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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Shaw Environmental, Inc.

File: B-297294

Date: December 2, 2005

Richard L. Moorhouse, Esq., and David T. Hickey, Esq., Greenberg Traurig, LLP, for the protester.
Capt. Geraldine Chanel, Department of the Army, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation was clear on applicable requirements and responses to offerors' questions were consistent with those requirements, agency had no duty to amend the solicitation to clarify protester's unilateral misinterpretation of solicitation.

2. Agency was not required to hold discussions to allow protester to make its proposal technically acceptable where solicitation advised offerors of the possibility of award without discussions.

DECISION

Shaw Environmental, Inc. protests its elimination from the competitive range and the award of a contract to Clayton Group Services, Inc. under request for proposals (RFP) No. W91ZLK-05-R-0009, issued by the Department of the Army for environmental restoration services in California. Shaw asserts that the agency improperly concluded that its proposal was technically unacceptable, misled it, and improperly failed to conduct discussions.

We deny the protest.

The RFP contemplated the award of a fixed-price contract, for a period of 10 years, to provide environmental restoration services to remediate the Joint Forces Training Base at Los Alamitos and Camp Roberts in California. The work includes both remediation and long-term management at 15 sites at the installations. The largest single component of the requirement and subject of this protest is the Los Alamitos Landfill.

Proposals were to be evaluated on the basis of three factors--technical, management, and price. The technical factor was divided into three subfactors--technical approach, project schedule, and personnel qualifications--and the management factor was divided into four subfactors--management plan, past experience, proof of insurability, and subcontracting plan. A proposal had to be evaluated as technically acceptable under all factors and subfactors in order to be considered for award. Price was to be evaluated on the basis of the cost/price analysis techniques in Federal Acquisition Regulation (FAR) § 15.404. The RFP advised that award could be made on the basis of initial proposals, without discussions, and that offerors thus should ensure that their initial proposals contained their most favorable terms and best efforts. RFP § M.1. Award was to be made to the offeror submitting the lowest-priced, technically acceptable proposal.

Four offerors, including Shaw and Clayton (the incumbent contractor), submitted proposals, which were evaluated by a technical evaluation board (TEB).[1] Based on a review of initial proposals, the TEB concluded that only Clayton's proposal was technically acceptable. Shaw's proposal was rejected because its technical approach for the landfill was found technically unacceptable. Based on the evaluation of initial proposals, and without conducting discussions, the contracting officer, as source selection authority, awarded the contract to Clayton. After receipt of a written debriefing, Shaw filed this protest.

BACKGROUND

This protest centers on Shaw's failure to comply with one provision of the performance work statement (PWS). The provision at issue describes the condition of the landfill, noting specifically that the groundwater under it had been affected by landfill leachate, and that landfill material had been in contact with the top of the aquifer and continued to cause significant groundwater contamination. The PWS provision also provided as follows:

> Formal closure of this landfill will require compliance with State regulations in which it is necessary to produce and sustain a five foot difference between the depth of the waste and the water table. There may be numerous mechanisms by which this may be achieved.

PWS ¶ 6.2.3. The applicable state regulation, Title 27, California Code of Regulations (CCR), § 22040, provides that new and existing landfills must be "operated to ensure that wastes will be a minimum of five feet (5 ft.) above the highest anticipated

[1] The TEB was assisted by various non-voting subject-matter experts, including representatives of the Santa Ana Regional Water Quality Control Board (RWQCB) and the National Guard Bureau.

elevation of underlying ground water." Title 27 elsewhere addresses the closure of landfills, requiring that infiltration of water into waste be minimized in order to minimize the production of leachate and gas. 27 CCR § 20950(a)(2)(A)(1). This provision is silent regarding the 5-foot separation requirement.

Shaw's technical approach provided for [deleted]. Shaw Proposal at I-1. It further provided that, if [deleted]. Id. at I-2. Shaw assumed that "five feet separation of waste to groundwater [was] [deleted]." Id. at I-3.

Cognizant of Shaw's failure to address the 5-foot separation requirement, the TEB further reviewed the requirement. Agency Report (AR), Tab 19, at 3. Noting that 27 CCR § 20950 (general closure and post-closure maintenance standards) does not explicitly discuss the 5-foot separation, the TEB recognized that a literal 5-foot separation was not required under the regulations. In this regard, the RFP did not prescribe the method for achieving the separation, providing that there "may be numerous mechanisms by which this may be achieved." PWS ¶ 6.2.3. In the agency's view, an alternative method--such as physical removal of the waste, construction of a liner system, or lowering the water table--was acceptable so long as it achieved the same result. AR at 15. The evaluators also considered that the agency could possibly face more expensive remedies if closure or corrective action under the Resource Conservation Recovery Act (RCRA) were required, and noted that a state regulator previously had recommended RCRA corrective action if waste containing hazardous constituents were left in contact with the groundwater. AR, Tab 19, at 3. The evaluators concluded that an acceptable remedy had to address the minimum 5-foot separation standard, and verified this conclusion with the local RWQCB. Id. The agency evaluated Shaw's proposal as failing to meet the Title 27 requirements, including mitigation of current and future contamination release to groundwater, and therefore rejected it as unacceptable. Id. at 5.

