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Decision

Matter of: L&G Technology Services, Inc.

File: B-408080.2

Date: November 6, 2013

J. Hatcher Graham, Esq., for the protester.
Pamela J. Mazza, Esq., and Alexander O. Levine, Esq., PilieroMazza PLLC, for Trinity Analysis & Development Corp., the intervenor.
Skye Mathieson, Esq., and Col. Barbara E. Shestko, Department of the Air Force, for the agency.
Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly permitted awardee as part of corrective action to clarify its intent and ability to comply with the solicitation's subcontracting limitation provision is denied where the exchange did not constitute discussions nor was it otherwise improper.

DECISION

L&G Technology Services, Inc., of Macon, Georgia, protests the award of a contract to Trinity Analysis & Development Corp., of Shalimar, Florida, under request for proposals (RFP) No. FA2823-12-R-0002, issued by the Department of Air Force for aerospace ground equipment support services at Eglin Air Force Base, Florida. L&G argues that the Air Force's decision, as part of corrective action, to conduct clarifications with Trinity and permit Trinity to provide additional information evidencing the offeror's intent and ability to comply with the RFP's subcontracting limitation clause was improper.

We deny the protest.

BACKGROUND

The RFP, issued as an 8(a) set-aside,¹ contemplated the award of a fixed-price contract for a 6-month base period, four option years, and a 6-month option.² In general terms, the performance work statement required the contractor to provide all labor, materials, and supplies necessary for the dispatching, servicing, inspecting, cleaning, corrosion control, modification, and maintenance of approximately 600 pieces of powered and nonpowered aerospace ground equipment for the Air Force's 96th Test Wing.

Offerors were informed that award would be made on a best-value basis, considering the following evaluation factors: technical acceptability, past performance, and price. RFP at 84. Past performance was approximately equal in importance to price. Id. Additionally, as relevant here, the RFP included FAR clause 52.219-14, Limitations on Subcontracting, which states in pertinent part:

(c) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

Id. at 33 (FAR clause 52.219-14).

Three offerors, including Trinity and L&G, submitted proposals by the RFP's closing date. The Air Force's source selection evaluation team (SSET) evaluated offerors' proposals for both technical acceptability (acceptable/unacceptable) and past performance confidence (substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence).

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2006), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.800(a). Department of Defense agencies have in turn been delegated authority to enter into 8(a) contracts on behalf of the SBA. Department of Defense FAR Supplement § 219.800(a).

² The RFP also included various items that were to be performed on a time-and-materials (e.g., overtime labor) or cost-reimbursement basis (e.g., materials).

Following its initial evaluation, the Air Force included all offers in the competitive range.³ The agency conducted three rounds of discussions with offerors, identifying deficiencies, weaknesses, and uncertainties in their respective proposals--22 in the case of L&G, and 2 in the case of Trinity. AR, Tab 13, Air Force Letter to L&G, Oct. 30, 2012, at 1-21; Tab 17, Air Force Email to L&G, Dec. 6, 2012, at 1-12. The Air Force's discussions with Trinity, however, did not include the offeror's intent and ability to comply with the RFP's subcontracting limitation because the SSET had not identified this to be a concern in its evaluation. AR, Tab 14, Air Force Letter to Trinity, Oct. 30, 2012, at 1-4; Tab 8, Initial Evaluation Report for Trinity, Oct. 23, 2012, at 1-44.

The offerors' final proposal revisions (FPR) were evaluated as follows:

	Trinity	L&G	Offeror C
Technical Acceptability	Acceptable	Acceptable	Acceptable
Past Performance	Substantial Confidence	Satisfactory Confidence	Unknown Confidence
Price	\$24,162,531	\$26,008,199	\$23,518,813

AR, Tab 28, SSET Final Evaluation Briefing, Feb. 21, 2013, at 8, 40.

The Air Force's source selection authority (SSA) determined that Trinity's proposal represented the best value to the government. Specifically, the SSA concluded that Trinity's higher performance confidence outweighed Offeror C's price advantage. The SSA also found that Trinity's proposal had both a higher performance confidence assessment and a lower price than L&G's proposal. AR, Tab 29, Source Selection Decision, Feb. 21, 2013, at 1-5.

On March 12, 2013, L&G protested to our Office arguing, among other things, that Trinity would not comply with the RFP's subcontracting limitation. Protest, Mar. 12, 2013, at 2-4. After the development of the protest, the cognizant GAO attorney held an "outcome prediction" alternative dispute resolution (ADR) conference.⁴ During

³ L&G was initially found to be technically unacceptable but was nevertheless included in the competitive range. Agency Report (AR), Tab 9, Competitive Range Determination Briefing, Oct. 30, 2012, at 9, 31.

⁴ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and explains what he or she believes the likely outcome will be, and the reasons for that belief. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the
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the conference the GAO attorney noted that Trinity's proposal should have alerted the agency to ambiguities regarding the offeror's intent and ability to comply with the RFP's subcontracting limitation.⁵ On May 24, the Air Force informed our Office that it would take corrective action by seeking written clarification from Trinity regarding the offeror's intent and ability to comply with the RFP's subcontracting limitation. Supp. AR, Tab 2, Air Force Letter to GAO, May 24, 2013. We dismissed the protest as academic. L&G Tech. Servs., Inc., B-408080, May 28, 2013.

On June 3, the Air Force sent Trinity a notice requesting that Trinity clarify its intent to comply with the RFP's subcontracting limitation provision. The agency also requested that Trinity provide various information regarding the portions of proposed work--both in terms of the number of employees and costs--to be performed by Trinity and its subcontractors, as well as the labor cost amounts for the work actually performed.⁶ Supp. AR, Tab 3, Air Force Clarification Notice to Trinity, June 3, 2013, at 1-4.

