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

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Decision

Matter of: Ashbury International Group, Inc.

File: B-401123; B-401123.2

Date: June 1, 2009

Anthony F. Troy, Esq., G. Brent Connor, Esq., and George G. Booker, Jr., Esq., Troutman Sanders LLP, for the protester.

William A. Shook, Esq., Shook, Doran, Koehl, LLP, for Horus Vision, LLC, an intervenor.

Major Kyle D. Murray, United States Marine Corps, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency miscalculated awardee's proposal is sustained where record shows that, while solicitation provided that agency would conduct extensive testing on submitted product samples, it failed to conduct testing on awardee's product, as revised following discussions, and instead accepted awardee's unsubstantiated representation that it would provide product that meets solicitation requirements.

2. Protest that agency failed to engage in meaningful discussions with protester is sustained, where record shows that agency downgraded protester's proposal for failure to include information that was not called for in solicitation, the information was not the subject of discussions, and weakness assigned to protester's proposal ultimately was the sole technical discriminator between proposals; agency either should have amended solicitation to reflect changed requirements, or conveyed new requirements to protester during discussions.

DECISION

Ashbury International Group, Inc., of Ruckersville, Virginia, protests the award of a contract to Horus Vision, LLC, of San Bruno, California, under request for proposals (RFP) No. M67854-08-R-1014, issued by the U.S. Marine Corps for a quantity of scout sniper observation telescopes (SSOTs or telescopes). Ashbury maintains that the agency miscalculated proposals, and failed to provide it with meaningful discussions.

We sustain the protest.

The solicitation contemplated the award of an indefinite-delivery, indefinite-quantity contract utilizing fixed-price delivery orders for a base year, with four 1-year options, for the fabrication, integration, testing, and delivery of a quantity of telescopes; logistical, technical, and training support; and associated documentation (for example, technical manuals) for the SSOTs. Firms were advised that the agency would make award to the firm submitting the proposal deemed to offer the “best value” to the government, considering technical capability (with subfactors for technical performance, system suitability, and integrated logistics support), which was significantly more important than the other evaluation factors; past performance; and price. RFP at 65. Past performance was more important than price, and technical capability and past performance combined were significantly more important than price. Id.¹

The RFP required the submission of production samples that would be subjected to a variety of tests. Specifically, the RFP advised:

In accordance with Performance Specification PS/07/EOTF/004, Attachment 1, the Government will subject production samples to any and all of the examinations and tests specified in the detailed Performance Specification. Production samples may be inspected for compliance with any or all requirements. Production sample testing may consist of user’s evaluations, environmental, optical testing and lab testing. Requirements are defined as meeting the minimum threshold as noted in Attachment 1, Performance Specification PS/07/EOTF/004.

RFP at 68.

In response to the solicitation, the agency received five proposals (one of which was rejected as late). Initial Business Clearance Memorandum, Oct. 8, 2008, at 11. The agency evaluated the proposals and conducted extensive testing of the offerors’ sample telescopes. Based on this evaluation, Ashbury’s and Horus’s proposals (the only proposals relevant here) were rated unacceptable/high risk under the technical capability factor, and Ashbury’s was rated very good and Horus’s “not applicable” under the past performance factor. Id. at 12. Ashbury’s and Horus’s were among three proposals included in the competitive range for discussion purposes. Competitive Range Determination, Oct. 15, 2008.

¹ Proposals were to be assigned adjectival ratings of outstanding, excellent, acceptable, marginal, or unacceptable, and risk ratings of high, moderate, or low under the technical capability factor. RFP at 67. Proposals were to be assigned adjectival ratings of exceptional, very good, satisfactory, marginal, unsatisfactory, or not applicable under the past performance factor. RFP at 67-68.

