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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: University of Dayton Research Institute

File: B-296946.6

Date: June 15, 2006

Daniel A. Bellman, Esq., and William R. Wernet, Esq., for the protester.
Lt. Col. Sharon K. Sughru, and Brett J. Swanson, Esq., Department of the Air Force,
for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency's communications with awardees following submission of initial proposals, during which awardees made multiple changes to the evaluated rates on which the agency's source selection decision was based, constituted discussions and required that the agency establish a competitive range and conduct discussions with all competitive range offerors.

DECISION

University of Dayton Research Institute (UDRI) protests various actions of the Department of the Air Force taken in connection with request for proposals (RFP) No. FA8222-04-R-1000 to provide design, engineering and technical support services. Among other things, UDRI protests that the agency failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

The Air Force issued RFP No. FA8222-04-R-1000 in October 2004, seeking proposals to "provide design and engineering/technical support services for the Department of

Defense weapon systems, components, and support equipment.”¹ Agency Report I,² Tab 8, Performance Work Specification (PWS), at 7. The solicitation contemplated multiple awards of indefinite-delivery, indefinite-quantity contracts,³ with 5-year ordering periods and 7-year performance periods and an aggregate ceiling value of \$1.9 billion. The solicitation also provided that the source selection decision would be made on a “best value” basis, and established the following evaluation factors: mission capability,⁴ past performance, proposal risk, and cost/price.⁵ RFP at 92-94. The solicitation stated that, although cost/price was less important than the other evaluation factors, “[consideration of] cost/price will contribute substantially to the selection decision.”⁶ Id. at 94.

¹ This procurement is the second conducted under the Air Force’s Design and Engineering Support Program (DESP); the procurement is frequently referred to as “DESP II.” UDRI held a contract under the first DESP procurement.

² In July 2005, UDRI filed its initial protest challenging the agency’s actions in this procurement. In August 2005, the agency submitted a report in response to that protest; in this decision we refer to the August 2005 report as “Agency Report I.” Thereafter, the agency took “corrective action” to address certain issues raised in UDRI’s July 2005 protest. In February 2006 the agency “reaffirm[ed]” its initial source selection decision, triggering another protest filed by UDRI in March 2006. The agency responded to UDRI’s March 2006 protest with a second agency report, referenced in this decision as “Agency Report II.”

³ The solicitation stated that the agency intended to award “approximately fourteen contracts.” RFP at 93.

⁴ Under mission capability, the solicitation identified the following four subfactors, listed in descending order of importance: technical capability, program management, organization, staff and subcontractor management, and participation of small/disadvantaged/minority businesses. RFP at 93.

⁵ The solicitation stated that, in issuing individual task orders under the contracts, the agency would select one of various cost/price arrangements; the alternative cost/price arrangements included cost-reimbursement task orders, time-and-materials task orders, and fixed-price task orders. RFP at 12. The agency’s estimates indicate that approximately 60 percent of the total contract effort will be performed on a cost-reimbursement basis, approximately 20 percent will be performed on a time-and-materials basis, and approximately 20 percent will be performed on a fixed-price basis. Agency Report I, Tab 5, at 14.

⁶ The solicitation provided, under the heading “Evaluation Factors,” that each offeror’s cost/price would be evaluated to determine if it was “unrealistically high or low.” RFP at 94.

With regard to mission capability, the solicitation identified 43 particular capabilities for which offerors were required to discuss acceptable technical approaches.⁷ More specifically, the RFP stated that each offeror's proposal was required to demonstrate the offeror's capability in "at least one sub-element for each systems/applications grouping (A through I) for each functional category (1 through 5)." RFP at 81.

With regard to evaluation of cost/price, the solicitation stated, "A TEP [total evaluated price] will be developed and used as a tool to evaluate rates and burden factors, as a consideration to select the awardees in the best value decision-making process for the basic contract." RFP at 97. In establishing a total evaluated price, offerors were directed to complete various rate tables, identifying both prime and subcontractor labor rates for various labor categories, by contract type (that is, cost-reimbursement, time-and-materials, or fixed-price), and by location of performance (that is, contractor site or government site). Regarding evaluation of cost/price, the solicitation provided that the "evaluated" rate tables would form the basis for the agency's cost/price evaluation and source selection decision, stating:

The total composite price for all years for each prime contractor table will be summed and entered into the appropriate cell on the Total Evaluated Price worksheet. . . . The total composite price for all years for each subcontracting table will be summed and entered into the appropriate cell on the Total Evaluated Price worksheet. . . .

