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Decision

Matter of: Evergreen Helicopters of Alaska, Inc.

File: B-409327.3

Date: April 14, 2014

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DIGEST

Protest of agency corrective action in response to a prior protest wherein the agency limited proposal revisions is denied where the record shows that the agency reasonably limited proposal revisions to remedy the concern that caused the agency to take corrective action.

DECISION

Evergreen Helicopters of Alaska, Inc. (EHA), of McMinnville, Oregon, challenges the terms of an evaluation notice (EN) issued by the U.S. Transportation Command (USTRANSCOM) under request for proposals (RFP) No. HTC711-13-R-R016 for the acquisition of fixed-wing aircraft services in the central region of Africa. The EN, issued as part of agency corrective action, requires offerors to submit performance data charts for proposed aircraft, but otherwise prohibits revision of proposals. EHA argues that the EN constitutes an amendment to the solicitation and, as a result, EHA should be permitted to revise any aspect of its proposal, including its price proposal.

We deny the protest.

BACKGROUND

This protest involves a procurement by USTRANSCOM to obtain equipment, services and support necessary to operate two fixed-wing aircraft in the Central

African region. RFP, Performance Work Statement (PWS), at 2. The RFP, issued on September 6, 2013, contemplated award of a fixed-price, indefinite-delivery/indefinite-quantity contract with a fixed price - economic price adjustment contract line item number (CLIN) and a cost reimbursement CLIN. RFP at 44. The acquisition was to be conducted as a best value, performance-price tradeoff, considering technical, past performance, price, and Fly America Act preference. Id. Non-price factors were to be approximately equal to price. Id.

The technical factor included six subfactors to be evaluated on an acceptable/unacceptable basis¹: (1) technical approach, (2) aircraft technical capability, (3) Federal Aviation Administration (FAA) certification documentation, (4) proof of aircraft ownership, (5) operational date, and (6) information assurance and cyber security. Id. Offers were required to be rated acceptable under each subfactor in order to be considered for award. Id. As relevant here, the RFP required offerors to demonstrate aircraft technical capability; in order to be rated acceptable, the aircraft type proposed must clearly meet the minimum requirements as outlined in the PWS for both aircraft. Id.

The agency received four proposals in response to the RFP. Competitive Range Determination, at 1. After an initial evaluation, USTRANSCOM set a competitive range consisting of three offerors: AAR Airlift Group, Inc. (AAR), EHA, and a third offeror. Id. at 2. Discussions were held with each of these offerors, and final proposal revisions were received from each.² Id.

After evaluation of revised proposals, the agency made award to AAR. EHA filed a protest challenging the agency's evaluation of AAR, the best value tradeoff decision, and the agency's affirmative responsibility determination. Protest, Dec. 9, 2013, at 2. In response to the protest, the agency filed a request for dismissal, arguing that EHA was not an interested party as it was not next in line for award. Agency Request for Dismissal, Dec. 19, 2013, at 3. EHA subsequently filed a supplemental protest challenging the agency's evaluation of the third offeror, arguing that the firm was improperly evaluated as acceptable under the technical approach factor as its available aircraft did not meet the minimum requirements of the RFP. Protest, Dec. 27, 2013, at 1-2.

On January 10, 2014, the agency informed our Office that it intended to take corrective action. In its notice, the agency stated that it would "reopen discussions

¹ The RFP defined an "acceptable" rating as "[p]roposal clearly meets the minimum requirements of the solicitation." Id. at 45. An "unacceptable" rating was defined as "[p]roposal does not clearly meet the minimum requirements of the solicitation." Id.

² The agency intended to evaluate offers and make award without conducting discussions, but reserved the right to do so. RFP at 41.

with the three offerors in the competitive range after which it will seek revised proposals. After evaluation of the revised proposals, the Agency will make a new award decision.” Notice of Corrective Action, Jan. 10, 2014. We dismissed the protests as the agency’s corrective action rendered the protests academic. See e.g., SOS International, Ltd., B- 407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 1.

