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Decision

Matter of: HDT Tactical Systems, Inc.

File: B-403875

Date: December 14, 2010

David A. Churchill, Esq., Luke C. Platzer, Esq., and Damien C. Specht, Esq., Jenner & Block LLP, for the protester.

Richard P. Rector, Esq., and Nedra Adams, Esq., DLA Piper LLP, for Mainstream Engineering, Inc., an intervenor.

Debra J. Talley, Esq., Jessica Easton, Esq., and Sarah McWilliams, Esq., Department of the Army, 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

Protest that agency misevaluated protester's proposal in making a downselection decision is denied, where record shows that agency properly eliminated the proposal for failing to meet a test standard established as a minimum requirement for further consideration in the competition.

DECISION

HDT Tactical Systems, Inc., of Solon, Ohio, protests the elimination of its proposal from further consideration during a downselection procedure conducted by the Department of the Army in connection with its acquisition of variously-sized improved environmental control units (IECUs), under request for proposals No. W909MY-08-R-0014. HDT maintains that its IECUs were misevaluated during a testing phase of the acquisition, that the agency treated it and its competitor, Mainstream Engineering, Inc., of Rockledge, Florida, disparately, and that the agency unreasonably failed to engage in discussions.

We deny the protest.

The agency originally issued the RFP in 2008 and awarded contracts to both HDT and Mainstream. Both contracts contemplated potentially four phases of performance. During phase one, both contractors were to design and fabricate two prototype IECUs, a 9,000 BTU unit, and an 18,000 BTU unit. At the conclusion of this initial effort, the contracts called for the performance of testing on the prototype

units to determine whether they met various performance characteristics required by the underlying contracts' purchase descriptions. The contracts¹ specified that the agency would select a single contractor at the conclusion of phase one to perform the remainder of the requirement.² The contracts further provided that the agency would base its selection decision on the results of various technical tests performed on the prototype units, as well as consideration of evaluated performance risk and cost. The technical tests were deemed significantly more important than either the performance risk or cost considerations, and performance risk was more important than cost. AR, exhs. D1, D2, at 127.

For purposes of evaluating the technical considerations, the contracts provided for testing the prototype IECUs to measure five parameters: total cooling capacity, sensible cooling capacity, high temperature operational limit, power consumption, and weight. AR, exhs. D1, D2, at 127-28.³ These parameters were outlined in two documents incorporated into the contracts—a purchase description and an interface characteristics document.⁴ The contracts provided that the IECUs developed during phase one had to meet the characteristics outlined in the purchase description and interface characteristic documents in order to be eligible for the downselect evaluation. Id. The contracts further provided that the final selection decision would be based on an evaluation of the prototypes and downselection proposals under the technical, performance risk and cost criteria, but only after the prototypes were deemed eligible (i.e., had passed all of the technical parameter tests) for downselection evaluation purposes. Id.

¹ HDT's and Mainstream's contracts included identical provisions relating to the agency's conduct of the downselection procedure. Agency Report (AR), exhs. D1 and D2, at 127-30.

² During phase two, the contractor will perform additional design work; during phase three, the contractor will perform low-rate production of the IECUs; and during phase four, the contractor will engage in full scale production of the IECUs. AR, exhs. D1, D2, at 61.

³ The contractors were responsible for preparing, submitting, and obtaining agency approval of, a testing plan that met the contract requirement to complete testing within 350 days after award, which occurred on May 13, 2009. AR, exhs. D2, D2, at 1, 64.

⁴ The record includes various iterations of these two documents. See AR, exhs. D1B, D1C, D1D, D2B, D2C and D2D. For purposes of this protest, the only relevant considerations relate to the high temperature operational limit and the sensible cooling capacity requirements; there is no dispute among the parties regarding the requirements that had to be met by the prototype IECUs.

