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Decision

Matter of: AMEC Earth & Environmental, Inc.

File: B-401961; B-401961.2

Date: December 22, 2009

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Timothy A. Chenault, Esq., United States Coast Guard, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging adequacy of discussions with protester is sustained where the record shows that, by asking specific questions regarding the protester's proposed management software tool, the agency did not convey the true nature of its concern—that the proposed software tool was generally inappropriate for the project and increased the risk of performance.

2. Under solicitation which required offerors to identify environmental issues and complications related to performing work at a particular site, agency improperly evaluated offers based on different understandings of the solicitation requirements where the agency did not inform offerors that it did not consider the site to be a wetland, but the protester reasonably concluded (from publicly available information) that the site could be considered a wetland, and the agency evaluated its proposal on that basis, while at the same time evaluating other offerors' proposals on the assumption that the site was not a wetland; as a result, agency's evaluation was contrary to the fundamental principle that a solicitation must provide for the submission of proposals based on a common understanding of the agency's requirements.

DECISION

AMEC Earth & Environmental, Inc. protests the nonselection of its proposal for one of five awards under request for proposals No. HSCG47-09-R-3EFK03, issued by the U.S. Coast Guard for design-build and construction services for the Department of Homeland Security. AMEC challenges the agency's evaluation of the offerors' technical proposals and argues that the discussions the agency conducted with AMEC were not meaningful.

We sustain the protest.

BACKGROUND

The solicitation, issued on January 15, 2009, contemplated the award of up to five indefinite-delivery/indefinite-quantity (ID/IQ) contracts for design-build construction, general construction, renovation, maritime construction, demolition, and historical restoration and alterations throughout the United States, Puerto Rico, Guam, and the U.S. Virgin Islands. Contracts were to be awarded for a 1-year base period, plus six 1-year option periods. Projects awarded under the ID/IQ contracts will have an estimated construction cost between \$3 million and \$100 million. The maximum value for each ID/IQ contract is \$500 million.

The agency used a two phase solicitation and selection process, as provided for by Federal Acquisition Regulation (FAR) Subpart 36.3. Based on the phase I results, which are not at issue here, the agency selected eight firms, including AMEC, to participate in the phase II competition for the five possible awards. The phase II solicitation provided for evaluation of the eight firms in connection with a specific "seed project"—the design and construction of a multi-mission facility at the U.S. Coast Guard Training Center, Cape May, New Jersey. Awards were to be made to the firms offering the best value to the government, considering six technical factors and price. The technical factors were: (1) technical approach; (2) particular project execution strategies; (3) preliminary project schedule; (4) preliminary quality control plans; (5) small business utilization (which was comprised of two subfactors: (a) past performance on utilization of small business and (b) small business subcontracting participation); and (6) demonstration of participation in E-verify. Factors 1 through 5 were of equal importance; factor 6 was the least important. For the purpose of evaluating price, each offeror was required to submit a firm fixed price for the seed project. According to the RFP, price was of equal weight to the six technical factors combined. RFP at 87.

As it relates to AMEC's protest, with respect to factor 2, particular project execution strategies, offerors were required to provide a narrative addressing, among other things, "the project site specific conditions at Cape May, NJ, foundation and long and short term settlement issues, environmental, and complications related to doing work in the New Jersey area." RFP at 82. Regarding factor 3, preliminary project

schedule, offerors were required to provide, among other things, a narrative describing their scheduling capabilities, planning organization, and a description of the equipment and “software/hardware” the offerors intended to use in performance of the seed project. Id.

The agency received initial proposals from all eight firms who were selected for the phase II competition, including AMEC. As part of its initial evaluation of AMEC’s proposal, under factor 2, the agency rated the proposal “superior” (the highest technical rating) with moderate risk. The moderate risk rating was based, in part, on AMEC’s identification of the project site as potentially a wetland. Specifically, the agency noted the following concern:

Offeror raised the possibility that the site would be a wetland. This would have a significant impact on project, if true, however no reason can be found to support this possibility. This statement may have arisen from inadequate site investigation. No information in RFP supports this possibility.

Agency Report (AR), Tab 15, Technical Evaluation, at 000485.

With respect to factor 3, the agency identified three strengths associated with its proposal, yet rated the proposal “satisfactory” with moderate risk based on the following weakness:

Offeror plans to use [Microsoft Project] a software program which is not the most applicable for managing the [design/build] process or construction projects. It lacks the analytical capabilities of other construction oriented software. Plan shows a critical path but the program, unless modified, is not known to be capable of generating a critical path with float calculations. The tool is considered to have the minimum acceptable level of scheduling capabilities and may adversely impact the overall management and reporting effort.

