



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Partnership for Response and Recovery

File: B-298443.4

Date: December 18, 2006

E. Sanderson Hoe, Esq., and Karri L. Garrett, Esq., McKenna Long & Aldridge LLP, for the protester.

Eric J. Marcotte, Esq., Scott A. Schipma, Esq., and Nathan C. Guerrero, Esq., Winston & Strawn LLP, an intervenor.

Leigh M. Hoburg, Esq., Federal Emergency Management Agency, 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

Agency is not required to limit discussions and revised proposals in taking corrective action in response to protest where it found discussions and evaluation were inadequate and new requirements have been added to the solicitation.

DECISION

Partnership for Response and Recovery (PaRR) protests the corrective action taken by the Federal Emergency Management Agency (FEMA) in response to the protest of Alltech, Inc. of FEMA's award of contracts under request for proposals (RFP) No. HSFHQ-06-R-0013 to PaRR and Michael Baker, Jr. Corporation for housing inspection services (HIS). The RFP contemplated award of multiple indefinite-delivery, indefinite-quantity contracts for HIS, which involves providing individual housing inspectors and managing a program to deploy and oversee the inspectors when a disaster occurs. PaRR argues that the agency's revised corrective action, which consists of reopening discussions and requesting completely revised proposals, unfairly favors Alltech and is an abuse of agency discretion.

We deny the protest.

Alltech had protested that the agency's evaluation was "irrational, unsupported by the record, and punctuated with recurring examples of blatant disparate treatment," that the discussions were incomplete, and the source selection decision was not explained or documented. Alltech's Protest Comments (B-298443, Aug. 7, 2006) at 2. After receipt of the agency report and comments thereon, our Office scheduled a

hearing to address the various problems in the record. The agency then decided to take corrective action in response to Alltech's protest, and we dismissed Alltech's protest.

Specifically, the agency found that the entire source evaluation board (SEB) had not reviewed the evaluation report, and only a "draft" report, which contained a discussion of a number of weaknesses attributed to Alltech's proposal that had been resolved during discussions and the submission of final proposal revisions, had been provided to the source selection official. The final SEB report was only prepared after the source selection decision. It was also found that the agency had not conducted meaningful discussions regarding Alltech's past performance and that there appeared to be a disconnect between the discussion questions asked and the agency's true concerns about Alltech's proposal, for example, in the training area. Agency Report at 4-5.

The corrective action first proposed by the agency was to appoint a new SEB and source selection official to conduct a de novo evaluation of the competitive range offerors' proposals. The new evaluators would evaluate proposals based upon the initial submissions and responses to discussion questions. FEMA contemplated that the agency would reopen discussions only for newly identified significant weaknesses that were not the subject of previous discussions and price revisions would only be permitted to the extent they could be tied to the technical changes resulting from new discussion questions. Contracting Officer's Statement at 8-9; FEMA's Corrective Action Letter (Aug. 18, 2006).

The agency later determined, for a variety of reasons, that the evaluation, discussions and proposal revisions, including price revisions, should not be restricted. In view of the previous errors in the procurement process, the agency determined that it was important for a new SEB to function independently of the previous SEB's determinations and not be biased by the prior evaluation or the discussion questions formulated by the prior SEB. The agency also believed that the limitation on price revisions was unworkable because of the difficulty of linking pricing changes to particular discussion questions and in view of the changes in the period of performance that were necessitated by the prior protest.

Since discussions were being reopened, the agency also determined to implement Homeland Security Presidential Directive 12 (HSPD-12) (Aug. 27, 2004), which requires that common "personal identify verification" (PIV) procedures be established for employees and contractors who have physical access to Federal facilities and logical access to Federally-controlled information systems. The PIV procedure entails a background check for "suitability" for work in the applicable area, which must be at a minimum a "National Agency Check with Inquiries," which includes a fingerprint check conducted by the Federal Bureau of Investigation (FBI). Contracting Officer's Statement at 10. The agency states that in order to comply with HSPD-12 and its implementing directives prior to commencement of work, each

housing inspector had to be fingerprinted, the prints submitted to the FBI, the results from the FBI's fingerprint database provided to FEMA, an "adjudication" obtained from FEMA that that person was "suitable" for employment, and the receipt by FEMA from that person of applicable forms for submission to Office of Personnel Management for further investigation. Id. at 11. The agency anticipated that this new requirement would affect both technical and price proposals. Id.

Although the protester does not contend that corrective action was not warranted, it contends that the agency should have continued with its initial "narrowly tailored" corrective action plan, and objects to the "astonishing breadth" of the agency's later revised corrective action plan. Protest at 5.

Generally, offerors in response to an agency request that discussions be opened or reopened may revise any aspect of their proposals they see fit—including portions of their proposals which were not the subject of discussions. American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197 at 2. However, 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. In this regard, the details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and 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. Consortium HSG Technischer Serv. GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Mgmt. KG, B-292699.4, Feb. 24, 2004, 2004 CPD ¶ 44 at 3. Moreover, as part of its corrective action, an agency can, as here, amend the RFP to add requirements that will require the submission of revised proposals and is not required to limit proposal revisions to only address these changes. Norvar Health Servs.—Protest and Reconsideration, B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4-6.

In our view, the corrective action here is well within the broad discretion afforded to contracting agencies in these circumstances. As described above, during the course of defending the previous protest, it came to the agency's attention that there were various errors in this procurement that warranted reopening discussions; as indicated above, the agency is not required to limit the scope of discussions in such circumstances.¹ To the extent that PaRR argues that because offerors were informed of its low price, rescinding the original award and reopening the competition will

¹ The protester has not cited and we have found no cases where our Office has required an agency to limit discussions in taking corrective action, but only relies upon cases where our Office found the agency had established particular circumstances for limiting discussions.

foster an auction and put PaRR at a competitive disadvantage, we have previously noted that the Federal Acquisition Regulation does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of requesting revised price proposals where the original awardee's price has been disclosed. In this regard, we have repeatedly observed that 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 does the possibility that the original awardee will be at a disadvantage in the reopened competition. PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4. Moreover, as described above, significant new requirements of HSPD-12 that have been added to the solicitation will require revised technical proposals and prices. Under the circumstances, the agency can choose not to limit discussions and revised proposals.

The protest is denied.

Gary L. Kepplinger
General Counsel