The agency conducted discussions, requested and received revised proposals, and evaluated the revised proposals. It rated Ashbury's proposal outstanding/moderate risk, and Horus's outstanding/low risk under the technical capability factor. Second Business Clearance Memorandum, Dec. 11, 2008, at 5. The firms' past performance ratings remained unchanged. Id. Based on these evaluation results, the agency established a revised competitive range consisting of the protester's and awardee's proposals, Competitive Range Determination, Dec. 9, 2008, held a second round of discussions, and solicited and obtained final proposal revisions (FPR). After evaluating the FPRs, the agency assigned Ashbury's proposal an outstanding/moderate risk rating, and Horus's an outstanding/low risk rating, for technical capability. Third Business Clearance Memorandum, Jan. 2, 2009, at 7. The agency specifically noted, in connection with Horus's low risk rating, that Horus had included certain information—including a program management plan, quality management system plan, and configuration management plan—in its proposal. Id. at 8. In contrast, the agency assigned the protester's proposal a moderate risk rating, stating:

Risk is rated moderate because the proposal did not provide certain detailed procedures outlining how the requirements of the solicitation will be met, e.g., detailed Program Management Plan and Configuration Management Plan were not enclosed. While the proposal did state that procedures, as required by the solicitation, would be established, without providing insight into these procedures, there is a risk to the Government that once established, the procedures may be inadequate and require Government oversight to correct.

Id. at 9. The offerors' past performance ratings remained unchanged. Id. Horus's evaluated price was \$13,448,675, and Ashbury's \$16,266,549.² Id. at 10. On the basis of these evaluation findings, the agency determined that Horus's proposal represented the best value, and thus made award to Horus. Id. at 12; Source Selection Decision Document, Jan. 9, 2009.

HORUS'S RETICLE

Ashbury maintains that the agency unreasonably concluded that Horus's proposed reticle was compliant with the terms of the solicitation. (The reticle is a system of lines, dots, crosshairs or wires in the focus of the eyepiece of an optical instrument, typically used to estimate speed or distance, or as a measuring or counting device or centering or aiming device. Webster's Third New International Dictionary of the English Language, Unabridged, 1,938 (1966).)

² Evaluated prices were determined by adding the prices for three notional "baskets" of goods and services.

Throughout the performance specification, various requirements were designated as key attributes (abbreviated “KA” in the specification). For these key attributes, the specifications expressed a threshold requirement and, in some instances, an objective that the agency hoped to achieve; failure of a proposed SSOT to meet at least the threshold of a key attribute rendered the proposal ineligible for award. Performance Specification, at 4. Regarding the reticle, the RFP provided:

3.3.1.13 Reticle (KA) The SSOT shall have a mil dot reticle that maintains its angular subtense in accordance with 3.3.1.13.1 throughout its magnification and focus range. The reticle shall be focusable at all magnification settings. The reticle shall be a visible 0.2 mil round dot mil-dot duplex reticle³ (Threshold) (See Figure 1 and be similar to the reticle in the USMC [United States Marine Corps] Scout Sniper Day Scope) (Objective) (See Figure 1, Additional marks/symbols.).

3.3.1.13.1 MIL-DOT (KA) The reticle shall be clearly visible and able to be brought in focus at all magnification settings. The vertical and horizontal elements of the reticle shall maintain their orthogonality throughout their extent. The SSOT mil dot reticle shall be a 0.2 mil round mil-dot duplex reticle and shall be contained in the first focal plane (Threshold) (See Figure 1).

Performance Specification, at 7.

As noted, after receipt of initial proposals, the agency subjected all of the proposed SSOTs to extensive testing, both to evaluate the performance of the devices, and to evaluate their durability when subjected to various environmental conditions. Additionally, the sample SSOTs were given to Corps personnel in the field to perform user evaluations. Most of these tests were conducted from April to June 2008, and the agency produced reports that detailed the results of the testing. Environmental Test Report, June 5, 2008; Test Evaluation Report for the Scout Sniper Observation Telescope, Vendors A-D, June 5, 2008. The initial test report found that, while Horus’s proposed reticle met the RFP’s threshold requirement for maintaining angular subtense, it was not similar to the reticle in the USMC Scout Sniper Day Scope. Test Evaluation Report for the Scout Sniper Observation Telescope, Vendor A, June 5, 2008, at i, 25.

