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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Harris Corporation

File: B-409148.3; B-409148.4

Date: July 30, 2014

Lori Ann Lange, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, PC, for the protester.

Mark D. Colley, Esq., Dominique L. Casimir, Esq., and Emma V. Broomfield, Esq., Arnold & Porter LLP, for the intervenor.

Debra J. Talley, Esq., U.S. Army Materiel Command, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where Government Accountability Office (GAO) sustained protest on grounds that awardee did not meet a material solicitation requirement, and agency implements corrective action that results in awardee's proposal being found unacceptable, GAO will not consider subsequent protest by awardee that original protester's proposal also should have been found unacceptable, where the challenge does not go beyond speculating about the contents of the original protester's proposal.

DECISION

Harris Corporation, of Lynchburg, Virginia, protests the award of a contract to Motorola Solutions, Inc., of Columbia, Maryland, under request for proposals (RFP) No. W91CRB-13-R-0024, issued by the Department of the Army, U.S. Army Materiel Command, for a land mobile radio (LMR) system for the Detroit Arsenal, Michigan. Harris maintains that the terms of the RFP exceed the agency's requirements, and that the Army failed to engage in discussions with it and misevaluated proposals in making its award decision.

We dismiss the protest.

This is our second occasion to consider the Army's actions in connection with this acquisition. Motorola filed a previous protest challenging the agency's award of a contract to Harris, maintaining, among other things, that, because Harris did not propose a radio that was approved by the Michigan Public Safety Communication

System (MPSCS), its proposal should have been rejected as technically unacceptable. We sustained Motorola's protest, finding that the RFP required that any radio proposed had to be approved by the MPSCS at the time of proposal submission. Motorola Solutions, Inc., B-409148, B-409148.2, Jan 28, 2014, 2014 CPD ¶ 59.

In this latter connection, we pointed out that the RFP required specific, written agreements between the offeror and any third-party equipment manufacturer where the equipment being furnished was not manufactured by the concern submitting the proposal. In the case of Harris, it offered to furnish Motorola radios, but did not include the required written agreement demonstrating that it was able to purchase the Motorola radios from Motorola. We reached our conclusion because Motorola provided persuasive evidence showing that it required its radio vendors to obtain express permission from Motorola to sell the radios that had been offered by Harris, and because Motorola had not granted (and would not grant) permission to sell the radios to Harris in light of the fact that the firm was a direct competitor of Motorola.

We recommended that the Army reevaluate proposals in a manner consistent with our prior decision. We further recommended that, should the agency conclude that Harris was not properly in line for award of the contract, the Army should terminate Harris's contract, and make award to the concern identified by the agency as the successful offeror, if otherwise proper.

After receiving our first decision, the Army initiated corrective action. By letter dated March 18, 2014, to Harris, the agency advised the firm that it had reevaluated the Harris proposal and determined that it was technically unacceptable. Initial Protest, exh. 4, Letter to Harris, March 18, 2014. In that letter, the Army advised Harris that it was opening discussions with the firm, and requesting its response by March 25. Id. Thereafter, the agency sent Harris a series of letters, first extending the deadline for submitting its response to the agency's discussions until March 31; then suspending the deadline for submitting its discussion response indefinitely; and finally, by letter dated April 8, advising the firm that it was cancelling discussions and would make its source selection based on the proposals that had been submitted previously. Initial Protest, exh. 7, Letter to Harris, Apr. 8, 2014. By letter dated April 21, the Army advised Harris that it had reevaluated proposals and had selected Motorola for award. Initial Protest, exh. 8, Letter to Harris, Apr. 21, 2014.

On April 30, Harris filed an initial protest with our Office, alleging that the agency's solicitation improperly overstated the Army's needs; that the agency improperly failed to engage in discussions; and that the agency treated Harris and Motorola unequally in its reevaluation of proposals, and should have found the Motorola proposal unacceptable for not including all necessary written agreements between it and any third-party vendors whose equipment was being furnished by Motorola. On May 6, the Army provided Harris with a debriefing. Thereafter, by letter dated May

9, Harris filed what it characterized as a supplemental protest with our Office, essentially restating its earlier bases for protest.

