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Decision

Matter of: AC4S, Inc.

File: B-404811.2

Date: May 25, 2011

Joseph M. Goldstein, Esq., Shutts & Bowen LLP, for the protester.
Brian A. Darst, Esq., and Matthew R. Keller, Esq., Odin, Feldman & Pittleman, PC, for Engineering Services Network, Inc.; and Robert E. Gregg, Esq., and Karen R. Harbaugh, Esq., Squire, Sanders & Dempsey (US) LLP, for NetCentrics, the intervenors.

Maj. James W. Nelson, and Brenda Oswalt, Esq., Department of the Army, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably eliminated proposal from consideration for award where the proposal failed to conform to a material term of the solicitation.
 2. Protester's omission of words from a required performance metric was not subject to clarification where the omission was material and constituted a deficiency.
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DECISION

AC4S, Inc., a small business, protests the elimination of its proposal from consideration for award under request for proposals (RFP) No. W91QUZ-08-R-0011, issued by the Department of the Army for information technology services.

We deny the protest.

The RFP was issued on March 25, 2009 as a total set-aside for small business, to establish a multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contract for a range of services and solutions necessary to implement the agency's enterprise infrastructure and infostructure goals. To achieve this end, the RFP sought to enter into "performance-based" arrangements with successful offerors. The RFP noted that establishing performance based arrangements introduced several changes from

traditional procurement approaches, including the use of a statement of objectives (SOO) rather than a statement of work (SOW). RFP, Section L, at 1. Under a SOO, the government describes its requirements in terms of desired objectives, and offerors are free to propose solutions that they believe will best meet or exceed those objectives. After award, the agency monitors and evaluates contractor performance using performance metrics established by the contract. These metrics gauge a contractor's level of success in meeting SOO objectives, and provide for performance-related incentives and disincentives. See Id. at 11; Contracting Officer's Statement of Facts (COSF), at 9. The RFP also advised that the agency contemplated making award without discussions. RFP, Section 1, at 1.

According to the RFP, the awards would be made to offerors with proposals determined to be the most beneficial, considering three evaluation factors: mission support, performance risk, and price. RFP, Section M, at 2-3. The mission support factor consisted of three subfactors: corporate capability, management approach, and quality control programs. Id. at 2.

Pursuant to the RFP, under the management approach subfactor, offerors were to identify performance metrics for each objective identified in the SOO using "Table 1 – Performance Metrics." RFP, Section L, at 9. These metrics consisted of "Measures and Metrics; Acceptable Level of Quality (ALQ); and the contract level Incentives (non-monetary)/Disincentives." Id. For three of the SOO objectives, the RFP set forth government-specified measures, metrics, and ALQ, which were pre-printed within the table. Id.

As relevant, entry 1.d of Table 1 applied to the SOO objective "[e]ffectively use small businesses to assure achievement of subcontracting targets allowing for mentorship of small businesses," and contained a government-specified metric: "usage of SBs [small businesses] in subcontracting." Id. at 10. Entry 1.d also contained a government-specified ALQ: "contractor's proposed % SB Usage of total dollar value," for which the applicable percentage was to be entered from "Table 3 – Subcontracting Participation Goals." Id.

With regard to the government-specified measures, metrics, and ALQs, the RFP cautioned offerors,

Note: With one exception [entry of the applicable percentage for ALQ 1.d], **the Offeror shall not change the Objectives, Measures and Metrics, and Acceptable Level of Quality listed in Table 1 – Performance Metrics, below. For Acceptable Level of Quality 1.d, in Table 1, the Offeror shall add the percentage it entered for "Small Business (inclusive of all categories below)" from Section L, Table 3 – Subcontracting Participation Goals. The Offeror is reminded that it is not to include itself in this figure.**

RFP, Section L, at 9 (emphasis original). Amendment 2 to the RFP, which incorporated agency answers to offeror questions, further emphasized this caution. In response to a question concerning whether the agency intended to limit offerors to one set of measures, metrics, acceptable level of quality, and incentives/disincentives per objective, the agency answered,

No. However, the already provided Measures and Metrics at 1.d, 2.c, and 3.c and Acceptable Level of Quality at 1.d, 2.c, and 3.c at Table 1 – Performance Metrics shall not be revised or deleted.

Amendment 2, Questions and Answers, at 16.

The agency received fifty proposals in response to the RFP. The agency made award without discussions on February 15, 2011, and AC4S received its debriefing the same day. During the debriefing, AC4S learned that its proposal had received a red/unacceptable rating under the management approach subfactor, which resulted in a red/unacceptable rating for the entire mission support evaluation factor, and a determination that AC4S's proposal was unacceptable overall. The debriefing explained that the red/unacceptable ratings stemmed from a deficiency assessed under the management support factor. Specifically, AC4S had improperly modified metric 1.d of Table 1 by omitting the phrase "in subcontracting" from the government-specified metric "usage of SBs in subcontracting." The agency determined that this omission materially altered the government-specified performance metric and that the proposal therefore failed to conform to a material term of the RFP.