Eventually, everything will feed into the worksheet tab named "Total Evaluated Price." This value will be used for evaluation/selection purposes only and is not to be construed as a minimum or maximum awardable amount. Minor formula adjustments and clerical errors may be added/corrected in the TEP by the government for situations that

⁷ The PWS contained a matrix of required capabilities. The matrix listed five functional categories across the horizontal axis--(1) technical documentation/courseware development; (2) systems design engineering, development; (3) software/firmware; (4) maintenance repair, operational support; and (5) environmental, health & safety--and nine systems/applications along the vertical axis--(A) aircraft/air vehicle systems; (B) ground equipment/ground transportation; (C) munitions/missiles; (D) gas generating, dispensing & handling systems; (E) applicable to multiple applications; (F) industrial engineering & infrastructure; (G) ground systems; (H) environmental research; and (I) space systems. Agency Report, Tab 8, PWS attachs. 4, 5. The 45 intersections between the numbered functional categories and the lettered systems/applications represented mandatory capabilities, with the exception of two intersections (identified as "D.3" and "I.4"), which the solicitation specifically stated were not mandatory. Agency Report I, Tab 8, PWS attach. 5.

may occur during the evaluation process that are necessary to reflect an accurate TEP. These will not require a proposal revision.

RFP at 88-89.

Under the heading “Instructions for Proposal Preparation,” the RFP advised offerors, among other things, that “compliance with these instructions is mandatory,” and similarly provided that, “[i]n order for a proposal to result in an awardable contract, it must . . . conform to all required terms and conditions.” RFP at 75, 92-93.

On or before the November 8, 2005 closing date, proposals were submitted by 28 offerors, including UDRI. The proposals were subsequently evaluated against the various evaluation factors.⁸

In evaluating UDRI’s proposal, the agency concluded that although UDRI’s proposal successfully demonstrated ability to perform [deleted], Agency Report I, Tab 5, at 339; accordingly, UDRI’s proposal was rated as [deleted] under the technical capability subfactor of the mission capability evaluation factor.⁹ UDRI’s proposal offered a total evaluated price of \$[deleted] million. Agency Report I, Tab 4, at 17.

In evaluating the offerors’ cost/price proposals, the agency found that “a number of proposals had failed to follow the instructions provided by the government [in the solicitation].” Agency Response to GAO Request for Information, May 16, 2006, at 2.¹⁰

⁸ Regarding proposal evaluation under the mission capability factor, the agency employed a color/adjectival rating system under which the agency assigned ratings of “Blue/Exceptional,” “Green/Acceptable,” “Yellow/Marginal,” and “Red/Unacceptable.” RFP at 94; Contracting Officer’s Statement at 4. In this regard, a “Blue/Exceptional” rating reflected a proposal that “[e]xceeds specified minimum . . . capability requirements”; a “Green/Acceptable” rating reflected a proposal that “[m]eets specified minimum . . . capability requirements”; a “Yellow/Marginal” rating reflected a proposal that “[d]oes not clearly meet some specified minimum . . . capability . . . but any proposal inadequacies are correctable”; and a “Red/Unacceptable” rating reflected a proposal that “[f]ails to meet specified minimum performance or capability requirements.” RFP at 94; Air Force Federal Acquisition Regulation Supplement § 5315.305, Table 5315-3.

⁹ UDRI’s proposal was also rated [deleted] under all of the mission capability subfactors, and received a [deleted] rating under the past performance evaluation factor. Agency Report I, Tab 4, at 17.

¹⁰ The agency elaborates that “approximately 39% (eleven out of twenty-eight [offerors]) did indeed have trouble following the instructions.” Agency Response to GAO Request for Information, May 16, 2006, at 5.

Specifically, in populating the “evaluated” rate tables, which formed the basis for each offeror’s total evaluated price, the agency found that several offerors had provided various rates for evaluation purposes that were inconsistent with the “official” rate tables.¹¹ The agency determined that the offerors’ failure to follow the RFP instructions, resulting in inconsistency between their “evaluated” rate tables and their “official” rate tables, “would not allow the government to validate the final TEP value.” Agency Response to GAO Request for Information, May 16, 2006, at 2.¹² Accordingly, the agency concluded that the evaluated rate tables “needed to be corrected” to enable the government to “ensure price reasonableness of the submitted data.” Agency Comments, Sept. 13, 2005, at 2.

