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Decision

Matter of: MCR Federal, LLC

File: B-416654.2; B-416654.3

Date: December 18, 2018

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DIGEST

Protest that the agency failed to provide sufficient time to respond to its request for final proposal revisions is sustained where under the circumstances here, the response time did not provide the protester with a fair opportunity to improve its proposal.

DECISION

MCR Federal, LLC, of El Segundo, California, protests the award of a task order to Tecolote Research, Inc., of Goleta, California, under Fair Opportunity Proposal Request (FOPR) Sol. No. FA8802-18-F-0002, issued by the Department of the Air Force for support services. The protester argues that the agency failed to provide sufficient time to respond to its request for final proposal revisions (FPRs).

We sustain the protest.

BACKGROUND

The FOPR was issued on April 10, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, to offerors holding indefinite-delivery, indefinite-quantity (IDIQ) contracts under the General Services Administration’s One Acquisition Solution for Integrated Services small business Pool 5B. Agency Report, (AR), Tab 13, FOPR, at 1. The FOPR contemplated the award of a task order to provide acquisition, financial, and administrative support services for the Space and Missile Systems

Center, Launch Enterprise Directorate. Id. at 61. Proposals were due in response to the FOPR on May 10, 2018. Id. at 1.

Award was to be made on a best-value tradeoff basis, considering the following factors: personnel management, technical expertise, and cost/price. Id. at 162. Under the personnel management factor, proposals would be rated as either acceptable or unacceptable. Id. at 162-163. Under the technical expertise factor, proposals would be assigned an adjectival rating of outstanding, good, acceptable, or unacceptable. Id. at 164. The technical expertise factor was significantly more important than the cost/price factor, which was more important than the personnel management factor. Id.

Under the technical expertise factor, the agency was to evaluate offerors' staffing solutions to fulfill the requirements delineated in the Performance Work Statement (PWS) in a relevant National Security Space (NSS) launch environment.¹ Id. at 165. The agency was also to review offerors' responses to problem statements to assess offerors' understanding of the PWS. Id. The FOPR further provided that the agency would evaluate the offeror's approach and understanding of the PWS by analyzing the proposed contractor staffing matrix, including their proposed labor and skill mix, key personnel, experience level, education, certification, technical experience, and expertise. Id. The FOPR provided that the "staffing matrix is the most important component of this factor" Id.

The agency received three proposals in response to the FOPR, including those from MCR and Tecolote. AR, Tab 1, Combined Contracting Officer's Statement of Facts/Memorandum of Law (COS/MOL) at 6. After performing an initial evaluation of proposals, the agency decided to conduct what it terms "interchanges"² with MCR and

¹ The FOPR defined an "NSS Launch environment" as "an environment where the [p]rogram office interfaces with the Air Force's multiple Space Vehicle program offices with the agency program offices outside of the Air Force . . . and coordinates with all stakeholders in successfully executing the Launch Systems Enterprise Directorate mission." FOPR at 165.

² The FOPR defined "interchanges" as "fluid interaction[s] between the [contracting officer] and the Offerors that may address any aspect of the proposal and may or may not be documented in real time." FOPR at 162. For the record, we need not conclude that the agency's "interchanges" were essentially discussions. Under any nomenclature, these offerors were provided with an opportunity to materially modify their proposal in response to the agency's concerns. See, e.g., Serco, Inc., B-406061.1, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 13 (noting that discussions occur when an agency communicates with an offeror to obtain information essential to determine the acceptability of a proposal, or provides an offeror with an opportunity to materially revise or modify its proposal).

Tecolote, and to exclude the third proposal from consideration. AR, Tab 15, Fair Opportunity Selection Evaluation Board (FOSEB) Initial Report, at 24.

On June 14, the agency issued two interchange notices to MCR. AR, Tab 20, MCR Round 1 Interchanges, at 1. In the notices, the agency provided MCR with its initial evaluation results, stating that the firm had been rated as acceptable under both the personnel management and technical expertise factors. Id. The first notice requested that MCR provide salary data missing from MCR's total compensation plan. Id. at 3-5. The second notice identified concerns regarding a lack of specificity in MCR's contract staffing matrix, asking the firm to provide specific experience and expertise as related to the unique qualifications for each individual proposed. Id. at 6-7. The notices provided MCR with five days to submit a FPR. AR, Tab 21, MCR Round 1 Interchange Responses, at 1.

