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Decision

Matter of: FPM Remediations, Inc.

File: B-407933.2

Date: April 22, 2013

David Taylor, Partner, Butzel Long Tighe Patton, PLLC, for the protester.
James M. Pakiz, Esq., and Stanley E. Tracey, Esq., Corps of Engineers, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an agency unreasonably excluded the protester's proposal from the competitive range is denied where the agency reasonably determined that the protester's proposal did not address a solicitation requirement and was not among the most highly-rated offers.

DECISION

FPM Remediations, Inc., of Rome, New York, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W9128F-11-R-0002, issued by the Department of the Army for environmental remediation services.

We deny the protest.

BACKGROUND

The RFP, issued as a total small business set-aside, provided for the award of multiple, indefinite-delivery/indefinite-quantity task order contracts for environmental remediation services for a 3-year base period and a 2-year option period. RFP at 2. Offerors were informed that the agency intended to award up to five task order contracts, against which fixed-price and cost-reimbursement task orders could be issued. Id. at 3.

The RFP provided that awards would be made on a best-value basis, considering cost/price and the following evaluation factors: technical requirements; performance risk/past performance; corporate technical plans, practices, and procedures.¹ These factors, when combined, were considered to be significantly more important than cost/price. Id. at 127, 128.

The RFP contained detailed instructions for the preparation of proposals. Offerors were directed to submit their proposals in two volumes, the first of which would include the technical proposal and past performance information, and the second of which would provide cost/price information. Id. at 110. With respect to the corporate technical plans, practices and procedures factor, offerors were required to provide a list of environmentally reportable incident violations and any notice of violations (NOVs) received by any member of the offeror's team that may have occurred in the past 3 years, or to state that there were none.² Id. at 122.

The agency received 25 proposals, including FPM's. Contracting Officer's Statement at 3. One proposal was rejected as incomplete, and the remaining technical proposals, including FPM's, were evaluated by the agency's source selection evaluation board (SSEB), which assigned adjectival ratings and identified strengths and weaknesses under each factor.³ A separate cost team evaluated the price/cost proposals. Id. at 4.

Ten proposals were evaluated as good or acceptable overall. Id. at 6-7. FPM's proposal, however, was found by the SSEB to be unacceptable under the corporate technical plans, practices and procedures factor because FPM failed to identify any

¹ Subfactors were identified under each of the non-cost/price factors.

² An NOV is issued by the Environmental Protection Agency (EPA), and notifies the recipient that EPA believes that the recipient has committed one or more violations of environmental statutes or regulations. It also provides instructions for environmental compliance. See <http://compliance.supportportal.com/link/portal/23002/23009/Article/32970/What-is-a-Notice-of-Violation-NOV>.

³ Proposals were evaluated as outstanding, good, acceptable, marginal, susceptible to being made acceptable, or unacceptable. RFP at 129. As relevant here, a marginal proposal was defined as a proposal that satisfied all requirements but demonstrated minimal understanding and a high degree of risk. A susceptible to being made acceptable proposal was a proposal that contained a minor error, omission, or deficiency that could be corrected without a major rewrite or revision of the proposal. An unacceptable proposal was one that contained a major error, omission or deficiency that indicates a lack of understanding or an approach that could not be expected to meet requirements or involved very high risk, and that would require a major rewrite or revision of the proposal. Id.

NOVs or to provide an affirmative statement that no member of the offeror's team had received an NOV in the past 3 years.⁴ AR, Tab H, SSEB Report at 88.

The contracting officer established a competitive range of the [deleted] most highly-rated offerors. Contracting Officer's Statement at 7. FPM's proposal was not included in the competitive range.

This protest followed a pre-award debriefing.

DISCUSSION

FPM challenges the exclusion of its proposal from the competitive range, arguing that the agency's evaluation of its technical proposal did not comply with the evaluation scheme stated in the RFP. Protest at 2. That is, FPM contends that its proposal could not have been found "unacceptable" because none of the identified "deficiencies" or "omissions" would require a major "rewrite or revision of the proposal" to be corrected. Id. In this regard, FPM acknowledges that it did not address the solicitation's notice requirements with respect to NOVs, but argues that this omission could have been corrected through clarifications. Id. at 2; 4.

The agency responds that FPM's failure to address the RFP's requirement that offerors identify NOVs or state none were received was reasonably evaluated as a deficiency that renders the proposal unacceptable. The Army states that this deficiency could not be corrected through clarifications. See Contracting Officer's Statement at 10. The Army also states that FPM's proposal was reasonably excluded from the competitive range, because its unacceptable proposal was not among the most highly rated. Id.

In reviewing a protest challenging an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the evaluation was reasonable and consistent with the stated evaluation factors and applicable statutes and regulations. Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 3; Foster-Miller, Inc., B-296194.4, B-296194.5, Aug. 31, 2005, 2005 CPD ¶ 171 at 6. Contracting agencies are not required to include a proposal in the competitive range where the proposal is not among the most highly-rated. Federal Acquisition Regulation (FAR) §15.306(c)(1); General Atomics Aeronautical

⁴ The SSEB also found FPM's proposal unacceptable under the technical requirements factor, because FPM did not demonstrate that its proposed contracts quality control supervisor had required experience. See AR, Tab H, SSEB Report, at 84.

Sys., Inc., B-311004, B-311004.2, Mar. 28, 2008, 2008 CPD ¶ 105 at 5; Hamilton Sundstrand Power Sys., B-298757, Dec. 8, 2006, 2006 CPD ¶ 194 at 6.

Here, the record establishes that FPM's proposal failed to satisfy the RFP's requirements. That is, under the corporate technical plans, practices and procedures factor, offerors were instructed that their proposal should provide information for the offeror and all of its team members on NOVs or state that neither it nor any of its team members had any violations. RFP at 122. The protester does not dispute that its proposal omitted this information. Protest at 6.

Rather, FPM argues that addressing this omission would not require material changes to its proposal, and therefore the proposal should not have received an unacceptable rating under the RFP's definition of this adjectival rating. See Comments at 4-5. This argument, however, misses the point. FPM's proposal was found to be not among the most highly rated for inclusion in the competitive range. Even if its proposal was rated susceptible to being made acceptable, which would appear to reflect a proposal, such as FPM's, that has an omission or deficiency, its proposal would not be among the most highly-rated offers.

We also find no merit to FPM's argument that it should have been permitted to correct this omission through clarifications. FAR § 15.306 describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an 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. FAR § 15.306(a); Satellite Servs., Inc., B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2.

By contrast, discussions--which are to occur after establishment of the competitive range--involve the agency indicating to each offeror the significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to materially enhance the proposal's potential for award. FAR § 15.306(d)(3). Although agencies have broad discretion as to whether to seek clarifications from offerors, offerors have no automatic right to clarifications regarding proposals and such communications cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6. FPM's correction of this omission would

require the protester to revise its proposal, which would constitute discussions, and not clarifications.

We deny the protest.⁵

Susan A. Poling
General Counsel

⁵ Although we have only addressed the protester's primary arguments, we have considered all of them, and find that none provide a basis to conclude that the Army unreasonably found that FPM's proposal was not among the most highly rated.