On February 10, the agency issued to the three offerors in the competitive range an EN calling for additional information to be submitted. The EN stated:

Please provide performance data charts for the aircraft type and tail numbers proposed. Data must be compliant with any manufacturers and FAA rules and restrictions.

Offeror is required to provide a response to this Evaluation Notice along with any associated revisions to your proposal. Ensure Offeror’s response includes reference to any required proposal revisions. Failure to provide required information may adversely impact your final evaluation ratings.

Agency Report (AR), Exhs. 2-4, Email to Offerors Regarding Limited Discussions.

The EN was transmitted with a cover letter that stated, in pertinent part, “the Government intends to open **limited** discussions in order to accomplish corrective action on subject solicitation. The Government is limiting the corrective action to the area of Technical where it is adequate to remedy the procurement issue.” Id. at 2 (emphasis in original). The letter went on, “[a]ny other proposal revisions, to include pricing revisions, or revisions to your technical, past performance proposal, etc., are prohibited. The Government will not consider any information submitted that was not requested in the attached EN.” Id. The letter also informed offerors that final proposal revisions would be limited to the technical information requested in the attached EN. Id.

On February 12, EHA protested the terms of the EN. On February 18, after receiving proposal revisions from the three offerors, the agency issued a revised EN, replacing the second paragraph of the EN with the following language:

Offeror is required to provide a response to this Evaluation Notice and provide only the performance data charts for the aircraft type and tail number proposed. No other revisions to your proposal will be accepted. Failure to provide the required information may adversely impact your final evaluation ratings.

AR, Exhs. 8-10, Second Agency Email to Offerors Regarding Limited Discussions. The agency explained the need for the revised EN as correcting a discrepancy in the February 10 memorandum. Id. at 1.

DISCUSSION

EHA contends that the item identified in the EN issued as part of corrective action amended the RFP to require performance data charts that were not previously required and changed the RFP's evaluation criteria. As a result, EHA argues that offerors should be permitted to revise any aspect of their proposals, including price.³ Protest at 1. The agency responds that the EN does not change the evaluation criteria, but simply asks offerors to provide information that was already required.

We find, based on our review of the record, that the EN sought information that was already requested by the RFP. Section L of the RFP requires, with respect to the aircraft technical capability factor, that offerors provide the make, model, variant and aircraft registration number. RFP at 41. Offerors were also required to “[p]rovide any other relative supporting documentation or explanation clearly demonstrating how the capabilities of the proposed aircraft can meet or exceed the minimum requirements of the PWS.” *Id.* Additionally, Section M of the RFP required offerors to demonstrate aircraft technical capability. To be rated acceptable, the aircraft type proposed had to clearly meet the minimum requirements in the PWS. RFP at 44.

The performance data charts required by the EN were to be used by the agency to assess the technical capabilities of the offered aircraft.⁴ The agency's request for this information did not change the evaluation requirement that aircraft clearly meet the minimum requirements set forth in the PWS. In addition, these charts were clearly contemplated as documents offerors could submit in order to demonstrate the technical acceptability of the proposed aircraft as specified in Section L of the RFP. We conclude that the EN, issued as part of corrective action, did not change the RFP's evaluation criteria as protester asserts, and, as a result, we need not consider whether the agency reasonably limited proposal revisions on this basis.

Clarifications/Discussions

³ EHA states that its objective is to ultimately revise its price. The firm suggests that, due to the delay in awarding the contract, its underlying costs have changed.

⁴ In a declaration, the agency's technical evaluator states that, after award, the contracting officer asked him to reexamine the technical capability of the offered aircraft based on a protest allegation. He states, “I informed the contracting officer I would require performance data charts for the aircraft to conduct the re-assessment.” AR, Combined Contracting Officer's Statement of Facts and Agency Memorandum of Law (Agency Memorandum), at Enclosure 1.

We next consider whether the EN constituted discussions, which would trigger an obligation on the part of the government to permit proposal revisions, even absent an amendment to the RFP. In addition, if we determine that the EN constituted discussions, we will consider whether the agency properly limited proposal revisions to the information sought in the EN.

