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**Comptroller General
of the United States**

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

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Decision

Matter of: Strand Hunt Construction, Inc.

File: B-292415

Date: September 9, 2003

Terry R. Marston II, Esq., Marston & Heffernan, for the protester.
David M. Freeman, Esq., Freeman & Watts, for H.C. Price Co., the intervenor.
Kevin Finnigan, Esq., U.S. Army Corps of Engineers, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest of corrective action taken in response to a post-award agency-level protest is denied where agency determined that it had made award on the basis of a technically noncompliant proposal, and that the solicitation exceeded the agency's actual minimum needs. Agency decision to terminate contract, amend the solicitation and reopen the competition constitutes reasonable means of correcting the errors in the procurement.

DECISION

Strand Hunt Construction, Inc. protests the decision by the United States Army Corps of Engineers to terminate for convenience Strand's contract awarded under solicitation No. DACA85-02-R-0024, amend the RFP and conduct a new evaluation and make a "best value" determination based on the new offers. The Corps's action is based on its conclusion that corrective action is required, made in response to an agency-level protest which had challenged the award on a number of grounds, in particular that the Corps had waived or relaxed certain solicitation requirements solely for Strand. The Corps's review led it to conclude that Strand's proposal was noncompliant with two material RFP technical requirements, and that the solicitation did not accurately reflect the agency's actual minimum needs. Strand asserts that the Corps lacks a reasonable basis to terminate its contract and begin the process anew because the firm that filed the agency-level protest was not prejudiced by the Corps's actions.

We deny the protest.

The RFP, issued on October 1, 2002, sought proposals for the design and construction of the central heat and power plant (CHPP) facility upgrades at the Clear Air Force Station (AFS) in Alaska. The CHPP facility provides heat and electricity through steam turbine generators and its existing major equipment includes three coal-burning boilers with a mechanical ash handling system. The project includes the design and construction of a one-story building addition to the existing CHPP facility to house three baghouse collection systems and associated equipment. The baghouse system is designed to remove particulate matter from each of the three existing coal-burning boilers at the CHPP facility. RFP amend. 2, §§ 01010-12, 01010-60.

The RFP contemplated award of a fixed-price plus delivery incentive design/build contract and the proposal schedule included various optional fixed-price line items. RFP amend. 2, Proposal Schedule at 1-2, and § 00800-13. Award was to be made on a “best value” basis with price and the non-price factors considered equally important. The RFP specified that the work must conform to the detailed performance and prescriptive based drawings and specifications, including baghouse specifications. As relevant here, under the heading “design criteria” the baghouse specifications required that (1) the maximum net pressure differential between manifolds (portions) of the baghouse should be 6 inches, and that (2) the minimum spacing between individual bags within the baghouse (bag-to-bag clearance) must be 2.5 inches. RFP amend. 2, ¶ 2.10.4.a (2) at § 01010-62. While this was not disclosed in the solicitation, the agency explains that the baghouse specifications were based on baghouses manufactured by [DELETED] and that many of the requirements were specific to the [DELETED] baghouse model. The agency also points out that the RFP did not state that a brand name (or brand name or equal) acquisition was contemplated. Contracting Officer’s Statement at 3.

[DELETED] proposals were submitted by the December 3 extended closing date. Of these, [DELETED] offerors, including H.C. Price, proposed a baghouse manufactured by [DELETED] while Strand’s proposal was based upon a [DELETED] baghouse model. After an initial evaluation by the source selection evaluation board (SSEB), all [DELETED] proposals were included in the competitive range. By letters dated December 26, the agency commenced discussions with each competitive range offeror. In the letter to Strand, the agency noted, among other things, that:

[t]he baghouse modules included in your proposal do not appear to meet the RFP requirements, including but not limited to:

* * * * *

- The normal pressure drop through the baghouses as proposed is higher than allowed

in the RFP, and the guaranteed pressure drop is even higher.

- Minimum bag-to-bag clearance is noted as 2", where the RFP requires 2.5".

Agency Report (AR) exh. 36, Letter from the Contracting Officer to Strand, Dec. 26, 2002, at 4 (emphasis in original).

Each competitive range offeror submitted a response to the agency's discussion questions by the January 7, 2003 due date. Strand responded to the agency's concerns regarding its proposed baghouse system as follows:

- The expected pressure loss across the baghouse is [6 inches] during normal operation which is consistent with the specification. [DELETED] has allowed [1 inch] as a margin of safety for making our performance guarantee.

* * * * *

- The actual space between support cages is just over 2 inches, but is less than 2.5 inches. [DELETED] has used this spacing . . . without having a problem due to bag-to-bag touching . . . [DELETED] could not adjust this spacing without making major design changes to our standard design.

AR exh. 36, Response from Strand to Discussion Questions, Jan. 7, 2003, at 20-21. After reviewing the discussion responses, the agency continued discussions with the offerors until March 6, after which final proposal revisions (FPR) were requested and were received on March 7. As relevant here, in its FPR Strand continued to offer a baghouse system with a maximum net pressure differential of 7 inches and bag spacing of 2 inches, as proposed in its initial proposal referenced above. Id., Strand FPR, Mar. 7, 2003, Strand Proposal, at 2 of 15, and 4 of 15. The final evaluation results were as follows:

[DELETED]

AR exh. 30, Source Selection Evaluation Decision, at 7.

The source selection authority (SSA) reviewed the evaluation findings and determined that [DELETED]. The SSA further determined that [DELETED]. Accordingly, the SSA awarded a contract for the base items to Strand [DELETED]. Id. After receiving notice of the award, Price then filed a protest with the agency,

which was amended after Price received additional documents. Among other things, Price challenged the technical evaluations, arguing that the Corps “accepted certain deviations from the RFP requirements” proposed by Strand thereby impermissibly favoring Strand over Price and the other competitive range offerors. AR exh. 22, Amended Agency-Level Protest, Apr. 16, 2003, at 1.