Upon receipt of the responses, the FOSEB evaluated the FPRs. Under the personnel management factor, both Tecolote and MCR's proposals received acceptable ratings for clearly meeting the factor's minimum requirements. Id. at 4. Under the technical expertise factor, the agency assigned MCR's proposal an acceptable rating. The agency concluded that MCR's staffing was "less representative of high-level, strategic thinking" due to the firm's personnel having lower average years of experience than Tecolote's personnel, as well as apparent inexperience in the NSS launch environment. The agency concluded that these concerns created a "moderate" risk of unsuccessful performance by MCR. Id. at 9. In contrast, the agency assigned Tecolote's proposal an outstanding rating under this factor, noting that the firm proposed staff with more experience than MCR's personnel, as well as more expertise in an NSS launch environment. Id. at 6. The agency noted that the difference in experience levels between Tecolote and MCR's proposed personnel was "akin to the difference between a mid-level, field grade military officer experienced with tactical-level operations compared to the value of a military senior officer with broader, seasoned experience who is adept at operating all the way up to the level of strategic thinking." Id.

Based on these results, the agency concluded that Tecolote's proposal represented the best value to the agency. AR, Tab 22, Fair Opportunity Decision Document, at 7-9. While Tecolote's proposed price of \$72,684,741 was higher than MCR's price of \$46,332,177, the agency found that Tecolote's proposal was significantly technically superior. Id. Thus, the agency concluded that Tecolote's proposal warranted its over \$26 million price premium. Id.

After requesting and receiving a debriefing, MCR filed a protest with our Office on August 6. In the protest, MCR alleged that the agency's evaluative preference for personnel with higher levels of experience was improper because such a preference was not reasonably based in the terms of the solicitation. AR, Tab 2, MCR Protest, B-416654.1, at 12-13. Additionally, MCR argued that the agency held misleading discussions as the interchange notices issued did not fairly alert MCR that the relative lack of experience of the firm's proposed workforce would be a discriminator that justified payment of a substantial price premium to Tecolote. Id.

In response to the protest, the agency advised that it would take corrective action. The agency stated that it would “issue interchange notices to the offerors and would allow offerors to submit a final proposal revision.” AR, Tab 4, Notice of Corrective Action, at 1. The agency further noted that it would “re-evaluate the proposals and make a new best value award decision.” Id. Our Office dismissed MCR’s protest as academic.

On September 10, the agency issued two new notices to MCR. COS/MOL at 10. The first notice advised MCR that the agency had concluded that only 5 of MCR’s proposed 58.5 full-time equivalents (FTEs) provided the desired level of experience in a relevant NSS launch environment, and that the remaining 53.5 FTEs did not have the desired experience. AR, Tab 27, MCR Second Round of Interchanges, at 4. The notice further explained that the agency “has qualified this concern as a risk that contributes to the ‘risk of unsuccessful performance being no worse than moderate,’” resulting in the firm’s acceptable rating for the technical expertise factor. Id. The notice concluded by requesting that MCR “revise or confirm that [its] staffing matrix aligns” with the objectives delineated in the PWS. Id. The second notice stated that the agency was concerned that [deleted] of the 58.5 of MCR’s proposed FTEs were contingent hires, which the agency concluded “present[ed] a risk in that MCR may not be able to fill personnel requirements by the end of the 30-day window,” further contributing to MCR’s acceptable rating for the technical expertise factor. Id. at 5-6. Final proposal revisions were due in two days, by September 12, 2018 at 5:00 p.m. Id. at 1.

On September 12, MCR filed the instant protest.³ MCR also responded to the notices by saying that, given the short timeframe to respond, the firm would stand by its previous submission.⁴ AR, Tab 29, MCR Round 2 Interchange Responses, at 1. MCR stated that if it were provided more time, it could propose candidates with more experience, increasing the portion of proposed staff that demonstrated experience in an NSS Launch environment. Id.

In response to MCR’s September 12 protest, on September 13, the agency notified MCR that it was proposing to take “voluntary corrective action,” and extend the response deadline until September 18 at 5:00 p.m. AR, Tab 31, Notice to MCR Extending Interchange Response Time, at 1. The agency subsequently notified GAO of this extension, and requested dismissal of MCR’s protest as moot. AR, Tab 33, Notice of Corrective Action, at 1. MCR objected to the request for dismissal, arguing that the

³ This protest, and the earlier one, are within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B); see Booz Allen Hamilton Eng’g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 6 n.12.