EHA argues that the exchanges were discussions. EHA asserts that the EN, on its face, shows that the exchanges contemplated were discussions. For instance, the EN refers to “limited discussions,” addressing the identified “discussion item,” and refers to Federal Acquisition Regulation (FAR) § 15.306(c), which, along with FAR § 15.306(d), sets forth the regulatory framework for conducting discussions in negotiated procurements. Comments at 4. Further, EHA argues that it is the terms of the original EN, not the revised EN, that must be considered in determining whether the EN called for discussions.⁵ EHA points to the language in the original EN that permitted “associated revisions” as evidencing discussions. Id. Finally, EHA argues that the performance data charts were necessary to determine if the proposals were technically acceptable, and thus constituted discussions. Id. at 6.

The agency responds that, despite its use of the term limited discussions, it was simply seeking verification that proposed aircraft met solicitation requirements. AR, Agency Memorandum, at 8-9. As a result, the agency contends that the exchange here constituted clarifications. Id.

FAR § 15.306 describes a spectrum of exchanges that may take place between an agency and an offeror in negotiated procurements. Clarifications are “limited exchanges” between the agency and offerors to clarify certain aspects of proposals or to resolve minor or clerical errors. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 3; see also FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency enters into negotiations with offerors in a competitive range with the intent of allowing an offeror to revise its proposal.⁶ FAR § 15.306(d). When discussions are conducted, the agency must, at a minimum, indicate to an offeror deficiencies, significant weaknesses, and certain adverse past performance, but may also discuss other aspects of its proposal that could be altered or explained to enhance materially the proposal’s potential for award. IPlus, Inc., supra, at 2; see

⁵ EHA argues that the revised EN was prepared in response to the firm’s initial protest and was an attempt to “undo” the discussions that had already occurred. Thus, EHA argues that we should disregard the revised EN in issuing this decision. Comments at 10-11. We decline to accede to the protester’s request.

⁶ In the context of negotiated procurements, the FAR also defines discussions as, “negotiations that occur after establishment of the competitive range that may, at the Contracting Officer’s discretion, result in the offeror being allowed to revise its proposal.” FAR § 52.215-1(a).

also FAR § 15.306(d)(3). Importantly, after concluding discussions an agency is required to give offerors in the competitive range an opportunity to submit revised proposals. FAR § 15.307.

In determining whether exchanges between the government and offerors are clarifications or discussions, the agency's characterization of the exchange is not controlling, as it is the actions of the parties that determine whether discussions have been held. Kardex Remstar, LLC, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 3. The "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise⁷ its proposal. IPlus, Inc., supra at 2.

In the context of pre-competitive range communications, the FAR illustrates circumstances under which revision of proposals has occurred. In this regard, the FAR states that "[s]uch communications shall not 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." FAR § 15.306(b)(2). Thus, in a non-exhaustive fashion, the FAR provides guidance that the preceding actions constitute proposal revisions, which can only be addressed through discussions. Id.; see, e.g., LINTECH LLC, B-409089, B-409089.2, Jan. 22, 2014, 2014 CPD ¶ 38 at 6 (concluding that such revisions are outside the scope of clarifications); DynCorp Int'l LLC, B-294232, B-294232.2, Sept. 13, 2004, 2004 CPD ¶ 187 at 6.

It seems clear that where an offeror is permitted to change the terms of its offer (i.e., materially alter its technical or cost elements) in response to exchanges with the agency, discussions have occurred. See, e.g., Priority One Servs, Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 4 (permitting offeror to replace personnel and amend salary structure in response to government inquiry determined to be discussions); DynCorp Int'l LLC, supra, at 6 (inquiring about and permitting upward adjustment to proposed personnel and cost would require discussions). What is less clear is the line between clarifications and discussions in the context of informational infirmities in proposals.

