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Decision

Matter of: Alliant Techsystems, Inc.

File: B-405129.3

Date: January 23, 2012

Jonathan D. Shaffer, Esq., John S. Pachter, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester.

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Tina Pixler, Esq., Timothy Reier, Esq., and Sharon Lipes, Esq., Department of the Army, U.S. Army Materiel Command, for the agency.

Kenneth Kilgour, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that agency has improperly precluded price revisions is denied where the underlying basis for the allegation--the protester's interpretation of the solicitation's amendments issued in connection with corrective action--is unreasonable.

2. Additional round of discussions, conducted as part of agency corrective action, that did not raise weaknesses identified during the protester's post-award debriefing, is unobjectionable where those weaknesses had been raised during prior rounds of discussions.

DECISION

Alliant Techsystems, Inc., of Radford, Virginia, protests the corrective action taken by the Department of the Army, U.S. Army Materiel Command (AMC), in response to a protest by Alliant against the award of a contract to BAE Systems Ordnance Systems Inc., of Kingsport, Tennessee, under request for proposals (RFP) No. W52P1J-09-R-0015, issued by the Department of the Army, U.S. Army Materiel Command, for the operation of the Radford Army Ammunition Plant. The protester argues that solicitation amendments, issued as part of agency's implementation of corrective action, improperly prevent Alliant from revising its price proposal in response to permitted changes to its technical proposal. Alliant also argues that the

amendments unfairly limit the scope of the agency's discussions where the protester will be denied an opportunity to address weaknesses identified during the protester's debriefing.¹

We deny the protest.

BACKGROUND

The Procurement

This procurement is for the operation of a government-owned, contractor-operated manufacturing plant, the Radford Army Ammunition Plant, that produces a variety of propellants and nitrocellulose (NC), the key ingredient in the majority of propellants required by the Department of Defense. Built in the 1940s, the Radford Plant is the only active, full spectrum, military propellant manufacturing facility in the United States. The current procurement includes modernization of the Radford Plant.

The RFP contemplated the award of three contracts to a single offeror whose proposal represented the best value to the government. The three contracts are as follows: a zero-dollar, fixed-price contract for facilities operations and maintenance; a fixed-price indefinite-delivery/indefinite-quantity (IDIQ) contract for supplies; and basic ordering agreements (BOAs) using task orders that may be fixed-price or cost reimbursable. The supply contract will be for a base year with four 1-year options.

The procurement provided for a two-step selection process. Under Step I, assessed on a go/no go basis, offerors were evaluated on successful demonstration of experience and ability to perform the core capabilities at the Radford Plant. Offerors rated "go" were awarded optimization contracts that required the submission of plans to upgrade the Radford Plant with modernization funding of \$400 million provided over 5 years, less the cost of the NC facility construction. Two firms--BAE and Alliant--were rated "go" under Step I.

Under Step II, which contemplated a best value selection process, the RFP established four evaluation factors, in descending order of importance: (1) management/technical approach, (2) contract start up, (3) past performance, and (4) cost/price. Factor 1 contained the following four subfactors, in descending order of importance: (1) management/technical plan, (2) optimization plan, (3) NC facility, and (4) small business utilization. The individually-rated subfactor scores were combined to produce a single rating for factor 1, management/technical approach.

¹ The protester also alleged that the course of action contemplated by the agency would lead to an improper evaluation. We dismissed that allegation as premature. Email from GAO to Parties, Nov. 3, 2011.

After several rounds of discussions, evaluations and proposal submissions, the Army made award to BAE, and Alliant protested that award to this Office.

Earlier GAO Protest by Alliant

During the course of Alliant's earlier protest, the agency produced a letter it had sent to BAE instructing it to remove various ground rules and assumptions in its proposal that the agency deemed "unacceptable." This letter was sent to BAE after the agency had conducted its final round of discussions, obtained final proposal revisions, completed its evaluation, and selected BAE for award. Upon learning of the letter, Alliant argued (in a supplemental protest) that the agency had improperly conducted discussions with BAE after the submission of final proposal revisions (FPR).

The GAO attorney assigned to the case conducted outcome prediction, alternative dispute resolution (ADR), with the parties and informed them that GAO would likely sustain the protest based on the protester's challenges of these post-FPR exchanges between the Army and BAE. See GAO Attorney Email to Parties, July 29, 2011. In response, the agency elected to take corrective action. The Army then requested that the GAO attorney identify other possible areas of concern with the conduct of the procurement, which he did, although this was not formal ADR. Rather, the GAO attorney offered his views on various areas, which were to be the subject of a previously scheduled hearing intended to further develop the issues. See GAO Attorney Email to Parties, Aug. 11, 2011. Of note, as it relates to the specific issues raised in the protest, was the agency's evaluation of offerors' proposed design hours. In this regard, the GAO attorney observed an apparent disconnect between the solicitation's instructions and its stated basis for evaluating offerors' manpower staffing plans, as well as the agency's actual evaluation of the offerors' staffing plans. Id.