³ A duplex reticle is one that has thick lines at the ends of the horizontal and vertical elements, with thinner lines in the center. A mil-dot reticle is one that has dots spaced along the horizontal and vertical elements at specified milliradian intervals on the crosshairs. The reticle called for in the RFP essentially combines the two types. Performance Specification, at 7.

Subsequently, in July, the agency conducted an additional test with respect to the proposed reticles. The original test regimen was modified “to include results of the procedure to determine the presence of a duplex reticle.” Addendum to the Test Report TER/08/EOTF/010, July 16, 2008. After conducting the additional test, the agency determined that Horus had not proposed a duplex reticle. Addendum to the Test Report TER/08/EOTF/010A, July 16, 2008. As a consequence, the agency’s initial technical evaluation report found Horus’s originally proposed telescope unacceptable because, among other reasons, it “does not meet the threshold requirement of being a duplex reticle per the requirement [of the performance specification]” Initial Technical Evaluation Report, Oct. 7, 2008, at 2. In contrast, all of the test data relating to Ashbury’s reticle showed that its proposed reticle met the requirements of the performance specification, was a duplex reticle, as required, and achieved the agency’s objective of being similar to the reticle in the USMC Scout Sniper Day Scope. Test Evaluation Report for the Scout Sniper Observation Telescope, Vendor D, June 5, 2008, at 25; Addendum to the Test Report TER/08/EOTF/010D, July 16, 2008. (The record shows that Ashbury was the only firm that offered a duplex reticle at the outset.)

During discussions with Horus, the agency pointed out, among other things, that its proposed reticle was not a duplex reticle, as required by the performance specification. Discussion Letter to Horus, Oct. 21, 2008, at 1. In response, Horus amended its proposal to state that [deleted]. Horus Proposal Revision, Nov. 12, 2008, at 3 (emphasis in original). This language is identical to the language included in Horus’s initial proposal, except for the addition of the word [deleted]. Horus’s revised proposal also made reference to an included drawing. An examination of the drawing shows that no manufacturer or part number for the reticle is identified, and it is described only as [deleted]. Horus Proposal Revision, Nov. 12, 2008, attach. 9.

Ashbury maintains that, while Horus offered in its FPR to provide an alternate reticle that purported to meet the requirements and objective of the RFP, in fact, its proposal did not provide the agency with a reasonable basis for finding it acceptable. More specifically, Ashbury maintains that the agency improperly failed to test Horus’s replacement reticle, as contemplated under the RFP, instead accepting Horus’s mere promise to provide a compliant reticle. Ashbury asserts that this promise could not reasonably form the basis for the agency to find that the replacement reticle met the objective of the RFP of being similar to the reticle currently in use in the USMC Scout Sniper Day Scope, or that it was technically equivalent to the one offered by Ashbury.

Agencies are required to evaluate proposals in a manner that is consistent with the terms of the solicitation. Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., B-309752 et al., Oct. 5, 2007, 2008 CPD ¶ 83 at 10. Our review of the record shows that the agency improperly failed to obtain a telescope from Horus that was configured with its alternate reticle and, consequently, did not evaluate and test the alternate reticle proposed by Horus in accordance with the requirements of the RFP.

As quoted above, the solicitation provided that the agency “will subject production samples to any and all of the examinations and tests specified in the detailed performance Specification.” RFP at 68. The record shows, however, that, after receiving Horus’s proposal revision, the agency neither required Horus to identify a specific model nor did anything to examine or test Horus’s proposed alternate reticle. The record contains no indication that the agency obtained a sample telescope with the alternate reticle installed, or that it in any way critically evaluated the change in the firm’s proposed reticle, despite the fact that this was a key attribute of the telescopes. Instead, the agency accepted Horus’s unsubstantiated representation that its alternate reticle was [deleted]⁴ and, in apparent reliance on that representation, concluded that its alternate reticle was not only acceptable, but also met the performance specification objective of being similar to the reticle in the USMC Scout Sniper Day Scope. In this regard, the agency’s second technical evaluation report simply notes, without elaboration, that the alternate reticle meets the objective requirement of the performance specification of being similar to the reticle in the USMC Scout Sniper Day Scope. Technical Evaluation Report, Nov. 26, 2008, at 3.

