148012

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Draeger, Inc.--Reconsideration

File: B-247919.7

Date: November 6, 1992

Gerald D. Morgan, Esq., William H. Espinosa, Esq., and Lance D. Bultena, Esq., Winthrop, Stimson, Putnam & Roberts, for the requestor.
J. Eric André, Esq., Howrey & Simon, for Mine Safety Appliances Company, an interested party.
John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where requesting party fails to show any legal or factual basis warranting reconsideration of prior decision.

DECISION

National Draeger, Inc. requests reconsideration of our decision, Mine Safety Appliances Co.; Interspiro, Inc., B-247919.5; B-247919.6, Sept. 3, 1992, 92-2 CPD ¶ ___, in which we sustained the protests of Mine Safety Appliances Company (MSA) and Interspiro Inc., against the Department of the Air Force's award of a contract to National Draeger under request for proposals (RFP) No. F08635-91-R-0203. We sustained the protests on the basis that the Air Force should not have accepted Draeger's proposal for award because Draeger's proposal did not evidence compliance with a material RFP requirement.

We deny the request for reconsideration.

The RFP, issued on October 2, 1991, sought proposals for commercially available self-contained breathing apparatus (SCBA), and the development of chemical warfare (CW) kits for the SCBAs, for use by Air Force fire fighters. The RFP provided that award would be made to the responsible offeror whose offer, conforming to the requirements of the RFP, was determined most advantageous to the government, cost and other factors considered. The evaluation criteria, listed in descending order of importance were: (1) technical, (2) management, and (3) cost/price. One of the assessment criteria to be used in the evaluation of proposals was

"[c]ompliance with the requirements." The RFP's proposal preparation instructions informed offerors that their proposals were to be specific and "presented in as much detail as possible following the Statement of Work," and that the agency would "not assume that any offeror possesses any capability unless specified in the proposal." (Emphasis deleted.)

An attachment to the RFP set forth in detail the specifications for the SCBAs and the CW kits. The paragraph containing the overall description of the SCBA, required that "[t]he completely assembled and fully charged [SCBA] shall not weigh more than 35 pounds."

The agency found, after receipt of initial proposals, competitive range determination, discussions, and receipt of best and final offers (BAFO), that Draeger's proposal conformed to the RFP, and offered the best overall value to the government based on technical and price considerations. After award was made to Draeger, MSA and Interspiro filed protests, contending that Draeger's proposal failed to meet a number of mandatory RFP specifications, including the requirement that the SCBA weigh 35 pounds or less.

In sustaining the protests of MSA and Interspiro, we found that it could not be determined from Draeger's proposal whether the SCBA it offered weighed 35 pounds or less as required by the RFP. We concluded that the failure of Draeger's proposal to address this requirement, considered in conjunction with the proposal having addressed virtually all other SCBA specification requirements as set forth in the RFP, should have led the agency to assure itself that Draeger was in fact offering an SCBA that was compliant with the 35-pound limitation. We therefore recommended that the Air Force reopen negotiations and request another round of BAFOs from all competitive range offerors.

Draeger participated in the MSA and Interspiro protests as an interested party. In its request for reconsideration, Draeger argues that our decision contains a factual error and thus should be reversed. In this regard, Draeger asserts that "[c]ontrary to [the General Accounting Office's] findings, the Draeger SCBA is fully compliant with the RFP, including the 35 pound weight requirement."

Draeger's argument, that our decision should be reversed because we erroneously found that its SCBA did not meet the 35-pound limitation, is predicated on its misunderstanding of our decision, and thus provides no basis for reconsideration. Our decision was not based on a "finding" by our

Office that the Draeger SCBA weighed more than 35 pounds.[1] Rather, as stated in our decision, we sustained the protest because we found it impossible to determine from Draeger's proposal whether Draeger's SCBA weighed 35 pounds or less, and that, under the circumstances, Draeger's proposal could not be accepted as there was reason to doubt that Draeger was offering to meet the 35-pound limitation. As discussed in our prior decision, award cannot be made on the basis of an offeror's proposal, where, as here, there is reason to doubt that the proposal offers a product that complies with a material solicitation requirement. See Telemetrics, Inc.; Techniarts Eng'g, B-242957.7, Apr. 3, 1992, 92-2 CPD ¶ ___; Technology for Coms. Int'l, B-242632.2, Dec. 13, 1991, 91-2 CPD ¶ 540.

Draeger next repeats the argument it made previously that the Air Force reasonably relied on Draeger's failure to take exception to the 35-pound limitation in finding Draeger's proposal acceptable. In support of this position, Draeger points to the same portions of the record that it did during our consideration of the previous protest. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either factual or legal errors, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1992). Draeger's repetition of this argument made during our consideration of the original protest and its disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Draeger finally argues that, at a minimum, our recommendation should be modified because the conduct of discussions and the submission of BAFOs will create a prohibited auction situation as Draeger's price was revealed to the offerors during the post-award debriefings. Where, as here, the reopening of discussions is properly required, the prior disclosure of an offeror's price does not preclude reopening negotiations, and reopening does not constitute an improper auction. The possibility that a contract may not be awarded

---

[1]Draeger's contention here is primarily based upon footnote No. 6 of our prior decision, where we observed that Draeger had not produced convincing evidence of compliance with the requirement, even after it had been protested. However, this footnote was not the basis for our prior decision; rather, we found the agency could not reasonably find Draeger acceptable based on the information the agency had at the time Draeger was selected for award.

on the basis of a fair and equal competition has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirement for competition take priority over the regulatory prohibitions of auction techniques. See H.J. Group Ventures, Inc., B-246139.3, Aug. 21, 1992, 92-2 CPD ¶ 116; Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35.

In sum, the request provides no factual or legal grounds which warrant reconsideration of our prior decision. 4 C.F.R. § 21.12(a).

The request for reconsideration is denied.

for Ronald Berger
James F. Hinchman
General Counsel