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

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Decision

Matter of: Ewing Construction Co., Inc.

File: B-401887.3; B-401887.4

Date: April 26, 2010

Paul H. Sanderford, Esq., Sanderford & Carroll, P.C., for the protester.
Joe D. Baker, II, Esq., Department of the Navy, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency conducted prejudicially misleading discussions with the protester where, in taking corrective action in response to the protester's prior protest, the agency reevaluated an aspect of the protester's proposal as constituting a deficiency that rendered the proposal ineligible for award under the solicitation's stated evaluation scheme, and while that aspect of the protester's proposal had been previously identified during discussions as a significant weakness, under the solicitation's stated evaluation scheme this would result in the proposal being downgraded, but not rendered ineligible for award.

DECISION

Ewing Construction Co., Inc., of Corpus Christi, Texas, protests the award of a contract to Overland Corp., of Ardmore, Oklahoma, under request for proposals (RFP) No. N69450-09-R-0754, issued by the Department of the Navy, for the design and construction of a rotor blade processing facility at the Corpus Christi Army Depot (CCAD), Naval Air Station, Corpus Christi, Texas. Ewing argues that the agency failed to conduct meaningful discussions and failed to reasonably evaluate proposals.

We sustain the protest.

The RFP provided for the award of a fixed-price contract for the design and construction of an addition to an existing building at the CCAD. The solicitation stated that the procurement would be conducted in two phases. In phase I, the agency would evaluate proposals under the evaluation factors of corporate experience (technical qualifications), past performance, and past performance in utilizing small business programs. RFP at 7. The solicitation explained that phase I

of the process “is a narrowing step of offerors” and that those offerors determined to be “most highly qualified” based upon their phase I proposals would be invited to submit phase II proposals. RFP at 8.

Offerors invited to participate in phase II were requested to submit technical and price proposals. The RFP provided that the offerors’ non-price proposals would be evaluated under the evaluation factors of participation of small business in performance of this contract, technical solution, and management approach. RFP at 7. The solicitation added that discussions may be held, and cautioned offerors that

[a]ny proposal found to have a deficiency in meeting the stated solicitation requirements or performance objectives will be considered ineligible for award, unless the deficiency is corrected through discussions. Proposals may be found to have either a significant weakness or multiple weaknesses that impact either the individual factor rating or the overall rating for the proposal.

RFP at 10. The solicitation further informed offerors that the agency would award a contract to the offeror submitting the proposal determined to provide the best value to the agency, and that in determining best value, the results of the phase I and phase II non-price evaluations would be considered equally as important as proposed price. RFP at 10.

The agency received and evaluated phase I proposals, requested and received phase II proposals, and conducted written discussions with the offerors. The record reflects that in conducting these written discussions, the agency informed Ewing that its phase II proposal was assessed as having a “significant weakness” under the technical solution factor because of the agency’s determination that Ewing’s “proposed roofing system does not meet the requirements of the RFP” with regard to “roof coverings.” Agency Report (AR), Tab 5, Ewing Discussion Letter (June 8, 2009), at 2. Additionally, Ewing was informed at this time that its proposal had been assessed as having a “weakness” under the management approach factor. Id.

The agency requested, received, and evaluated final revised proposals from the offerors, including Ewing, which included the offerors’ responses to the discussion questions posed. In its final proposal revision, Ewing explained why it believed its proposed roof design would meet the agency’s requirements. AR, Tab 6, Ewing’s Final Proposal Revision, Technical Solution, at 4. Overland’s proposal was rated as “good” overall with a price of \$11,712,934, and Ewing’s proposal was rated as “satisfactory” overall with a price of \$[DELETED]. AR, Tab 2, Business Clearance Memorandum (BCM), at 7, 20. The agency determined that Overland’s proposal represented the best value to the agency, and awarded a contract to that firm. After requesting and receiving a debriefing, Ewing protested the award to our Office on September 9, 2009.

In response to Ewing's September 2009 protest, the agency took the corrective action of reevaluating Ewing's and Overland's phase I and phase II proposals. In taking corrective action, the agency did not reopen discussions, nor permit offerors to revise their proposals. The agency reevaluated Overland's proposal as "satisfactory" overall and Ewing's proposal as "poor" overall. AR, Tab 2, BCM, at 19. In reevaluating Ewing's proposal, the agency determined that Ewing's proposed roofing system constituted a "deficiency," rather than a "significant weakness" as the agency had previously determined, and concluded that because of this, "Ewing [was] ineligible for award." *Id.* The source selection authority (SSA) expressly adopted the findings of the agency evaluators, and because of the deficiency assessed regarding Ewing's proposed roofing system as reevaluated by the agency, specifically noted in the source selection decision as follows: "I specifically find that Ewing has a deficient proposal and is therefore, ineligible for award." *Id.* at 20. The SSA then affirmed the selection of Overland for award. *Id.* After requesting and receiving a debriefing, Ewing again protested to our Office.