AC4S protests that the agency's assessment of a deficiency under the mission support subfactor was improper because the "inadvertent omission" of the phrase "in subcontracting" from one metric did not change AC4S's intent to meet the SOO's objective to increase small business subcontracting. AC4S argues that its intent to meet the objective was apparent from Table 1 and from its proposal throughout, in which AC4S repeatedly discussed its intent to subcontract 30 percent of the work to other small business subcontractors. AC4S also argues that the agency should have corrected the missing phrase through clarifications. We disagree.

Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award. National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is unacceptable. See TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. Here, we conclude that the government-specified performance metrics were material requirements of the RFP, that the agency reasonably determined that AC4S improperly modified the performance metrics in a manner that did not conform to the terms of the RFP, and that the error was not subject to correction via clarifications.

Under a performance based contracting arrangement, such as we have here, performance metrics are more than mere proposal evaluation tools. Rather, the metrics become the measurable performance standards used to assess the contractor during performance, and to determine the application of performance incentives and disincentives. Indeed, the measures, metrics, ALQ, and incentives/disincentives establish the performance levels that are required to meet the objectives specified by the SOO, and are critical aspects of the resulting performance-based contract. In this case, the agency provided certain government-specified performance metrics reflecting the level of performance that the government required, and the agency repeatedly cautioned the offerors that these metrics were not to be revised in any way. Such clearly stated RFP terms are undoubtedly material to the needs of the government, and failure to conform to such terms renders a proposal unacceptable.

Next, based on our review of the RFP and AC4S's proposal, it is readily apparent that AC4S's modification of the performance metric at issue did, in fact, materially alter the metric's meaning. The agency explains that, based on its past experience, the awardees will likely outgrow their small business status over the course of the contract, leaving few firms to compete for future set-asides. COSF, at 10. The objective "[e]ffectively use small businesses to assure achievement of subcontracting targets allowing for mentorship of small businesses" was therefore included in the SOO to encourage awardees to "mentor and grow other small businesses, that would obtain relevant experience, and . . . enhance the competition for the next generation of small business set-asides of this kind." Id.

The applicable government-provided performance metric, "usage of SBs in subcontracting," was specified to provide a common, clearly understandable and measurable basis for monitoring awardee's success in meeting the above objective during performance. The metric, "usage of SBs," as modified by AC4S, however, fails to reflect the intent of the SOO objective to assure achievement of subcontracting targets and allow for mentorship of small businesses, or the intent of the provided metrics, because it captures AC4S's own efforts as a small business along with those of its small business subcontractors.

The extent to which AC4S's modified performance metric deviated from the SOO objective and government-specified metric is apparent when it is considered that AC4S also included its own efforts as a small business in its proposed percentage small business usage in ALQ 1.d, contrary to the RFP's instructions. In Volume IV of its proposal, AC4S stated that "AC4S is retaining 80% of the contract towards small businesses. The 80% includes 50% for AC4S." On the same page of the proposal, in Table 3 – Subcontracting Participation Goals, AC4S confirms that 30 percent of the contract will be subcontracted to small businesses. However, rather than enter the 30 percent figure from Table 3 into ALQ 1.d, as instructed, AC4S entered "80 percent."

The overall effect is that, by including its own efforts in the small business utilization percentage of ALQ 1.d, and by omitting the phrase “in subcontracting” from metric 1.d, AC4S made it possible to compensate for failure to meet its subcontracting objective by increasing its own share of contract performance. For example, if AC4S were to fall 10 percent short of its small business subcontracting target during performance, but increase its own portion of contract performance to 60 percent, AC4S would meet its modified performance metric of 80 percent small business usage and avoid performance-based disincentives, despite failing to meet the small business subcontracting target. Therefore, the omission of the phrase “in subcontracting” had a material effect on AC4S’s commitment to conform to the specified small business usage metric required by the RFP.

AC4S also suggests that the omission of the phrase “in subcontracting,” and the inclusion of its own efforts in the small business usage percentage should have been corrected through clarifications. We disagree. Clarifications are limited exchanges between the agency and offerors that may occur where, as here, contract award without discussions is contemplated. FAR § 15.306(a). An agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. Id. However, clarifications may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or revise the proposal. Superior Gunite, B-402392.2, Mar. 29, 2010, 2010 CPD ¶ 83 at 4. Because the omission of the phrase “in subcontracting” in this case was both a material omission and a deficiency, the error was not subject to correction via the clarifications process.

The protest is denied.

Lynn H. Gibson
General Counsel