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Comptroller General
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United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Consortium HSG Technischer Service GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Management KG

File: B-292699.6

Date: June 24, 2004

Reed L. von Maur, Esq., for the protester.

Paul D. Reinsdorf, Esq., Reinsdorf & Associates, for Joint Venture SKE GmbH-Siemens Gebäudemanagement und Services GmbH & Co. OHG, an intervenor.

Maj. Gregg A. Engler, Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that a change in ownership of one of the two entities comprising a joint venture, which occurred between the time offerors submitted final proposal revisions and the award decision, renders the agency's evaluation of the joint venture's proposal unreasonable, is denied where the record shows that, although the entity's ownership and name were changed, the entity remains intact, retains the same location and offices, and promises to honor its previous commitments, and where there is no showing in the record that the resources offered by this entity have been rendered unavailable, or have in any way changed, as a result in the change of ownership.

DECISION

Consortium HSG Technischer Service GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Management KG (HSG) protests a decision by the Department of the Army to reselect SKE GmbH/Siemens Gebäudemanagement und Services GmbH & Co. OHG, Joint Venture (SKE/SGM), as its contractor for preventive maintenance and repairs of facilities and equipment used by the Defense Commissary Agency in Germany, Belgium, and the Netherlands. HSG complains that the sale of SGM after the submission of final proposal revisions (FPR) but prior to the agency's reselection decision, rendered the evaluation of SKE/SGM's proposal unreasonable. HSG also argues that the agency will not be able to enter into a novation agreement with SKE/SGM under the circumstances here.

We deny the protest.

The Army's request for proposals (RFP) No. DABN01-03-R-0010 contemplated award of a mixed fixed-price and time-and-materials requirements contract for preventive maintenance and repairs at facilities used by the Defense Commissary Agency in Germany, Belgium, and the Netherlands. The award at issue was for one of four geographic regions covered by the solicitation; this region was referred to in the RFP as area IV. Area IV includes not only a portion of the regular commissary facilities identified in the RFP, but also includes the Central Meat Processing Plant, the principal meat-packing plant for the U.S. forces in Europe, which is located at Ramstein Air Base in Germany.

In response to the initial award, HSG protested to our Office that the agency's favorable evaluation of SKE/SGM's proposal disregarded the proposal's failure to provide required documentation in several areas. After all pleadings on both the initial and a supplemental protest were submitted, the Army decided to reopen discussions, request revised proposals, conduct new evaluations, and make a new selection decision (to include terminating the initial award to SKE/SGM if HSG prevailed in the reopened competition). As a result, we dismissed HSG's protest of the initial award.

HSG also filed a protest challenging the breadth of the Army's corrective action, arguing that the corrective action should be limited to a reevaluation of the proposals as submitted. We denied this protest. Consortium HSG Technischer Service GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Management KG, B-292699.4, Feb. 24, 2004, 2004 CPD ¶ 44.

After deciding to reopen the competition, in November 2003, and after holding discussions, the Army requested submission of FPRs by December 19, 2003. At the conclusion of its reevaluation, the Army rated both offers equal under each factor and subfactor identified in the solicitation, and again selected SKE/SGM for award, based on its lower price of 6,309,902 euros. On March 10, 2004, the Army lifted the stop-work order it had issued to SKE/SGM in response to HSG's protest of the initial award, and notified HSG of the results of the recompetition. On March 19, HSG filed the instant protest.

Unbeknownst to the Army (until HSG filed its March 19 protest), SGM was sold to another company after the submission of FPRs and prior to the award decision. Specifically, effective January 1, 2004, the corporate shares of SGM were taken over by Hochtief Facility Management GmbH (hereinafter Hochtief), with the entity to be operated under the name of Hochtief Gebäudemanagement GmbH & Co. OHG. Agency Report (AR), Tab 3, at 2. By letter dated January 19, Hochtief advised the joint venture that despite the change in ownership and the change in SGM's name, the location and address of the entity would remain the same, and the entity would continue to honor its contractual relationship with the joint venture. Id. The public

announcement of the acquisition also advised that SGM would remain an intact entity under its new owner. AR at 3.

Given the sale of SGM, HSG argues that the evaluation of SKE/SGM's proposal in several areas, as well as the agency's responsibility determination, are now invalid. In addition, HSG argues that the agency will not be able to enter into a proper novation agreement with SKE/SGM. For the reasons set forth below, we deny HSG's challenge to the agency's evaluation of SKE/SGM's proposal, as well as its related challenge to the responsibility determination, and we conclude that HSG's argument regarding the agency's ability to enter into a novation agreement raises a matter we will not review.

