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Decision

Matter of: Pioneering Evolution, LLC

File: B-412016; B-412016.2

Date: December 8, 2015

Carol L. O’Riordan, Esq., Pamela J. Bethel, Esq., Taimur Rabbani, Esq., and Anthony J. Marchese, Esq., O’Riordan Bethel Law Firm, LLP, for the protester. Joseph P. Hornyak, Esq., and Megan Mocho Jeschke, Esq., Holland & Knight LLP, for the intervenor.

Toya McLendon, Department of the Navy, for the agency.

Stephanie B. Magnell, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the evaluation of the protester’s proposal as unacceptable is denied where the agency reasonably found that the protester failed to satisfy a material solicitation requirement concerning key personnel.
 2. Exchanges with the awardee in a task order competition were, effectively, clarifications rather than discussions where the agency requested that the awardee confirm the agency’s understanding regarding a mistake that was apparent from the face of the awardee’s cost proposal.
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DECISION

Pioneering Evolution, LLC (Pioneering), of Arlington, Virginia, protests the award of a task order to Abbott on Call, Inc. (AOC), of Vienna, Virginia, by the Department of the Navy, Naval Surface Warfare Center, Carderock Division, under request for proposals (RFP) N00024-14-R-3241 for systems engineering support services. Pioneering challenges the agency’s rejection of its proposal as technically unacceptable and claims that the agency reopened discussions with AOC after receipt of final proposals.

We deny the protest.

BACKGROUND

The solicitation was issued on August 8, 2014, as a task order competition under the SeaPort-e multiple award indefinite-delivery, indefinite-quantity (ID/IQ) contracts. Agency Report (AR) at 1. The Navy intended to procure systems engineering support services for a variety of platform design applications. Id.

The RFP anticipated the award of a cost-plus-incentive-fee task order with a 1-year base period, two 1-year option periods, and two 1-year award periods, for a maximum possible term of 5 years, to be awarded to the small business offeror presenting the best value to the government. RFP at 1, 9, 56.¹ The solicitation, conducted under Federal Acquisition Regulation (FAR) § 16.505, provided for evaluation of proposals on three factors: technical, past performance, and cost. Id. The technical factor was comprised of three subfactors in decreasing level of importance: personnel, management approach, and corporate experience. Id. at 57. The technical factor was more important than past performance, but when combined with past performance, was more important than cost; however, as the non-cost factors became equal, cost increased in importance. Id. at 55, 57. The RFP advised the agency intended to make award without discussions; however, the solicitation also stated that the agency could conduct discussions, as permitted under FAR part 16. Id. at 52.

As to the incentive fee, the solicitation provided:

The minimum fee shall be 2%, the maximum fee shall be 8%. The Offeror shall not propose a target fee² in excess of 5.5% of cost.
Note: Upon award, the successful Offeror's proposed Maximum Incentive Fee and Target Fee percentages, if less than the solicitation stated thresholds, will be incorporated in FAR clause 52.216-10 INCENTIVE FEE in SECTION I.

(1) The final target cost, target fee amounts shall be based upon the actual level of effort the contractor provides as explained in the following paragraphs (replicated for each CPIF labor item CLIN):

¹ The RFP in the agency report contains different pagination at the top and bottom of its pages. The pagination at the top was used in this decision.

² The target fee is "the fee initially negotiated on the assumption that th[e] contract would be performed for a cost equal to the estimated cost initially negotiated," subject to equitable adjustments. FAR clause 52.216-10(a)(2).

CPIF Labor Items	Labor Hours	Target Cost	Target Fee (NTE=5.5%)	Total Target Cost/Fee Amount
7000	TBD	\$TBD	\$TBD	\$TBD

Id. at 3-4, incentive fee summary chart (additional CLINs and hourly rate rows not included).

The RFP informed offerors of the solicitation’s requirements for the personnel subfactor as follows:

(a) The offeror shall include a resume(s) for each “Key Personnel” labor category in the quantity specified in Section C (if applicable). In the event Section C fails to specify the exact quantity of resumes, the offerors shall include a resume for the number of individuals that would be required to perform the entire level of effort for each Key Personnel category.

* * * * *

A signed “letter of intent” shall be submitted for all proposed key personnel who are not currently employed by the offeror or a proposed subcontractor.

Id. at 46-47 (emphasis removed). Under section C, the RFP required at least one resume for each of the three lead mechanical engineer positions. Id. at 10. The RFP also instructed offerors that the estimated level of effort for lead mechanical engineers was 5,760 hours annually. At a required level of effort of 1,920 labor hours per year (id. at 46), the RFP separately established, by hours (5,760/1,920), that three lead mechanical engineers were required. AR at 2.