Id.

Upon completion of the technical evaluations, the agency decided to open discussions with the offerors and obtain revised proposals. During discussions with AMEC, the agency asked AMEC to address the following concern regarding factor 2:

1. Your proposal raised the possibility that the site would be a wet land. Please clarify this reference to wet land. Are you aware of information which would alter the conclusion that the site is not in a designated wet land area?

AR, Tab 16, Discussions, at 000561.

With respect to technical factor 3, preliminary project schedule, the agency asked AMEC to address “how the critical path shown on your schedule is developed and to what extent can float be identified and managed using the proposed tool.” Id.

In response to the wetlands issue, AMEC explained that its determination was based on “the New Jersey Department of Environmental Protection’s (NJDEP) online i-Map-NJ GIS-based information system,” which “graphically presents natural resource and management areas regulated by various NJDEP groups, including the Division of Land Use Regulation (DLUR), the primary regulatory group for wetlands and open waters.” AR, Tab 18, AMEC Discussion Responses, at 000842. AMEC provided a printout of the i-Map-NJ map to show that the area for the seed project has been identified as a managed wetland, but noted that “the likelihood of it being a functioning wetland is very remote and most likely an artifact of the methods used in developing the GIS layers for the i-Map-NJ system.” Id. at 000843. AMEC further added, however, that “because it is listed on the NJDEP database as a wetland, arguments need to be made to the Department that a permit for wetland disturbance is not needed.” Id.

Based on AMEC’s response, the agency changed AMEC’s risk rating under factor 2 to “low,” noting that AMEC “adequately addressed the wetland issue.” AR, Tab 19, Supplement to Technical Evaluation Report, at 000584.

Regarding technical factor 3, AMEC detailed how it developed the critical path on its schedule and explained how “float” is identified and managed using Microsoft Project software. Id. at 000844. Considering this additional information, the agency revised AMEC’s risk rating under factor 3 to “low”; however, it did not revise AMEC’s satisfactory rating. In this regard, the agency noted that while AMEC adequately addressed the ability of the selected program to define a critical path, “the ‘tool’ is still considered to be less appropriate than alternatives so the technical rating remained unchanged.” AR, Tab 19, Supplement to Technical Evaluation Report, at 000584.

After considering all the offerors’ responses to the discussions questions and their revised proposals, the agency selected five firms for award, and awarded the seed project to the firm which had submitted the lowest price. AMEC, whose proposal was ranked sixth technically and seventh in terms of price, was not selected for award. After receiving a debriefing, AMEC filed this protest.

DISCUSSION

AMEC argues that the agency’s discussions regarding the weakness identified in its proposal under factor 3, preliminary project schedule, were not meaningful because they did not disclose the true nature of the agency’s concern regarding its proposed use of the Microsoft Project software. AMEC also contends that the agency failed to

properly consider as part of its technical evaluation under factor 2, particular project execution strategies, the fact that the seed project site has been designated as a wetlands area, as disclosed by AMEC during its discussions with the agency.

The record reflects that the agency's discussions with AMEC with respect to factor 3 were flawed. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 6. An agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. MCT JV, B-311245.2, B-311245.4, May 16, 2008, 2008 CPD ¶ 121 at 15-16; Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Here, as noted above, the agency's technical evaluation team identified a weakness in AMEC's technical proposal based on its use of the software program Microsoft Project, which the agency concluded was "not the most applicable for managing the [design/build] process or construction projects . . . lacks the analytical capabilities of other construction oriented software . . . and may adversely impact the overall management and reporting effort." AR, Tab 15, Technical Evaluation, at 000485. In its discussions with AMEC, the agency's questions, however, focused on specific features of the Microsoft Project software, in particular, its ability to manage schedule "float." While AMEC was able to satisfactorily address the agency's specific questions in this regard, the record reflects that the agency continued to fault AMEC for proposing Microsoft Project as adversely impacting the overall management and reporting effort of the project, and that it was the presence of this weakness which prevented AMEC from achieving a higher rating under factor 3, therefore materially affecting the agency's technical evaluation of AMEC's proposal. In this regard, the record reflects the agency's view that AMEC's proposal had several strengths under factor 3 and no other weaknesses, but that, based on the risks associated with its software selection, AMEC was not entitled to a higher technical rating. AR, Tab 19, Technical Evaluation Report, at 000584. By being asked only to address specific questions regarding the particular features of Microsoft Project, AMEC could not have reasonably understood the true nature of the agency's broader concerns about the use of Microsoft Project. As a consequence, the agency's discussions were materially misleading, thereby depriving AMEC of an opportunity to address the agency's concern regarding the use of Microsoft Project in the management of the seed project.

