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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: HK Systems, Inc.–Protest and Reconsideration

File: B-291647.6; B-291647.7

Date: August 29, 2003

William J. Spriggs, Esq., and Max V. Kidalov, Esq., Spriggs & Hollingsworth, for the protester.

William H. Carroll, Esq., Dykema Gossett, for Siemens Dematic Corporation, an intervenor.

Lt. Colonel Samuel T. Stevenson, Defense Logistics Agency, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award to offeror that submitted low-priced proposal offering equipment required by the solicitation is unobjectionable, especially where offeror also was found technically more advantageous.

DECISION

HK Systems, Inc. protests the award of a contract to Siemens Dematic Corporation under request for proposals (RFP) No. SP3100-02-R-0014, issued by the Defense Logistics Agency (DLA), Defense Distribution Center (DDC), for the upgrade and/or reconfiguration of storage and retrieval systems, and for the installation of one automatic guided vehicle (AGV) system at the Defense Distribution Depot in San Diego, California. HK principally asserts that the awardee's proposal is technically unacceptable because certain equipment proposed by Siemens does not comply with the RFP's commerciality requirements. HK also requests reconsideration of our decision dismissing as untimely HK's previously filed protests against the award to Siemens.

We deny the protest and the request for reconsideration.

The solicitation, issued on April 23, 2002, as a commercial-item procurement, provides for the award of a fixed-price contract on the basis of a "best value" determination. The RFP sets forth technical/business, past performance, and price as evaluation factors, and provides that the non-price evaluation factors when combined are significantly more important than price. Under the technical/business

factor, the RFP specifies the following sub-elements: project management plan; organization structure and qualifications; system layout and design; integration of software; and reliability, maintainability and parts availability. The RFP states that alternate equipment and system architecture and layout may be proposed by the contractor, provided that all firm performance requirements specified in the RFP are satisfied by the proposed design. RFP § 3.0. As relevant here, the RFP also specifically provides the following:

All equipment (each whole product with its integral software) shall be the manufacturer's current, commercially designed and available or a commercial product that has been slightly modified to fit the proposed system. The commercial product must have proven, successful field application for at least two years immediately preceding the issue date of this solicitation. The field experience of each specific equipment product shall have been gained by an identical or previous model to the one being offered.

Id.

Offerors were required to identify all areas of their proposal that differed from or enhanced the requirements of the technical specifications. RFP at 16. The solicitation defines an enhancement as any proposed change which fulfills a "specified requirement in a [manner] different from the Technical Specification or associated Drawings, but which results in better performance, safer operation, or lower cost at no sacrifice in performance." Id. The solicitation provides that an enhancement would be evaluated to determine if the change offered results in lower cost and higher efficiency of the operation. RFP at 17.

Four proposals were received by the June 7, 2002 closing date and, after discussions, the agency determined to award to Siemens on the basis that it offered the best value to the government. After receiving a debriefing, HK filed an agency-level protest on September 18. After the agency denied its protest, HK filed a protest with our Office on November 4, in which it argued that the agency improperly evaluated Siemens' past performance and HK's technical proposal. HK also argued that the agency's discussions with the protester were inadequate. Our Office conducted a hearing on January 14, 2003, to clarify the record with respect to the agency's past performance evaluation and its conduct of discussions. On January 29, at the request of the agency, our Office conducted "outcome prediction" alternative dispute resolution. The GAO attorney advised the agency that the record appeared to demonstrate that the agency's discussions with the protester were inadequate. Specifically, several weaknesses identified by the evaluators relating to HK's failure to identify "install and test" personnel, failure to offer a manual control for the AGV, and failure to provide a software integration plan were actually deficiencies because HK was not in compliance with specific solicitation requirements. The agency was advised that these items should have been raised with the protester during discussions, but were

not. In response, the agency decided to take corrective action and to re-open negotiations and evaluate revised proposals. Our Office dismissed the protest on January 31, based on the agency's determination to take corrective action.

On February 5, the agency terminated for convenience the award to Siemens and sent letters to the offerors detailing weaknesses/deficiencies in their proposals and offering them the opportunity to submit revised proposals. Since the Siemens proposal contained no weaknesses or deficiencies, Siemens was merely invited to submit a final proposal revision.

HK submitted a series of letters to the agency requesting oral discussions concerning its proposal deficiencies. All of these requests were denied by the agency. In the agency's February 24 letter denying HK's request for oral discussions, the agency provided HK additional clarifications concerning its proposal deficiencies. Through another series of letters, HK was provided more information further clarifying the deficiencies. Finally, amendment No. 0002 was issued on March 4 clarifying issues concerning the AGV controller and requesting proposals and final pricing by March 12.