Under section M, evaluation factors for award, the solicitation informed offerors:

Key Personnel will be evaluated in terms of experience, education and training as stated in the target and/or minimum qualifications in the labor categories listed in Section C. The Government will evaluate the resumes submitted by each offeror by comparing the education and experience of proposed personnel against the qualifications indicated. Targets are not considered absolute requirements; however, minimums are, and must be met.

RFP at 52-53.

The agency received two timely proposals--from Pioneering and AOC--by the October 1, 2014, closing date. The agency conducted two rounds of discussions,

and requested final proposals by July 10, 2015. AR, Tab 2, AOC Second Discussion Ltr. (June 30, 2015), at 1.

As relevant here, Pioneering proposed a total of four individuals for the lead mechanical engineer positions. AR, Tab E, Pioneering Proposal, at 1, 28-29. Persons A, B and C were proposed for each of the first three performance years, while in the last two, Person D replaced Person C. Id.

As also relevant here, AOC's proposal included the following required incentive fee summary chart, which addressed the RFP's requirements regarding the proposed target fee:

CPIF Labor Items	Target Cost	Target Fee* (NTE=5.5%)	Total Target Cost/Fee Amount
7000	[\$DELETED]	[\$DELETED]	[\$DELETED]
7100	[\$DELETED]	[\$DELETED]	[\$DELETED]
7200	[\$DELETED]	[\$DELETED]	[\$DELETED]
7300	[\$DELETED]	[\$DELETED]	[\$DELETED]
7400	[\$DELETED]	[\$DELETED]	[\$DELETED]

AR, Tab P, AOC Final Proposal Revision, at 9 (hourly rate rows not included).³

As part of its detailed cost summary, AOC's proposal also included the following summary of its proposed fee:

Fee Analysis - Total for All Years	Amount	Percent
Prime Contractor Labor Cost	[DELETED]	
Fixed Fee for Labor Performed by Prime Contractor	[DELETED]	[DELETED]
Maximum Fixed Fee Allowed by SeaPort-e IDIQ Contract		

AR, Tab T, AOC Cost Summary, at A120:C123.

On July 15, after the closing date for submission of final proposals, Pioneering informed the Navy that Person A, whom Pioneering had proposed as a lead mechanical engineer in all five possible performance years, had accepted another

³ AOC's target fee, as presented in its incentive fee summary chart, [DELETED].

position and was no longer available.⁴ AR, Tab F, Pioneering and Agency Emails (July 15, 2015; July 16, 2015), at 13. Pioneering wrote: “We have another qualified candidate[] to propose for that position, and we are standing by for direction on how you’d like us to proceed.” Id. The Navy responded: “Since the second round of discussions has concluded, we are unable to accept a revised proposal[,] including a new resume for this position. . . . [T]he Government will need to evaluate [Pioneering’s] proposal based on the information already received.” Id. at 13.

On July 22, Pioneering again wrote to the Navy: “We would like to provide an updated solution [to the withdrawal of one of the lead mechanical engineers] that keeps the cost the same and just shifts existing resources in the proposal No new individuals need to be added, just shifted around slightly.” AR, Tab F, Pioneering and Agency Emails (July 22, 2015), at 17. On July 24, the Navy confirmed that it could not accept a new resume for the vacant position and would instead evaluate the proposal as submitted. Id. at 16.

On August 7, the contracting officer emailed AOC concerning an apparent error in its proposed fee, writing:

In reviewing your proposal, it appears that there are inconsistencies between your fee table and the cost summary spreadsheet. It appears that you added the subcontractors’ fee to your target fee line. The subcontractors’ fee is a cost to the prime contractor and is to be included in the target cost. Therefore, based on section L of the solicitation the target fee and target cost will be calculated based on the cost summary format.

AR, Tab 3, AOC and Agency Emails (Aug. 7, 2015), at 7-8.⁵ The agency confirmed that AOC took no exception to its approach. Id. at 7.

The Navy’s final evaluation of proposals was as follows:

⁴ Person A signed a letter of intent with Pioneering, which was included with Pioneering’s final proposal. AR, Tab E, Pioneering Proposal, Ltr. (July 9, 2015), at 98.

⁵ The agency placed multiple documents within the same tab, each with its own pagination, such that there are multiple pages numbered 1 within certain tabs. In such cases, the page is cited according to its ordinal placement within the tab and not its nominal denotation.

