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Comptroller General
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Decision

Matter of: American K-9 Detection Services, Inc.

File: B-400464.6

Date: May 5, 2009

Fernand A. Lavalley, Esq., J. Philip Ludvigson, Esq., and Seamus Curley, Esq., DLA Piper US LLP, for the protester.

John E. Jensen, Esq., Daniel S. Herzfeld, Esq., and Orest J. Jowyk, Esq., Pillsbury, Winthrop, Shaw, Pittman LLP, for EOD Technology, Inc., the intervenor.

Lt. Col. James Lewis and Capt. John J. Pritchard, Department of the Army, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In implementing corrective action in response to a protest, agency improperly limited discussions to requesting information to show that a proposed key position complied with the solicitation requirements, where the discussions did not provide the protester with the opportunity to become more competitive through meaningful discussions by allowing it to address significant weaknesses or deficiencies found in its proposal.

DECISION

American K-9 Detection Services, Inc. (AK-9) of Lake Mary, Florida, protests the award of a contract to EOD Technology, Inc. (EODT) of Knoxville, Tennessee, under request for proposals (RFP) No. W91B4L-08-R-0025 (-0025), issued by the Department of the Army for contractor working dog (CWD) services in Afghanistan.

We sustain the protest.

CWD services include providing, on a 24-hour basis, trained and certified patrol dogs, narcotics detector dogs, and explosives detector dogs, as well as trained and certified dog handlers and staff to conduct operations. AK-9 was the contractor for CWD services in the southern region of Afghanistan. Subsequently, on February 10, 2008, solicitation No. W91B4L-08-R00013 was issued for CWD services for that region, under which EODT was awarded a contract on February 28. On March 11, AK-9 filed a protest of this award to our Office (B-311349) and a stop work order for

the contract was issued on March 16. The EODT contract was terminated on March 26, and our Office dismissed the protest as academic.

The services were then noncompetitively obtained under bridge contracts from AK-9, which led to a protest to our Office by EODT (B-311349.2), as well as litigation at the Court of Federal Claims relating to the propriety of the agency's determination to override the stay of performance on the bridge contract. EODT's protest was dismissed by our Office on June 11 because we found that it failed to state a sufficient basis for protest and was otherwise untimely filed. The CWD services in southern Afghanistan are currently being performed by AK-9.

RFP -0025 (the subject of this protest), as issued on June 13, and subsequently amended, was to obtain CWD services throughout Afghanistan. The solicitation contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a 1-year base period, with 4 option years.

Under section M of the RFP, award was to be based on consideration of the following evaluation factors: price, technical capability, and past performance. The combined weight of the technical and past performance factors was said to be approximately equal to price. Section M further provided that technical capability and past performance were to be adjectivally rated.¹ No specific subfactors or elements or categories of the evaluation factors were identified in section M, although the actual agency evaluation of the proposals under the technical capability factor considered 10 separate "categories," for each of which the proposals received adjectival ratings. Agency Report (AR), Tab 15, Technical Evaluation Report, at 4.² Price was to be evaluated based upon "price algorithm" assumptions identified in section M.

The RFP contained proposal preparation instructions in section L, which provided for the submission of a price proposal, a technical proposal and a past performance

¹ The possible evaluation ratings for technical capability were exceptional, very good, good, satisfactory, and unsatisfactory. The possible evaluation ratings for past performance were high confidence, significant confidence, satisfactory confidence, neutral/unknown confidence, little confidence, and no confidence. RFP § M.

² The "categories" were (1) offeror's transition to performance plan, (2) ensure necessary mobilization, (3) CWD ratio, (4) team training schedule, (5) certification of teams, (6) obtaining security clearances, (7) ability to sustain operations, (8) response to surge requests, (9) resume of kennel master/project manager (KM/PM), and (10) resume of trainer/supervisor. AR, Tab 15, Technical Evaluation Report, at 4. The evaluation documentation identifies no relative weight for these "categories."

proposal. The technical proposal required resumes for the KM/PM and the trainer/supervisor, as well as:

A plan describing how the offeror would transition to performance after contract award. Among the topics, the plan shall include how the contractor will ensure necessary mobilization, how many teams a CWD trainer/supervisor will be responsible for, team training schedule, certification of teams, and obtaining necessary security clearances. The plan shall also include the offeror's ability to sustain operations after mobilization, and its ability to quickly meet governmental requests for additional dog teams.

