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Decision

Matter of: MOWA Barlovento, LLC-JV

File: B-408445

Date: September 12, 2013

Reginald M. Jones, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.

Alan I. Saltman, Esq., S. Gregory Joy, Esq., and Stephen J. Kelleher, Esq., Smith Currie & Hancock LLP, for Howard W. Pence, Inc., an intervenor.

Deena G. Braunstein, Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is not required to invite further proposal revisions from a competitive-range offeror that failed to timely respond to the agency's discussions and acknowledge a material amendment.

DECISION

MOWA-Barlovento, LLC-JV, of Gautier, Mississippi, protests the rejection of its proposal under request for proposals (RFP) No. W912QR-13-R-0026, issued by the U.S. Army Corps of Engineers for battle course renovations at Fort Knox, Kentucky. The protester argues that the Corps should have allowed MOWA-Barlovento to submit a revised proposal, despite the firm's failure to timely respond to the agency's discussions and acknowledge a material solicitation amendment.

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside, sought offers for the renovation of an infantry squad battle course. Offerors were informed that award would be made on a best-value basis, considering technical quality and price. The RFP was amended five times before the closing time for receipt of initial proposals. As relevant here, amendment 5 provided a price breakout schedule that offerors were to use in providing their prices for 11 base contract line items and one optional item.

The amendment provided that the optional item could be “awarded within 6 months of Notice To Proceed.” RFP amend. 5, at 4-5.

Eight firms, including MOWA-Barlovento, submitted proposals, which were evaluated by the agency’s source selection evaluation board. MOWA-Barlovento and another firm submitted the only technically acceptable initial proposals. See Agency Report (AR), Tab 14, Summary Evaluation Report, at 22. The contracting officer (CO) decided to conduct discussions and established a competitive range that included all of the offerors. AR, Tab 15, Competitive Range Determination, at 1.

Discussion letters were transmitted via email to the offerors, and stated that their revised proposals must be submitted by March 27, 2013. MOWA-Barlovento’s letter identified no weaknesses or deficiencies to be addressed. See AR, Tab 17, MOWA-Barlovento Discussion Letter. The discussion letters included RFP amendment 6, which provided a new price breakout schedule and a revised Davis-Bacon Act wage determination. The revised price breakout schedule was nearly identical to the schedule provided in amendment 5, except that offerors were now informed that the optional item could be “awarded within 200 days of award,” rather than within 6 months of notice to proceed. See RFP amend. 6, at 5. The revised wage determination increased the labor and fringe rates for at least one labor category. Offerors were also informed that a failure to “respon[d] will be understood to mean your firm is no longer interested in pursuing award of this solicitation.” See, e.g., AR, Tab 17, MOWA-Barlovento Discussion Letter, at 1. MOWA-Barlovento did not reply to the agency’s discussion letter, acknowledge amendment 6 in any way, or otherwise contact the Corps, by March 27, as required in the discussion letter.¹

MOWA-Barlovento explains that it did not receive the agency’s discussion letter, because, although unknown to it at the time, MOWA-Barlovento had an internet problem that prevented the firm from receiving incoming emails. Protest at 7. On April 8, MOWA-Barlovento contacted the agency’s contract specialist “to inquire whether MOWA-Barlovento needed to take any action with respect to its proposal.”² Protest, exhib. D, President’s Affidavit, at 2. The contract specialist did not advise MOWA-Barlovento that the agency had not received a response from the company; instead, the specialist informed MOWA-Barlovento that it did not need to do anything at that time. Id.; AR, Tab 27, Contract Specialist’s Statement, at 3.

¹ Another offeror also did not respond to the agency’s discussion letter.

² MOWA Barlovento states that during the week of April 8, it heard something from its subcontractors that caused the protester to think that it may have missed a communication from the Corps. Protest at 8.

On April 24, MOWA-Barlovento learned of its internet problem. See Protest, exh. D, President's Affidavit, at 2. The next day, the company advised the Corps via email of its email problem, and asked the agency to resend any correspondence that had been sent concerning this solicitation. Protest, exhib. E, Email to Contract Specialist, April 25, 2013. The contract specialist discussed the request with the contracting officer, who concluded that the agency could not consider a later submission from MOWA-Barlovento in this circumstance. The contracting officer reasoned that any further submission from the protester would be late, and that a late submission could not be accepted, given that the protester's failure to receive the discussion email was not caused by the agency. AR at 5. As a result, the Corps did not respond to MOWA-Barlovento's April 25 email. AR, Tab 27, Contract Specialist's Statement, at 4.

