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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: Marathon Medical Corporation

File: B-408052

Date: June 4, 2013

Kristen E. Ittig, Esq., Arnold & Porter LLP, for the protester.
James S. Phillips, Esq., and Eric s. Cruisus, Esq., Centre Law Group, LLC, for Manus Medical, LLC, the intervenor.
Russell L. Emery, Esq., Department of Veterans Affairs, for the agency.
Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency held unequal discussions is sustained where agency allowed awardee, but not protester, to submit information to demonstrate that its proposal was acceptable.

DECISION

Marathon Medical Corporation, of Commerce City, Colorado, protests the Department of Veterans Affairs' award of a contract to Manus Medical, LLC, of Glendale, Colorado, under request for proposals (RFP) No. VA259-12-R-0078, for custom sterile surgical procedure packs and trays. Marathon asserts that the agency held unequal discussions with offerors.

We sustain the protest.

BACKGROUND

The solicitation requested offers to provide custom sterile surgical packs and procedure trays; it listed the items that had to be provided for each pack by brand name and item number. RFP, exh. 1, att. A-E. The solicitation, however, included a brand name or equal clause which permitted offerors to propose equal items (unless specifically prohibited for an individual item). Offerors were required to clearly identify any offered equal items, which were to be evaluated for equality based on information furnished in the offer or other information reasonably available to the

agency. RFP § C.18. The solicitation further provided that an offeror proposing an equal item

must furnish as part of his/her bid all descriptive material (such as cuts, illustrations, drawings or other information) necessary for the purchasing activity to: (i) Determine whether the product offered meets the salient characteristics requirement

Id. The solicitation, however, did not identify any salient characteristics for the listed brand name items that an offered equal item was required to meet.

In addition, offerors were required to provide samples of components included in 4 custom procedure packs (open heart, PICC (peripherally inserted central catheter) tray, total joint, and major), which comprised approximately 40% of the items requested under the solicitation. RFP § E.4; Bid Sample Instructions.¹ These samples were to be evaluated to determine whether the offeror provided the right type and number of components from the right manufacturer. RFP § E.4. The instructions for submitting samples further informed offerors that any equal products “shall clearly be identified in the proposal and shall fully satisfy the salient characteristics of the items listed by the Government.” Bid Sample Instructions.

Offerors also were required to identify and furnish references, including contact information, for three, preferably government, customers for which the offeror had provided the custom surgical packs described in the solicitation. RFP § E.4. In addition, the solicitation provided with respect to past performance that the agency would consider whether the offeror had received at least a satisfactory rating from each individual reference with respect to: schedule; training and skill of personnel; responsiveness to customer requirements; problem identification and correction; and overall (customer) satisfaction. RFP § E.4(A)(I).

Award was to be made to the lowest-priced, technically acceptable offeror, based on a pass/fail evaluation under nine technical factors, including (as relevant here) sample, reference, and past performance factors. RFP § E.4. Offerors were required to receive a rating of pass for all technical factors to be eligible for award. Id.

Six offerors responded to the solicitation. Marathon submitted the lowest priced offer (\$3,816,156.11), but its proposal did not include the three required references.

¹ Although the RFP referred to these samples as “bid samples,” we note that the VA was using negotiated procurement procedures, not sealed bidding procedures. Compare FAR Part 14 (Sealed Bidding) with FAR Part 15 (Contracting by Negotiation).

Final Evaluation Report (FER) at 5. Consequently, it was evaluated as unacceptable under the reference and past performance factors, and considered ineligible for award. Id. The agency nevertheless sent an “evaluation notice” to Marathon which asked whether at least 3 references had been provided with its proposal. Id. In response, Marathon provided 4 references, and also indicated that it had not provided the required references in its initial proposal. Marathon Evaluation Notice Response. The agency determined that Marathon’s proposal was unacceptable since the references had not been submitted with the proposal. FER at 5.