RFP § L, Proposal Preparation Details, Technical Proposal.

With regard to the past performance proposal, the solicitation required that offerors demonstrate the successful completion of at least two, with a limit of five, contracts within the last 5 years, as of the date of the solicitation. Section L provided that relevant performance included K-9 security operations that were comparable in "scope, magnitude, and complexity to the effort described in this solicitation," and that past performance in Afghanistan and/or Iraq would receive a higher confidence rating than past performance that was carried out outside of Afghanistan and/or Iraq. RFP § L, Proposal Preparation Details, Past Performance.

The agency received five proposals in response to the RFP, including AK-9's and EODT's. Four proposals were included in the competitive range and, based on its evaluation, the agency determined that EODT's proposal represented the best value to the government.

AK-9 protested the award decision (B-400464) to our Office on August 15, and filed a supplemental protest (B-400464.2) on September 11, in which it argued that the agency failed to properly evaluate past performance. We dismissed these protests on September 17, based on the agency's promised corrective action of reevaluating past performance. This corrective action was implemented by a letter dated September 14 from the agency to the offerors whose proposals had been included in the competitive range. This letter stated that these offerors were being given "an opportunity to re-submit (for re-evaluation) past performance information they believe is recent and relevant in accordance with stated solicitation criteria. (Refer to sections L & M regarding)." The letter also encouraged offerors to submit a two-page letter listing recent and relevant examples of relevant past performance. Offerors also were encouraged to send past performance questionnaires to respondents that had knowledge of the firm's past performance. AR, Tab 20, Reevaluation Notice-Contractor Past Performance (Sept. 14, 2008). Both AK-9 and EODT responded with 2-page letters discussing their past performance. AR, Tab 22, AK-9 Past Performance Submission (Sept. 20, 2008); Tab 61, EODT Past Performance Submission (Undated). The reevaluation resulted in an affirmation by the agency of

its original award to EODT. AR, Tab 26, Revised Source Selection Document (Oct. 9, 2008).

On October 16, AK-9 again protested (B-400464.3) the agency's award decision, which it supplemented (B-400464.4), arguing, among other things, that EODT was ineligible for award because its proposed KM/PM failed to satisfy the minimum requirements of the performance work statement (PWS) and that the agency evaluated more than five contracts when evaluating EODT's past performance. We dismissed these protests based upon the agency's promised corrective action to reconsider the competitive range, to reconsider "aspects of the proposals related to B-400464.3 and B-400464.4 only," to reconsider the source selection decision, and to terminate EODT's contract if a different source selection decision was made. AR, Tab 58, Agency Corrective Action Letter (Dec. 10, 2008).

In implementing this last corrective action, the agency first excluded two proposals from the competitive range, so that only the proposals of EODT and AK-9 remained. AR, Tab 41, Source Selection Authority's Competitive Range Determination Addenda (Dec. 11, 2008), at 1.

The agency found that the resume of EODT's proposed KM/PM failed to meet the experience qualifications required by the solicitation. AR at 12. Thus, on December 11, the agency notified EODT that a "deficiency" had been noted with regard to the qualifications of EODT's KM/PM and that EODT was being given the opportunity to update its proposal or to otherwise respond to show how its proposed KM/PM conforms to the RFP and PWS requirements, but that no other proposal revisions were requested. AR, Tab 40, Agency Notice of Technical Deficiency to EODT (Dec. 11, 2008). In response, EODT provided an updated resume for its proposed KM/PM. AR, Tab 42, Email from EODT to Agency (Dec. 13, 2008).

On December 11, the agency also provided a letter to AK-9, also labeled "Notice of Technical Proposal Deficiency," in which it advised AK-9 that it had reason to "infer" the KM/PM offered by AK-9 in its proposal was no longer the KM/PM that AK-9 intended to provide under the procurement in question here, given that that individual "does not appear to be performing work on the current contract." The agency requested that AK-9 update its proposal to "solely address[] the KM/PM position." AR, Tab 39, Agency Notice of Technical Deficiency to AK-9 (Dec. 11, 2008). On December 13, AK-9 responded by confirming the content of its proposal, particularly its proposed KM/PM, and explaining why the agency's inference was unreasonable and incorrect. AK-9's response also stated that notwithstanding the title of the agency correspondence, the body of the letter never alleged or identified a deficiency and that:

Our understanding is that the 11 December 2008 memorandum does not constitute discussions or negotiations. We respectfully request that the agency immediately notify us if our understanding is incorrect.