The agency received four final revised proposals, including those of Siemens and HK. The Siemens offer was priced at \$2,724,606. HK offered alternative proposals. One HK proposal, priced at [DELETED], was rejected as unacceptable because it did not provide the AGV control hardware to provide vehicle redirection capability that was required by the specifications. HK's other proposal, priced at [DELETED], included the required AGV control hardware and was evaluated for award. Siemens' offered price was based on delivery of the system with the Allen Bradley model 1336 drives specified by the solicitation. However, Siemens also stated in its final proposal that it would "(with DLA approval) replace the Allen Bradley Drives 1336. . . in the below paragraphs with [DELETED] [Drives]." Agency Report (AR), Tab 18, Siemens' Final Price Offer. (The drives control the horsepower and torque ratios of the motors that power the cranes for the system.)

The evaluation team conducted a reevaluation of the offers based on the specified 1336 drives, as a result of which the technical proposals of Siemens and HK were both rated as "excellent" overall. AR, Tab 21, Summary Input Form For Source Selection Evaluations. The source selection authority (SSA) determined that Siemens' offer was the most advantageous and offered the best value to the government in terms of technical merit, management merit, and price. AR, Tab 22, Source Selection Decision Document. The SSA concluded that Siemens' lowest priced offer provided a number of specific technical advantages. The SSA noted that Siemens proposed to upgrade all drive motors to [DELETED] drives, which the SSA concluded were superior to the Allen Bradley 1336 drives and to the drives being supplied by other vendors because they [DELETED]. Other advantages noted by the SSA included Siemens' proposed [DELETED]. Award was made to Siemens on March 27. After receiving a debriefing, HK filed several protests with our Office.

On June 27, 2003, we dismissed as untimely HK's protests asserting that the agency unreasonably evaluated Siemens' past performance and misapplied a definitive responsibility criterion.

We first address the timely-filed supplemental protest issues. In its supplemental protest, HK argues that, prior to the submission of its initial proposal, the DDC technical representative refused its request to propose the Allen Bradley [DELETED] drives, which the agency subsequently accepted from Siemens in its final revised proposal. HK argues that it was prejudiced by the technical representative's actions because it could have proposed the [DELETED] drives at a lower price. Alternatively, HK argues that the [DELETED] drives do not meet the solicitation's 2-year commerciality requirement. On July 23, our Office conducted a hearing to clarify the record with respect to whether an agency official denied HK the opportunity to propose the [DELETED] drives and whether the [DELETED] drives meet the solicitation's 2-year commerciality requirement.

In its comments on the hearing, the protester abandoned its argument that an agency official denied its request to propose the [DELETED] drives, while allowing Siemens to propose those drives. We note that testimony at the July 23 hearing made clear that HK was not deterred by the technical representative from proposing the [DELETED] drives. Hearing Transcript (Tr.) at 106-08, 123-28, 135. In fact, the record shows that at the time HK submitted its initial proposal, there was not a currently available [DELETED] drive version that would satisfy the solicitation requirements, and one did not become available until the agency reopened negotiations. Thus, neither HK nor, for that matter, any other firm could have proposed the [DELETED] at the time of initial proposals. An HK official also testified that the firm did not propose the [DELETED] drives during the reevaluation as a result of the agency's corrective action because he believed these drives would not meet the 2-year commerciality requirement of the solicitation. Tr. at 108.

HK essentially is left with its contention that Siemens' proposal is technically unacceptable because the [DELETED] drives do not meet the 2-year commerciality requirement of the solicitation. HK's Post-Hearing Comments, Aug. 4, 2003, at 10. DLA responds that Siemens' proposal conformed to the RFP's technical requirements and was rated excellent, the same rating given to HK's proposal, and that its decision to award to Siemens on the basis of its lower price was reasonable. Agency Report on Supplemental Protest at 5.

Our Office will question an agency's evaluation of proposals only if it lacks a reasonable basis or is inconsistent with applicable statutes or regulations or with the stated solicitation evaluation criteria. Cobra Techs., Inc., B-280475 et al., Oct. 6, 1998, 98-2 CPD ¶ 98 at 3; DAE Corp., Ltd., B-257185, Sept. 6, 1994, 94-2 CPD ¶ 95 at 4.