⁴ In implementing its corrective action, the agency also sent interchange notices to Tecolote. AR, Tab 28, Tecolote Second Round of Interchanges, at 1. Tecolote responded to the interchanges and stated that it would not be making any revisions to its proposal. AR Tab 30, Tecolote Round 2 Interchange Response, at 1.

agency's proposed corrective action did not render the protest academic, as the agency should be required to provide no fewer than 30 days to submit an FPR in response to the interchanges under the circumstances. AR, Tab 34, MCR Objection to Agency Request for Dismissal, at 4. Our Office declined to dismiss the protest.⁵

DISCUSSION

MCR argues that the agency unreasonably failed to provide a sufficient amount of time for it to submit a FPR to address the agency's concerns. Protest at 9. In this regard, MCR asserts that the agency identified areas of its proposal that required substantial revisions if MCR hoped to remain competitive and that the time provided by the agency to respond was insufficient to complete the necessary revisions. Protest at 9-10; Comments at 6. In its request for relief, MCR requests that our Office recommend that the agency provide no less than 30 days to submit a FPR. Protest at 11. For the reasons discussed below, we conclude that MCR was not provided a reasonable amount of time to respond to the agency's interchanges, and we sustain the protest on this basis.

When conducting a task order competition under FAR § 16.505, agencies are required to provide contract holders with a "fair opportunity" to be considered for task order. FAR § 16.505(b)(1). In this regard, FAR § 16.505 further specifies that a "fair opportunity" to be considered, includes a reasonable response period. FAR § 16.505(b)(1)(iv). Moreover, while FAR § 16.505 does not establish specific requirements for discussions in a task order competition, when exchanges with the agency occur in task order competitions, they must be fair and not misleading.⁶ See, e.g., Vencore Servs. and Sols., Inc., B-412949, B-412949.2, July 18, 2016, 2016 CPD ¶ 346 at 5; MicroTechnologies, LLC, B-413091, B-413091.2, 2016 CPD ¶ 219 at 14. Our Office has also recognized, in analogous decisions regarding FAR part 15 procurements, that the fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals and to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation. See Gulf Copper Ship Repair Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6 (citing FAR § 15.306(d)).

As discussed above, on September 10, the agency issued notices in which it communicated perceived risks in MCR's proposal, risks which justified the payment of

⁵ On October 4, the agency notified MCR that its proposal was eliminated from further consideration for award. On October 10, MCR filed a supplemental protest challenging its elimination from the competition. Supp. Protest at 12.

⁶ While we agree with the agency's contentions that it was under no obligation to provide "interchanges," once it elected to do so, it was required to provide these offerors with a fair opportunity to prepare a meaningful response.

over a 50 percent price premium to Tecolote. AR, Tab 27, MCR Second Round of Interchanges, at 4-6. First, the interchange notice explained that only 5 of MCR's 58.5 proposed FTEs demonstrated the desired level of expertise. Id. at 4. Second, the notice stated that the contingent-hire status of [deleted] of MCR's proposed 58.5 FTEs also presented a risk of unsuccessful performance. Id. at 5. The agency's notice then asked MCR to submit a FPR by 5:00 p.m. on September 12. Id. at 1. Then, on September 13, in response to MCR's protest challenging the sufficiency of the response time, the agency provided an extension of the submission deadline until September 18 at 5:00 p.m. AR, Tab 31, Notice to MCR Extending Interchange Response Time, at 1. In the final analysis, the agency gave MCR eight days to revise or confirm 53.5 of its proposed 58.5 FTEs.

The agency argues that MCR had ample time to submit a competitive proposal, and noted that as early as February 20, all potential offerors were provided a draft FOPR advising that the agency would "assess the Offeror's staffing solution and proposed key personnel to fulfill the requirements as described in the PWS. . . ." COS/MOL at 19 (citing AR, Tab 10, Draft FOPR at 167). Moreover, the agency argues that MCR was on notice that it would need to submit a superior staffing proposal, since the technical expertise factor, which included staffing, was significantly more important than price. Id. The agency additionally contends that MCR had at least 18 days to prepare its FPR, as it received the agency's corrective action notice on August 30, 2018, in response to MCR's original protest. Id.