AR, Tab 43, Email from AK-9 to Agency (Dec. 13, 2008).

On December 16, the agency issued a second letter to AK-9, also labeled “Notice of Technical Proposal Deficiency,” which raised a new question regarding the AK-9’s proposed KM/PM. The agency now stated that this individual’s resume did not indicate that he met the dog handler experience requirement in the solicitation. The agency also indicated that this letter “may” constitute discussions. AR, Tab 45, Agency Notice of Technical Proposal Deficiency to AK-9 (Dec. 16, 2008). In response, on December 19, AK-9 confirmed that, and explained why, the proposed KM/PM met and exceeded the PWS requirements, and referenced why the agency had actual knowledge that this individual’s experience, both from his work on prior contracts and previously submitted resumes, satisfied the solicitation requirements. AR, Tab 48, AK-9 Response to Agency Notice of Technical Proposal Deficiency (Dec. 19, 2008).

Meanwhile, on December 19, AK-9 protested to our Office the agency’s implementation of the corrective action based upon its belief that the agency was conducting “results oriented” discussions rather than meaningful discussions. AK-9 contended the discussions were apparently designed “solely to permit EODT to – for the first time – present an offer that complies with the Solicitation.” AR, Tab 59, AK-9 Protest (B-400464.5), at 1. The agency requested dismissal of the protest, and on January 13, 2009, our Office dismissed it, stating:

AK-9’s assertion of unequal discussions is premature, given that an award decision has not yet been made. If AK-9 is not selected for award, it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time.

American K-9 Detection Services, Inc., B-400464.5, Jan. 12, 2009, at 2-3.

The agency reevaluated the proposals of AK-9 and EODT in light of the discussion responses and made adjustments to the ratings of the KM/PM “category” of the technical capability factor, although the proposals’ overall ratings for technical capability did not change. That is, the agency evaluated AK-9’s proposed KM/PM as [REDACTED] as opposed to the previous rating of [REDACTED] but AK-9’s overall technical capability assessment of [REDACTED] remained unchanged. The agency evaluated EODT’s proposed KM/PM as [REDACTED] as opposed to the previous rating of [REDACTED] but its overall technical capability assessment of

[REDACTED] remained unchanged.³ AR, Tab 50, Technical Report Addenda (Jan. 17, 2009), at 3; AR, Tab 51, Revised Source Selection Decision (Jan. 24, 2009), at 2.

Both offerors received “significant confidence” past performance ratings. AR, Tab 24, Past Performance Re-evaluation Report (Oct. 3, 2008), at 15. However, the revised source selection decision stated that the source selection official regarded EODT’s past performance as superior to AK-9’s, primarily because of EODT’s [REDACTED]. AR, Tab 51, Revised Source Selection Decision (Jan. 24, 2009), at 2.

EODT had a total evaluated price of \$38,350,935 and AK-9 had an evaluated price of [REDACTED]. AR at 9. The source selection authority regarded these prices as approximately equal. AR, Tab 51, Revised Source Selection Decision (Jan. 24, 2009), at 2. However, the agency noted in the revised source selection document that:

[AK-9] provides performance risk because its prices [REDACTED] has the potential for straining [AK-9’s] ability to perform the contract in the [REDACTED] option years.

Id.

The source selection decision concluded that, based upon its consideration of various identified aspects of EODT’s technical proposal that were considered superior to AK-9’s, EODT’s superior past performance, and EODT’s lower performance risk as compared to AK-9, EODT’s proposal represented the best value to the government. Id.

This protest followed. AK-9 challenges the agency’s decision to limit discussions to the KM/PM, arguing that this resulted in the discussions being unfair and not meaningful.⁴ We agree.

³ It is not clear from the record the agency’s basis for its conclusion that the rating for EODT’s proposed KM/PM should be raised to [REDACTED] from the initial rating of [REDACTED] as a result of the updated resume. In this regard, it does not appear that the initial [REDACTED] rating for EODT’s KM/PM was justified since [REDACTED] the solicitation requirements.