Because of the conflicting data within the rate tables of several offerors, the agency sent “Evaluation Notices” to those offerors, requesting “clarifications” regarding their cost/price. For example, with regard to one offeror (subsequently selected as an awardee) the agency’s “Evaluation Notice” stated:

Section L [of the RFP] provides the following instruction for completion of Evaluated Sub Rates Tables, “The offeror shall enter in each cell, the average of all DESP II subcontractor rates for the applicable contract type, labor category, calendar year, and location

¹¹ The solicitation stated:

[T]here will be two sets of Pricing Tables. One is the set of “official” tables and the other is the set of “evaluated” tables. The offeror must propose their own labor rates, burden factors (which shall not include profit), and NTE profit/fee factors in Official Prime Rates Tables P-1 through P-16. The offeror must propose each DESP II Subcontractor’s rates in Official Sub X Rates Tables SX-1 through SX-6 (note, that “X” will be replaced with a number assigned to each DESP II Subcontractor). These official tables will be the tables that will be incorporated into the resulting contract, if an offeror is selected for award. The offeror will also complete Evaluated Prime Rates Tables EP-1 through EP-6 with the appropriate rate from the Official Prime Rates Tables P-1 through P-6. If there is no Prime Contractor rate for a particular category, the offeror will enter the Average Subcontractor Rate. If there are no DESP II Subcontractor rates for a particular cell, the offeror will enter the prime rate. Every cell in these tables must have a value entered.

RFP at 88.

¹² The agency similarly states that “[t]he evaluation team could not allow a source selection decision to be made based upon TEPs that they knew were incorrectly calculated.” Agency Comments, Sept. 13, 2005, at 2.

(Government-site or contractor-site). This value is referred to as the Average Subcontractor Rate.” It has been determined that contrary to these instructions contained in Section L and Attachment 6 of the RFP, the Offeror did not use the simple average technique as required (but calculated and applied a weighted average which could allow a contractor to skew the Total Evaluated Price relative to the other offerors). Request you refer to Attachment 6 instructions and make the needed changes to the proposal to arrive at the correct Total Evaluated Price and submit two corrected hardcopies and two corrected electronic copies of Attachment 6.

Agency Report II, Tab 16, [deleted] Evaluation Notice, at 1.

Similarly, with regard to another offeror (also subsequently selected as an awardee) the agency sent an “Evaluation Notice” stating:

The rates entered in the Evaluated Prime Rates Tables are inflated from the rates proposed in the Official Prime Rates Tables. Request you correct the Evaluated Prime Rates Tables to exclude profit/fee and other non-labor related factors in the evaluated rates so that the Evaluated Rates Tables reconciles with the Official Prime Rates Tables.

Agency Report II, Tab 14, [deleted] Evaluation Notice, at 1-2.

With regard to yet a third offeror (also subsequently selected as an awardee) the agency sent an “Evaluation Notice” stating:

There is a difference between the printed and electronic versions of the proposal for the subcontractor rates. [The offeror’s] electronic version of Attachment 6 . . . does not represent a copy of the printed version of this attachment The discrepancy between the printed copy and electronic copy of Attachment 6 . . . is most obvious in the Total Evaluated Price tab of the printed proposal and the accompanying Excel spreadsheet. However, discrepancies between the printed and electronic copies have also been found in the Evaluated Subcontracting Rates Tables. Request you submit two copies of the electronic version . . . that is a copy of the printed version.

Agency Report I, Additional Documents, [deleted] Evaluation Notice, at 1.

In June 2005, the agency's source selection authority selected 10 proposals for award, characterizing the selections as having been made "without discussions."¹³ Agency Report I, Tab 4, Source Selection Decision, at 29. UDRI's proposal was not selected for award. Thereafter, UDRI filed an initial protest with our Office.¹⁴

DISCUSSION

UDRI protests, among other things, that the agency conducted discussions with various offerors regarding their failure to comply with the RFP instructions concerning their total evaluated price--yet declined to similarly conduct discussions with UDRI regarding the limited areas of its proposal in which the agency concluded UDRI's proposal did not adequately demonstrate certain technical capabilities. That is, UDRI maintains that the agency improperly declined to conduct meaningful discussions with UDRI, notwithstanding its discussions with other offerors. We agree.

Communications between a procuring agency and an offeror that permit the offeror to materially modify its proposal generally constitute discussions. FAR § 15.306(d); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 24, 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. Where an agency obtains information from an offeror that makes a previously unacceptable proposal acceptable for

¹³ The total evaluated prices for the 10 awardees ranged from \$[deleted] million to \$[deleted] million. Agency Report I, Tab 4, Source Selection Decision, at 17. As noted above, UDRI's total evaluated price was \$[deleted] million.