We dismiss Harris's protest. Harris first asserts that the RFP exceeds the agency's requirements because it requires offerors to provide written agreements with manufacturers that are providing equipment not manufactured by the offeror, and because the RFP requires offerors to propose radios that are approved by the MPSCS as of the date proposals are submitted. These assertions are untimely challenges to the terms of the RFP. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014) challenges to the terms of a solicitation must be filed before the deadline for submitting proposals.

Harris maintains that this aspect of its protest is timely because it did not know until after the agency advised it of its decision to make award to Motorola that the agency actually would enforce these solicitation requirements. However, there is no basis for Harris to have believed that the agency would not enforce the express terms of the RFP, and Harris has not explained why it actually would have believed (or, in fact, did believe) that the agency would not enforce the express terms of the RFP.

Harris's challenge to the agency's decision not to engage in discussions also is untimely. Allegations challenging an agency's adverse action, to be timely, must be filed within 10 days of when the protester knows or should know of its basis for protest. 4 C.F.R. § 21.2(a)(2). Here, the Army advised Harris by letter dated April 8 that the agency was cancelling the discussions it previously had initiated as part of its initial corrective action. To be timely, any protest challenging this aspect of the agency's actions had to be filed no later than April 18. Since Harris did not challenge the agency's decision to cancel discussions until April 30, this aspect of its protest is untimely as well.¹

¹ In opposing the dismissal of this aspect of its protest, Harris suggests that it did not know until being advised of the agency's source selection decision that the agency viewed its proposal as deficient for lacking a written agreement with Motorola and, by extension, that it was not afforded adequate discussions. Harris's original letter of protest, however, specifically identifies the agency's cancellation of discussions as the underlying factual predicate for its allegation, see Protest, Apr. 30, 2014, at 14, which provided as follows:

The Army, however, subsequently cancelled the discussions and would not allow Harris to submit a revised proposal responding to IFN [item for negotiation] No. 1. As a result, Harris was deprived of the opportunity to respond to a deficiency identified by the Army.

Finally, Harris's challenge to the evaluation of the Motorola proposal is based entirely on its speculation regarding the contents of the Motorola proposal. Specifically, Harris contends that "... it is highly likely that Motorola did not include written business partnership/agreements for the pieces of equipment for the LMRS [land mobile radio system] that Motorola does not manufacture itself" Protest, April 30, 2014, at 10.

Here, the acceptability of proposals in terms of meeting the RFP's requirement for including written agreements between offerors and any third-party manufacturer whose equipment was being offered was directly at issue in the earlier protest. In the earlier case, Motorola was uniquely-placed to raise its challenge: Harris was offering a Motorola radio, Harris was required by the solicitation to have a written agreement to offer equipment from another manufacturer, and Motorola had provided no such agreement. In addition, while Harris was not required to intervene in the earlier protest, if Harris had participated, it would have had an opportunity to review the Motorola proposal as part of the record, and could have advanced any and all challenges to the acceptability of the Motorola proposal at that time. At this juncture, Harris is speculating that the Motorola proposal also did not provide written agreements for non-Motorola equipment, but Harris has no information to support its claim. Such speculation, without more, does not meet the requirements of our Bid Protest Regulations that a protest include a detailed statement of the legal and factual grounds for protest. 4 C.F.R. § 21.1(c)(4); see Coffman Specialties, Inc., B-400706.2, Nov. 12, 2008, 2008 CPD ¶ 211.

Harris also characterizes its current protest as a challenge to the agency's allegedly unequal reevaluation of proposals in the wake of our earlier decision. Harris therefore maintains that it could not have known of its basis for protest before the agency announced the results of its reevaluation. However, notwithstanding Harris's characterization of its argument, it is, in the final analysis, based on speculation about Motorola's proposal.

The protest is dismissed.

Susan A. Poling
General Counsel