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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Consortium HSG Technischer Service GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Management KG

File: B-292699.4

Date: February 24, 2004

Reed L. von Maur, Esq., for the protester.

Maj. Gregg A. Engler, Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's corrective action, taken in response to an earlier General Accounting Office protest, of reopening discussions and requesting revised proposals, rather than reevaluating existing offers, is denied where the record shows that the agency reasonably concluded that discussions held before the previous award decision may not have been adequate to advise one of the offerors of significant weaknesses in its proposal.

DECISION

Consortium HSG Technischer Service GmbH and GeBe Gebäud- und Betriebstechnik GmbH Südwest Co., Management KG (HSG) protests the corrective action taken by the Department of the Army in response to HSG's protest of the Army's award of a contract to SKE GmbH/Siemens Gebäudemanagement GmbH & Co. OHG, Joint Venture (SKE) for preventive maintenance and repairs of facilities and equipment used by the Defense Commissary Agency in Germany, Belgium, and the Netherlands. Specifically, the agency decided to reopen discussions, request revised proposals, conduct new evaluations, make a new selection decision, and if the decision is to award to HSG, terminate the award to SKE. HSG argues that the agency's corrective action should be limited to a reevaluation of the proposals as submitted. It contends that reopening discussions and requesting revised proposals unfairly favors SKE, and is an abuse of agency discretion.

We deny the protest.

As indicated above, the solicitation here, request for proposals (RFP) No. DABN01-03-R-0010, contemplated award of a contract for preventive maintenance and repairs at facilities used by the Defense Commissary Agency in Germany, Belgium, and the Netherlands. The award at issue was for one of four geographic regions covered by the solicitation; this region was referred to in the RFP as area IV. Area IV includes not only a portion of the regular commissary facilities identified in the RFP, but also includes the Central Meat Processing Plant (CMPP), located at Ramstein Air Base in Germany. The CMPP is the principal meat-packing plant for the U.S. forces in Europe, and contains highly sophisticated refrigeration equipment, which must operate without interruption both to preserve meat and to permit ongoing meat-packing activities.

The RFP required offerors to submit certain specific types of information with their proposals. For example, with respect to the area of technical staffing, and the requirement that the contractor repair and maintain certain sophisticated refrigeration equipment in use at the locations within area IV, offerors were required to have a refrigeration “meister” on staff.¹ To demonstrate the availability of required meisters, offerors were instructed to append meister certificates to their technical proposals. The RFP included similarly detailed instructions and requests for information in other areas.

The gravamen of HSG’s earlier protest was that the agency’s favorable evaluation of SKE disregarded SKE’s failure to provide the required documentation in several areas. These areas included the solicitation’s requirement, set forth above, of identifying a refrigeration meister for area IV, as well as the requirements for providing evidence of necessary licenses and permits required by the host nation of Germany, and providing evidence of adequate capitalization to perform the work. HSG also argued that the agency’s evaluation of SKE’s past performance was unreasonable.

After all pleadings on both the initial and supplemental protests were submitted, and after our Office convened two conference calls to clarify the record about the content of the proposals, oral presentations, and subsequent discussions, the agency decided to take corrective action in response to HSG’s protest. As explained during the course of the current protest, the agency reached its decision because “the Protester made several key points that the Army could not effectively refute.” Agency Report, Dec. 17, 2003, at 4.

¹Under the German labor system, a meister is a highly trained tradesman who has been certified by the Handwerkskammer (Chamber of Trade) in the geographic area in which the tradesman works. Protester’s Comments on Supp. Agency Rep., Oct. 17, 2003, attach. 1, at 1; see also Vereinigte Gebäudereinigungsgesellschaft, B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117 at 2 n.2.

HSG's challenge to the proposed corrective action is that the agency should only reevaluate proposals and make a new selection decision; it asserts that reopening discussions and requesting revised proposals improperly will allow SKE to address shortcomings in its proposal. The agency answers that responding to the protest revealed to it "that the awardee's proposal may have significant weaknesses that disqualify it from award." *Id.* at 7. Given this situation, the agency points out that it was required to "notify each offeror in the competitive range of deficiencies, significant weaknesses, and other aspects of its proposal that the offeror could alter or explain to materially enhance its potential for award." *Id.* In reply, HSG urges our Office to reject these concerns because, in HSG's view, the discussions held with SKE during the course of the procurement were sufficient to put SKE on notice of any of the problems with its proposal.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Patriot Contract Servs. LLC et al., B-278276.11 *et al.*, Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. We will not object to the specific proposed 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. Where an agency has reasonable concerns that there were errors in the procurement, corrective action may appropriately include reopening discussions and requesting revised proposals before reevaluating. Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3.

In our view, the corrective action here is well within the broad discretion afforded to contracting agencies in these circumstances. As noted above, HSG's earlier protest alleged that the SKE proposal did not include certain information required by the RFP. During the course of defending against the protest, the agency came to the conclusion that there were areas where HSG's assertions about significant shortfalls in SKE's proposal had merit. Since discussions were held in this procurement, the agency was required to advise offerors of significant weaknesses and deficiencies in their proposals. Federal Acquisition Regulation § 15.306(d)(3). Given this requirement, together with the agency's concern that it may not have adequately advised SKE of these weaknesses, we think the agency reasonably decided to reopen discussions here.

We also note that HSG's own arguments--both in the earlier protest and in the instant proceeding--support the agency's assessment that the weaknesses in SKE's proposal were significant and should have been raised during discussions. For example, during the earlier protest, HSG argued that SKE's proposal should have been disqualified from further consideration for failing to meet minimum requirements of the RFP. Supp. Protest, Sept. 25, 2003, at 2, 3. Even now, HSG complains that the agency should not allow SKE "to correct its at-best minimum submission." Protester's Comments on Agency's Response to the Corrective Action Challenge, Dec. 29, 2003, at 6. Given the protester's consistent assessment of SKE's proposal during these proceedings, we see no basis for its current assertion that the agency is

acting unreasonably in concluding that it must ensure that the significant weaknesses in SKE's proposal were pointed out during discussions.

With respect to HSG's reply that the earlier discussions were sufficient to lead SKE into the areas of its proposal that needed improvement, we again see nothing unreasonable in the agency's determination. Although HSG points to places in the record in the earlier protest—which, incidentally, was not about the adequacy of discussions with SKE—where it appears the oral presentation and subsequent discussions broached areas somewhat related to the issues HSG challenged in its earlier protest, we see no basis to find unreasonable the agency's view that more precise discussions are needed.

In sum, since the agency reasonably has concluded that its prior discussions may not have been adequate, we think its approach to structuring its corrective action here is unobjectionable.

The protest is denied.

Anthony H. Gamboa
General Counsel