	Pioneering	AOC
Factor 1 - Technical	Unacceptable	Good
<i>Subfactor 1A Personnel</i>	Unacceptable	Good
<i>Subfactor 1B Management Approach</i>	Marginal	Good
<i>Subfactor 1C Corporate Experience</i>	Good	Outstanding
Factor 2 – Past Performance	Relevant/Satisfactory Confidence	Very Relevant/ Satisfactory Confidence
Total Proposed Price	\$38,873,219	\$43,291,233

AR, Tab L, Final Technical Evaluation-Pioneering, at 3; Tab N, Business Clearance Memorandum (Aug. 3, 2015), at 9, 22. The Navy assessed one deficiency against Pioneering’s proposal in the personnel subfactor factor on the basis that “one of [Pioneering’s] Lead Mechanical Engineers rescinded his letter of intent . . . due to taking a different job. Not having a Lead Mechanical Engineer is a deficiency.” Id. at 3. The agency found that Pioneering’s “technical proposal did not meet the requirements [of the solicitation . . . [and] indicate[d] a high risk of unsuccessful performance.” Id. at 23-24. As a result, the Navy found Pioneering’s proposal to be technically unacceptable for subfactor 1A, and technically unacceptable overall. Id. at 11.

In making award to AOC, the Navy found that despite AOC’s higher cost, “it is not in the best interest of the Government to award a task order to an offeror rated technically Unacceptable due to the risk of unsuccessful performance.” Id. at 24. On August 24, the Navy informed Pioneering that the task order had been awarded to AOC, and this protest followed.⁶ AR, Tab H, Pioneering Debriefing, at 1.

DISCUSSION

Pioneering challenges the Navy’s assessment that its proposal was technically unacceptable. The protester also argues that the agency improperly engaged in a third round of discussions with the awardee, without providing the protester a similar

⁶ Since the value of this task order was approximately \$43 million, this procurement falls within our jurisdiction to hear protests related to the issuance of task orders under multiple-award ID/IQ contracts valued in excess of \$10 million. 10 U.S.C. § 2304c(e)(1)(B).

opportunity, which, the protester contends, would have allowed it to address the agency's concerns regarding the acceptability of its proposal. For the reasons below we find no merit to the protester's arguments.⁷

Navy's Finding of Technical Unacceptability

Pioneering challenges the Navy's assessment of a deficiency for its proposal's failure to include the minimum number of lead mechanical engineers--and the resultant finding that its proposal was technically unacceptable, overall--on the basis that it provided a sufficient number of resumes to satisfy the solicitation requirement. Pioneering alternatively argues that the Navy should have allowed it to substitute other proposed personnel for the vacant lead mechanical engineer position, claiming that such changes are allowable as clarifications. Protest at 18-19.

In reviewing protests challenging an agency's evaluation of proposals in a task order competition that, as here, uses negotiated procurement techniques, our Office does not reevaluate proposals, but examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Trandes Corp., B-411742 et al., Oct. 13, 2015, 2015 CPD ¶ 317 at 6; Technology Concepts & Design, Inc., B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 8. It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. Trandes Corp., supra at 6; The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 54; Special Operations Grp., Inc., B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 4.

As relevant to the requirement to provide resumes, the solicitation stated as follows: "The offeror shall include a resume(s) for each 'Key Personnel' labor category in the quantity specified in Section C" RFP at 46. Section C of the RFP required offerors to submit resumes for three lead mechanical engineers. Id. at 10. Furthermore, offerors were required to "include a resume for the number of individuals that would be required to perform the entire level of effort for each Key Personnel category." Id. at 46. Thus, there were two firm criteria regarding resumes for the lead mechanical engineer position: a minimum of three resumes, and a minimum of one resume per individual required to perform the specified level of effort. The solicitation cautioned offerors that these minimums were "absolute requirements . . . and must be met." Id. at 53.

⁷ Pioneering raised several other protest grounds, each of which was considered, and none of which provides a basis to sustain the protest. Additionally, two supplemental protest grounds were withdrawn. Protester's Supp. Comments (Oct. 22, 2015), at 10.

