149346

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Reconsideration

File: B-250158.4

Date: May 28, 1993

Ronald K. Henry, Esq., and Sue Ann Dilts, Esq., Baker & Botts, for Eldyne, Inc.
Eric A. Lile, Esq., and Candice Fox-Wilson, Esq., Department of the Navy, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where agency failed to conduct meaningful discussions with firm; agency should have discussed its concerns regarding technical proposal's serious weaknesses which required amplification and had a significant adverse affect on the proposal's technical evaluation despite agency's failure to label these serious weaknesses as deficiencies or the determination that the proposal was otherwise acceptable. Reconsideration of protest decision is not warranted where requester essentially raises same arguments on reconsideration as were raised in original protest and request for reconsideration does not demonstrate that decision was based on an error of fact or law.

DECISION

The Department of the Navy requests reconsideration of our decision in Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ ___, in which we sustained Eldyne's protest of the award of a contract by the agency to McLaughlin Research Corporation under request for proposals (RFP) No. N66604-92-R-0060.[1] We sustained the protest because the agency

[1]The 5-year, cost-plus-fixed-fee, level-of-effort, indefinite delivery/indefinite quantity contract is for engineering, technical, instructional, and software support for submarine shipboard electrical/electronic systems related to navigation, communications, sonar, fire control, power distribution, ship control, and interior communications systems, and their associated input/output systems.

failed to conduct meaningful discussions with Eldyne, the incumbent contractor of the technical support services required by the RFP. In that decision, we found that the Navy failed to discuss serious weaknesses in the firm's proposal which had a significant adverse affect on the proposal's technical evaluation score, especially in light of the agency's reliance on the point scores received by the two offerors' proposals in making the award determination. The record showed that the agency limited its technical discussions to one question concerning one of Eldyne's proposed personnel and did not raise any concerns regarding lack of detail in Eldyne's technical and management approaches which had resulted in its offer being scored at the low end of the acceptable point score range.

We deny the request for reconsideration because it provides no basis for reconsidering our prior decision.

In its request for reconsideration, the Navy essentially contends that the Federal Acquisition Regulation (FAR), at § 15.610, requires the agency to discuss only matters that make a proposal unacceptable ("deficiencies") with offerors whose proposals are included in the competitive range. Since Eldyne's lack of detail in its technical proposal was considered a "weakness," but was not labeled as a "deficiency" failing to meet the agency's technical requirements, the Navy contends there was no requirement for the agency to discuss the evaluators' concerns with the firm. The agency also asserts that it was not required to discuss with Eldyne those portions of its proposal found to be lacking in detail because they reflected the firm's lack of competence, diligence and inventiveness in preparing its proposal. The Navy argues that it was not required to inform the offeror how to improve its proposal's technical approach to the level of the awardee's detailed technical proposal so that no discriminating factors between the merit of the proposals would remain.

The Navy's contention that contracting officers are never required to discuss aspects of a proposal that do not make it unacceptable is simply wrong. As we stated in our decision sustaining Eldyne's protest, discussions conducted with offerors in the competitive range must be meaningful. FAR § 15.610; Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. The FAR explicitly recognizes that, in conducting meaningful discussions, a contracting officer must use his or her judgment based on the facts of each acquisition (except that deficiencies and other matters listed in FAR § 15.610(c) must always be discussed). Substitution of the mechanical approach suggested by the Navy for this exercise of judgment can, as it did in this

case, frustrate the fundamental requirement of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(2) (1988), for meaningful discussions. As reflected in FAR § 15.610, CICA effectively requires agencies to point out weaknesses, deficiencies or excesses in proposals necessary for an offeror to have a reasonable chance of being selected for award, which is, after all, the basis for including a proposal in the competitive range in the first place. See FAR § 15.609(a); Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190.

The exercise of the contracting officer's judgment in this respect requires weighing several competing interests. For example, agencies are admonished by the FAR to protect the integrity of the procurement process by balancing the need for meaningful discussions against actions that result in technical leveling (FAR § 15.610(d)), technical transfusion (FAR § 15.610(e)(1)), or auctions (FAR § 15.610(e)(2)). See generally Mine Safety Appliances Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76. The FAR defines technical leveling as helping an offeror "bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." FAR § 15.610(d). Also, while agencies generally must lead offerors into the areas of their proposals that require amplification or correction for them to have a reasonable chance of award, there is no obligation to afford all-encompassing discussions or to discuss every element of a technically acceptable competitive range proposal. Jaycor, supra.

Since the number and type of proposal deficiencies will vary among proposals, contracting officers necessarily must have considerable discretion in determining what will be discussed with each offeror, and in striking the appropriate balance between meaningful discussions and technical leveling. See CBIS Fed. Inc., B-245844.2, 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308; E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192. For example, in a case where it might have been preferable for an agency to have informed an offeror in the request for BAFOs of continuing concerns about a weakness identified during discussions, we found that there was nothing improper about not doing so, given the agency's reasonable concerns about technical leveling. E-Systems, Inc., supra. Our Office will sustain a protest, however, if an agency, attempting to strike the balance between holding meaningful discussions and avoiding technical leveling, acts unreasonably. See Price Waterhouse, supra, (protest sustained where agency provided

offerors with identical discussion questions because of concerns that questions tailored to the individual proposals would violate the FAR's restrictions against technical leveling and technical transfusion).[2]

Here, Eldyne was not advised during discussions of any concerns about its technical proposal except in regard to its initial proposal of an individual who subsequently became unavailable for employment. Yet, each evaluator supported his individual determination to significantly downgrade Eldyne's technical evaluation score (primarily for technical approach, but also for management approach) on the basis of the proposal's lack of detail. Our review of the record showed that this lack of detail raised concerns regarding Eldyne's level of understanding and ability to address certain technical problems and, in at least one management area, whether or not Eldyne's "vague" approach met the requirements.

Regardless of the agency's description of its concerns with Eldyne's proposal as constituting a weakness rather than a deficiency,[3] the record shows that Eldyne's proposal was significantly downgraded in these areas of its proposal. We believe the agency was required to discuss the matter with Eldyne; the firm should have been allowed the opportunity to amplify its approach to confirm its understanding of the RFP's requirements and satisfy the agency's serious concerns. (Although the Navy disputes our interpretation of the above described concerns regarding the proposal as "serious," we believe the substantial number of evaluation points lost solely due to the perceived lack of detail show the evaluators believed that those concerns were serious.)

---

[2]As the Navy correctly recognizes, much of the case law in this area is not especially useful as precedent because meaningful discussion determinations depend so much upon the facts of each case. The agency errs, though, in its apparent belief that the key to the determination in cases about the reasonableness of the contracting officer's judgment can be found in whether GAO or the agency characterized a particular matter as a weakness or deficiency. The issue in determining if discussions are meaningful is whether the contracting officer struck a reasonable balance between giving an offeror a reasonable opportunity for award (and the agency an opportunity to make the most efficient use of its resources) and other competing interests.

[3]The record shows that the agency discussed an aspect of the lack of detail in the awardee's proposal because that lack of detail was found to constitute a "deficiency" in McLaughlin's initial technical proposal.

Further, although the agency criticizes our decision sustaining the protest for focusing primarily on the findings of one evaluator, rather than the consensus of the technical evaluation results prepared by the technical evaluation panel chairman, the consensus determination was also supported by the same concerns.[1]

As stated in our decision on the protest, the agency's award determination documentation shows that the comparison of the two firms' point scores (which was the final basis of the agency's finding of technical equivalency between the proposals) weighed heavily in the ultimate award determination. By failing to advise Eldyne during discussions of the agency's actual serious concerns about its initial technical and management proposal which resulted in the substantial downgrading of the proposal, and instead limiting its questions regarding the technical proposal to one unrelated question, we believe the agency effectively deprived the firm of the opportunity to meaningfully compete for the contract award since the firm was given no notice of the manner in which it needed to respond to address the agency's actual concerns.

Further, in our view, the agency's limited technical discussions were not justified by concerns as to technical transfusion or technical leveling. The record did not show that technical transfusion, that is, the government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal, was an issue for the agency in the conduct of discussions here. We do not see how discussion questions to elicit more detail and explanation from Eldyne concerning its own technical and management approach involves technical transfusion. Also, technical leveling was not an apparent concern since it only arises as an issue where, as a result of successive rounds of discussions, the agency helped an offeror to bring its

---

[1]In particular, the Navy refutes the importance of an individual evaluator's initial determination that one aspect of Eldyne's Proposal was deficient (regarding the failure to explain the proposed approach to meeting a sample task presented in the RFP) and explains that during the consensus of all of the evaluator's findings, that determination was changed so not to affect the acceptability of the proposal. The record shows, however, that although the labelling of that initial "deficiency" determination was changed to one of acceptability, the individual point score (which was significantly downgraded to reflect a finding of unacceptability and was averaged into the consensus score) was not increased to reflect the subsequent change in description and thus did negatively factor into the final consensus point score for Eldyne's proposal.

proposal up to the level of the other proposals. Successive rounds of discussions were not contemplated nor conducted here. Moreover, the weaknesses in Eldyne's proposal were not inherent in Eldyne's approach nor would they have required extensive revision to resolve. See Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439. It is clear that the agency's failure to discuss the weaknesses which represented a significant loss of points unreasonably deprived the firm, which had been placed in the competitive range, of any further opportunity to obtain the contract.

The agency in essence repeats arguments it made previously and expresses disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1993). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The request for reconsideration is denied.

for James F. Hinchman
General Counsel