After reviewing the protest, as supplemented, the Corps concluded that it had improperly waived or relaxed material baghouse specification requirements for Strand. Specifically, the agency noted that Strand’s proposal did not meet the solicitation requirement for maximum net differential pressure between manifolds of 6 inches or the 2.5 inch minimum bag-to-bag clearance requirement. AR exh.1, Contracting Officer’s Memorandum for Record. As a result, the Corps determined that it had erred in accepting Strand’s nonconforming proposal. Further, in reviewing the procurement, the agency concluded that the baghouse specification, which favored a single manufacturer [DELETED] “was, in effect, a proprietary specification that did not state [the agency’s] minimum needs and did not give potential proposers an accurate statement of our requirements.” *Id.* Consequently, because of these defects, the Corps decided to terminate Strand’s contract and amend the RFP to set forth the agency’s actual minimum needs.

Strand challenges the agency’s actions on several grounds. Strand principally objects to the agency’s conclusion that its noncompliance with the referenced baghouse specifications constitutes a material deviation from the RFP requirements. Protester’s Comments at 12. Strand concedes that its baghouse system does not meet these specification requirements, but contends that any differences between the configuration of its [DELETED] baghouse model and the [DELETED] baghouse are immaterial because these differences do not affect the nature or the performance of the baghouse system. Protest at 10-13. In its view, the [DELETED] baghouse is equal to the [DELETED] model in functionality; therefore, Strand asserts, the differences in the configuration of the two models do not constitute deviations from the specifications. Protest at 13-14. Strand alternatively contends that even if the agency erred in making award to Strand, this did not warrant corrective action because there was no showing of competitive prejudice. *Id.*; Protester’s Comments at 12.

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, the agency may take corrective action, even if it is not certain that a protest of the procurement would be sustained. Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3.

The record provides no basis to object to the Corps's corrective action. A proposal that fails to conform to one or more material requirements of the RFP is technically unacceptable and may not form the basis for award. Integrated Sys. Group, B-272336, B-272336.2, Sept. 27, 1996, 96-2 CPD ¶ 144 at 6. Here, the RFP set forth discrete minimum specification requirements for the baghouse system, which were material terms of the solicitation. The RFP informed offerors that all proposed baghouses must meet the specified design criteria and that the "baghouse arrangement and installation shall be as shown on the drawings and specified." RFP amend. 2, ¶ 2.10.4.a.(2), at § 01010-60. It is undisputed that the baghouse system proposed in Strand's proposal did not satisfy the maximum net pressure differential and the bag-to-bag clearance requirements of the design criteria for the baghouse system. As previously stated, the agency advised Strand, during written discussions, that its proposed baghouse system did not meet these design requirements. Strand is simply incorrect when it contends that the baghouse specifications that it failed to comply with in its final proposal were immaterial. Strand's proposed [DELETED] baghouse model, regardless of whether (as Strand insists) it was functionally equivalent to the [DELETED] baghouse, did not meet two of the stated design requirements for the baghouse system, and could not do so without major design changes. Strand's response to the agency made it clear that compliance with these design criteria would necessitate major design changes to the standard [DELETED] baghouse design. Strand's failure to propose a baghouse system that met these requirements rendered its proposal noncompliant with material solicitation provisions and, thus, the proposal could not form a valid basis for award.

The agency's acceptance of Strand's noncompliant proposal meant that the agency waived these design criteria for Strand, which resulted in an unfair and unequal evaluation. It is a fundamental principle of federal procurement that competition must be conducted on an equal basis; that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. SWR, Inc., B-284075, B-284075.2, Feb. 16, 2000, 2000 CPD ¶ 43 at 3. Accordingly, the Corps reasonably determined that it was necessary to terminate Strand's contract in order to correct the improper award. The protester nonetheless argues that acceptance of its significantly lower-priced proposal would not have prejudiced other offerors since its [DELETED] baghouse model is more expensive than that of the [DELETED] model offered by the other competitive range offerors. Protest at 4. As support, Strand has provided a cost comparison of the [DELETED] baghouses which purports to show that the [DELETED] model was higher priced than the [DELETED] model [DELETED]. Protest, attach. A.

We are unpersuaded by Strand's argument that other offerors were not prejudiced by the agency's admittedly improper actions here. The Corps found that the RFP specifications exceeded the agency's actual needs. As explained above, the baghouse specifications were based on a baghouse system designed by [DELETED], and the Corps reports that it had determined that the agency did not need a

[DELETED] baghouse system. Nor was it necessary, the agency reports, to require offerors to comply with baghouse specifications that were based on the [DELETED] baghouse model where its needs could be met by other equipment. In this regard, the agency has identified manufacturers, other than [DELETED], whose baghouse models would meet the revised RFP requirements and could result in a materially different competition. We therefore conclude that acceptance of Strand's non-conforming proposal prejudiced offerors who could have proposed other solutions, potentially at a lower cost, if the competition had not been improperly restricted. In sum, we find reasonable the Corps's corrective action of amending the RFP to state its actual needs and obtaining revised proposals from the competitive range offerors based on the revised RFP requirements.

Finally, Strand contends that the corrective action will result in an impermissible auction. Since Federal Acquisition Regulation § 15.306(e)(3) does not prohibit auctions, and where, as here, the corrective action taken by the agency was not improper, the request for revised price proposals will not constitute an improper auction. The possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over any possible regulatory constraints on auction techniques. Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 6.

The protest is denied.

Anthony H. Gamboa
General Counsel