Pioneering acknowledges that the withdrawal of one of its lead mechanical engineers, Person A, left Pioneering's proposal without any candidate for five of the fifteen lead mechanical engineering years. AR, Tab F, Pioneering and Agency Emails (July 15, 2015), at 13 ("We have another qualified candidate[] to propose for that position. . ."). As above, at the RFP's estimated total level of effort for lead mechanical engineers of 5,760 annual hours, and at a required level of effort of 1,920 labor hours per year (*id.* at 46), three lead mechanical engineers were required. AR at 2. Furthermore, Pioneering had proposed to satisfy these hours by proposing Person A for 1,920 hours per year. AR, Tab E, Pioneering Proposal, at 86. When Pioneering withdrew Person A's resume, its proposal then included key personnel hours for which no individual was proposed.

Pioneering argues that although it withdrew the resume for Person A, this change should not have rendered its proposal unacceptable because its proposal still had the resumes of three lead mechanical engineers, as the solicitation required. Protest at 18; Protester's Comments & Supp. Protest (Oct. 13, 2015), at 8. Pioneering asserts that allowing it to shift personnel such that Person D would replace Person A as a lead mechanical engineer for the first three contract years would be merely clarifications, not discussions.⁸ Protester's Comments & Supp. Protest (Oct. 13, 2015), at 8. We do not agree. When a solicitation requires resumes for key personnel, these form a material requirement of the solicitation. Submission of key personnel resumes after receipt of final proposals constitutes discussions, not clarifications, because without these resumes, the proposal would omit material information required by the RFP.⁹ CACI Techs., Inc., B-411282, June

⁸ We address the issue of discussions in the context of a FAR part 16.5 procurement more fully below.

⁹ To the extent the protester argues that Person D could have substituted for Person A, we also disagree. Individuals performing as lead mechanical engineers were required to have a minimum of 10 years of relevant professional experience. RFP at 14. As the agency noted, Person D did "not meet the target experience for 10 years of progressively responsible professional experience." AR, Tab L, Technical Evaluation – Pioneering, at 6. At the time of proposal submission, Person D had 7 years of experience; for this reason, the protester explained, the individual was proposed as a lead mechanical engineer starting in the fourth year of performance, when Person D would first have the requisite 10 years of experience. AR, Tab C, Pioneering First Final Proposal Revision, at 1. The protester's attempt to shoehorn Person D into Person A's position before gaining the requisite experience--on the basis that the agency had accepted Person D in the original role proposed--has no merit. Protester's Comments & Supp. Protest (Oct. 13, 2015), at 9. Furthermore, the protester's solution fails to resolve the problem. If Person D replaces Person A in all 5 contract years, the protester is again left with proposed hours for which there is no corresponding lead mechanical engineer in award years
(continued...)

18, 2015, 2015 CPD ¶ 185 at 2 (finding that proposal missing resumes of key personnel lacked the substantive information for the agency to find the proposal acceptable).

Here, Pioneering notified the Navy of the withdrawal of one of its key personnel. AR, Tab F, Pioneering and Agency Emails (July 15, 2015), at 13. As our Office has held, offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 10 (it is an offeror's obligation to inform a procuring agency); Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD ¶ 133 at 3-6. However, upon notice of the withdrawal, the Navy had two options: either evaluate Pioneering's proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or reopen discussions to permit Pioneering to correct this deficiency. Paradigm Techs., Inc., B-409221.2, B-409221.3, Aug. 1, 2014, 2014 CPD ¶ 257 at 5. The Navy, having already engaged in two rounds of discussions, reasonably declined to reopen a third round of discussions. Under the circumstances here, where prior discussions were meaningful and equal, the agency's decision not to reopen discussions is a matter within its discretion. The Boeing Co., B-409941, B-409941.2, Sept. 18, 2014, 2014 CPD ¶ 290 at 7 (agency not required to reopen discussions to address proposal weakness introduced after final proposal revisions were received and discussions had concluded). On this basis, the challenge to the agency's evaluation is denied.

Post-Final Proposal Exchanges with AOC

Next, Pioneering argues that the Navy improperly reopened discussions with AOC concerning its cost proposal after the submission of the final round of proposal revisions. Protester's Comments & Supp. Protest (Oct. 13, 2015), at 7, 13. Specifically, the protester contends that an exchange between the Navy and AOC on August 7, 2015, constituted discussions because it permitted the awardee to revise its cost proposal. Id. The Navy responds that the exchanges with AOC constituted clarifications, rather than discussions. Supp. AR, at 12. We agree with the agency.