⁷ Our decisions have used the terms "modify" and "revise" virtually interchangeably. See, e.g., L&G Tech. Servs., Inc., B-408080.2, Nov. 6, 2013, 2014 CPD ¶ 47 at 4 (using the phrase "revise or modify"); IPlus, Inc., supra, at 2 (using the term "modify"). Prior to the FAR Part 15 rewrite, the definition of discussions used the phrase "provides the offeror an opportunity to revise or modify its proposal." FAR § 15.601 (30 June 1997). The current FAR utilizes the term "revise" (without "modify") in the context of discussions. FAR §§ 15.306(d), 15.307. We do not discern an appreciable difference between the terms "modify" and "revise" in this context, and use the term "revise" in this decision as it is the term adopted in the current FAR.

In this context, we have held that clarifications may not be used to furnish information required to determine the technical acceptability of a proposal.⁸ eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. We have also found exchanges to be discussions where the terms of the offer were not changed, but the pervasiveness of the information exchanged exceeded the scope of clarifications. See, e.g., Kardex Remstar, LLC, supra, at 3 (requiring offeror to respond to 34 requirements found to be discussions); Chicago Dryer, Inc., B-402340, Feb. 16, 2010, 2010 CPD ¶ 52 (correction of absent detailed plans and explanation of various aspects of proposal would be discussions). These circumstances connote constraints on clarifications based both on the depth as well as the breadth of the exchanges undertaken by the parties.

This limitation on exchanges in the context of clarifications is evident from the underlying statute, which permits “discussions conducted for the purpose of minor clarification” when award without discussions is contemplated. 10 U.S.C. § 2305(b)(4)(A)(ii). In other words, under the statutory regime prescribing these exchanges, clarifications, as used in the FAR, are necessarily “minor” in nature. Exchanges undertaken to clarify, that is, to explain or make certain aspects of the proposal clearer and undertaken on a limited basis, both as to depth and breadth, would be clarifications. If, however, the exchange is undertaken to change the offer or exceeds the scope of minor clarifications by, for example, seeking to cure a deficiency or address a material omission, then it likely constitutes discussions.

Under this framework, we conclude that the EN constituted discussions. While we agree with the agency that the information requested in the EN would not permit offerors to revise the specific aircraft proposed (i.e., change the terms of the offer), the information is apparently necessary to determine the technical acceptability of the offered aircraft. We base this conclusion on the technical evaluator’s unequivocal statement that he required the disputed performance data charts in order to re-assess the technical acceptability of the aircraft in light of one of EHA’s protest allegations.

The agency argues that the facts here are like those presented in L&G Technology Services, Inc.. We disagree. In L&G Technology Services, Inc., the agency requested clarifications from the awardee after its compliance with a subcontracting

⁸ Indeed, prior to the FAR Part 15 rewrite, discussions were defined as communications between the government and an offeror, (other than communications conducted for the purpose of minor clarification) that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal. FAR § 15.601 (30 June 1997). The first prong of the definition was not carried forward to the current FAR, but appears to have been subsumed into an expanded definition of proposal revisions.

requirement was questioned. There, we observed that the awardee's proposal did not, on its face, take exception to the subcontracting requirement, but information in its proposal should have led to further inquiry by the agency. In that context, we found that the agency's exchange with the awardee was clarifications because it was a limited exchange to clarify a proposal ambiguity. Here, the information requested by the agency is required to determine if the offered aircraft meet the RFP's minimum requirements. As the absence of this information would render the proposal unacceptable, it appears that its omission would be a deficiency (or material omission) in the proposal, correctable only through a proposal revision after discussions.

Limiting Proposal Revisions

Having determined that the exchange of information that occurred pursuant to the EN was discussions, we now turn to whether the agency reasonably limited the scope of proposal revisions. We conclude that it did.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. In this regard, an agency's discretion when taking corrective action extends to a decision on the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors may make to their proposals. See, e.g., Honeywell Tech. Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; Rel-Tek Sys. & Design, Inc.- Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

Here, the corrective action taken by the agency was limited to address a particular procurement issue identified in response to a prior protest filed by EHA. The information sought by the agency addresses that particular identified issue. We observe that the protester was particular in emphasizing its desire to revise its price proposal which, on this record, could not be impacted by the discussions entered into here.

The protest is denied.

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General Counsel