Trinity responded to the agency's clarification request, affirming its intent to comply with the subcontracting limitation provision. Trinity also submitted information regarding the portions of proposed work (both as to employees and costs) that it proposed to be performed by itself, and by its subcontractor. Supp. AR, Tab 4, Trinity Clarification Response to Air Force, June 10, 2013, at 1-5. Moreover, Trinity provided the Air Force with the labor cost amounts for itself and its subcontractor for the work performed to date, demonstrating its compliance with the subcontracting limitation provision. Id.; Supp. AR, Tab 8, Trinity Clarification Response to Air Force, June 21, 2013, at 1-5. Trinity made no changes to the amount or type of work that it or its subcontractor would perform.

The Air Force determined that Trinity's response fully indicated the offeror's intent to comply with the subcontracting limitation provision and, as a result, affirmed its

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agency taking corrective action or the protester withdrawing the protest), our Office closes the case.

⁵ Trinity's proposal did not expressly indicate the offeror would not comply with the subcontracting limitation; in fact, the offeror expressly stated that it took no exception to the terms and conditions in the solicitation. AR, Tab 27, Trinity FPR, Feb. 12, 2013, at 1. Rather, there were various aspects in Trinity's proposal (e.g., the apparent degree of reliance on the proposed subcontractor) that should have led to a further inquiry by the agency.

⁶ L&G's March 12 protest did not trigger the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(3)(A), and the Air Force elected not to suspend performance. Contracting Officer's Statement, Apr. 11, 2013, at 12.

original contract award decision. Supp. AR, Tab 9, Air Force Evaluation of Trinity Response; Tab 11, Air Force Memorandum for Record, July 2, 2013, at 1-2.

On July 8, the Air Force informed L&G of the results of the corrective action, and this protest followed.

DISCUSSION

L&G complains that Trinity should have been found ineligible for award, because Trinity's proposal--prior to corrective action--allegedly did not contain any commitment to comply with the RFP's subcontracting limitation. L&G also argues that the Air Force's exchange with Trinity was improper because it went beyond a mere clarification and constituted discussions by permitting Trinity to revise a deficient proposal.⁷ Importantly, L&G does not dispute that Trinity's response here fully indicates the awardee's intent to comply with the subcontracting obligation, as does Trinity's actual post-award performance. We have examined the issues raised by the protester and find they provide no basis on which to sustain the protest.⁸

Contracting officials in negotiated procurements, such as this, have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. The Matthews Group, Inc. t/a TMG Constr. Corp., B-408003.2, B-408004.2, June 17, 2013, 2013 CPD ¶ 148 at 5. This includes determining the means necessary to remedy the identified shortcomings. We generally will not object to corrective action that places all offerors in the same competitive posture they enjoyed prior to the defect in the source selection process. National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 8. In our view, the corrective action taken here is well within the broad discretion afforded to contracting agencies in these circumstances.

⁷ To the extent L&G is also protesting the agency's decision to undertake its announced corrective action (*i.e.*, to seek clarifications from Trinity), we consider that to be untimely. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8 (protest objecting to expressly stated terms of corrective action was untimely where filed after award); *see* Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10.

⁸ After developing the record, the GAO attorney responsible for the protest here conducted an "outcome prediction" ADR and informed the parties in a detailed discussion that GAO would likely deny the protest (*i.e.*, that the agency's exchange with Trinity was limited and proper). Notwithstanding the predicted outcome, the protester elected not to withdraw.

Clarifications are “limited exchanges” between an agency and an offeror for the purpose of clarifying certain aspects of a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27 at 8. 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. Highmark Medicare Servs., Inc. et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11; see FAR § 15.306(d). In situations where there is a dispute regarding whether an exchange between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. Id.; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

Contrary to L&G assertion, we find that the agency’s exchange with Trinity here did not constitute discussions. The Air Force’s June 3 letter to Trinity merely sought verification of the offeror’s intent to comply with its subcontracting obligations during performance, and did not provide for the submission of a revised proposal. Similarly, Trinity’s response merely explained an aspect of the offeror’s proposal that was otherwise vague. Quite simply, in light of the ambiguity in Trinity’s proposal, the Air Force, consistent with its letter stating its intent to take corrective action in response to L&G’s prior protest, conducted a limited exchange with the offeror to clarify the ambiguity. As such, the exchange here constituted clarifications. See FAR § 15.306(a); LOGMET LLC, B-405700, Dec. 14, 2011, 2011 CPD ¶ 278 at 3 (agency letter seeking confirmation of understanding of subcontracting obligations during performance constituted clarifications).

In any event, we find that L&G has failed to demonstrate that it was prejudiced by the agency’s exchange with Trinity, even were we to consider the communication to be discussions. Prejudice is an element of every viable protest, and our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions, that is, unless the protester demonstrates that but for the agency’s actions, it would have had a reasonable possibility of receiving award. Here, L&G has not established that its competitive position would have improved through discussions insofar as: (1) the agency’s multiple rounds of discussions with L&G resolved all weaknesses; (2) there was no opportunity for the protester to improve its technical acceptability rating; and (3) the protester has not stated that it would have changed anything in its proposal. See PAE Gov’t Servs., Inc., B-407886 et al., Mar. 22, 2013, 2013 CPD ¶ 92 at 8; Metropolitan Interpreters and Translators, Inc., B-403912.4 et al., May 31, 2011, 2012 CPD ¶ 130 at 8.

In sum, while L&G may have preferred that the Air Force declare Trinity’s proposal unacceptable based upon an ambiguity, and provide Trinity with no opportunity to address the matter--unlike the approach taken with L&G, which was permitted to

address all of the identified shortcomings in its proposal--this preference provides no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel