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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: DataSource, Inc.

File: B-412468

Date: February 16, 2016

Thomas K. David, Esq., David, Brody & Dondershine, LLP, for the protester.
Michelle S. Bennett, Esq., and Aleacia Chinkhota, Esq., Department of the Navy, for the agency.
Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of protester's quotation as unacceptable is denied where the record shows that the agency's evaluation was reasonable and in accordance with the evaluation criteria.

DECISION

DataSource, Inc., of McLean, Virginia, protests the exclusion of its proposal from further consideration under request for proposals (RFP) No. N00024-14-R-3125, issued by the Department of the Navy for operations support and sustainment services. The protester argues that the agency improperly evaluated DataSource's proposal as non-compliant with the RFP requirements and as a result unreasonably excluded the proposal from the competition.

We deny the protest.

BACKGROUND

The RFP, issued to holders of the SeaPort-e Multiple Award Contract (MAC), Zone 2, and set aside for small businesses, contemplated the issuance of a cost-plus incentive fee task order,¹ with a 12 month base period and four 1-year

¹ The value of the task order is in excess of \$10 million. This procurement therefore falls within our jurisdiction to hear protests related to the issuance of task orders

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options, to the firm whose proposal represented the best value to the government considering three evaluation factors: technical capability, including subfactors (in descending order of importance) for technical knowledge and capability, management approach, and staffing approach; past performance; and total evaluated cost. RFP at 28, 65, 82, 84. Technical capability was more important than past performance, and, when combined, the two technical factors were significantly more important than total evaluated cost. Id.

The RFP advised offerors that “[l]etters of intent shall be provided for all key personnel not currently employed by the prime or proposed subcontractor, demonstrating their agreed upon start date in accordance with the requirements in Attachment 07 in the key personnel sheet.” RFP at 72. Likewise, the solicitation also stated that:

For any key personnel that is not a current employee of the offeror or one of its subcontractors, a letter of intent or contingent hire letter as required under Section L Paragraph 4.1.3.1 will be sufficient so long as it includes the key personnel’s agreed upon salary and direct-labor hourly rate.

RFP at 77. The RFP further advised offerors that “in order to be eligible for award” a “proposal shall meet all solicitation requirements.” Id. at 83. In addition, the solicitation indicated that the agency intended to award a task order on the basis of initial proposals. RFP at 64.

DataSource submitted a proposal that was evaluated as unacceptable for failure to include a letter of intent for a proposed task order project manager, one of the 29 key personnel specified in the solicitation. Agency Report (AR), Exh. A, Proposal Review for DataSource, at 2; see RFP, Attach. J-6. The agency notified the protester that its proposal had been eliminated from further consideration, and this protest followed.

DISCUSSION

DataSource argues that the requirement to submit letters of intent for key personnel not currently employed by the prime or proposed subcontractors was not a material requirement of the RFP such that a failure to submit one of the letters of intent would render the proposal unacceptable. Protest at 8-9. The protester notes in this regard that a failure to submit letters of intent was not included among the solicitation requirements specifically described as “a material requirement of this

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under multiple-award ID/IQ contracts valued in excess of \$10 million. 10 U.S.C. § 2304c(e)(1)(B).

contract.” RFP at 28 (access to proprietary data or computer software, and non-disclosure requirement), 34 (organizational conflict of interest, and access to proprietary data or computer software). The agency maintains that the requirement for letters of intent for key personnel was an essential, material requirement. AR at 5.

In negotiated procurements, a proposal that fails to conform to the material requirements and conditions of the solicitation should be considered unacceptable. Special Operations Group, Inc., B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 4; Essex Corp., B-246536.3, June 25, 1992, 92-2 CPD ¶ 170 at 8. Generally, a requirement for letters of intent from key personnel constitutes a material solicitation requirement. Essex Corp., *supra*; see Special Operations Group, Inc., *supra*, at 5 (failure to comply with requirement for letter of intent for proposed project manager rendered proposal unacceptable); Strategic Analysis, Inc., B-270075, B-270075.4, Feb. 5, 1996, 96-1 CPD ¶ 41 at 4.

Here, the RFP was unequivocal in the importance placed on key personnel. Besides letters of intent, offerors were also required to provide resumes for those individuals. RFP at 72. Further, the RFP advised offerors that “[k]ey personnel are considered essential to the performance of this effort and cannot be replaced without prior notice to the Government.” *Id.* Likewise, DataSource’s own proposal appeared to demonstrate an understanding of the importance of key personnel to contract performance, noting that “DataSource brings unmatched experience, expertise and continuity” to support the requirement and “offers significant depth and breadth of knowledge.” See AR, Tab 5d, DataSource Cost Proposal at 5.

Further, in its answers to questions as to whether letters of intent would in fact be required, the agency indicated that it would not relax the requirement that offerors submit letters of intent for key personnel not employed by the offeror or a proposed subcontractor. See AR, Tab 4, Q&A (answering questions 15, 103, and 268 by reiterating that letters of intent were required for any key personnel not currently employed by the offeror or a proposed subcontractor). For example, in response to the objection that requiring a “Contingent Hire Letter” favored the incumbent contractor, the agency responded that:

The Government will not remove this requirement. Letters of intent are required for key personnel not currently employed by the prime offeror or proposed subcontractor(s). The Government does not agree that this creates an unfair advantage to the team that contains the incumbent large businesses because the key personnel requirements are role specific rather than system or application specific and can be met by nonincumbents.

AR, Tab 4, Q&A 103.

Finally, while only one of the required key personnel letters of intent was missing from DataSource's proposal, we note that it was for a proposed task order project manager. In this regard, according to the solicitation, the task order project manager is, "[u]nder the guidance of the Program Manager, responsible for the overall management of the specific task areas and insuring that the technical solutions and schedules in the task order are implemented in a timely manner." RFP, Attach. J-6. In these circumstances, where the agency repeatedly emphasized the importance of and need for the letters of intent for key personnel not currently employed by the prime or proposed subcontractor, we find that the agency reasonably concluded that DataSource's failure to furnish the required letter of intent for a proposed task order project manager rendered the proposal unacceptable for failure to comply with a material solicitation requirement. Essex Corp., supra.

DataSource asserts that the agency abused its discretion in not seeking clarification of the proposal's failure to include the missing letter of intent. It was clear from the proposal, DataSource argues, that the employee "was in fact committed to DataSource as evidenced by the quantum of data contained in the proposal regarding her qualifications and her tenure on the staff of an incumbent contractor dedicated to the program." Protest at 9. The agency argues that permitting DataSource to furnish the missing letter of intent after proposal submission would have constituted discussions, not clarifications, and that the proposal information concerning this employee was not an acceptable substitute for the required letter of intent. As explained below, we agree with the agency on both issues.

It is well settled that "[a]n agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors." Wolverine Services LLC, B-409906.3, B-409906.5, October 14, 2014, 2014 CPD ¶ 325 at 6; see also, Future Techs. Consulting Group, Inc., B-409867, August 13, 2014, 2014 CPD ¶ 240; Savvee Consulting, Inc., B-408623, B-408623.2, Nov. 8, 2013, 2013 CPD ¶ 265 at 6. Further, clarifications cannot be used to cure deficiencies or material omissions in a proposal or otherwise revise a proposal. Savvee Consulting, Inc., supra. Discussions are exchanges with offerors after the establishment of a competitive range, tailored to each offeror's unique proposal, with the intent of obtaining proposal revisions through bargaining, give and take, attempts at persuasion, the alteration of assumptions and positions, and negotiations. Federal Acquisition Regulation § 15.306(d). Providing an offeror the opportunity to revise its proposal and cure a deficiency would constitute discussions, not clarifications, because that would require the submission of information necessary to make the proposal acceptable. Id. Further, agencies are not required to conduct discussions when, as here, the solicitation advises of the agency's intent to award a contract or task order on the basis of initial proposals. Id.

As discussed above, the missing letter of intent was a material omission from DataSource's proposal. In this regard, where a solicitation specifically requires offerors to provide letters of intent for key personnel not currently employed by the offeror, communications regarding the proposed key personnel's employment status where the letter of intent was omitted constitute discussions, not clarifications. Strategic Analysis, Inc., supra. Thus, allowing DataSource to submit the missing letter of intent after its initial proposal was submitted and after the closing date for the solicitation would have constituted a revision to its proposal and constituted the opening of discussions. Id.

Furthermore, the agency reasonably concluded that the information contained in the proposal was not a reasonable substitute for an actual letter of intent. DataSource asserts that its proposal indicated that the proposed employee was committed to working as DataSource's employee if DataSource were awarded the contract. We agree with the agency, however, that the representation in DataSource's proposal carries less weight than would a signed letter of intent with a commitment of the employee herself, and thus does not suffice to satisfy the material solicitation requirement for a signed letter of intent. AR at 8-9.

The protest is denied.

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General Counsel