On August 17, the agency submitted its notice of corrective action and requested dismissal of Alliant's protest. As part of its corrective action, the Army indicated that it intended to amend the RFP, reopen discussions with Alliant and BAE, request final proposal revisions, reevaluate the offerors' proposals, and make a new selection decision. Accordingly, we dismissed Alliant's protest as the agency's proposed corrective action rendered the protest academic.

The Army's Corrective Action

1. Amendment 8

As part of its corrective action, the agency issued amendments 8-11 to the RFP. Amendment 8, issued on September 20, sought to revise and clarify the solicitation in various respects. As it relates to the protest, amendment 8 included the following

note regarding Volume 2, Management/Technical Approach, subfactor 1, Management/Technical Plan, “Offerors shall ensure that the information provided under this subfactor covers the offerors’ Management and Technical Plan to fulfill all the requirements of the contract including transition, production, and all other aspects of contract performance.” Amend. 8 at 2.

In addition, the RFP’s instructions were amended pertaining to Volume 2, Management/Technical Approach, subfactor 3, Nitrocellulose Facility, paragraph (a) Execution Plan, subparagraph (12) Manpower Staffing Plan. In this regard, amendment 8 required offerors to provide a breakdown and rationale of their proposed labor hours for the NC facility. See Amend. 8 at 2 (noting that “[t]he offeror shall provide a Man Power Staffing Plan (matrix and/or chart) of the monthly distribution of labor hours for the 1) design, 2) construction, and 3) commissioning/start-up of the NC facility Rationale which supports the labor hours proposed shall be included”). Section M was also changed to clarify that the agency would evaluate offerors’ “manpower staffing plans” by reviewing their break-out of labor hours by “1) Discipline/craft for each of the 3 phases individually (design, construction, commissioning/start-up); 2) Individual phases; and 3) Total for all 3 phases added together.” Amend. 8, at 3.

Amendment 8 also instructed offerors to “submit a separate, consolidated listing of any/all proposal assumptions or ground rules included in their proposal that alter or supplant any clause, instruction, condition or notice” in the RFP. The amendment further advised that this listing is not to be construed as the agency’s acceptance of the assumptions or ground rules submitted. Id. at 3.

In addition, amendment 8 advised that the agency would hold limited discussions with offerors. The areas for discussion tracked the areas clarified by amendment 8, and offerors were advised that they would receive letters detailing the specific items of discussion. Finally, amendment 8 advised that price revisions would not be accepted, and that any proposal revisions were limited to the specific areas “directly impacted by the revisions/clarifications stated in paragraphs 1 and 2 of this Amendment.” Id.

2. Alliant Discussions

In a letter issued the same day as amendment 8, the agency provided Alliant with various items for discussion. Item 1 read as follows:

- (1) In the area of NC Facility Design, the labor hours to complete the NC facility design [DELETED]. In addition, it appears that you have merely [DELETED]. Please review this area of your proposal.

Discussion Letter to Alliant, Sept. 20, 2011, at 1.

With respect to discussion question number 1, the record reflects that, prior to taking corrective action, the agency assessed Alliant with a weakness based on the [DELETED] hours proposed by Alliant for NC design as compared with the initial government cost estimate. The record further reflects that the agency specifically raised this issue with Alliant during previous rounds of discussions. See, Agency Report (AR), Tab 12-14 at 2; AR, Tab 12-24 at 3. As a related matter, regarding Alliant's final proposal submission, the agency was concerned that Alliant had [DELETED] for design work [DELETED]. In reviewing this [DELETED], the agency questioned whether Alliant's [DELETED] would be willing to perform the design work at the [DELETED]. Protest at 26.

The agency raised several other issues in its September 20 letter, including Alliant's "NC Facility Design Assumptions" and issues with Alliant's past performance. In this regard, the letter advised that Alliant should examine its proposal to ensure that it does not take exception to any of the terms or conditions of the RFP. The letter further advised that revisions to Alliant's proposal should be limited to those parts of its proposal described in amendment 8. Discussion Letter to Alliant, Sept. 20, 2011, at 1

On September 22, Alliant sent a letter to the contracting officer raising various concerns regarding the proper scope of its proposal revisions based on the discussion issues raised in the September 20 letter and the limitations established by amendment 8.

On September 27, the Army asked Alliant to further expand on the issues raised in its September 22 letter, which Alliant did in a letter dated September 28. As it relates to this protest, Alliant expressed concern about [DELETED] for the NC facility design to address the agency's concern that its design hours [DELETED] (as indicated in the Army's September 20 discussions letter), without an ability to make a corresponding [DELETED] adjustment in its price (which was not permitted under amendment 8). Alliant also indicated that the "note" in amendment 8 regarding subfactor 1 invites potentially broad changes to an offeror's Technical/Management Plan, which could affect other volumes that offerors were barred from changing under the amendment. In this regard, Alliant raised concerns regarding its ability to "fully address management of risk." AR, Tab 45, Alliant Letter, Sept. 28, 2011, at 2.

On October 7, the Army again sent Alliant a letter to "clarify/revise" the NC Facility labor hour discussion item, which read, in part, as follows:

With respect to Item (1) in the above referenced letter, the undersigned Contracting Officer noted concerns regarding the labor hours [DELETED] to complete the NC facility design, as well as the method you used to determine the number and rates for those hours. The Government clarifies that the information it requires to satisfy this concern

[DELETED].

Discussion Letter to Alliant, Oct. 7, 2011.

The agency also sent Alliant a separate letter in response to Alliant's prior letters to the agency advising Alliant that amendment 8 "makes no changes to the area of Risk Management/Mitigation. The Government will issue another Amendment to clarify." AR, Tab 55, Response to Alliant's Letters of Sept. 23 and 28, Oct. 7, 2011, at 3.

3. Amendment 11 and Additional Discussions with Alliant

Also, on October 7, the agency issued amendment 11 to further clarify the RFP modifications contained in amendment 8. Specifically in response to Alliant's concern regarding its ability to address risk, the amendment clarified that "[n]othing in Amendment 0008 will be construed to directly impact or make changes to the RFP with respect to Risk Management or Mitigation." Amend. 11, Oct. 7, 2011, at 1.

The record reflects that on October 11, Alliant confirmed that it could obtain the requested [DELETED], which would be provided with Alliant's revised proposal. See, AR, Tab 58, Alliant E-mail, Oct. 11, 2011.

In a letter to Alliant dated October 12, the Army provided an additional response addressing the NC facility hours, as follows: "[DELETED] will be treated by the Government as adequate explanation of labor hours used. Offerors should not, however, assume that the Government agrees that those hours are reasonable." AR, Tab 61, Letter to Alliant, Oct. 12, 2011.

On October 13, prior to the due date for the submission of revised proposals, Alliant filed the subject protest.

DISCUSSION

In its current protest, Alliant is challenging the limited scope of the agency's corrective action. Specifically, Alliant challenges the prohibition against making any changes in price, and the limited scope of the agency's discussions, which, Alliant argues, did not address weaknesses identified by the Army during Alliant's post-award debriefing.

Fundamentally, we view this protest as a challenge to the agency's efforts to turn back the clock on the procurement only to the point where the agency sent its post-award letter to BAE regarding unacceptable assumptions and ground rules contained in the final proposal revisions submitted by BAE. In this regard, the

agency argues that it may properly limit further proposal changes to those issues not previously raised with the offerors before the post-FPR letter to BAE. Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. As a general matter, the details of corrective action are within the sound discretion and judgment of the contracting agency. Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. In this regard, an agency's discretion when taking corrective action extends to a decision on the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors may make to their proposals. See, e.g., Honeywell Tech. Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; Domain Name Alliance Registry, supra. We generally will not object to the specific 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.

Here, the Army maintains that its limited corrective action addresses the specific concerns raised through the ADR process. Specifically, the Army contends that it sought to correct issues surrounding its evaluation of various assumptions contained in BAE's proposal, as well as the agency's post-FPR communication with BAE regarding these concerns. In order to address these issues, the agency issued amendment 8, which advises both offerors not to condition their proposals on assumptions or ground rules that are inconsistent with the RFP. Moreover, the agency is conducting discussions with both offerors to address areas where the offerors appear to have proposed such assumptions, and to provide them with their first opportunity to address these concerns.

The agency also sought to address concerns regarding the scope of its evaluation of offerors' NC Facility staffing plans. To address this concern, amendment 8 clarifies the information that offerors are required to submit for their staffing plan and conforms the related evaluation factor consistent with the revised information.² Amendment 8 also advises offerors that further discussions will be limited to specific areas. Amendment 8 establishes that the agency will only accept limited technical proposal revisions and that offerors are not permitted to change their pricing. These

² Amendment 8 also made changes to address other areas of concern with the procurement. For example, with respect to past performance, amendment 8 clarified that relevant service contracts include "service contracts for facility support services or similar contract support services, including, but not limited to, any contracts for energetic manufacturing facility . . . construction" RFP, Amendment 8, at 2. These changes are not addressed with any specificity by Alliant in its protest, or in its comments on the agency report; therefore, we need not address them.

limits are intended to prevent reopening issues that were previously addressed by the agency during prior rounds of discussions.

