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Decision

Matter of: Hydro Engineering, Inc.

File: B-407603.4

Date: February 25, 2013

James L. Barnett, Esq., Holland & Hart, LLP, for the protester.
Maj. Joseph Venghaus, Department of the Army, for the agency.
Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's corrective action is denied where, in response to an earlier protest, the agency concluded that it had improperly conducted discussions with only the awardee and then determined to take corrective action.

DECISION

Hydro Engineering, Inc., of Salt Lake City, Utah, protests the Department of the Army's determination to take corrective action in connection with an earlier protest filed by Enviro Safety Technologies, of Tempe, Arizona, challenging the award of a fixed-price contract to Hydro under request for proposals (RFP) No. W9124N-12-R-0054, for wash racks. Enviro Safety complained, among other things, that the agency had conducted discussions in an unequal manner.

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside, sought offers for a portable wash rack system and associated services for four specified locations. The Army received four proposals, including Enviro Safety's and Hydro's. Only Enviro Safety's proposal was found to be technically acceptable; however, the Army found that Enviro Safety's price was unreasonably high.

The contracting officer conducted discussions with all offerors and obtained revised proposals.¹ Hydro's revised proposal was found to be technically unacceptable. Agency Report (AR), Tab 5, 2nd Technical Evaluations, at 1. By letter of September 20, 2012, the Army asked Hydro to address two identified deficiencies and informed Hydro that it needed to participate in "discussions to address the above described deficiency" and stated that a final selection decision would be made based on Hydro's proposal revision "if all requirements are met." AR, Tab 9, Request for 2nd Revised Proposal.

In response, Hydro submitted a September 21, 2012 letter to explain why its proposal was not deficient. Hydro included a drawing from its 1st revised proposal, which Hydro annotated, "to assist and guide the technical reviewer(s) to each concern cited" in the agency's discussion letter. AR, Tab 8, Protester's 2nd Revised Proposal, at 1. In this regard, Hydro informed the agency that "[b]oth submitted designs fall within Hydro Engineering, Inc. patented wash rack designs," and that Hydro could provide whichever design the agency preferred. Id. at 2.

Based upon her review of Hydro's 2nd revised proposal, the contracting officer determined that Hydro's 1st revised proposal "had not been deficient after all." AR, Tab 2, Contracting Officer's Statement, at 1. Award was made to Hydro based on its lowest-priced, technically acceptable offer.

Enviro Safety protested to our Office, arguing that Hydro (and the other offeror) could not offer compliant wash racks. Following its receipt of the agency's report, Enviro Safety filed a supplemental protest, arguing that the Army conducted unequal discussions with the offerors, since the agency provided only Hydro the opportunity to submit a second revised proposal.

The Army decided to take corrective action in response to Enviro Safety's supplemental protest, stating that it would reopen discussions, request revised proposals from all offerors, and make a new selection decision. We dismissed Enviro Safety's protest as academic.

Hydro protests the agency's decision to take corrective action in response to Enviro Safety's protest.

DISCUSSION

Hydro raises a number of challenges to the agency's corrective action. Hydro first contends that it was "perfectly appropriate under the circumstances" for the agency to engage in an additional round of discussions with only Hydro. Hydro also argues that reopening the competition is improper because Hydro's price was revealed and

¹ One offeror withdrew from the competition without submitting a revised proposal.

because doing so “inappropriately rewards the Army for its own alleged shortcomings.” Protest at 1. Finally, Hydro argues that, given that the contracting officer ultimately recognized from its review of Hydro’s 2nd revised proposal that the protester’s 1st revised proposal was acceptable, other offerors, such as Enviro Safety, were not prejudiced by the second round of discussions with only Hydro.

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. Rockville Mailing Serv., Inc., B-270161, B-27016.2, Apr. 10, 1996, 96-1 CPD ¶ 184. As a general matter, the details of a 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. 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, Hydro’s underlying premise--that the agency was justified in conducting discussions with only Hydro, or that the exchange between the Army and Hydro constituted an allowable clarification, rather than improper discussions--is incorrect as a matter of law.

The Federal Acquisition Regulation (FAR) prohibits a contracting agency from engaging in discussions that favor one offeror over another, see FAR § 15.306(e)(1); and requires that discussions, when held, be conducted with each offeror within the competitive range. FAR §15.306(d)(1); see also Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. In addition, the contracting officer is required to establish a common cut-off date for receipt of final proposal revisions. FAR § 15.307(b). The underlying purpose of the requirement for a common cutoff date is to ensure that all offerors are being treated fairly and on an equal basis. OMNIPLEX World Servs. Corp., B-406251, B-406251.2, Mar. 14, 2012, 2012 CPD ¶113 at 6. Here, Hydro alone was provided with a second opportunity to respond to the agency’s concerns relating to its proposal and to provide a revised proposal.

Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. EERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4. No matter how minimal Hydro insists its second revisions were, the fact remains that Hydro was permitted to revise its proposal, and that it was not until it was permitted to do so that the agency found Hydro’s proposal acceptable.

Given the agency’s legitimate concerns with respect to the manner in which discussions were conducted, we find the agency’s decision to take corrective action in response to Enviro Safety’s protest reasonable. In this regard, the corrective

action addresses the issue that was protested, and nothing in Hydro's protest demonstrates that the agency's approach was an abuse of discretion. See Intermarkets Global, B-400660.10, B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 3. It is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has a reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Main Bldg. Maintenance, Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. Where, as here, reopening the competition is appropriate to remedy an apparent procurement error, prior disclosure of an offeror's price does not preclude reopening the competition. See Roxco, Ltd., B-277545, Oct. 27, 1997, 97-2 CPD ¶ 117 at 5.

The protest is denied.

Susan A. Poling
General Counsel