As an initial matter, we note that this procurement was conducted as a competition between IDIQ contract holders and, as such, was subject to the provisions of FAR § 16.505, which does not establish specific requirements for conducting clarifications or discussions. See Companion Data Servs., LLC, B-410022, B-410022.2, Oct. 9, 2014, 2014 CPD ¶ 300 at 12. However, where, as here, an

(...continued)

4 and 5 because Person D cannot simultaneously fill both its own and Person A's positions in the last two contract years.

agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. See, e.g., Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 5. In conducting exchanges with offerors, agency personnel may not “engage in conduct that ... [f]avors one offeror over another,” FAR § 15.306(e); in particular, agencies may not engage in what amounts to disparate treatment of the competing offerors. Front Line Apparel Grp., B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4.

Exchanges between a procuring agency and an offeror that permit the offeror to materially revise or modify its proposal generally constitute discussions. FAR § 15.306(d); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 4, 2004, 2005 CPD ¶ 27; 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936, B-251936.2, May 13, 1993, 93-1 CPD ¶ 420. In this regard, exchanges that permit an offeror to correct a mistake constitute discussions unless the mistake is minor and both the existence of the mistake and what was actually intended are clearly apparent from the face of the proposal. Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89; Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9. In contrast, clarifications are limited exchanges that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical mistakes. FAR § 15.306(a)(2).

Here, AOC stated that it proposed the following fees:

AOC proposes a target fee of [DELETED] in accordance with its Seaport E IDIQ contract (N00178-14-D-7585). [DELETED].

AR, Tab P, AOC Final Proposal Revision, at 4. AOC’s total prime contractor labor costs (inclusive of overhead, fringe benefits, and G&A) were \$[DELETED],¹⁰ and on this amount it proposed a [DELETED] fee, or \$[DELETED]. AR, Tab T, AOC Cost Summary, at A120:C123. AOC’s total subcontractor labor costs were \$[DELETED] (id. at D50:D85), and AOC’s total subcontractor costs included a subcontractor fee of [DELETED] (id. at B87) on subcontractor labor costs, or \$[DELETED].

In its incentive fee summary chart, AOC included amounts that sum as below:

¹⁰ Amounts may vary slightly throughout due to rounding.

CPIF Labor Items	Target Cost	Target Fee (NTE=5.5%)	Total Target Cost/ Fee Amount
Total	[\$DELETED]	[\$DELETED]	[\$DELETED]

AR, Tab P, AOC Final Proposal Revision, at 9 (amounts presented above are sums of individual CPIF labor items). The target fee of \$[DELETED] is the sum of AOC's [DELETED] of \$[DELETED] on its own labor costs plus its subcontractor's fee of [DELETED] (*id.* at B87), or \$[DELETED], on its subcontractor's labor costs. Intervenor's Supp. Comments (Oct. 22, 2015), at 3-5.

On August 7, after receipt of final proposals, the agency and AOC had the following exchanges:

[Agency]: In reviewing your proposal, it appears that there are inconsistencies between your fee table and the cost summary spreadsheet. It appears that you added the subcontractors' fee to your target fee line. The subcontractors' fee is a cost to the prime contractor and is to be included in the target cost. Therefore, based on section L of the solicitation the target fee and target cost will be calculated based on the cost summary format.

[AOC]: Is there a need for AOC to take action at this time?

[Navy]: No action just understanding and agreement.

[AOC]: Thank you. We understand.

AR, Tab 3, Emails Between AOC and Navy (Aug. 7, 2015), at 7-8.

We think this exchange demonstrates that the Navy found a mistake on the face of AOC's proposal and understood how AOC had added a cost amount to a fee instead of a target cost. The Navy also understood AOC's intent from the cost summary spreadsheet and AOC's proposal, namely, that AOC intended to put its subcontractors' fee amounts into its costs, and not its fees. Finally, the fees stated in AOC's proposal (AR, Tab P, AOC Final Proposal Revision, at 4) are the same as in AOC's detailed cost spreadsheet. On this record, we find that the mistake in the incentive fee summary chart was minor, apparent,¹¹ and easily correctable. As a result, we see no basis to conclude that the agency held discussions only with AOC. See CH2M Hill Antarctic Support, Inc., B-406325 et al., Apr. 18, 2012, 2012

¹¹ Pioneering has not suggested that any other two numbers within AOC's cost proposal represent or account for the [DELETED].

CPD ¶ 142 at 11 (agency's request that offeror confirm the agency's understanding, without allowing the offeror to revise its costs, constituted clarifications, not discussions).

Furthermore, the Navy was not required to contact Pioneering for any further information regarding its proposal; even under the more rigorous requirements of FAR Part 15, requesting clarification from one offeror does not trigger a requirement that the agency seek clarification from other offerors. See Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. See also Serco Inc., B-406061.1, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61. On this record, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel