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Decision

Matter of: Northrop Grumman Technical Services, Inc.

File: B-404636.11

Date: June 15, 2011

John W. Chierichella, Esq., Anne B. Perry, Esq., and Townsend L. Bourne, Esq., Sheppard, Mullin, Richter & Hampton, for the protester.
Debra J. Talley, Esq., Department of the Army, for the agency.
David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency corrective action did not include reopening discussions with all offerors and the opportunity to generally revise proposals is denied where the corrective action--reevaluation and reexamination of performance validations for all offerors, followed by a new source selection decision--was appropriate to remedy the concerns identified during an outcome prediction alternative dispute resolution conference.

DECISION

Northrop Grumman Technical Services, Inc. (NGTS) protests the corrective action taken by the Department of the Army, U.S. Army Materiel Command (AMC), in response to protests by NGTS, L-3 Communications Integrated Systems, and Lockheed Martin Corporation (LM), against the Army's award of a contract to The Boeing Company, under request for proposals (RFP) No. W15P7T-10-R-S206, for the development and initial production of the Enhanced Medium Altitude Reconnaissance and Surveillance System (EMARSS). NGTS asserts that the corrective action is unduly limited.

We deny the protest.

The EMARSS is the Army's future airborne intelligence collection, processing, and targeting support system. EMARSS is a manned multi-intelligence, airborne intelligence surveillance and reconnaissance (ISR) system that provides a persistent capability to detect, locate, classify/identify, and track surface targets in day/night, near-all-weather conditions with a high degree of timeliness and accuracy. The

EMARSS will be integrated on the government-directed Hawker Beechcraft King Air 350ER aircraft, with the modified aircraft to include Communications Intelligence (COMINT), Aerial Precision Guidance (APG), and Electro Optic/Infra Red (EO/IR) sensors, two operator workstations, Satellite Communications (SATCOM), additional communications equipment, Aircraft Survivability Equipment (ASE), and standard military avionics systems. RFP Executive Summary; Performance Work Statement § 2.1.

The solicitation provided for award on a “best value” basis considering four evaluation factors: technical, including subfactors for integration approach and aircraft approach; cost/price; performance risk, reflecting an assessment of the offeror’s likelihood of success based on recent and relevant past performance by the offeror and its major subcontractors; and small business participation. RFP § M-3. Of particular importance to the subsequent protests, offerors were required to demonstrate in their proposals (with a “complete discussion and analysis”) that their proposed EMARSS systems will meet certain minimum, threshold performance requirements identified in the solicitation Performance Based Specification (PBS), as well as to identify where their proposed systems will exceed the threshold requirements and/or meet the objective requirements. RFP § L-17.

Boeing, NGTS, L-3 and LM submitted proposals in response to the solicitation. After conducting extensive discussions and obtaining revised proposals, the Army determined that Boeing’s proposal and EMARSS system represented the best value. NGTS, L-3 and LM thereupon filed protests with our Office challenging the source selection.

The protesters raised numerous challenges to the evaluation of proposals under each of the evaluation criteria. Among the arguments raised were challenges to the agency’s evaluation of the performance of the offerors’ EO/IR sensors as part of their proposed EMARSS systems, including assertions that Boeing’s proposed EMARSS system improperly was determined to be compliant with a number of the PBS threshold requirements.

After a hearing was held in this matter, GAO conducted an outcome prediction alternative dispute resolution conference in which the cognizant GAO attorney indicated that GAO likely would sustain L-3’s protest against the past performance evaluation. In this regard, the GAO attorney indicated that it appeared that the Army, in evaluating Boeing’s proposal under the performance risk factor, had improperly given Boeing credit for the past performance of a subcontractor that, although critical to Boeing’s proposed effort, nevertheless did not satisfy the prerequisite of being a major subcontractor for consideration in the past performance evaluation. In addition, the GAO attorney expressed concerns about the adequacy of the agency’s evaluation of the performance of the EO/IR sensors as part of the offerors’ proposed EMARSS systems.

In response, the agency advised the parties that, consistent with the provisions of the solicitation governing the scope of the performance risk evaluation, the Army would reevaluate the performance risk of Boeing, without consideration of the past performance of the cited critical, but not major, subcontractor. The agency further advised that the Army would also reexamine the performance validations for all offerors as to the performance of their EO/IR sensors. Finally, the agency advised that after performing the above, the Source Selection Authority would render a new source selection decision. Letter from AMC, Mar. 17, 2011. Given that the agency would be making a new source selection decision, that could result in award to an offeror other than Boeing, we considered the protests of the prior source selection to be academic and therefore dismissed those protests (B-404636 *et al.*, Mar. 18, 2011).

NGTS challenges the extent of the proposed corrective action. NGTS asserts that the corrective action is unduly limited, and that the agency instead should reopen discussions with all offerors followed by the opportunity to generally revise proposals.

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 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. 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*; Rel-Tek Sys. & Design, Inc.-Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. 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's intended corrective action focused not only on the very procurement deficiency (an unreasonable past performance evaluation) that led to GAO's ADR prediction that L-3's protest would be sustained, but also on the concerns expressed by GAO regarding the adequacy of the evaluation of the performance of the EO/IR sensors as part of the offerors' proposed EMARSS systems. Since the agency's corrective action responded to the areas of concern identified by GAO, and nothing in NGTS's protest demonstrates that the agency's approach was an abuse of discretion, we deny NGTS's protest regarding the scope of the corrective action. Intermarkets Global, B-400660.10; B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 3; cf., Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5; B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 6 (change in evaluation methodology required opportunity to respond to revised scheme).

NGTS asserts that in reexamining the performance validations for the offerors' EMARSS systems, including considering information learned as a result of the protest process, it is likely that the agency essentially will conduct unequal discussions. We need not now resolve this dispute, since we view NGTS's assertion of unequal discussions as premature, given that an award decision has not yet been made. If NGTS is not selected for award, it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time. See Intermarkets Global, supra, at 4-5; American K-9 Detection Servs., Inc., B-400464.6, May 5, 2009, 2009 CPD ¶ 107 at 5.

The protest is denied.

Lynn H. Gibson
General Counsel