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**Comptroller General
of the United States**

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

Decision

Matter of: Intermarkets Global

File: B-400660.10; B-400660.11

Date: February 2, 2011

Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith, Pachter & McWhorter, for the protester.

Eric J. Marcotte, Esq., and Scott A. Schipma, Esq., Winston & Strawn, for Anham, FZCO, the intervenor.

Jeremiah Kline, Esq., Catherine Kellington, Esq., and Judith P. Gever, Esq., Department of Defense, Defense Logistics Agency, for the agency.

David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency determination to limit the revisions offerors may make to their proposals during corrective action is denied where the corrective action was appropriate to remedy the concerns identified by the cognizant GAO attorney during an outcome prediction alternative dispute resolution conference, and agency permitted offerors to make changes required to address clarifications of solicitation requirements.

DECISION

Intermarkets Global (IMG), of Amman, Jordan, protests the corrective action taken by the Department of Defense, Defense Logistics Agency (DLA), in response to protests by KGL Food Services and IMG against DLA's award of a contract to Anham, FZCO, of Dubai, United Arab Emirates, under request for proposals (RFP) No. SPM300-08-R-0061, for the supply of a full service food line to troops in Kuwait, Iraq and Jordan. IMG asserts that DLA has implemented its corrective action in an unreasonable manner.

We deny the protest.

The prime vendor contract was awarded to Anham on April 14, 2010. KGL and IMG thereupon protested the award in protests filed with our Office (on April 27 and April 26, respectively) within 5 days of receiving a requested and required debriefing.

However, the resulting stay against Anham's performance of the contract was overridden by the agency on May 7, on the basis that urgent and compelling circumstances significantly affecting the interests of the U.S. did not permit suspending contract performance. On July 20, GAO conducted an outcome prediction alternative dispute resolution (ADR) conference in which the cognizant GAO attorney indicated that GAO likely would sustain the protests on the basis that the agency's price realism determination was unreasonable. The GAO attorney also raised concerns about several aspects of the solicitation requirements and technical evaluation--including the force protection requirements and evaluation of warehouse capacity--but indicated that these concerns would not serve as additional bases for sustaining the protests.

On July 22, DLA advised our Office and the parties that it intended to undertake corrective action in response to the ADR. DLA advised that it would reopen limited discussions with the offerors on specific issues, request revised proposals, and make a new source selection decision. We thereafter dismissed the protests as academic (B-400660.4 et al., July 22, 2010).

On September 2, DLA reopened limited discussions by requesting a detailed explanation (with supporting documentation) as to how the offerors would satisfy the normal delivery requirements under their proposed prices. The agency advised that, while the discussions were then limited to responding to the above inquiry, the agency "intend[s] to conduct subsequent discussions in other areas as well." DLA Letters to Offerors, Sept. 2, 2010. On September 13, KGL filed a protest asserting that the agency's corrective action was illogical and favored Anham. Offerors' pricing responses were received on October 7. On October 14, DLA issued an amendment to the solicitation clarifying the assumed size of the required warehouse pallets (the estimated minimum number of which previously had been disclosed) and the extent of the solicitation force protection requirements. Amendment 26. On October 20, offerors were advised that they could submit a "final technical proposal revision" addressing either or both of these areas, but were cautioned that other revisions to their technical proposals were prohibited. DLA Letters to Offerors, Oct. 20, 2010. Regarding possible price revisions, offerors were advised as follows:

Price revisions are prohibited unless you can provide documented evidence, including a narrative explanation, showing a direct link, with supporting cost-type information, between changes in your proposal resulting from these two clarifications and the proposed pricing.

Id.

On October 29, IMG filed the current protest challenging the terms of the corrective action and asserting that there was insufficient time before the scheduled November 1 closing date in which to prepare a revised proposal. DLA subsequently extended the closing date to November 17 and amended the solicitation to more clearly indicate the intended limited nature of the revised proposals. Amend. 27. On

December 14, GAO dismissed KGL's prior protest, finding that the agency's approach of addressing price realism before turning to clarification of the agency requirements did not demonstrate either undue delay or bad faith (B-400660.9).

As an initial matter, IMG asserts that the corrective action is unduly limited, and that the offerors instead should be given the opportunity to generally revise their proposal.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. 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. In this regard, an agency's discretion when taking corrective action extends to a decision on the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors may make to their proposals. See, e.g., Honeywell Technology Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; Domain Name Alliance Registry; Computer Assocs. Int'l, *supra*; Rel-Tek Sys. & Design, Inc.-Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

Here, DLA's corrective action first focused on the very procurement deficiency (an unreasonable price realism evaluation) that led to GAO's ADR prediction that the protests would be sustained, and then turned to the other areas of concern identified during the ADR. In this regard, the agency amended the solicitation to clarify the assumed size of the required warehouse pallets and the force protection requirements, Amend. 26, and then advised offerors that they could submit a final technical proposal revision addressing either or both of these areas, as well as make any price revisions for which the offeror could provide documented evidence showing a direct link between changes in the proposal resulting from the two clarifications and the proposed pricing. DLA Letters to Offerors, Oct. 20, 2010. Since the agency's corrective action responded to the areas of concern identified by GAO, and nothing in IMG's protest demonstrates that the agency's approach was an abuse of discretion, we deny IMG's protest regarding the scope of the corrective action. Cf., Lockheed Martin Sys. Integration--Owego; Sikorsky Aircraft Co., B-299145.5; B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 6 (change in evaluation methodology required opportunity to respond to revised scheme).