On April 29, the Corps requested final proposal revisions (FPR) from the remaining six offerors, but not from the protester or the other offeror that did not respond to the agency's discussion letter. On June 14, the Corps awarded the contract to Howard W. Pence, Inc. for \$3.9 million. This protest followed.

DISCUSSION

MOWA-Barlovento protests that the Corps unreasonably excluded the firm from the competitive range, which prevented MOWA-Barlovento from submitting a revised proposal. See Protest at 12. The protester also complains that the agency failed to provide prompt notice of the exclusion of the firm's proposal from the competitive range, which denied the protester certain procedural safeguards to which it argues it was entitled.³

The Corps states that it did not exclude MOWA-Barlovento's proposal from the competitive range. Instead, the Corps explains that it concluded that MOWA-Barlovento was electing to remove itself from the competition by failing to timely submit a response to the discussion letter and to acknowledge a material solicitation amendment. The Corps also states that it could not consider anything the protester submitted after it failed to timely respond to the first round of discussions, since any

³ MOWA-Barlovento raises numerous additional issues; although we do not specifically address all of its arguments, we have considered all of them and find that none provide a basis to sustain the protest. For example, although the protester contends that the agency failed to provide prompt notice of the exclusion of the firm's proposal from the competitive range, the protester simply has not demonstrated that it has suffered any prejudice from the timing of the agency's notice of the firm's exclusion from the competition. See Carriage Abstract, Inc., B-290676, B-290676.2, Aug. 15, 2002, 2002 CPD ¶ 148 at 3 n.1.

submission after March 27 would be late.⁴ AR at 4-5, citing Federal Acquisition Regulation (FAR) § 15.208(b)(1).

The protester argues that amendment 6 is not material, arguing that it would not have changed its proposal in response to the amendment and that a change in the period in which the optional item could be exercised is inconsequential because this “amounts to only a 20 day increase for a bid item representing ½ of 1% of the total bid price.” See Protester’s Response to Agency Request for Dismissal, exhib. B, President’s Affidavit. MOWA-Barlovento also argues that the FAR late proposal rules do not apply to proposal revisions in response to an agency’s discussions. See Protester’s Response to Intervenor’s Supp. Comments, at 2.

First, we disagree with the protester that amendment 6 was not material. Generally, an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation. Skyline ULTD, Inc., B297800.3, Aug. 22, 2006, 2006 ¶ 128 at 3. In this regard, changing the time within which an option can be exercised changes the rights of the parties and is therefore material. See, e.g., Peckham Vocational Indus., Inc., B-257100, Aug. 26, 1994, 94-2 CPD ¶ 81 at 4-5.

We also do not agree with MOWA-Barlovento’s apparent belief that the agency was required, under the circumstances presented here, to allow the protester to submit a late response to the discussions letter and amendment. While the protester, and even our Office, would have preferred a more forthcoming response from the agency in answer to the protester’s April 8 and April 25 inquiries, those responses would not have changed the fact that MOWA-Barlovento failed to respond to the discussion letter or to acknowledge the solicitation amendment by March 27. Since the record here unequivocally establishes that the agency was not the cause of MOWA-Barlovento’s failure to timely respond to the agency’s discussions and to acknowledge a material amendment, we cannot say that the agency has violated

⁴ The agency apparently believes that it was not within its discretion to consider any proposal revisions from the protester, once MOWA-Barlovento failed to meet the March 27 deadline. While it may well have been within the agency’s discretion to allow (or invite) the protester to submit an FPR at the same time as the competitive range offerors, we need not reach this issue. The question before us is whether the Corps in this instance was required to invite or accept further submissions from the protester, and MOWA-Barlovento has not shown any regulation or statute requiring the agency to do so.

any procurement law or regulation by applying the language of a cut-off date stated in the discussions letter.

The protest is denied.

Susan A. Poling
General Counsel