¹⁴ In October 2005, the agency advised our Office that, with regard to UDRI's initial protest, the agency would "take corrective action to reevaluate [UDRI's] proposal." Agency Report II, Tab 5. Accordingly, we dismissed UDRI's initial protest pending completion of the agency's actions. University of Dayton Research Inst., B-296946.2, Oct. 19, 2005. Thereafter, the SSA established a team of evaluators to reevaluate UDRI's proposal and directed that "[t]he corrective action shall be . . . completed no later than Thursday, 10 November 2005." Agency Report II, Tab 7. As documented in a briefing dated November 9, the re-evaluation team initially concluded that UDRI's proposal successfully demonstrated the [deleted]. Agency Report I, Tab 5; Agency Report II, Tab 8. Thereafter, the SSA directed that the re-evaluation team be combined with the initial evaluation team. Agency Report II, Tab 2, Contracting Officer's Statement, at 2. Following the SSA-directed combination of the two evaluation teams, the agency [deleted]. Agency Report II, Tab 12. Based on the combined evaluation teams' final re-evaluation of UDRI's proposal (which was not completed until February 2006) the SSA "reaffirm[ed]" his initial source selection decision. Id. Following the SSA's affirmation of the original award decision, UDRI again filed a protest with this Office.

award, such information generally constitutes a material change to the proposal. Aquasis Servs., Inc., B-240841.3, July 26, 1991, 91-2 CPD ¶ 94; J. A. Jones/IBC Joint Venture; Black Constr. Co., B-285627, B-285627.2, Sept. 18, 2000, 2000 CPD ¶ 161. Further, communications 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, B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89; Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9. When an agency conducts discussions with one offeror, it must conduct discussions with all competitive range offerors, and provide all those offerors an opportunity to submit revised proposals. KPMG Peat Marwick, LLP, B-259479, May 9, 1995, 95-2 CPD ¶ 13; Paramax Sys. Corp., B-253098.4, B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282.

Here, as discussed above, the solicitation specifically provided that each offeror's total evaluated price, derived from the "evaluated" rate tables, would be relied upon for purposes of the evaluation and source selection determinations. RFP at 88-89. Consistent with this clear solicitation provision, in defending against UDRI's protest, the agency expressly acknowledged that the rates contained in the evaluated rate tables were necessary "to ensure price reasonableness," and that the agency "could not allow a source selection decision to be made" on the basis of the rates initially submitted in those tables. Agency Comments, Sept. 13, 2005, at 2.

The record clearly establishes that in responding to the agency's evaluation notices requesting "clarifications" of their proposals, several offerors made changes to dozens of rates that had been initially submitted in their "evaluated" rate tables. Agency Report II, Tabs 14, 15, 16; Agency Response to GAO Document Production Request, May 18, 2006. The multiple changes to the evaluated rates included both increases and decreases, and the overall effect of the changes was to alter the total evaluated price of several offerors by millions of dollars. For example, one awardee's total evaluated price decreased by more than \$6 million, while another awardee's total evaluated price increased by more than \$6 million. Agency Response to GAO Document Production Request, May 18, 2006, attach. 1, at 9, 20; attach. 2, at 7, 17.

As noted above, communications that permit an offeror to correct a proposal 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. Here, the flaws in the awardees' proposals were not minor; as noted, "correction" of the evaluated rate tables resulted in significant increases and decreases in the evaluated cost/price of the ultimate awardees. Further, while the internal inconsistency of the offerors' proposals reasonably put the agency on notice regarding the existence of errors (which, by the agency's own admission, rendered the proposals unacceptable for award), it is clear the agency could not determine, from the face of the proposals, what the various offerors' intent was with regard to each of the multiple rate changes effected in response to the agency's evaluation

notices. Further, as the agency states, identification of the particular rates proposed was necessary for the agency to ensure price reasonableness,¹⁵ and to make source selection decisions. Because these altered rates were evaluated by the agency and relied upon for the source selection decision, the communications between the agency and offerors clearly constituted discussions. Accordingly, the agency was obligated to conduct meaningful discussions with all competitive range offerors.

The protest is sustained.

RECOMMENDATION

We recommend that the agency establish a competitive range on the basis of the initial proposals submitted, conduct meaningful discussions with all competitive range offerors, request revised proposals, evaluate those submissions consistent with the provisions of the solicitation, and make new source selection determinations regarding the proposals offering the best overall value to the government. We also recommend that the agency reimburse UDRI for its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). UDRI's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

¹⁵ As noted above, the solicitation provided that each offeror's cost/price would be evaluated to determine whether it was "unrealistically high or low." RFP at 94. While the agency acknowledges that it was necessary for the evaluated rate tables to accurately reflect the offerors' proposed rates in order for the agency to "ensure price reasonableness," the record does not clearly establish whether the various proposed rates were also evaluated to establish cost realism. In light of the specific solicitation provision quoted above, along with the fact that, as noted above, the agency anticipates that a majority of the total contract effort will be performed on a cost-reimbursement basis, a cost realism assessment was required. See Federal Acquisition Regulation § 15.305(a)(1).