



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: IAP-Leopardo Construction, Inc.

File: B-408890

Date: December 19, 2013

Philip J. Davis, Esq., Brian G. Walsh, Esq., and Tara L. Ward, Esq., Wiley Rein LLP, for the protester.

Mark G. Jackson, Esq., Jackson Rosenfield LLP, for Alutiiq Manufacturing Contractors, an intervenor.

Connie L. Baran, Esq., Terry G. Peters, Esq., Department of the Army, Corps of Engineers, for the agency.

Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to inform the protester that its proposal was unacceptable for exceeding the construction cost limitation set forth in the solicitation is denied where the agency's question concerning the protester's technical proposal constituted clarifications, and therefore did not trigger an obligation to conduct discussions regarding other issues, such as the protester's defective price.

DECISION

IAP-Leopardo Construction, Inc., of Columbus, Ohio, protests the issuance of a task order to Alutiiq Manufacturing Contractors, of Vienna, Virginia, under task order request for proposals (TORP) No. W912HN-09-X-5939, issued by the Department of the Army, Corps of Engineers, for design and construction services.

We deny the protest.

BACKGROUND

The TORP was issued on May 28, 2013, to firms who held contracts under a multiple-award task order contracts awarded by the Corps. The solicitation, which

was issued pursuant to Regulation (FAR) § 16.505, sought proposals to renovate building 3219, trainee barracks, at Fort Benning, Georgia.¹ Award was to be made on a best-value basis considering the following four factors: (1) designer specialized experience, (2) contract duration and schedule, (3) design and construction teaming approach, and (4) price. As relevant here, the TORP contained the following construction cost limitation:

A Construction Cost Limitation (CCL) for this project is \$30,000,000. This limitation includes both design and construction costs and shall not be exceeded. Offers which exceed the CCL will be rendered ineligible for the award.

TORP at 4.

For purposes of award, factor 1 was the most important, followed by factor 3, with factor 2 being the least important. TORP at 6. All the non-price factors combined were equal in importance to price. Id.

With respect to the contract duration and schedule factor, the TORP required offerors to submit an integrated design and construction schedule. The TORP stated that the “Contractor shall commence work within 10 calendar days after receipt of notice to proceed . . . and shall complete all work ordered under this task order in accordance with the proposed duration, not to exceed the maximum duration of 540 calendar days after receipt of notice to proceed. Id. at 11. In this connection, the offeror was required to submit a narrative explaining how the schedule would be achieved. Id. at 20. The TORP explained that the government would evaluate the overall understanding of the design-build process, as well as the schedule to assess the inclusion of “fast tracking” and the rationale for how the offeror planned to meet the schedule. The TORP further explained that a schedule that improves on the maximum duration would be viewed more favorably. Id. As also relevant here, the solicitation stated that, during performance, the contractor will be required to prepare a site plan addressing its proposal for the construction and renovation work. Id. at 190. The contractor will be required to “indicate if the use of supplemental or other staging areas is desired.” Id.

Four offerors, including IAP and Alutiiq, submitted proposals by the June 28 closing. A three-member technical evaluation board (TEB) evaluated proposals under the non-price evaluation factors. IAP proposed a more favorable schedule than the maximum duration of [DELETED] calendar days. Agency Report (AR), Tab E, IAP

¹ As the value of this task order is in excess of \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 10 U.S.C. § 2304c(e)(1)(B).

Proposal, Vol. 2, Factor 2, at 1. To meet the shorter schedule, IAP proposed to utilize two newly constructed TA-50² buildings on the base to store key materials. Id. at 2.

The Corps posed the following questions, which were labeled “clarification requests,” to IAP concerning its proposed use of the TA-50 buildings:

The contractor states he will use the TA-50 storage areas to store key material items for a long duration. That facility belongs to the government once the 1354 is turned in at the end of Phase one. Is the contractor going to take the liability for that facility if damage occurs? If the GOVT does not allow this do they have an alternate plan?