IMG asserts that the revised solicitation includes conflicting requirements. In this regard, the solicitation generally requires offerors to propose both distribution prices and subsistence product prices, with the latter subject to adjustment under an economic price adjustment clause to reflect the contractor's actual material costs for

subsistence products. RFP at 31. Further, the solicitation as issued required that “ALL offered product prices must be substantiated with a copy of the manufacturer’s or grower’s invoice or quote for each item in the Schedule of Items,” with offerors submitting revised pricing required to submit invoices or quotes dated within 30 days prior to the due date for revised proposals. RFP at 165. Subsequently, the solicitation was amended to provide that invoices or quotes “should reflect prices effective within forty-five (45) days prior to the date specified for receipt of offers (initial or revised, whichever is later).” Amend. 18. However, after IMG asserted in its initial protest that there was an inconsistency between the requirement for updated vendor pricing information and the limits imposed on revisions to the price proposal, DLA further amended the solicitation to add the following: “Note: Therefore, offerors should not submit product price quotes or invoices as part of their final proposal revision due on November 17, 2010.” Amend. 27. IMG asserts that while under the revised solicitation offerors were not required to submit updated invoices or quotes, the solicitation improperly required offerors to obtain revised vendor pricing information without giving offerors an opportunity to correspondingly revise their price proposals.

IMG’s protest in this regard provides no basis to question the terms of the reopening. As an initial matter, we agree with DLA that the solicitation as amended above did not require offerors to obtain updated vendor invoices and quotes. Given the limitation on price revisions in the revised proposals, it is not evident what purpose would be served by requiring offerors to generally obtain updated vendor pricing information. This is especially so where the express prohibition on offerors furnishing updated vendor invoices and quotes means that such information would not be considered in the evaluation. Further, given IMG’s identification in its protest of the problems posed by requiring updated vendor invoices and quotes, we fail to see how an agency response directing that offerors “should not submit product price quotes or invoices as part of their final proposal revision,” Amend. 27, can reasonably be read as nevertheless requiring them to obtain such updated vendor pricing information. In any case, prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. Armorworks Enter’s, LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3. IMG has not shown, nor does the record otherwise indicate, how an asserted requirement to obtain updated vendor invoices and quotes, which were not to be submitted to the agency and thus would not be evaluated as part of the source selection, resulted in any competitive prejudice to IMG.

IMG asserts that the communications DLA has had with Anham while that company prepares to commence performance amounts to discussions, thereby rendering the limited discussions DLA has had with IMG unequal and unfair. DLA, on the other hand, maintains that the communications and meetings cited by IMG were necessary to administer Anham’s ongoing contract and ensure that food supplies are delivered; according to the agency, no discussion of Anham’s proposal or the corrective action took place during these interactions. Agency Report at 20-21. We need not now

resolve this dispute, since we view IMG's assertion of unequal discussions as premature, given that an award decision has not yet been made. If IMG is not selected for award, it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time. See American K-9 Detection Services, Inc., B-400464.6, May 5, 2009, 2009 CPD ¶ 107 at 5.¹

Finally, IMG asserts that DLA allowed insufficient time in which to prepare a revised proposal. In this regard, the contracting officer must establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action. What constitutes a reasonable opportunity to respond will depend on "the circumstances of the particular acquisition, such as complexity, commerciality, availability, and urgency." Federal Acquisition Regulation (FAR) § 5.203(b). Here, in response to IMG's protest in this regard, the agency extended the initial 12-day response time to 28 days, just 2 days short of the normal minimum 30-day response time for submission of initial proposals. FAR § 5.203(c). Given the significant limits on the offerors' ability to revise their proposals as part of the corrective action, and the fact that offerors were not generally required to obtain updated vendor invoices or quotations, we conclude that the record supports the reasonableness of the contracting officer's exercise of discretion in establishing a 28-day response time for submission of revised proposals.

The protest is denied.

Lynn H. Gibson
General Counsel

¹ IMG asserts that notwithstanding the strict limitations on the revision of proposals established by DLA, the agency nevertheless has permitted Anham to change the membership of its proposed contract team. This assertion also is premature, given that an award decision has not yet been made.