⁴ The agency argues that AK-9 failed to timely challenge the agency’s December 11 notice that advised AK-9 that discussions would be limited, and that nothing in its proposal beyond information pertaining to its proposed KM/PM could be revised. We disagree. This case is different from that in Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8 (relied upon by the agency), where the agency clearly announced the ground rules of the corrective action so as to make them part of the solicitation and we dismissed the post-award protest of this announced evaluation plan. Here, in contrast, the agency did not clearly announce

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The exchanges with EODT regarding its KM/PM were undeniably discussions, given that the agency indicated that this was a “deficiency” and does not deny that without EODT’s modification to its proposal its proposed KM/PM did not comply with the RFP requirements. See J.A. Jones/IBC Joint Venture; Black Constr. Co., B-285627, B-285627.2, Sept 18, 2000, 2000 CPD ¶ 161 at 5. When an agency conducts discussions with one offeror, it must conduct discussions with all other offerors whose proposals have been found in the competitive range. Federal Acquisition Regulation (FAR) § 15.306(d)(1); Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4. Moreover, discussions should be meaningful, equitable, and not misleading. The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 49. That is, discussions, at a minimum, must be in sufficient detail to indicate to each offeror whose proposal remains in the competitive range deficiencies, significant weaknesses, or adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3). At the conclusion of discussions, each offeror still in the competitive range shall be provided an opportunity to submit a final proposal revision. FAR § 15.307(b). In this regard, offerors, in response to an agency request that discussions be opened or reopened, generally may revise any aspect of their proposals they see fit—including portions of their proposals which were not the subject of discussions. Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3.

As noted by the agency, 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. Moreover, in appropriate circumstances where the agency has established a reasonable basis for doing so, our Office has not objected to an agency’s decision to limit discussions under a negotiated procurement in implementing corrective action in response to a protest. See Rel-Tek Sys. & Design, Inc.—Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3.

Here, the agency states that the “discovery of two identical weaknesses in EODT’s and AK-9’s proposals prompted the contracting officer to enter into discussions with both offerors to address those concerns.” AR at 16-17. The agency went on to state that it did not allow “broader revisions” because EODT’s prices had been disclosed,

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the ground rules of the corrective action and did not specifically indicate that no further discussions would be conducted. Indeed, as noted above, our Office previously determined that AK-9’s challenges to the scope and fairness of discussions were premature because award had not been made, and that AK-9 could raise these issues after award was made. American K-9 Detection Servs., Inc., B-400464.5, Jan. 12, 2009.

and the agency did not want to give one offeror an unfair competitive advantage over another. AR at 20.

We find that the agency's limitation on discussions was unreasonable and inappropriate. This limitation failed to account for other significant weaknesses or deficiencies found in the proposals and thus constituted unequal, not meaningful, discussions. Specifically, the record indicates that the limited discussions were primarily to allow EODT to fix its otherwise unacceptable proposal and did not similarly provide AK-9 with the opportunity to become more competitive through meaningful discussions.⁵ See Ridoc Enters., Inc./Myers Investigative & Security Servs., Inc., B-293045.2, July 26, 2004, 2004 CPD ¶ 153 at 3; Rockwell Elec. Commerce Corp., *supra*, at 4-5.

For example, as quoted in part above, the revised source selection decision document found that AK-9's price structure represented "performance risk" that "ha[d] the potential for straining [AK-9's] ability to perform the contract in the [REDACTED] option years" and referenced this as one of the discriminators in making the source selection decision. AR, Tab 51, Revised Source Selection Decision (Jan. 24, 2009), at 2. This was not a subject of discussions with AK-9. As noted above, discussions cannot be meaningful if an offeror is not advised of the significant weaknesses or deficiencies that must be addressed in order for its offer to be in line for award. Tiger Truck, LLC, B-400685, Jan. 14, 2009, 2009 CPD ¶ 19 at 8. In our view, this issue was a significant weakness or deficiency that was required to be brought to AK-9's attention during discussions, so that it could be given the opportunity to submit a revised proposal.

⁵ We note that the problems found with regard to AK-9's proposed KM/PM seem contrived, which suggests that they might have been developed to justify conducting discussions with AK-9 as well as EODT with regard to the KM/PM and to limit discussions to this subject. In this regard, in contrast to the deficiency notice that allowed EODT to address the undenied deficiencies in its proposed KM/PM's resume (or possibly to propose another KM/PM), the initial question to AK-9 regarding its proposed KM/PM was based upon an "inference" that because this individual was currently not working in Afghanistan under the predecessor contract, he would no longer be AK-9's KM/PM on the contract to be awarded under this RFP. AK-9's confirmation of its proposal and its KM/PM could hardly be characterized as discussions. Only after this confirmation by AK-9 did the agency, for the first time, find that the resume of AK-9's proposed KM/PM did not show that this individual satisfied the solicitation requirements. The protester states, and has provided un rebutted evidence, that the agency had actual knowledge that AK-9's proposed KM/PM, who had been working under the predecessor contract, satisfied the solicitation requirements.

