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Decision

Matter of: Kardex Remstar, LLC

File: B-409030

Date: January 17, 2014

Eric S. Crusius, Esq., James S. Phillips, Esq., Stephen P. Ramaley, Esq., and Kevin P. Joyce, Esq., Centre Law Group, LLC, for the protester.

Ron R. Hutchinson, Esq., Doyle & Bachman LLP, for Hanel Storage Systems, L.P., an intervenor.

David G. Fagan, Esq., Department of Veterans Affairs, for the agency.

Pedro E. Briones, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, notwithstanding an agency's characterization of its exchanges with the protester as clarifications, the agency conducted discussions yet failed to identify a deficiency associated with the protester's quotation that rendered the quotation unacceptable.

DECISION

Kardex Remstar, LLC, of Westbrook, Maine, protests the issuance of a purchase order to Hanel Storage Systems, L.P., of Pittsburgh, Pennsylvania, under request for quotations (RFQ) No. VA256-13-Q-1665, issued by the Department of Veterans Affairs (VA) for vertical storage units for the Jack C. Montgomery VA Medical Center in Muskogee, Oklahoma. Kardex contends that the VA conducted discussions with Kardex that were misleading and not meaningful.

We sustain the protest.

BACKGROUND

The RFQ contemplated the issuance of a delivery order for "vertical storage units" after a reverse auction among Federal Supply Schedule (FSS) vendors; the reverse

auction was to be conducted through the FedBid website.¹ RFQ at 4-8, FedBid Cover Page; Contracting Officer's Statement at 1. The RFQ anticipated a delivery order would be issued for 14 units, 5 of which were to be climate-controlled. RFQ at 7; Contracting Officer's Statement, at 1. The RFQ included specifications for these units, including the following specification for climate-controlled units:

Each climate-controlled unit is required to . . . be fully enclosed. The cooling system is required to have 2 independent compressor/condenser units that run at 50% duty cycle simultaneously. If one should fail, the other must be capable of maintaining the cooling specifications. No water or drains are allowed; each unit must be totally self-contained. . . .

RFQ amend. 2, at 2. The RFQ did not state how quotations would be evaluated, although it appears from the record that the agency evaluated price and technical acceptability.

The agency received quotations from Kardex and Hanel in response to the RFQ. Kardex quoted a total price of approximately \$800,000; Hanel quoted a total price of approximately \$976,000. Contracting Officer's Statement at 1. Since Kardex quoted a lower price, the VA reviewed the firm's quotation for technical acceptability. Id.

After an initial review of Kardex's quotation, the agency's contracting officer contacted the firm seeking information about the firm's proposed storage units. The agency characterized the communication as "clarifications" and stated that "[t]his request for clarifications does not allow for any changes in the equipment or price." Agency Report (AR), Tab 10, VA-Kardex Communications, at 2. However, the communications did inquire what additional discounts were being provided to Kardex' FSS pricing, id. and included the following statement:

The committee reviewing Kardex-Remstar's offer was unable to clearly find where some of the requirements in the SOW [statement of work] are addressed. Attached is a spreadsheet with worksheets for each of the [units] from the SOW. The worksheets show[] the VA requirements, remarks on Kardex-Remstar's offer, and [provides] an area for Kardex-Remstar's response. Please provide responses via the spreadsheet on how the current items in your companies [sic] offer meets these requirements.

¹ The RFQ was designated as FedBid Buy No. 532432. FedBid, Inc., is a commercial online procurement services provider that runs a website at FedBid.com, which, among other things, hosts reverse auctions.

Id. In the spreadsheets provided by the agency to Kardex, the agency identified 34 requirements and commented that the “[q]uote does not provide info on this” or “does not meet requirements.” Id. at 3-8. However, the agency did not disclose that the quote failed to comply with the solicitation requirement that the climate-controlled units be self-contained.

Kardex provided the information requested by the agency. The agency thereafter conducted multiple additional rounds of what it called “clarifications,” seeking more information about Kardex’s units. Id. at 9-13. Again, the agency did not identify concerns that Kardex’s units were not self-contained. Kardex responded to each communication, providing additional information not included in its quotation, including a “more detailed specification describing [heating, ventilation, and air conditioning] components” and an “additional statement” describing the “means for setting up automatic data logging.” Id. at 12.