DISCUSSION

In its initial protest, Shaw asserted that the agency erred in finding its technical approach unacceptable, maintaining that 27 CCR §§ 20080 and 209550 allow for the alternative type of landfill closure it proposed, without requiring a 5-foot separation between waste and groundwater. However, in its comments on the agency report, Shaw asserts that its compliance with Title 27 is no longer the issue; rather, the issue is whether the agency failed to notify Shaw of a change in its requirements. Comments at 9. Specifically, Shaw asserts that, while the RFP called for offerors to produce and maintain a 5-foot separation between groundwater and waste, agency responses to offeror questions effectively negated this language and made acceptable any solution that generally complied with Title 27. Comments at 11. Shaw concludes that, when the agency subsequently determined that the 5-foot separation in fact was required, it was obligated to notify offerors of this shift back to the original requirement. In this regard, where, before or after the receipt of proposals, an agency's solicitation requirements change, the agency must issue an

amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR § 15.206(a); Northrup Grumman Info. Tech, Inc., et al., B-295526 et al., Mar. 16, 2005, 2005 CPD ¶ 45 at 13.

The agency's actions were unobjectionable; the RFP requirements remained the same throughout the procurement, so there was no need for the agency to amend the solicitation. The RFP clearly required compliance with state regulations that made it "necessary to produce and sustain a five foot difference between the depth of waste and the water table." PWS § 6.2.3. Shaw does not dispute the clarity of this requirement. Thereafter, while, as Shaw alleges, the agency responded to various questions regarding the requirement, all of its answers were consistent with the RFP. For example, Shaw asked if "the performance standard [was] regulator approval or sustaining a 5 foot difference." RFP, amend. 8, at 7, Question No. 25. The agency responded that the "performance standard [was] to meet the requirements in Title 27." Id., Answer No. 25. The agency addressed other offerors' questions similarly, by either referring offerors to the Question 25 response, or otherwise calling for the contractor to meet the regulatory requirements in Title 27. Id., Question/Answer Nos. 75-76. Nothing in these responses, calling for compliance with Title 27 as a whole, indicated that the otherwise clearly stated 5-foot requirement had been relaxed. Although the regulatory provisions dealing with closure of landfills (§§ 20080 and 20950) do not mention the 5-foot requirement, this silence did not serve to relax the requirement which, again, was clearly stated in the RFP. There is nothing inherently inconsistent in requiring the 5-foot separation to meet the section 20950 requirement to minimize infiltration of water into waste, and the section 20080(b) allowance of the use of alternative methods that afford "equivalent protection against water quality impairment." 27 CCR § 20080(b)(2)(B). Shaw therefore had no reasonable basis to believe that the agency had modified the PWS to eliminate the 5-foot separation requirement, and it follows that there was no basis for the agency subsequently to advise Shaw that the requirement was reinstated.[2] Since Shaw's alternative approach did not address the separation requirement, its proposal was reasonably rejected as technically unacceptable.

Our conclusion is not changed by Shaw's claim that it relied on input it obtained from a representative of the RWQCB concerning application of the 5-foot separation requirement. In this regard, prior to submitting its proposal, an RWQCB

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[2] Shaw observes that the agency's answers did not expressly state that the 5-foot methodology was an "absolute requirement." Comments at 4, 11. However, since the requirement was clearly stated in the RFP and the agency did not expressly change the requirement in its responses to offerors' questions, the agency's failure to restate the requirement did not make it any less absolute. While Shaw asserts that it believed that PWS § 6.2.3 "reflected a misinterpretation of Title 27's requirements," its question did not bring that view to the agency's attention. Shaw Declaration, Nov. 3, 2005, ¶ 7.

representative opined to Shaw that 5 feet of separation was not a "strict requirement" if the firm could control groundwater as it had on another project using a [deleted]. Shaw Proposal Preparation Minutes. While this same representative later served as an advisor to the TEB and advised it of the necessity for the 5-foot requirement, he was not a voting member of the TEB and lacked any authority to amend the RFP. Oral advice does not operate to amend a solicitation or otherwise legally bind the agency. Digital Imaging Acquisition Networking Assoc., Inc., B-285396.3, Nov. 8, 2000, 2000 CPD ¶ 191 at 5 n.6. An offeror chooses to rely on such advice, and to propose an approach contrary to the RFP, at its own risk. Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 25 at 13.

Shaw also asserts that the agency was required to conduct discussions with it to apprise it of its failure to meet the requirements. However, there generally is no obligation for an agency to conduct discussions where, as here, the RFP specifically instructs offerors that award may be made on the basis of initial proposals. FAR § 15.306(a)(3); Colmek Sys. Eng'g , B-291931.2, July 9, 2003, 2003 CPD ¶ 123 at 7. An agency is not precluded from awarding on an initial proposal basis merely because an unacceptable lower-priced offer might be made acceptable through discussions. Integration Techs. Group, Inc., B-274288.5, June 13, 1997, 97-1 CPD ¶ 214 at 6. The contracting officer's discretion in deciding not to hold discussions is quite broad. Our Office will review the exercise of that discretion only to ensure that it was reasonable based on the particular circumstances of the procurement. Id. We find no circumstances here that call into question the agency's decision not to engage in discussions.

The protest is denied.

Anthony H. Gamboa
General Counsel