did conclude that it was reasonable for an agency to eliminate a firm from further consideration based on its submission of its cost proposal in a pdf format rather than in as a Microsoft Excel spreadsheet. In that case, the agency provided a detailed explanation regarding its attempt--and inability--to review the protester's proposal in pdf format. In contrast, the agency's cost analyst in the current case suggests only that the pdf version of ME's proposal prevents the agency from performing a 'validation' of the ME cost/price proposal and makes a vague reference to an alleged inability to perform parametric cost modeling in light of the absence of a Microsoft Excel version of the protester's cost/price proposal. AR, exh. 16, Cost Price Analyst Review Memorandum, at 1. However, the agency has provided no meaningful explanation regarding why ME's submission of a pdf version of its cost/price proposal could have affected the agency's ability to verify various aspects of ME's cost/price

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Microsoft Excel version of the proposal would include the underlying formulae used to arrive at the cost/price proposed by ME, the agency has not explained how the lack of such information would necessarily lead to its inability to evaluate the MS cost/price proposal.

The agency also has not explained how allowing ME to substitute a Microsoft Excel version of its cost/price proposal for the pdf version originally submitted by the firm would be improper. Assuming that ME did not make any changes to its proposed cost/price in submitting its proposal in a different format, there would be no basis necessarily to conclude that acceptance of a Microsoft Excel version of the ME cost/price proposal would involve anything more than a clarification of ME's proposal.¹⁰

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proposal, or how a pdf version of the cost/price proposal prevented the agency from performing parametric cost modeling, assuming for the sake of argument that the agency actually intends to use such an evaluation methodology. In this latter connection, nothing in the RFP required offerors to use parametric cost modeling techniques in the development of their cost/price proposals and there is no evidence that ME used such modeling to develop its cost/price proposal. In addition, nothing in the record shows that the agency has developed a parametric cost model that it intends to use in connection with the evaluation of proposals.

¹⁰ We note as well that the agency has not explained its apparent concern with the possibility of opening discussions in this acquisition. (The RFP cautions offerors in a number of instances that various actions on the part of the agency will not constitute the establishment of a competitive range or the conduct of discussions. RFP at 139, 146, 156.) While the RFP did provide for the possibility of making award without discussions, it also provided the agency with discretion to engage in discussions. RFP at 154. Where a Department of Defense agency is acquiring goods or services valued at more than \$100 million, the Defense Federal Acquisition Regulation Supplement (DFARS) § 215.306(c) provides that the agency "should" conduct discussions. As noted, the ceiling value of the contract to be awarded is \$4 billion.

The record here shows that, of the [deleted] proposals submitted, only [deleted] still currently under active consideration. In this connection, the record includes an e-mail From Mr. A to Ms. B dated April 7, 2017, which provides as follows:

[deleted]

We make no specific finding at this time regarding the reasonableness of the agency's exercise of its discretion concerning whether to engage in discussions, since the agency has not yet made a decision about that question; nonetheless, any exercise of discretion on the part of the agency in connection with such a decision must be reasonable. See Science Applications International Corp., B-413501, B-413501.2, Nov. 9, 2016, 2016 CPD ¶ 328 at 8-11.

In sum, we conclude that the agency unreasonably eliminated the ME proposal from consideration based on findings relating to the firm's alleged noncompliance with the solicitation's proposal instructions rather than based on substantive findings made after a meaningful review of the firm's proposal, considering only the evaluation factors outlined in the RFP. We also conclude that the agency's specific findings of noncompliance largely were based either on incorrect information, a misunderstanding of the firm's proposal, or conclusions regarding the necessity of certain information or the agency's ability to obtain that information through clarifications. As noted, nothing in the solicitation's evaluation criteria advised offerors that the agency would perform a preliminary compliance review of proposals to determine whether firms had complied strictly with the solicitation's proposal preparation instructions. Instead, the evaluation criteria advised offerors that the agency would perform a meaningful, substantive review of proposals. We therefore sustain ME's protest.

RECOMMENDATION

We recommend that the agency reevaluate the ME proposal in a manner that is consistent with the terms of the solicitation as well as the discussion above. On the basis of that reevaluation, we recommend that the agency make a new determination as to the acceptability of the ME proposal, and as to the firm's likely potential for award of the contract. We also recommend that ME be reimbursed the costs associated with filing and pursuing its bid protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Susan A. Poling
General Counsel