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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: McKean Defense Group–Information Technology, LLC

File: B-401702.2

Date: January 11, 2010

Michael A. Hordell, Esq., Stanley R. Soya, Esq., and Heather Kilgore Weiner, Esq., Pepper Hamilton LLP, for the protester.

Heather A. James, Esq., J. Bradley Aaron, Esq., Whiteford, Taylor & Preston L.L.P., for Basic Commerce and Industries, Inc., an intervenor.

Stephen H.S. Tryon, Esq., Department of the Navy, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's corrective action, which included opening discussions with all offerors in the competitive range, is denied where the agency reasonably concluded that in addition to correcting the flawed cost realism evaluation, discussions should be opened with the offerors, rather than proceeding with award on the initial proposals.

DECISION

McKean Defense Group–Information Technology, LLC, of Philadelphia, Pennsylvania, a small business, protests the terms of corrective action announced by the Department of the Navy, in response to an earlier protest by Basic Commerce and Industries, Inc. (BCI), of Moorestown, New Jersey. BCI had protested the decision to issue a task order to McKean, under task order solicitation No. N00024-08-R-3331 for services to support the Navy Research, Development, Test and Evaluation network, the Navy/Marine Corps Intranet contract, and the Navy's Next General Enterprise Network. The task order solicitation was issued to small businesses holding Navy Seaport-e contracts. In this protest, McKean objects to the Navy's plan to open discussions to allow the submission of revised proposals from all offerors.

We deny the protest.

BACKGROUND

On November 17, 2008, the Navy posted the solicitation electronically for firms holding the Seaport-e indefinite-delivery/indefinite-quantity (ID/IQ) contracts for “Zone I.” Agency Report at 2.¹ In December, six firms submitted task order proposals, including both BCI and McKean. *Id.* After evaluating the task order proposals, the Navy selected McKean for award, and issued a task order on July 22, 2009. BCI requested a debriefing, which was held on July 24.

On August 3, BCI protested the selection of McKean. The Navy submitted an agency report on September 3, and both BCI and McKean filed comments on the agency report on September 16.² Among the protest issues was an allegation that McKean had engaged in a bait-and-switch of personnel needed to perform the contract. According to BCI, although the terms of the solicitation required vendors to identify key personnel, when McKean’s performance began, it immediately hired BCI’s incumbent personnel.

In response, the Navy and McKean both argued that McKean had proposed its own personnel, but that upon award BCI obstructed the transition. The Navy then directed McKean to hire incumbent personnel in order to ensure continued services. As a result, McKean has been performing these services using many former BCI personnel.

After reviewing the agency report and comments, our Office notified the parties that we had concluded that a hearing would be helpful to understand the basis for the agency’s evaluation judgments, particularly with respect to the cost realism evaluation.

On October 9, the Navy notified our Office and the parties that the agency would take corrective action, because it had concluded that McKean’s costs had been misevaluated in the cost realism analysis. The Navy advised that it intended to hold discussions with BCI and McKean, request and evaluate revised proposals, and make a new source selection decision. With respect to its decision to open discussions, the Navy explained that it believed that “the passage of time [since the original task order proposals] necessitate[d] the requirement for revised technical proposals to anticipate any personnel/resume changes.” Corrective Action Letter from Navy Counsel to GAO, Oct. 9, 2009, at 1. Since that corrective action rendered BCI’s protest against the initial award academic, we dismissed BCI’s protest. Basic Commerce & Indus., Inc., B-401702, Oct. 20, 2009.

¹ Citations to the agency report refer to the Navy’s agency report filed in the original protest by BCI.

² At the request of counsel for BCI, our Office extended the due date for comments on the agency report.

This protest followed.

DISCUSSION

McKean argues that the Navy's proposed corrective action goes beyond what is required to address any concern with the cost evaluation, and is therefore unreasonable.³ Since McKean has hired many of the incumbent personnel at the direction of the Navy, McKean argues that requiring it to submit a revised proposal will harm its chances of award.

Our Office requested that McKean further explain why it is necessary to restrict the Navy's discretion in taking corrective action here. McKean responded that BCI was not prejudiced by any error in the cost realism analysis because McKean's evaluated cost was significantly lower than BCI's. Thus, in McKean's view, the error in the cost realism analysis did not prejudice BCI, while the reopening of discussions will cause significant harm to McKean's competitive position. Accordingly, McKean argues that the Navy must limit its corrective action to a reevaluation of the proposals submitted previously. McKean Response to GAO, Nov. 3, 2009, at 5 (citing Security Consultants Group, Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53). We disagree.

In negotiated procurements, agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. MayaTech Corp., B-400491.4, B-400491.5, Feb. 25, 2009, 2009 CPD ¶ 55 at 3. Where the corrective action taken by an agency is otherwise unobjectionable, a request for revised price proposals is not improper merely because the awardee's price has been exposed. Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 6. We have recognized a limited exception to that rule where the record establishes that there was no impropriety in the original evaluation and award, or that an actual impropriety did not result in any prejudice to offerors; where this is the case, reopening the competition after prices have been disclosed does not provide any benefit to the procurement system that would justify compromising the offerors' competitive positions. Security Consultants Group, *supra*, at 2-3; Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67 at 6, *recon. denied*, Gunn Van Lines; Dept. of the Navy-Recon., B-248131.2, B-248131.4, Nov. 10, 1992, 92-2 CPD ¶ 336.

³ Although McKean's protest was filed before the agency initiated discussions, we do not view the protest as premature; rather, McKean was required to file a timely protest once the Navy made clear that its corrective action would include discussions. *Cf.* Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8 (protest objecting to expressly stated terms of corrective action was untimely where filed after award).

The Navy advises that it needs to reopen discussions to address potentially significant changes, due to the passage of time, in how the offerors will meet the agency's requirements. In our view, this is a matter where the agency has considerable discretion and we will not substitute our views for the Navy's on how the agency should proceed, absent a showing that this discretion is being abused. We see no such showing here.

Rather than being inconsistent with the rationale of our decision in Security Consultants Group, we view that decision as involving a critical difference. There, after identifying a flaw (the solicitation did not disclose that the past performance factor was nearly three times more significant than either of the other non-price factors), it appeared that none of the offerors had been competitively prejudiced by the incorrect weighting described in the solicitation. Nevertheless, the agency proposed to request revised proposals, but presented no reason to reopen the competition. In contrast, here, the Navy has presented both a flaw requiring corrective action (an error in the cost realism evaluation) and a reasonable basis why reopening the competition is appropriate to achieve a fair competition--i.e., the likelihood that one or both offerors would need to make significant personnel/resume changes in their initial proposals.

In our view the Navy has shown a reasonable basis for conducting discussions and requesting revised proposals. Doing so is within the discretion of the Navy to determine the scope of corrective action, and therefore we will not substitute our judgment for the agency's.

The protest is denied.

Lynn H. Gibson
Acting General Counsel