The agency raises several arguments in defense of the adequacy of discussions, none of which alters our conclusion that its discussions with AMEC were fundamentally flawed. Specifically, the agency contends that, pursuant to FAR § 15.306(d)(3), it was not required to discuss its general concerns regarding AMEC's use of Microsoft

Project since the weakness was not “significant,” and it was not identified as a deficiency.¹ In this regard, the agency suggests that it did not consider AMEC’s use of Microsoft Project to be an unacceptable approach since the technical evaluation team determined that it had the “minimum acceptable level of scheduling capabilities.” AR, Tab 15, Technical Evaluation, at 000485. Moreover, the agency argues that identifying the use of Microsoft Project as a weakness would have been inappropriate since it would have been tantamount to directing AMEC to implement a particular technical approach and thereby imposing an undisclosed requirement.

While it is true that agencies are only required to address “significant” weaknesses and deficiencies during discussions, FAR § 15.306(d)(3) further indicates that these are the “minimum” areas for discussion. The record reveals that the agency went well beyond these minimum requirements during its discussions with the eight firms in the phase II competition. In this regard, the record reflects that the agency identified nearly every weakness, in most instances verbatim, from the technical evaluation findings, without regard to whether the weakness was considered “significant” or whether the weakness was associated with an “unacceptable” approach. By way of example, in its discussions with one of the awardees, the agency indicated that it considered the offeror’s use of soil-supported ground slabs to be “acceptable,” yet the agency advised the offeror that its proposed approach was considered “to be more prone to long term settlement issues.” AR, Tab 16, Agency’s Discussion Questions, at 000572. Given the agency’s decision to hold broad discussions with all firms, which went well beyond the FAR’s minimum requirements, it was incumbent on the agency to do so with all offerors equally, and it may not now defend its failure to have apprised AMEC of a perceived weakness in AMEC’s proposal based on the FAR’s minimum discussion requirements. See also, FAR § 15.306(e) (an agency shall not engage in exchanges that “favors one offeror over another.”)

In addition, we find the agency’s concerns about directing AMEC toward a particular technical approach to be misplaced. Had the agency simply identified to AMEC the perceived risks associated with AMEC’s proposed software, AMEC would then have been in a position to develop an appropriate response, which could have ranged from continuing to propose the software notwithstanding the associated risk, justifying its decision to the agency, or proposing to use a different software package, any of which could have addressed the agency’s concerns. While there might have been tradeoffs associated with these various options, AMEC should have been allowed to make such a decision based on an understanding of the true nature of the agency’s concerns regarding its technical proposal.

¹ In relevant part, FAR § 15.306(d)(3) states that, “at a minimum,” the agency is “to indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond.”

We also find that the agency's consideration of the wetlands issue under evaluation factor 2 was improper. AMEC argues that it was the only offeror to have identified the project site as a potential wetland and that the agency failed to reasonably consider this fact in its evaluation of the other offerors' proposals. As noted above, for factor 2, particular project execution strategies, offerors were required to address project site specific conditions at Cape May, New Jersey, to include "environmental, and complications related to doing work in the New Jersey area." RFP at 82. This provision essentially required offerors to perform due diligence regarding the nature of the agency's requirements and to incorporate their findings in their proposals. In its initial proposal, AMEC advised the agency that the project site "may be classified as wetlands in accordance with State of New Jersey standards," and went on to address the potential wetlands designation as an aspect of the permitting process, which was incorporated in AMEC's project schedule. AMEC Proposal at 000686-000688. The record indicates that the other offerors did not specifically identify this potential concern.

During discussions, the agency asked AMEC to clarify its wetland reference and to identify "information which would alter the conclusion that the site is not in a designated wetland area." AR, Tab 17, Discussion Questions, at 000566. In its response, AMEC provided the agency with publicly available information contained in the New Jersey Department of Environmental Protection's iMap-NJ system, which specifically identified the project site as a wetland, and provided the basis for AMEC's belief that there was a need for the wetland issue to be addressed with the state of New Jersey, notwithstanding the fact that it was unlikely the project site ultimately would be found to be a wetland.