The protester argues that the agency conducted materially misleading discussions regarding Ewing's proposed roofing system, and that the agency's evaluation of Ewing's and Overland's proposals was unreasonable in a number of respects.

This protest is illustrative of one of the challenges an agency faces when, for whatever reason (but here in taking corrective action in response to a previous protest), the agency reevaluates proposals after discussions are complete. In this regard, we have held that where an agency, during a reevaluation of proposals, identifies new concerns in a proposal and those concerns would have had to be raised had they been identified before discussions were held, the agency is required to reopen discussions and raise the new concerns with the offeror. Lockheed Martin Simulation, Training & Support, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 11; DevTech Sys., Inc., B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4.

Here, prior to taking corrective action, the agency raised its concerns regarding Ewing's proposed roofing system during discussions, and specifically identified its concerns as a "significant weakness." After evaluating Ewing's final proposal revision, the agency assigned the proposal ratings of "marginal" under the technical solution factor and "satisfactory" overall. AR, Tab 5, Ewing Discussion Letter (June 8, 2009). These ratings were consistent with the terms of the solicitation, which stated that a "significant weakness" may result in an adverse impact on the proposal's rating under the technical solution factor and overall rating. RFP at 10.

In contrast, during the reevaluation--performed as part of the agency's corrective action in response to Ewing's initial protest--the agency determined that Ewing's proposed roofing system constituted a "deficiency in meeting the stated solicitation requirements." Rather than downgrading Ewing's proposal, this reassessment rendered the proposal "ineligible for award," in accordance with the terms of the

RFP—which, as quoted above, expressly stated that proposals with uncorrected deficiencies would be ineligible for award. AR, Tab 2, BCM, at 15, 19-20; RFP at 10. Because the agency did not reopen discussions with the offerors, Ewing was never informed that its proposal was deficient. Although the agency is correct that its concern with Ewing’s proposed roofing system was raised during discussions (such that the concern is not a “new concern”), the identification of the concern as a “significant weakness,” rather than a “deficiency,” misled the protester. Specifically, the protester was never apprised of the severity of the agency’s concern, or the ramifications of not adequately addressing it—i.e., ineligibility for award.

It is a fundamental concept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror’s proposal that could reasonably be addressed in a manner to materially enhance the offeror’s potential for receiving award. Federal Acquisition Regulation (FAR) § 15.306(d); Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7. An agency may not, through silence, the framing of a discussion question, or in a response to a question, mislead an offeror into responding in a manner that does not address the agency’s concerns, or that misinforms the offeror concerning a problem with its proposal or the government’s requirements. Lockheed Martin Corp., supra; Metro Mach, Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Under the circumstances here, since the agency’s concerns with the protester’s proposed approach changed during the reevaluation to the point that, should they remain unaddressed, the proposal would be rejected as ineligible for award, the agency was required to reopen discussions. On this issue, the protester represents that “[h]ad the Agency identified the proposed roof design as a deficiency during discussion[s], [Ewing] would have been made aware that its proposal was ineligible for award, which would have elicited a different response from [Ewing] to the Discussion Letter.” Protest at 6; see Protester’s Comments at 6.

The protest is sustained. We recommend that the agency reopen and conduct appropriate discussions with all offerors whose proposals are in the competitive range, request revised proposals, and make a new source selection.¹ If a proposal other than Overland’s is selected for award, the agency should terminate for

¹ Ewing also protests that the agency’s evaluation of proposals and selection of Overland’s proposal for award were unreasonable. We need not address the propriety of the agency’s evaluation or source selection given our recommendation that the agency reopen discussions, and request and evaluate revised proposals. However, the agency may want to be mindful of these issues as it implements the recommended corrective action. In addition, the agency should consider a review of RFP’s specifications pertaining to roofing systems, given its and the protester’s disagreement over the solicitation’s minimum requirements regarding such systems.

convenience the contract awarded to Overland, and award a contract to the appropriate offeror. In addition, we recommend that Ewing be reimbursed the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). The protester 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).

Lynn H. Gibson
Acting General Counsel