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Decision

Matter of: Trace Systems, Inc.

File: B-404811.4; B-404811.7

Date: June 2, 2011

James Kearney, Esq., Holly Emrick Svetz, Esq., and Steven W. Cave, Esq., Womble Carlyle Sandridge & Rice, for the protester.
Brian A. Darst, Esq., and Matthew R. Keller, Esq., Odin, Feldman & Pittleman, PC, for Engineering Services Network, Inc.; and Robert E. Gregg, Esq., and Karen R. Harbaugh, Esq., Squire, Sanders & Dempsey (US) LLP, for NetCentrics, the intervenors.
Maj. James W. Nelson, and Brenda Oswalt, Esq., Department of the Army, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably eliminated proposal from consideration for award where the proposal failed to conform to a material term of the solicitation.

DECISION

Trace Systems, Inc., a small business, protests the elimination of its proposal from consideration for award under request for proposals (RFP) No. W91QUZ-08-R-0011, issued by the Department of the Army for information technology services.

We deny the protest.

The RFP was issued on March 25, 2009 as a total set-aside for small business, to establish a multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contract for a range of services and solutions necessary to implement the agency's enterprise infrastructure and infostructure goals. To achieve this end, the RFP sought to enter into "performance-based" arrangements with successful offerors. The RFP noted that establishing performance based arrangements introduced several changes from traditional procurement approaches, including the use of a statement of objectives (SOO) rather than a statement of work (SOW). RFP, Section L, at 1. Under a SOO, the government describes its requirements in terms of desired objectives, and

offerors are free to propose solutions that they believe will best meet or exceed those objectives. After award, the agency monitors and evaluates contractor performance using performance metrics established by the contract. These metrics gauge a contractor's level of success in meeting the stated objectives, and provide for performance-related incentives and disincentives. See Id. at 11; Contracting Officer's Statement of Facts (COSF), at 10. The RFP also advised that the agency contemplated making award without discussions. RFP, Section 1, at 1.

According to the RFP, the awards would be made to offerors with proposals determined to be the most beneficial, considering three evaluation factors: mission support, performance risk, and price. RFP, Section M, at 2-3. The mission support factor consisted of three subfactors: corporate capability, management approach, and quality control programs. Id. at 2.

Pursuant to the RFP, under the management approach subfactor, offerors were to identify performance metrics for each objective identified in the SOO using "Table 1 – Performance Metrics." RFP, Section L, at 9. These metrics consisted of "Measures and Metrics; Acceptable Level of Quality (ALQ); and the contract level Incentives (non-monetary)/Disincentives." Id. For three of the objectives, the RFP set forth government-specified measures, metrics, and ALQ, which were pre-printed within the table. Id.

As relevant, entry 3.c of Table 1 pertained to an objective that sought to ensure that contractors "[a]ssure affordable, best value, best pricing solutions while using best commercial practices," and contained a government-specified metric requiring contractors to "[r]eview proposals submitted to ensure affordable, best value, best pricing solutions are being utilized." RFP, Section L, at 11. Entry 3.c also contained a government-specified ALQ, which provided as follows:

All task orders must be completed within the negotiated price for items within the contractor's control 100% of the time. This means 100% compliance with the metric is the target.

Id.

With regard to the government-specified measures, metrics, and ALQs, the RFP cautioned offerors,

Note: With one exception [not relevant here], the Offeror shall not change the Objectives, Measures and Metrics, and Acceptable Level of Quality listed in Table 1 – Performance Metrics, below.

RFP, Section L, at 9 (emphasis original). Amendment 2 to the RFP, which incorporated agency answers to offeror questions, further emphasized this caution. In response to a question concerning whether the agency intended to limit offerors

to one set of measures, metrics, acceptable level of quality, and incentives/disincentives per objective, the agency answered,

No. However, the already provided Measures and Metrics at 1.d, 2.c, and 3.c and Acceptable Level of Quality at 1.d, 2.c, and 3.c at Table 1 – Performance Metrics shall not be revised or deleted.

Amendment 2, Questions and Answers, at 16.

The agency received fifty proposals in response to the RFP. The agency made award without discussions on February 15, 2011, and Trace received its debriefing on February 16. During the debriefing, Trace learned that its proposal had received a red/unacceptable rating under the management approach subfactor, which resulted in a red/unacceptable rating for the entire mission support evaluation factor, and a determination that Trace's proposal was unacceptable overall. The debriefing explained that the red/unacceptable ratings stemmed from a deficiency assessed under the management support factor. Specifically, the agency determined that Trace had improperly modified metric 3.c and ALQ 3.c of Table 1 in a manner that materially altered the performance metric's meaning and failed to conform to the RFP. Rather than propose the government-specified metric and ALQ, as instructed, Trace entirely rewrote the metric to state "Percentage of pricing obtained competitively by Trace from its subcontractors, vendors, and suppliers," with the corresponding ALQ defined as "100% competitively obtained." Proposal, Volume 1, at 20.

Trace now raises a variety of protest allegations centered on the argument that the agency's assessment of a deficiency for under the mission support subfactor was improper. For example, Trace asserts that the deficiency was improper because the agency misapplied the evaluation factors, unreasonably applied the evaluation factors according undue weight to one deficiency, unreasonably applied undue weight to the management approach subfactor, introduced an unstated evaluation factor, and mechanically applied the evaluation factors under the mission support subfactor.¹ We disagree.

Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5; National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5.

¹ After reviewing the agency report in this protest, Trace filed a supplemental protest raising various allegations, which essentially recast issues raised in Trace's initial protest. Given our conclusion that the agency reasonably found Trace's proposal unacceptable, these issues are also without merit.

Here, the government-specified performance metrics were material requirements of the RFP and the agency reasonably determined that Trace improperly modified the performance metrics in a manner that did not conform to the terms of the RFP.

Under a performance-based contracting arrangement, such as here, performance metrics are more than mere proposal evaluation tools. Rather, the metrics become the standards used to assess the contractor during performance, and to determine the application of contractor-proposed performance incentives and disincentives. Indeed, the measures, metrics, ALQ, and incentives/disincentives serve to establish the performance levels that are required to meet the objectives specified by the SOO. In this case, the agency provided certain government-specified performance metrics reflecting the level of performance that the government required, and repeatedly cautioned the offerors' that they were not to be revised. Such clearly stated RFP terms, which establish the obligations of the parties during contract performance, are undoubtedly material to the needs of the government; failure to conform to these terms rendered this proposal unacceptable.

Based on a review of the record, it is apparent that through its modifications to the government-specified metric at 3.c of Table 1, and the corresponding ALQ, Trace materially changed the fundamental nature of the performance metric established by the agency in the RFP. The contracting officer explains that the agency has a concern, based on its past experience, about the quality of the proposals that will be submitted in response to task order competitions, and wants to avoid price adjustments on negotiated task orders that may result from a lack of mutual understanding of the task order requirements. COSF, at 10. To achieve this objective, stated in the RFP as “[a]ssure affordable, best value, best pricing solutions while using best commercial practices,” the agency included the metric at 3.c, “review proposals submitted to ensure affordable, best value, best pricing solutions are being utilized,” and the corresponding ALQ, “all task orders must be completed within the negotiated price for items in the contractor’s control 100% of the time.” As explained by the agency, these metrics were intended to provide offerors with an incentive to submit clear task order proposals, with accurate pricing, and offerors were not to modify these metrics because the agency considered them to be material aspects of its requirements. Id.

Instead of following the RFP’s clear directive not to alter the metric and ALQ for 3.c., Trace, as noted above, revised the proposed metric to read, “[p]ercentage of pricing obtained competitively by Trace from its subcontractors, vendors and suppliers,” and the corresponding ALQ to state, “100% obtained competitively.” Under Trace’s proposed metric and ALQ, Trace would be entitled to any proposed performance incentives merely by competitively obtaining its subcontractor’s prices, and would also thereby avoid the imposition of performance based disincentives even in the event that it sought upward price adjustments during task order performance. Since the deviations introduced by Trace altered the fundamental legal relationship of the parties with respect to contract performance requirements, the agency reasonably

determined that Trace's proposed deviations constituted deficiencies, which rendered its proposal unacceptable.

Trace's arguments that the agency applied unreasonable weight to this deficiency, or to the mission support subfactor, are also unavailing. A proposal that fails to conform to a material term of the RFP is unacceptable and may not form the basis for award. See National Shower Express, Inc.; Rickaby Fire Support, *supra*. An agency is not required to "balance" a deficiency under a subfactor against strengths under other subfactors, or other evaluation factors, when the deficiency renders the proposal unacceptable. Given our conclusion, as discussed above, that the agency reasonably found Trace's proposal unacceptable, and thus ineligible for award, this ground of protest must also fail.

Finally, Trace argues that the agency should have raised the above issues concerning the 3.c metrics with Trace through discussions. The RFP, however, expressly advised that the agency contemplated making award without discussions. RFP, Section 1, at 1. Further, the contracting officer's discretion in deciding not to hold discussions is quite broad. Sletten Co./Sletten Constr. Co., B-402422, Apr. 21, 2010, 2010 CPD ¶ 97, at 7. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, and there is also no requirement that an agency document its decision not to initiate discussions. As a result, an agency's decision not to initiate discussion is a matter that we generally will not review. Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3. The fact that a protester in its proposal failed to comply with the RFP requirements does not give rise to an obligation on the agency's part to hold discussions, where discussions are not otherwise necessary. Sletten Co./Sletten Constr. Co., *supra*.

The protest is denied.

Lynn H. Gibson
General Counsel