Finally, the Army maintains that limited corrective action is necessary to preserve the fairness of this competition. According to the Army, unlimited proposal revisions would substantially delay the procurement, and would undermine certain of the incentives for having this competition (i.e., NC facility funding, which is a critical incentive for competition, would be in jeopardy, and further delay has the potential to significantly reduce revenue for any firm other than Alliant, which is the incumbent). The Army also contends that limited corrective action is a reasonable approach to avoid allowing Alliant a “second bite at the apple” in pricing its proposal, especially after Alliant learned of BAE’s pricing during Alliant’s debriefing.

We address the specific challenges to the scope of the agency’s corrective action below.

Limits on Pricing Changes

In challenging the limited nature of the agency’s corrective action, Alliant maintains that the solicitation improperly precludes offerors from making changes to their pricing.³ According to Alliant, since it is allowed to revise its labor hours for NC facility design, it should be permitted to make corresponding adjustments to its price.⁴

³ Alliant also contends the terms of amendment 8 appear to allow Alliant to make changes to its risk tables in the Management Technical Plan, yet prohibit it from making similar changes in other parts of its proposal. This allegation is at odds with the agency’s clear guidance--through correspondence and with amendment 11--that amendment 8 does not provide for changes to Risk Management/Mitigation.

⁴ The protester also argues that it should be able to change its price to address an assumption in its proposal regarding [DELETED] during the design phase--an assumption the agency now rejects. Comments, Dec. 12, 2011 at 11-12. This argument is untimely. The protester was clearly on notice of this concern when it filed its protest, yet it first raised the issue two months later. Our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. CapRock Gov’t Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24. Moreover, whatever change in its price that would result from the changed [DELETED] would be insignificant when compared to the total cost of the contract. In addition, the protester would presumably raise its price--not lower it--to account for the later [DELETED].

The agency disagrees with Alliant's underlying premise. Specifically, the Army explains--now, as it did to Alliant earlier--that the RFP, as amended, does not permit changes to the labor hours proposed for the NC facility. Instead, the intent of the RFP amendments, and the discussions with Alliant, was to allow Alliant to submit a [DELETED] proposed; this was not another opportunity for Alliant to revise the proposed number of hours, a matter which had been previously raised with the company during several rounds of discussions.⁵ See AR, Tab 61, Letter from Procuring Contracting Officer to Alliant, Oct. 12, 2011 at 1 (noting that the intent of the amendments and discussion letters is to provide the offerors a fair and equal opportunity to explain [DELETED] hours and rates for the NC facility); Agency Legal Memorandum, at 19.

We find unpersuasive Alliant's assertion that the agency is acting improperly by not allowing it to revise its price because of the changes made during the course of corrective action. The original RFP advised offerors that the government would assess the "Man Power Staffing Plan of the monthly distribution of labor hours for the design and construction of the facility by craft (i.e., engineering disciplines, laborers, electricians)." Original RFP, § M. Amendment 8 clarified that the government would "review the Offeror's break-out of labor hours [in the Man Power Staffing Plan] by: 1) Discipline/craft for each of the 3 phases individually (design, construction, commissioning/start-up); 2) Individual phases (design, construction, commissioning/start-up total; 3) Total for all 3 phases added together." RFP, Amend. 8, ¶ 1(g).

We agree with Alliant that amendment 8 does not categorically state that offerors are not permitted to change the number of hours proposed. That said, in subsequent communications with the protester, the agency stated that its intent was to put offerors on notice of the precise way in which it would test the NC facility hours for reasonableness, to permit offerors an opportunity to explain the number of hours proposed, and to provide an opportunity to submit [DELETED].