We disagree with these assertions. As discussed above, MCR initially challenged the agency's evaluative preference for personnel with higher levels of experience as improper, contending that such a preference was not reasonably based in the terms of the solicitation. AR, Tab 2, MCR Protest, B-416654.1, at 12-13. Our Office never addressed this issue due to the agency's decision to take corrective action. Thus, even if MCR's argument was not meritorious--an issue not before us--the firm cannot be imputed with knowledge of the serious impact of the agency's underlying staffing preferences until September 10, when the agency issued interchange notices communicating its specific concerns regarding MCR's proposed personnel.

In responding to MCR's allegations that the time provided to submit FPRs was insufficient, the agency highlights that our Office has recognized that the determination of what constitutes a sufficient amount of time for proposal preparation is a matter committed to the discretion of the contracting officer, and our Office will not object to that determination unless it is shown to be unreasonable. COS/MOL at 16 (citing Financial Asset Mgmt. Sys., Inc., B-409722.9, Apr. 24, 2015, 2015 CPD ¶ 145 at 6). The agency argues that it provided MCR a reasonable amount of time to respond to the second round of interchanges, asserting that MCR is attempting to utilize interchanges to remedy its failure to submit a competitive proposal. Id. at 18. The agency also notes that it ultimately offered to provide eight days to respond, which is longer than the

response time provided for the first round of interchanges--an amount of time to which MCR did not object.⁷ Id. at 19.

The notices provided advised MCR that 53.5 out of 58.5 of its proposed FTE's did not have the desired level of experience, and that over [deleted] of MCR's proposed personnel were deemed to present a risk due to their contingent-hire status. The notice also requested that MCR revise or confirm its staffing matrix. In order to be responsive to the agency's experience concerns, and to remain competitive in the procurement, MCR could not simply confirm its staffing proposal. Instead, it would have had to successfully recruit and negotiate employment agreements in roughly a week's time with a substantial number of highly-skilled personnel that have senior-level experience in an NSS launch environment. To address the agency's concern about contingent-hire personnel, MCR would need to propose non-contingent-hire personnel, which would affect the firm's pricing, or alternatively required substantial revisions to its transition plan. Protest at 10. In our view, the amount of time provided by the agency to respond does not appear to have been calculated to actually allow MCR to submit a proposal responsive to these concerns.

Moreover, with respect to the agency's contention that since MCR did not object to the five day response time imposed on earlier exchanges, it should not object now, we disagree. In our view, the amount of time provided (five days) to respond to the first round of interchanges supports the conclusion that the response time provided for the second round was insufficient. In the first round of interchanges, MCR was only required to fill in salary data and clarify the experience of its proposed personnel, or essentially, more fully complete aspects of its proposal with information. AR, Tab 20, MCR Round 1 Interchanges, at 1. In contrast, the second round of interchanges required that MCR recruit and retain a significant number of highly qualified personnel, as well as to potentially make other substantial revisions to its proposal. AR, Tab 27, MCR Second Round of Interchanges, at 4-6. As such, to the extent the agency was attempting to provide a reasonable response time commensurate with the expectation that offerors submit a responsive FPR, the agency should have provided substantially more than five days to offerors to respond to the second round of interchanges.

Based on the unique circumstances presented here, and the nature of what the interchanges required of MCR, our review of the record leads us to conclude that the response time provided was unreasonable. Instead, the record shows that the time

⁷ The agency also argues that the short response time was necessary because it has an urgent need for the requirements, as the procurement would greatly expand the level of support for this program, and stating that "there is a high level of interest in the space launch program." COS/MOL at 25-26. The agency has not adequately explained how, in light of the procurement history here, the provision of a reasonable amount of time to respond to the notices it elected to provide would have substantially delayed addressing its needs.

provided to MCR was not calculated to provide the firm with a fair opportunity to improve its proposal, or to maximize the agency's ability to obtain the best value. See FAR § 16.505(b); Gulf Copper Ship Repair Inc., supra.⁸

RECOMMENDATION

We recommend that the agency provide MCR a reasonable amount of time to respond to the agency's concerns, and that the agency evaluate proposals received in response to the interchanges. We further recommend that, upon completion of this evaluation, the agency make a new source selection decision. If, after performing the reevaluation, the agency determines that a firm other than Tecolote represents the best value to the agency, we further recommend that the agency terminate the task order awarded for the convenience of the government and make award to the firm selected, if otherwise proper. Finally, we recommend that MCR be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). MCR should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

⁸ While MCR argued that a 30 day response time is needed for it to submit an FPR, Comments at 6, we decline to recommend a specific time period for the FPR responses. Our finding here is limited to the conclusion that the response time provided was insufficient in light of the unique circumstances of this case.