Agency Report (AR), Tab F, Clarification Request and Response 1, at 1. IAP responded as follows:

Although it is our intention to take precautions to mitigate possible damage, we will take full responsibility for the TA-50’s during construction.

If we are not allowed to utilize the TA-50’s as storage, then we plan on enclosing two of the covered training areas for storage.

Id.

The Corps’s final evaluation ratings for the IAP and Alutiq were as follows:

	IAP	Alutiq
Designer Specialized Experience	Outstanding	Good
Contract Duration and Schedule	Outstanding	Acceptable
Design and Construction Teaming Approach	Good	Good
Price	\$32,190,727	\$29,369,459

AR, Tab I, Award Memorandum at 4. During the price evaluation, the Corps eliminated IAP from further consideration for award because its price exceeded the cost limitation of \$30 million. Id. at 7. On September 4, 2013, the contracting officer

² Two TA-50 buildings--for soldier’s tactical equipment and gear--are located within the site limits of construction for this project that were constructed by IAP under Phase I of the work under a separate contract. See AR at 3.

awarded the task order to Alutiiq, as the best value. See id. at 8-10. This protest followed.

DISCUSSION

Although IAP does not challenge the Corps' rejection of its proposal for exceeding the TORP's cost limitation of \$30 million, it contends that the Corps' questions concerning the protester's proposed use of the TA-50 buildings constituted discussions, and that the agency was therefore required to inform IAP that its proposal was ineligible for award because its price exceeded the cost limitation. Specifically, IAP argues that the agency's questions required or invited IAP to modify its proposal to either assume liability for damage to the storage area, and to propose an alternative plan to using the TA-50 buildings. For the reasons discussed below, we find no basis to sustain the protest.

IAP's arguments cite FAR part 15 as the primary support for its argument that the Corps engaged in inadequate discussions. Specifically, the protester notes that when an agency engages in discussions with an offeror, FAR part 15 requires that the discussions be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving the award. See Onsite Health Inc., B-408032, B-408032.2, May 30, 2013, 2013 CPD ¶ 138 at 7. FAR part 15 specifically requires that discussions, when held, must address "at a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3).

However, the regulations concerning discussions under FAR part 15, which pertain to negotiated procurement, do not, as a general rule govern task and delivery order competitions conducted under FAR part 16, such as the procurement here. See NCI Info. Sys. Inc., B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 6. In this regard, FAR § 16.505 does not establish specific requirements for discussions in a task order competition; exchanges in that context, like other aspects of such a procurement, must be fair and not misleading. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 9. Nonetheless, even if FAR part 15 applied here, we conclude that the agency's questions did not constitute discussions. In this regard, communications that do not permit or require an offeror to revise or modify its proposal, but rather request that the offeror confirm what the offeror has already committed to do in its proposal, are clarifications and not discussions. See Pinnacle Solutions, Inc., B-406998, B-406998.2, Oct 16, 2012, 2012 CPD ¶ 338 at 7; Environmental Quality Mgmt., Inc., B-402247.2, Mar. 9, 2010, 2010 CPD ¶ 75 at 7.

IAP argues that the first question posed by the Corps required the protester to modify its proposal to accept liability for the TA-50 buildings it proposed to use for storage of materials. In this regard, the protester contends that the agency's

question required the contractor to accept “liability” for the buildings, and further argues that such an obligation will require the protester to “compensate third parties for any personal injuries or property damage stemming from the contractor’s performance of this task.” Protester’s Comments (Nov. 7, 2013) at 5. The Corps argues, however, that its question concerning IAP’s proposal to utilize the TA-50 buildings for storage only confirmed the protester’s obligation to repair existing facilities under the terms of the contract. Moreover, the agency contends that the question did not address the broad scope of liability that the protester claims was encompassed by this question. We agree with the agency.