The agency’s actions were unreasonable in view of the fact that Horus’s originally-proposed reticle was found technically unacceptable. In contrast, as noted, the reticle offered by Ashbury was shown through the agency’s testing procedures to have met both the threshold requirements and the objective of the performance specification of being similar to the reticle in the USMC Scout Sniper Day Scope. The agency’s acceptance of the alternate Horus reticle was unreasonable because doing so was inconsistent with the stringent testing requirements that the RFP stated would be applied to establish technical acceptability. Moreover, the agency’s actions constituted an improper waiver of the testing requirements for Horus, but not Ashbury. As a result of the waiver, although Horus’s proposal was higher priced than Ashbury’s, it is not clear whether Horus submitted a technically acceptable proposal. Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., supra. We therefore sustain this aspect of Ashbury’s protest.

DISCUSSIONS

⁴ Ashbury states that it is the exclusive licensee of the Premier Reticle GenII Mil-Dot Reticle, the reticle found by the agency through its testing to meet all specification requirements, and to be similar to the USMC Scout Sniper Day Scope reticle. In support of its assertion, Ashbury has provided a letter from Premier’s counsel to its vice president that appears to support its claim regarding its exclusive license. Protester’s Comments, Apr. 6, 2009, exh. 2. Horus has not established otherwise. Whether any alternative reticle that is similarly close to the USMC Scout Sniper Day Scope reticle is available, or whether Horus could, for example, obtain a licensing agreement with Premier are matters not established in the current record.

Ashbury maintains that the agency failed to engage in adequate discussions with it. As noted, the agency assigned the Ashbury proposal a moderate risk rating based on the firm's failure to include various management plans in its proposal. Noting that the RFP did not require offerors to include such plans in their proposals, Ashbury asserts that the agency should have advised it during discussions that the plans were required. The protester notes further that the agency raised this specific concern with Horus.

The agency concedes that the RFP did not require the management plans and that it raised the matter in discussions with Horus, but maintains that it was not required to discuss the matter with Ashbury because the firm's risk rating did not amount to a weakness assessed against its proposal.

Again, we agree with Ashbury. Ashbury's proposal's moderate risk rating, and the reasons underlying it, were specifically referenced in the agency's source selection decision as the sole technical discriminator for selecting Horus's proposal (rated low risk). Third Business Clearance Memorandum, Jan. 2, 2009, at 12. There is no indication that the agency ever determined that this lower rating was considered only a minor matter; indeed, it was the only evaluated difference in the technical proposals, and, based on the record, appears to have been a material concern to the agency. We thus find no merit in the agency's contention that Ashbury's lower risk rating did not have to be raised during discussions because it was not a significant proposal weakness.

In any case, since the RFP did not call for the management plans in question, it was unreasonable for the agency to downgrade Ashbury's proposal for failing to include them. The agency either should have amended the RFP to include a requirement for the detailed management plans, or informed both firms of the added requirement during discussions. See Hines/Mortenson, B-256543.4, Aug. 10, 1994, 94-2 CPD ¶ 67 at 5. Because the agency did not amend the solicitation, and downgraded Ashbury's proposal without otherwise informing it of the requirement during discussions, we sustain the protest on this ground.⁵

⁵ We point out as well that the agency's discussing the matter with Horus, but not with Ashbury, amounted to improper disparate treatment of the offerors during discussions. The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 49-50.

RECOMMENDATION

We recommend that the agency reopen the acquisition; determine whether it is necessary to amend the solicitation to more accurately reflect its requirements; obtain and test a Horus telescope configured with its alternate reticle consistent with the terms of the RFP; and (if necessary) obtain and evaluate revised proposals. We further recommend that, if the agency determines after its reevaluation that Ashbury's proposal represents the best value, it terminate Horus's contract and make award to Ashbury, if otherwise proper. Finally, we recommend that the agency reimburse Ashbury's costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). Ashbury should submit its certified claim, detailing the time expended and the costs incurred, directly to the agency within 60 days of its receipt of our decision.

The protest is sustained.

Daniel I. Gordon
Acting General Counsel