HSG's arguments regarding the evaluation and the agency's responsibility determination are based upon the premise that the entity whose proposal the agency evaluated no longer exists, and, as a result, the agency's conclusions about that proposal (and entity) have been rendered invalid. Under the logic of this premise, HSG contends that the agency's evaluation review of SKE/SGM's licenses and permits, specialized personnel, information conveyed during the oral presentation, and administrative resources—which, presumably, relied on SGM's contributions to the joint venture—now lacks a reasonable basis. Our standard in reviewing evaluation challenges is to examine the record to determine whether the agency's judgments were reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. In our view, HSG's premise overstates the effect of the change of ownership in this case.

Our reading of the materials submitted with the agency report provides no support for HSG's contention that the Army's evaluation has been rendered invalid by the change in SGM's ownership. For example, the record shows only that the corporate shares of SGM changed hands. AR, Tab 3, at 2. In addition, the new owners have indicated that the entity formerly known as SGM remains intact, has the same location and offices, and intends to honor its prior commitments. Id. In our view, this situation is analogous to those where an agency properly credits an offeror with the favorable past performance experience of key employees who gained their experience working elsewhere. See MCR Eng'g Co., Inc., B-287164, B-287164.2, Apr. 26, 2001, 2001 CPD ¶ 82 at 7. In fact, unlike in MCR, there is no suggestion that any of the strengths of the entity formerly known as SGM are other than fully intact and available. Put simply, there is nothing in this record that suggests that the licenses and permits, the specialized personnel, the information conveyed during the oral presentation, or the administrative resources offered by SGM have been rendered unavailable, or in any way changed by this transaction.

One of HSG's most specific challenges to the reevaluation is the agency's assessment of SKE/SGM's financial resources, an area of review expressly identified in the solicitation's evaluation scheme. In its protest of the previous selection decision, HSG alleged that agency's assessment of SKE/SGM's financial resources was

improperly based, at least in part, on a financial statement from Siemens AG, without any explanation of the relationship between that company and SGM.¹ During the earlier protest, HSG argued that its proposal offered better evidence of strong financial responsibility, and challenged any conclusion that it and the SKE/SGM proposal were on equal footing in this regard.

In our review of this protest, we examined the record to determine whether the agency's evaluation of the SKE/SGM proposal continued to rely on financial information from Siemens AG to bolster the joint venture's financial resources--as it had in the previous evaluation. In this regard, we recognized that the agency's reliance on the finances of Siemens AG to evaluate the financial resources of SKE/SGM, given the subsequent sale of SGM, could provide support for HSG's challenge to the validity of the reevaluation. Again, we found no support in the record for HSG's contentions. In the selection decision, the source selection authority (SSA) expressly concluded that "[t]he joint venture as well as both companies that compose it are financially sound, and the offeror demonstrated sufficient resources and ability to obtain credit in case of an unforeseen contingency." AR, Tab 11, at 4. Given the SSA's reliance on the joint venture's resources to reach his conclusions in this area, rather than relying on the resources of SGM's corporate owner, even this area of inquiry provides no support for HSG's contention.

In a derivative argument, HSG also challenges the agency's responsibility determination, based again on the change in ownership of SGM. Our Office generally will not consider a protest challenging an agency's affirmative determination of responsibility, except under limited exceptions, because the determination that a particular contractor is capable of performing a contract is largely committed to the contracting officer's (CO) discretion. 4 C.F.R. § 21.5(c) (2004). The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met, and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the CO unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Id.

While there is no dispute here that the CO had not considered the information about the change in SGM's ownership and this information was available on the Internet (and perhaps other places), we cannot say--as our bid protest rules require--that the CO's failure to consider the information was unreasonable. The sale of SGM occurred after the submission of FPRs, and SKE/SGM did not provide information

¹ Although both companies contained the word "Siemens" in their names, the SKE/SGM proposal had not explained the relationship between the two companies. In the discussion that follows, we assume a relationship between the two companies, although the precise nature of the relationship is not relevant here.

about the sale to the CO prior to the award decision. There is also no evidence here that the CO was aware of this information, or should have been aware of it. Without a showing that the CO unreasonably failed to consider available information, we will not consider a protest challenging the CO's affirmative responsibility determination.²

As a final matter, HSG argues that the award to the joint venture was improper as a legal matter due to the change in ownership of SGM. We see no impediment to award on this basis given that the award was made to a joint venture that continues to exist--as do both of the entities that comprise the joint venture--even though ownership of one of the joint venturers has changed. See generally Sunrise Int'l Group, Inc., B-266357, Feb. 12, 1996, 96-1 CPD ¶ 64 at 2-3. HSG also argues that the agency is precluded from entering into a novation agreement with the awardee. HSG's contention is not only speculative, but raises a matter of contract administration not for consideration by our Office. 4 C.F.R. § 21.5(a); Bosma Mach. and Tool Corp., B-257443.2, B-257443.3, Oct. 17, 1994, 94-2 CPD ¶ 143 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel

² In any event, even if the CO had been aware of this information, there is no basis to conclude that it would have had any material effect on the agency's responsibility determination, given that, as discussed above, there has been no change in SGM's resources or role in the joint venture, despite the change in ownership.