The agency concedes that the iMap-NJ system does in fact identify the project site as a wetland and it does not dispute the propriety of AMEC's consideration of the iMap information. Contracting Officer's Supplemental Statement, at 000873. Rather, the agency asserts that the site is not in fact considered a wetland by the state of New Jersey, as reflected by a 2003 Integrated Natural Resources and Environmental Assessment, which had been provided to the agency by the New Jersey Department of Environmental Protection, as well as information solicited from an official within the New Jersey Department of Environmental Protection,² thereby rendering

² The record of the agency's conversation with this official indicates that the individual did not in fact dispute the validity of the iMap wetland designation, nor did he affirmatively indicate that the location was not in fact a wetland. Rather, the official merely noted, as AMEC had in its discussion response, that the iMap information does not definitively establish the project site as a wetland and explained that "questionable sites must be field surveyed by an environmental professional to determine if wetlands are present or not." AR, Tab 33, Notes from Conversation with New Jersey Department of Environmental Protection, at 000943.

immaterial the failure of the other offerors to identify the project as potentially a wetland. Supplemental Agency Report, at 000865. We disagree.

The information upon which the agency now relies was not publicly available and was not otherwise made available to any of the offerors during the competition. For this reason, once the agency learned of AMEC's reasonable reliance on the publicly available iMap information, which was in direct conflict with the information that was in the agency's sole possession which shaped the premise of its technical evaluation of the other offerors' proposals, the agency was obligated to clarify the agency's understanding of wetland requirement with AMEC. Absent clarification of the matter, AMEC was placed in the position of addressing a solicitation requirement in a manner different than the other offerors and which placed it at a competitive disadvantage to the other offerors given the conflicting public and nonpublic information.³ The agency's failure to clarify the wetland issue was contrary to the fundamental principle that a solicitation must provide for the submission of proposals based on a common understanding of the agency's requirements. See Media Funding, Inc. d/b/a Media Visions, Inc., B-265642, B-265642.2, Oct. 20, 1995, 95-2 CPD ¶ 185 at 3. We therefore sustain the protest on this basis as well.⁴

Recommendation

We recommend that the agency reopen the competition and hold meaningful discussions with AMEC, and other offerors, as necessary. The discussions with

³ The agency argues that once AMEC learned the project site had been identified as a wetland through the iMap system, it became AMEC's responsibility to seek clarification of the matter from the agency. We disagree. As explained above, AMEC reasonably relied on New Jersey's publicly available iMap information in addressing the solicitation's requirement to identify potential environmental issues involving the project location. Because AMEC was unaware, and could not have known, of contrary indications from New Jersey regarding the designation of the location as a wetland, information which was internal to the agency, it was the agency's responsibility to address the conflicting information with AMEC since the agency was solely aware of the conflict regarding the requirements.

⁴ Throughout the protest, the agency has asserted that AMEC could not have been prejudiced by the alleged errors due to its higher price. However, had the agency held proper discussions with AMEC regarding factor 3, AMEC's rating under this factor might have been higher, thereby necessitating a different tradeoff with at least one of the lower rated, lower priced awardees. In addition, had the agency properly addressed the wetland's issue with AMEC, which AMEC asserts was considered in developing its schedule and price, there is a reasonable possibility that AMEC's price would have been more competitive and it reasonably could have been in a position to receive an award.

AMEC should, at a minimum, address the agency's concerns regarding AMEC's choice of management software and clarify its position regarding the wetland issue. The agency then should reevaluate the offers, as revised, and make new best-value determinations and source selection decisions, as appropriate.⁵ In addition, we recommend that the agency reimburse AMEC the costs of filing and pursuing its protest, including reasonable attorneys' fees. AMEC should submit its certified claim for its protest costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2009).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel

⁵ In response to other challenges raised in AMEC's protest, the agency conceded that it had erred in its evaluation of AMEC's proposal under factor 4, quality control plan, and that its evaluation under factor 5(b), small business participation, was inconsistent among offerors. Regarding these admitted errors, the agency maintains that it took appropriate "corrective action" during the course of the protest by revising AMEC's technical rating under factor 4 from "satisfactory" to "superior," by lowering the scores of three other offerors, one of which was an awardee under factor 5(b), from "superior" to "satisfactory," and conducting a new tradeoff decision. According to the agency, the new tradeoff decision indicates that AMEC still would not be in line for award as a consequence of its higher price. We do not consider the agency's new tradeoff determination to be appropriate "corrective action" since the revised decision is based on a new assessment of the relative standing of offerors made in the midst of protest litigation. Revised assessments under these circumstances are entitled to little weight in our deliberations because they may not reflect the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Accordingly, the agency's reevaluation and new source selection determination should include correction of these conceded evaluation errors.