AK-9 submitted, with its protest, a declaration from the firm's president that summarized the proposal revisions that AK-9 would have submitted had it been notified by the agency of an opportunity to submit final proposal revisions. For instance, AK-9 states that if discussions had been opened it would have made a "change in [REDACTED]" that would have made its prices [REDACTED]. AK-9's president also declared that if discussions had been opened and revised proposals submitted, AK-9 would have made numerous changes/improvements in its technical and price proposals, for example, [REDACTED]. Protest, exh. HH, Declaration of AK-9 President (Jan. 27, 2009).

In sum, the agency's limitation of discussions here was inappropriate and resulted in the discussions being unfair and not meaningful. The disclosure of EODT's contract price alone does not provide a compelling basis for the failure to provide for meaningful discussions. The possibility that the contract may not have been awarded based on the most advantageous proposal because, for example, discussions are not meaningful, has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; generally the statutory requirements for competition take priority over any possible concern regarding auction techniques. RS Info. Sys., Inc., B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98 at 4.

Because the discussions were not meaningful, we sustain the protest. However, before we make our recommendation, we discuss a number of concerns we have identified in the record that the agency may wish to address as part of its implementation of our recommendation.

Specifically, the protester asserts that the agency relied upon unstated evaluation subfactors that were not consistent with section M of the RFP. In this regard, as noted above, the agency separately evaluated 10 categories under the technical capability factor that were not stated in section M. While it could be argued that these categories are reasonably contemplated in the evaluation of the technical capability factor, see Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 at 4, the Competition in Contracting Act of 1984 requires solicitations to include a statement of all significant factors and significant subfactors that will be considered in the evaluation, as well as their relative importance. 10 U.S.C. § 2305(a)(2)(A) (2006), as implemented by FAR § 15.304(d). The categories here would seem to be significant subfactors, even though they are not specifically labeled as such, and they were not disclosed in the solicitation, nor was their relative weight disclosed. The agency may wish to amend the RFP to address this.

The protester also asserts that the solicitation limited past performance references to five contracts, but that the agency considered far more than five contracts in evaluating EODT's past performance. The agency responds by stating, among other things, that the letter requesting past performance information from the offerors in the competitive range (quoted above) put no limit on contract references. However,

as noted by the protester, this letter also expressly referenced sections L and M of the RFP, which contained the five contract limitation. AR, Tab 20, Reevaluation Notice-Contractor Past Performance (Sept. 14, 2008). This is another matter that the agency may wish to address in implementing corrective action.

Finally, the protester asserts that the agency did not properly account for EODT's allegedly adverse performance under the previously awarded CWD contract, which had been protested by AK-9 before the services were obtained from AK-9 on a sole-source basis. The record shows that as part of the corrective action addressing past performance the agency questioned EODT regarding adverse performance under this contract. In its evaluation documentation, the agency states that EODT responded, "*We were forwarded a Stop Work order, therefore, could not perform.*" The agency evaluators concluded, "The committee considers the concern adequately addressed as the Stop Work order would naturally have precluded contractor performance," and did not negatively consider this past performance in its evaluation of EODT. AR, Tab, 24, Past Performance Re-evaluation Report (Oct. 3, 2008), at 6. However, in an earlier agency report on the EODT protest of the noncompetitive award to AK-9 (and in pleadings filed with the Court of Federal Claims), the agency referenced various instances of [REDACTED] in justifying the sole source award to AK-9. *E.g.*, Protest, exh. O, Agency Report (B-311349.2), at 9-10. Based on our review of the record the agency has not reconciled its conflicting positions regarding EODT's past performance on this contract.

We recommend that the agency amend the RFP as appropriate, and reopen and conduct meaningful discussions with all offerors whose proposals are in the competitive range. At the conclusion of discussions, we recommend that the agency request final proposal revisions, and make a new source selection. If AK-9's proposal is selected for award, the agency should terminate EODT's contract, and make award to AK-9. In addition, we recommend that AK-9 be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Daniel I. Gordon
Acting General Counsel