The VA concluded, after reviewing Kardex’s responses, that the firm’s quotation did not meet the specification that the climate-controlled storage units be totally self-contained, that is, fully enclosed. The reason for this determination was that Kardex’s condensers would be located on the medical center’s grounds or roof and would require refrigerant lines to run from the external condensers to air handlers in the storage units. AR, Tab 12, Technical Meeting Minutes, at 1.

After finding Kardex’s quotation unacceptable, the VA evaluated Hanel’s quotation, sought additional “clarifications and information” from Hanel, and determined that the quotation met the RFQ specifications. Id. The agency issued the order to Hanel and this protest followed.

DISCUSSION

Kardex protests its technical evaluation, arguing, among other things, that the VA conducted misleading and non-meaningful discussions by failing to advise Kardex that its climate-controlled storage units did not comply with the specification for totally self-contained cooling systems.² See Protest at 9; Comments at 5.

The VA asserts that its communications with Kardex constituted clarifications, not discussions, because the agency merely permitted the protester to explain or clarify

² The protester contends that the RFQ does not require that the compressor/condenser units be self-contained within the cooling system. We disagree. The RFQ clearly required that each climate-controlled unit, which included the compressor/condenser units as part of the cooling system, be self-contained. RFQ amend. 2, at 2.

its proposed storage units and explicitly prohibited Kardex from revising its quotation. AR at 16.

As a preliminary matter, we note that this competition was limited to FSS vendors. As we have previously noted in our decisions, the procedures of Federal Acquisition Regulation (FAR) part 15 governing contracting by negotiation—including those concerning exchanges with offerors after receipt of proposals—do not govern competitive procurements under the FSS program. FAR § 8.404(a); USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors. See USGC Inc., supra. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in making this determination. A-Tek, Inc., B-404581.3, Aug. 22, 2011, 2011 CPD ¶ 188; USCG Inc., supra.

In this regard, we have looked to FAR part 15 as guidance in defining clarifications as “limited exchanges” that agencies may use to allow offerors to clarify certain aspects of their proposals (or in this case quotations) or to resolve minor or clerical mistakes. See FAR § 15.306(a)(2); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 11 (using FAR part 15 definitions of post-proposal communications, or exchanges, as guidance in FSS context). Discussions, by contrast, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or quotations, or provides the vendor with an opportunity to revise or modify its proposal. Diversified Collection Servs., Inc., supra, at 11-12; see FAR § 15.306(d). The agency’s characterization of a communication as clarifications or discussions is not controlling; it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

Here, the agency’s insistence that the communications it conducted were clarifications and not discussions is unavailing. The communications sent by the agency to Kardex invited the firm to respond to 34 requirements that the firm either “does not meet” or “does not provide info on,” and requested that the firm provide pricing discounts. These communications invited responses from Kardex that were necessary to determine the acceptability of the firm’s quotation, and in fact resulted in Kardex being permitted to supplement its quotation. This is quintessentially the nature of discussions, not clarifications. Diversified Collection Servs., Inc., supra, at 11-12.

More importantly, we conclude that the nature of the communications here were fundamentally unfair. Despite the repeated rounds of discussions with Kardex concerning multiple requirements that the firm’s quotation did not meet, the agency

never identified the one requirement for which the quotation was found technically unacceptable--the firm's failure to provide totally self-contained units. Under the circumstances here, where a firm holds discussions with a vendor, those discussions must be meaningful. See A-Tek, Inc., supra (evaluating whether discussions were meaningful in FSS competition). Since the discussions here were not fair, as required in FAR part 8 procurements, we sustain the protest.³

RECOMMENDATION

We recommend that the agency reopen discussions with vendors and reevaluate quotations consistent with this decision. We also recommend that Kardex be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2013). Kardex should submit its certified claims for costs directly to the contracting 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

³ We find that prejudice, which is an essential element of every protest, Savee Consulting, Inc., B-408416, Sept. 18, 2013, 2013 CPD ¶ 231 at 12, is present here. The protester expressly asserted that it would have proposed a compliant solution had the agency raised the issue in discussions. Protest at 9. The agency also acknowledges that Kardex may be able to quote a totally self-contained unit based on different, albeit older, technology. Contracting Officer's Statement at 6.