Here, we conclude that the agency's evaluation and selection decision were reasonable and supported by the record. The commerciality requirement at issue

here essentially requires that the system and components have successful field application for at least 2 years immediately preceding the solicitation issue date. However, the requirement states that this field experience can be based on a “previous model to the one being offered.” RFP § 3.0. The record supports the agency’s view that the [DELETED] drives meet the 2-year requirement because these drives are an upgrade of the Allen Bradley 1336 drives. The agency’s technical representative testified that, based on [DELETED] product literature and Siemens’ proposal, the [DELETED] drive is “a new and improved model” of the 1336 drive. He further testified that “whether it’s a 1336 or it’s a [DELETED], they’re doing the same thing.” He stated that “the [DELETED] drives are [[DELETED]] next generation model,” that “[h]e didn’t see any new science” with respect to the [DELETED] drives, and that “the basic product is essentially the same.” Tr. at 16-19, 28-35. The technical representative’s testimony, taken as a whole, reasonably supports the agency’s position that the [DELETED] drives satisfy the RFP’s commerciality requirement because the drives are commercially available and are an upgrade to the previous model 1336 drive. Thus, the 1336’s successful field experience reasonably can be applied to the [DELETED] drives.

In any event, even if the [DELETED] drives do not satisfy the solicitation’s commerciality requirement, the award to Siemens is not objectionable. Siemens’ final revised proposal was based on providing the 1336 drives as required by the RFP and offering, at the same price and subject to DLA approval, the substitution of the [DELETED] drives for the 1336 drives. Siemens did not condition its price on acceptance of the [DELETED] drives and left the decision to DLA on whether to allow the substitution. Notwithstanding HK’s argument to the contrary, the record shows that Siemens’ revised proposal met the drive requirements by offering to furnish the technically acceptable 1336 drives. Siemens’ offer to supply, subject to DLA approval, the upgraded [DELETED] drives at the same price did not render Siemens’ proposal nonconforming. Accordingly, the award to Siemens on the basis of its low priced, technically acceptable proposal was reasonable.¹

We also deny HK’s request for reconsideration of our decision in HK Sys., Inc., B-291647.4, B-291647.5, June 27, 2003, dismissing as untimely its previously filed

¹ Moreover, the record shows that notwithstanding the same adjectival rating for HK, the SSA reasonably considered Siemens’ lower priced proposal superior to HK’s proposal. As identified above, the SSA found numerous strengths in Siemens’ proposal which merited a superior rating beyond the advantages offered by the [DELETED] drives. AR, Tab 22, Price Negotiation Memorandum. The record is clear that even without the substitution of the [DELETED] drives, the agency reasonably concluded that Siemens’ lower priced proposal offered significantly more advantages than HK’s.

protests against the award to Siemens. We dismissed HK's protests as untimely because the allegation that the awardee failed to meet an alleged definitive responsibility criterion in the RFP was known or should have been known to the protester from the record developed during the initial round of protests. We also held that HK's protest of the agency's failure to consider a contract at Anniston Army Depot in DLA's past performance evaluation was an untimely challenge to the agency's corrective action.

In requesting reconsideration, HK argues that this protest ground in fact was premature because the definitive responsibility issue was predicated upon Siemens' past performance record "developed after the award adjudicated in the original protest." Protester's Request for Reconsideration at 2. However, as we stated in our dismissal, the information HK relies on to challenge the eligibility of Siemens for award and the evaluation of Siemens' past performance history, specifically the Anniston contract, was developed during the initial round of protests prior to the agency's corrective action. HK is essentially repeating and elaborating upon its earlier-raised arguments concerning the timeliness of its protests and expressing disagreement with the conclusion in our dismissal that its protests were untimely filed. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2003); R.E. Sherrer Inc.--Request for Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274 at 2. HK's repetition of its original arguments and its disagreement with our decision do not satisfy the standard for reconsideration.

In any event, definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. Federal Acquisition Regulation § 9.104-2. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3.

Here, the record is clear that the requirement for offerors to submit information on all contracts valued at over \$500,000 was included to assist the agency in its past performance evaluation. In this regard, it is instructive that the requirement was contained in the proposal preparation instructions, which provided that the "instructions contained herein are to serve as a guide in preparation of proposals." Under the RFP's evaluation section, the solicitation states that in investigating past performance, the government would consider information in the offeror's proposal and information obtained from other sources, including past and present customers

and government agencies. The RFP is clear that this information was to be used in connection with the past performance evaluation, and that the proposal preparation language in the RFP does not constitute a definitive responsibility criterion.

The protest and the request for reconsideration are denied.

Anthony H. Gamboa
General Counsel