Here, the solicitation required the contractor to take responsibility for damage during construction that might occur to existing facilities, including the TA-50 buildings. See SOW ¶¶ 2.13(e), 3.11.B.1.c, 3.11.B.1.d, 3.11.B.2.I, 6.1. For example, the SOW stated that the “Contractor is to pay utility bills and repair any damage to the existing site and facilities, to include out buildings, sidewalks, access roads, and furnishings. . . . Any damage to Phase I work [including TA-50 buildings] shall be repaired to new condition at the contractor’s expense.” Id. ¶ 2.1.3(e). The RFP also advised of the contractor’s obligations regarding newly-constructed improvements, such as the TA-50 buildings: “There were improvements made to this facility and site completed under a previous phase of work. Do not damage newly completed work or remove new furniture or accessories.” Id. ¶ 6.1; see also AR at 3.

To the extent the protester argues that the agency’s use of the word “liability” required IAP to assume additional responsibilities, we disagree. IAP maintains that assuming the responsibility to repair or replace any damage to existing facilities or items is not the same as the assumption of liability--which the protester argues imposes an obligation on the contractor to compensate third parties for any personal injuries or property damage stemming from the contractor’s performance of this task.

The Corps’ question, however, discussed IAP’s proposal to use the TA-50 buildings for storage of materials, and in this context asked: “Is the contractor going to take the liability for that facility if damage occurs?” AR, Tab F, Clarification Request and Response 1, at 1. Moreover, the protester’s response clearly discussed its obligations in the context of damage to the buildings: “Although it is our intention to take precautions to mitigate possible damage, we will take full responsibility for the TA-50’s during construction.” Id. We conclude that neither the agency’s question nor the protester’s response expressly addressed liability in terms broader than those anticipated by the SOW, and thus we find no support for the protester’s argument that the question required the protester to assume obligations beyond those set forth in the solicitation. For these reasons, we do not find that the question required or permitted IAP to revise its proposal, and therefore did not constitute discussions. See Pinnacle Solutions, Inc., supra.

We also do not find that the Corps engaged in discussions by asking IAP whether it had an alternate plan to using the TA-50 buildings for storage, in the event the government did not agree to IAP's proposal to utilize those buildings. As discussed above, with regard to the protester's proposal to use the TA-50 buildings, the agency asked the following: "If the GOVT does not allow this do they have an alternate plan?" AR, Tab F, Clarification Request and Response 1, at 1. In response, the protester stated, "[i]f we are not allowed to utilize the TA-50's as storage, then we plan on enclosing two of the covered training areas for storage." Id. IAP contends that the question required the protester to submit an alternative plan to its proposal to use the TA-50 buildings, and that the protester's response was a revision to its proposal that triggered the agency's obligation to conduct discussions regarding its proposed price.

As discussed above, the SOW states that the contractor will be required to prepare a site plan "indicating the proposed location and dimensions of any area to be fenced and used by the Contractor," and further stated that the plan must "indicate if the use of a supplemental or other staging area is desired." TORP at 190. The agency notes that this SOW provision pertains to contract performance, and thus neither required offerors to submit site plans as part of their proposals, nor required offerors to seek approval for elements of its site plan, including the use of particular buildings, until after award. AR at 3; Supp. AR (Nov. 21, 2013) at 4. For this reason, the agency argues that neither the protester's proposal to use the TA-50 buildings, nor its response to the agency's question pertained to the acceptability of its proposal. In this context, we find that the agency's inquiry as to whether the protester had an alternative plan pertained to a minor uncertainty, that was not related to the acceptability of the protester's proposal, and did not permit or require the protester to modify its proposal in a manner that constituted discussions. See Pinnacle Solutions, Inc., supra.

In sum, the record does not show that the agency engaged in discussions with IAP. We therefore conclude that the Corps properly rejected IAP's proposal because its proposed exceeded the cost limitation.

The protest is denied.

Susan A. Poling
General Counsel