Moreover, the overarching goal of the agency was to conduct one final round of discussions, in order to narrowly remedy the concerns that led to the corrective action. The protester's suggestion that the agency has improperly precluded it from revising its price proposal in light of changes it will make to its technical proposal lacks merit, because it is unreasonable to interpret the RFP, as amended, as permitting the technical proposal revisions contemplated by the protester. We also note that Alliant has provided no specifics about how it would need to change its proposal to account for the allegedly new basis for evaluation. In conclusion, given

⁵ Alliant also argues that BAE will be required to make price changes based on necessary changes to its technical proposal, otherwise there will be a price technical mismatch in BAE's proposal. Such concerns, however, are properly raised by BAE, not Alliant.

the limited nature of this change, we see no credible basis to conclude that Alliant would need to make any change to its proposed number of NC facility hours or price.⁶

Scope of Discussions

Alliant next argues that the agency's discussions with Alliant are unduly limited in scope. In this regard, Alliant complains that it will not have an opportunity to address weaknesses identified by the agency during its debriefing. According to Alliant, this reflects disparate treatment since BAE is being afforded an opportunity to address deficiencies previously identified during post-FPR discussions, and the conduct of those discussions is what ultimately led the agency to take corrective action.

As a general matter, agency personnel may not conduct discussions that favor one offeror over another. Federal Acquisition Regulation (FAR) § 15.306(e)(1). While offerors must be given an equal opportunity to revise their proposals, discussions need not be identical; rather, discussions must be tailored to each offeror's proposal. FAR §§ 15.306(d)(1), 15.306(e)(1); Engineered Elec. Co. d/b/a DRS Vermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2008 CPD ¶ 4 at 7. An agency is not required to afford an offeror multiple opportunities to cure a weakness remaining in a proposal that was previously the subject of discussions. Portfolio Disposition Mgmt. Group, LLC, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 2. Having sufficiently led an offeror to the area of concern in earlier rounds of discussions, an agency is not required to raise a matter again in any subsequent round of discussions, even where the matter continued to be considered a concern by the agency. USFilter Operating Servs., Inc., B-293215, Feb. 10, 2004, 2004 CPD ¶ 64 at 3.

Although Alliant raises the specter of disparate treatment, it fails to establish the basis for such a claim. Underlying Alliant's assertion of disparate treatment is the notion that BAE is being afforded an opportunity to address deficiencies in its proposal whereas Alliant is being denied such an opportunity. Regarding the latter point, the agency argues that it previously afforded Alliant with several opportunities to address the weaknesses identified in its debriefing and that it is therefore not required to expand the scope of its corrective action to revisit these issues. In its

⁶ Given that the agency intends to revisit its evaluation of offerors' staffing plans, it is somewhat premature to conclude that the previously assessed weakness associated with Alliant's staffing levels for NC facility design will in fact ultimately carry forward in the next phase of the agency's evaluation. In the event that it does, and Alliant believes such a finding to be unreasonable, it may challenge that evaluation finding after award.

report, the agency specifically describes how it had previously raised each of the weaknesses with Alliant.

For example, the protester alleged a lack of meaningful discussions regarding Factor 1, Subfactor 1, Management/Technical Plan. Protest at 27. The agency contends that it twice alerted the protester to weaknesses with the plan. See Agency Report at 3, citing Discussion Letters, Dec. 1, 2010 & Dec. 7, 2010. Because Alliant's comments do not meaningfully rebut the agency's position that it has already provided Alliant with multiple rounds of discussions on this weakness, we have no basis to conclude otherwise. See Comments, Dec. 12, 2011 at 7 (reiterating its complaint that "Alliant protested a lack of meaningful discussions under the Management/Technical Optimization, NC Facility subfactors").

We also disagree with Alliant's contention that the agency is improperly providing only BAE with an additional opportunity to address deficiencies in its proposal. The assumptions and ground rules contained in BAE's proposal--which rendered the proposal unacceptable, and which rest at the heart of the agency's corrective action--were only first raised with BAE after it was selected for award. Through its limited corrective action, the agency is effectively providing BAE with its first opportunity to address the agency's concerns regarding apparent deficiencies in its proposal.

To the extent Alliant is arguing that the Army is improperly allowing BAE to address Army concerns about BAE's [DELETED], Alliant, Dec. 12, Comments at 4, Alliant is mistaken. The record reflects that BAE did not have an outstanding weakness with regard to the [DELETED] issue. To the contrary, BAE's response to the agency's final round of discussions on this "significant weakness" resolved the matter to the agency's satisfaction. See, AR, Tab 11-03b, RADFORD Source Selection Evaluation Board Report, at 279-80 (reflecting that [DELETED] weakness had been resolved by BAE in its final proposal submission). As such, there is no weakness for the agency to improperly resurrect with BAE. Moreover, it is not apparent how the agency's concern regarding BAE's assumption about [DELETED], a matter which is the subject of the agency's corrective action, is even related to [DELETED] issue. Rather, the agency's concern regarding this assumption reflects a distinct concern--and one to which BAE has not previously been afforded an opportunity to respond during the course of this competition.

The protest is denied.

Lynn H. Gibson
General Counsel