Manus, the second lowest-priced offeror (\$4,666,322.80), offered equal items for all requested items. Manus included a brief description of the item, and listed the name of the manufacturer and the relevant part number. According to the agency, Manus supplied the samples required by the solicitation (that is, for approximately 40% of the items under the solicitation), the company’s proposal was considered “technically acceptable,” and it was initially considered the “apparent awardee.” Agency Response to Questions, Apr. 26, 2013. The agency nevertheless sent Manus an evaluation notice which asked the following:

In order to verify if the proposed components are equal or equivalent to the components listed in the solicitation, would one of the options below be possible?

1. Samples of all equivalent components listed in the proposal either be brought in or sent in to the Denver facility for viewing.
2. If a facility/warehouse is available near Denver and is available for a visit to view the components that were listed in the proposal as “equivalent.”

Manus Evaluation Notice. According to the agency,

Manus did provide samples as required by the solicitation. However . . . the reason the VA requested additional sample components was because there were numerous components that were proposed by manufacturers that the technical evaluation team was not familiar with. By viewing them they were able to make a firm determination that they were in fact “equivalent.”

Supplemental Legal Memorandum at 6.

According to the Final Evaluation Report,

Manus Medical brought in all proposed components so the [Source Selection Evaluation Board] Chair could visually inspect the

components. The determination was made that all components proposed were “equivalent.”

FER at 5.

Since, as discussed above, Marathon’s proposal had been rejected as technically unacceptable, award was made to Manus as the lowest-priced, technically acceptable offeror. Marathon thereupon filed this protest with our Office.

DISCUSSION

Marathon protests that the agency improperly held discussions with Manus, but failed to hold discussions with Marathon. Specifically, Marathon asserts that the agency allowed Manus to provide its components for inspection after the closing date for proposals, which allowed Manus to become acceptable, but did not allow Marathon the same opportunity with respect to its past performance references. In response, the agency responds that it did not hold discussions with Manus because it did not allow Manus to alter its proposal, and instead only requested clarification of its proposal.

Federal Acquisition Regulation (FAR) § 15.306 describes a range of exchanges that may take place between an agency and an offeror during negotiated procurements. Clarifications are “limited exchanges” between the agency and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical mistakes. FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency indicates to an offeror aspects of its proposal that could be altered or explained to materially enhance the proposal’s potential for award or to obtain information from the offeror that is necessary to determine the proposal’s acceptability. See FAR § 15.306(d)(3); Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 at 4-5; Nu-Way, Inc., B-296435.5, B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 7. If a procuring agency holds **discussions** with one offeror, it must hold **discussions** with all offerors whose proposals are in the competitive range. International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6. In addition, when holding discussions procuring agencies are not permitted to engage in conduct that favors one offeror over another. FAR § 15.306(e)(1).

Here, the solicitation required that an offeror proposing an equal item “must furnish as part of his/her [offer] all descriptive material . . . necessary for the purchasing activity to: (i) Determine whether the product offered meets the salient characteristics requirement.” RFP § C.18. According to the evaluation notice, the agency was requesting samples for all proposed equal items “[i]n order to verify if the proposed components are equal or equivalent.” Manus Evaluation Notice. As the agency subsequently explained, “[b]y viewing [the samples] they were able to make a firm determination that they were in fact ‘equivalent.’” Supplemental Legal Memorandum at 6. Since visual inspection of the requested samples was necessary

for Manus to meet its obligation of establishing that the proposed equal items were in fact equivalent to the name brand items, the request that Manus bring in the components for a visual inspection amounted to discussions with Manus for the purpose of allowing it to establish the acceptability of its proposal. Accordingly, the agency was required to treat Marathon equally, and allow Marathon a similar opportunity to meet the solicitation's requirements. In this case that would mean allowing Marathon to provide the references it initially omitted. Since the agency failed to do so the agency engaged in unequal discussions.

RECOMMENDATION

In light of the foregoing discussion, we sustain Marathon's protest. We recommend that the agency open discussions and then allow offerors to submit revised proposals. We also recommend that the agency reimburse Marathon the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2013). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel