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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: ERIE Strayer Company

File: B-406131

Date: February 21, 2012

Richard Lanzillo, Esq., Knox McLaughlin Gornall & Sennett, for the protester.

John Jacob, for RexCon LLC, the intervenor.

Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency should have requested clarifications from protester is sustained, where the record demonstrates that the agency improperly conducted discussions only with the awardee.

DECISION

ERIE Strayer Company, of Erie, Pennsylvania, protests the award of a contract to RexCon LLC, of Burlington, Wisconsin, under request for quotations (RFQ) No. FA4861-11-R-B014, issued by the Air Force for a mobile concrete plant at Nellis Air Force Base, Nevada. The protester asserts that the Air Force improperly evaluated its proposal as unacceptable and that, to the extent that the agency had particular concerns regarding its proposal, the Air Force should have requested clarifications from ERIE.

We sustain the protest.

BACKGROUND

The RFQ was issued using simplified acquisition procedures pursuant to the authority of Federal Acquisition Regulation (FAR) subpart 13.5, Test Program for Certain Commercial Items.¹ It contemplated the award of a fixed-price contract for a

¹ At the time this solicitation was issued, FAR subpart 13.5 authorized the use of simplified procedures for the acquisition of commercial supplies and services in

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single mobile, low-profile central mix concrete batch plant, including set-up and related accessories. Technical and price were the two evaluation factors. The technical factor contained the following three subfactors, each of which was evaluated as acceptable or unacceptable: technical proposal, demonstration of capability, and demonstration of technical responsibility. An unacceptable rating on one or more of the technical subfactors would render a proposal unacceptable. Award would be made to the lowest-priced, technically acceptable offeror.

The RFQ contained the following requirements relevant to this protest. The plant must have a capacity of at least 200 cubic yards per hour (cy/hr). RFQ, Attach. 1, Specifications at 1. The physical plant requirements were broken out among several separate areas, including Mixer/Central Dust Control System and Drum Mixer. Under the Mixer/Central Dust Control System area, the RFQ required "Personnel Access," id. at 2, and under the Drum Mixer area, the RFQ required "Personnel Access To All Plant Components (Safety Ladders)." Id. at 3. The plant's batching controls were required to "Utilize The 'Windows' Operating System With Graphical, Point And Click Capability And Be The Standard For The Plant Offered." Id. at 4. The RFQ required that the generator be "Sized Appropriately For Physical Plant And All Plant Accessories To Include Conveyors, Cement Storage Silos And Control Trailer." Id. at 5. Under "other," the RFQ required a 24 hour a day, 7 day a week customer support hotline. Id. at 6.

The agency received eight proposals.² The Air Force initially evaluated RexCon's proposal as unacceptable under the technical proposal subfactor for offering stand-by generator power rather than prime power, for failing to satisfy the RFQ requirements with respect to the "electric system,"³ and for not providing 24 hour a day, 7 day a week technical support. Agency Report (AR), Tab 8, Technical Evaluation of RexCon. The contract specialist conducted what the agency

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amounts greater than the simplified acquisition threshold but not exceeding \$5.5 million. On January 1, 2012, the authority under this subpart expired. Notwithstanding the expiration of this authority, contracting officers are permitted to award contracts under solicitations issued before the authority expiration. See FAR § 13.500(d).

² Although the solicitation is an RFQ, throughout the record the parties use the term "proposal" to refer to the offerors' responses to the RFQ. For purposes of this decision, we adopt this usage of the term "proposal"; the distinction between a quotation and proposal is not relevant to our analysis.

³ It is unclear from the evaluator's handwritten notes the precise nature of this deficiency, except that it concerned the electric system and resulted in a separate unacceptable rating under the technical proposal subfactor. It is also not clear, given the questions and answers, whether this deficiency was remedied.

characterized as verbal “clarification[s]” with RexCon regarding how such “discrepancies” were accounted for within the proposal submitted. Contract Specialist Memorandum for Record, July 21, 2011. Following that telephone call, the agency submitted written questions to RexCon, to which RexCon replied in writing. Following are those questions and answers memorializing that verbal exchange:

1. Can the Generator that you proposed run the entire plant without having to add any additional power?

Yes. Per the proposal, we’ve done an extensive power study showing the power load of the plant and all equipment. The power load is 400 [kilowatts (KW)], the proposed generator is 455KW, providing ~12% safety factor.

2. Does your company provide 24 hour 7 days a week technical support?

Yes. We have field techs on call. Included as well are free upgrades for a year and 2 free attendees at our annual RC3 training school.

3. Is the moisture compensation you proposed automatic?

Yes. Per page 7 of our proposal: “Includes Automatic computer batching capability and automatic moisture compensation with a slump meter readout.”

4. Did you provide safe ladders and/or stairs to access the requested parts of the plant?

Yes. Per [agency] specifications, Personnel Access to all plant components (safety Ladders) are included. Access Ladders will be provided to all plant components as specified.

Id., Attach., Email from RexCon to Agency, July 21, 2011. After receiving RexCon’s responses, the Air Force evaluated RexCon’s proposal as technically acceptable.

The agency evaluated ERIE’s quotation, which was lower-priced than RexCon’s, as technically unacceptable in four areas. Under the technical proposal subfactor, ERIE’s quotation was rated unacceptable for failure to provide information on plant capacity, for failure to provide plant-wide personnel access, for providing a Linux--rather than a Windows--operating system, and for failure to provide a generator capable of continuous operation of the plant. AR at 3-5.

Unlike with RexCon, the agency did not conduct “clarifications” with the protester. Award was made to RexCon at a total contract price greater than that offered by ERIE. The protester filed an agency-level protest alleging improper evaluation of the protester’s proposal and asserting, in part, that the agency’s concerns should have

been addressed through clarifications with ERIE. The agency denied the protest, and this protest, asserting the same allegations, followed.

DISCUSSION

As noted above, the procurement was conducted under the simplified procedures for evaluation of commercial items. Simplified acquisition procedures are designed, among other things, to reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR § 13.002; 41 U.S.C. § 3305 (Supp. IV 2010). When using these procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate proposals in accordance with the terms of the solicitation.

Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. Russell Enters. of N. Carolina, Inc., B-292320, July 17, 2003, 2003 CPD ¶ 134 at 3. Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures. See Kathryn Huddleston and Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57 at 6; Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 8-10.

In this regard, FAR § 15.306 describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated procurements. Clarifications are “limited exchanges” between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27 at 8. Clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; see FAR § 15.306(d). When an agency conducts discussions with one offeror, it must conduct discussions with all other offerors in the competitive range. Gulf Copper Ship Repair, Inc., supra.

Ultimately, it is the actions of the parties that determine whether discussions have been held and not the characterization of the communications by the agency. Id. In

situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. Id. Communications that do not permit an offeror to revise or modify its proposal, but rather request that the offeror confirm what the offeror has already committed to do in its proposal, are clarifications and not discussions. Environmental Quality Mgmt., Inc., B-402247.2, Mar. 9, 2010, 2010 CPD ¶ 75 at 7.

As explained below, we disagree with the agency that its exchange with the awardee involved only clarifications. Prior to the exchange, the agency viewed the proposal as unacceptable; after the exchange, the rating was changed to acceptable.

In our view, RexCon's answers to questions two and four resulted in material revisions to its proposal.⁴ Specifically, the second question concerned the solicitation's requirement for a 24 hour a day, 7 day a week technical hotline direct from the manufacturer for plant troubleshooting. The agency asked if RexCon provided such technical support and RexCon replied, "Yes. We have field techs on call." Email from RexCon to Agency, July 21, 2011. Through this exchange, the awardee was permitted to augment its proposal to address a clear omission regarding a material solicitation requirement. In response to the fourth question, which concerned the solicitation requirement for stairs or ladders to access the plant, the awardee responded that access ladders to all plant components will be provided. While the agency asserts that it intended to require personnel access to the entire concrete plant, the RFQ specified, as noted above, that access must be provided to only two discrete portions of the plant.⁵ The awardee's response to the agency's

⁴ We agree that Rexcon's answer to question three simply clarified the issue of whether its proposal offered an automatic moisture compensation capability by providing reference to its proposal, at page 7. Leading an agency to the portion of one's proposal that explicitly responds to an agency concern may properly be considered a clarification. See BE, Inc., PAI Corp., B-277978, B-277978.2, Dec. 16, 1997, 98-1 CPD ¶ 80 at 6 (noting that, where an agency question regarding specific qualification of key personnel could be answered through a resume included in the proposal, the exchange cannot properly be considered discussions). We also agree that the agency's inquiry into whether the offered generator could perform continuous operation of the plant could be considered clarification of the generator's intrinsic capabilities. In any event, the awardee's response explained that a generator with the offered specifications could, in the awardee's estimation, operate a concrete plant with the power requirements of the one being offered. With that assertion, the awardee did not materially modify or enhance RexCon's proposal.

⁵ The record suggests that neither the awardee nor the protester understood the agency's intended requirements for the capacity of the generator or the availability of personnel access throughout the plant. Because, as explained below, we sustain

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question references no portion of RexCon's proposal, and there is no evidence in the record that the awardee's proposal previously met the access requirement. Because the agency effectively conducted discussions with RexCon, the Air Force was required to afford ERIE with an opportunity to address the agency's concerns with its proposal through discussions, as well. Gulf Port Ship Repair, Inc., supra.

Where improper discussions were held, we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. See Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108. In other words, once an impropriety in the conduct of discussions is found, it must be clear from the record that the protester was not prejudiced in order to deny the protest. Id.

In brief, on this record, we see a reasonable possibility of prejudice to the protester. The protester's proposal was found unacceptable on four grounds. Two grounds--failure to provide a generator of sufficient capacity for continuous operation of the concrete plant and failure to provide plant-wide personnel access--were issues that the awardee was permitted to address through discussions. Additionally, the protester omitted from its proposal a key performance specification, namely, plant capacity. The record contains the protester's un rebutted assertion that, if it were provided the opportunity for clarifications, its proposal could be amended to accurately state that its offered plant meets that required performance. Finally, the protester's proposal was rated unacceptable for offering an operating system other than Windows. There is a reasonable possibility that, with the conduct of discussions, the protester could satisfy this requirement, as well.⁶

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the protest, we suggest that the agency might wish to clarify these requirements as part of its corrective action.

⁶ We need not have determined that the exchanges were discussions rather than clarifications in order to sustain this protest, but the determination does influence our recommendation. That is because, even if the communications between the agency and RexCon were viewed as clarifications, rather than discussions, based on the analysis above, we would still find improper the agency's action of communicating only with RexCon. In conducting exchanges with offerors, including clarifications as well as discussions, agency personnel "shall not engage in conduct that ... favors one offeror over another." FAR § 15.306(e)(1); Martin Elecs., Inc., B-290846.3, B-290846.4, Dec. 23, 2002, 2003 CPD ¶ 6 at 9.

RECOMMENDATION

We recommend that the agency conduct discussions, reevaluate proposals in accordance with the RFQ, and make a new selection decision.⁷ If an offeror other than RexCon is selected, the agency should terminate the contract awarded to RexCon and award a contract to the successful offeror. We also recommend that ERIE be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the Air Force within 60 days of receiving this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel

⁷ Having initially pursued an agency-level protest, ERIE's protest with our Office did not invoke the statutory stay provisions of the Competition in Contracting Act-- ERIE's protest with our Office was filed months after the agency had made award, and months after the date of its debriefing. 31 U.S.C. § 3553(d) (2006). The agency, nonetheless, voluntarily suspended contract performance until resolution of this protest. See FAR § 33.103(f)(4) (providing that an agency may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at the GAO).