The record shows that Mainstream's IECUs passed all applicable tests. AR, exh. C, at 4. However, during the testing of HDT's units in March 2010, its 9,000 BTU IECU failed the high temperature operational limit test, and its 18,000 BTU IECU failed the sensible cooling capacity test. Specifically, the 9,000 BTU IECU was unable to operate uninterrupted for 1 hour at a temperature of 125° Fahrenheit (F), as required; it was only able to pass the test at a temperature of 123° F. AR, exh. B, at 60. With respect to HDT's 18,000 BTU IECU, the unit was required to have a sensible cooling capacity of 13,100 BTUs per hour, but was only able to achieve a sensible cooling capacity of 12,774 BTUs per hour. Id. at 63.

Based on the results of the testing, as well as the agency's evaluation of the firms' downselection proposals, the agency made award to Mainstream at a cost/price higher than HDT's (\$63,085,456 versus \$41,388,969), concluding that HDT was ineligible for award based on its failure to pass all of the required tests. AR, exh. F5. After being advised of the agency's downselection decision and receiving a debriefing, HDT filed this protest.

HDT argues that the agency's evaluation of its 9,000 BTU IECU was unreasonable. According to the protester, when its unit was subjected to the high temperature operational limit test, it was connected to the wrong power source for an interval of time prior to the test; this caused the unit's compressor to overheat, thereby preliminarily predisposing it to fail the high temperature operational limit test.

In reviewing an agency's evaluation of proposals, we will not reevaluate proposals; rather, we examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation (or, as in this case, the underlying contracts), as well as applicable procurement laws and regulations. Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2008 CPD ¶ 4 at 3-4.

We have no basis to object to the evaluation here. Even if we agreed with HDT regarding the propriety of the high temperature operational limit test, as discussed, HDT's 18,000 BTU IECU independently failed the sensible cooling capacity test, and HDT does not take issue with the manner in which that test was conducted. Since, as discussed, the express contract terms required passage of all tests in order for a proposal to be considered for award, HDT's proposal was properly excluded from further consideration based on this failure, notwithstanding the outcome of the high temperature operational limit test.

HDT asserts that the agency engaged in disparate treatment in connection with the conducting of the testing described above. According to the protester, the record shows that Mainstream was permitted to postpone its testing for a period of

approximately 5 weeks;⁵ HDT explains that it, too, would have benefited from postponement of its official testing. HDT maintains that, had its testing been postponed, it could have implemented a design change to its 18,000 BTU IECU that would have enabled it to pass the sensible cooling test. HDT maintains, in this regard, that it had already devised the engineering change necessary to improve the performance of its unit, but that it chose not to activate the feature during testing because it believed a malfunctioning part needed replacing, and HDT did not believe it could effect the repair before its scheduled testing time. HDT concludes that it was unreasonable for the agency to allow Mainstream to postpone its official testing without advising HDT that it could postpone its testing.

We have no basis to object to the agency's actions here. The record shows that the agency did not advise any offeror that it could postpone its testing. Rather, Mainstream approached the agency and, on its own initiative, requested an opportunity to reschedule its official testing to a later date within 350 days after contract award (offerors were free to establish any testing date in their test plans, so long as the date was within the 350 day period). In this regard, in an affidavit submitted by the contracting officer's representative (COR) for the Mainstream contract, the COR states:

In my capacity as COR on Mainstream's contract, I received a phone call from . . . [the cognizant Mainstream representative] on March 5, 2010. He informed me that Mainstream wanted to postpone all of its official tests because Mainstream's own unofficial tests conducted at Intertek [an independent testing concern used by both firms] had gone poorly and revealed the need for further design changes. After determining that the rescheduled testing would still occur within the required 350 days after contract award (DAC) per SOW [statement of work] Para. 4.6, I granted the request. All of Mainstream's official tests were postponed to later dates, not just the official testing to be performed at ITS [Intertek]. No change was made to Mainstream's test plan except to postpone the tests for a five-week period.

Supplemental Agency Report, exh. D.

HDT did not ask to reschedule its testing date. In this connection, HDT's representative submitted an affidavit in which he states:

⁵ In its initial protest, HDT speculated that the agency had allowed Mainstream to conduct its official testing a second time, after initially failing to pass certain of the tests. The record contains no support for HDT's speculation; Mainstream conducted its testing only once, and passed all tests.

HDT did not believe, at the time of downselection testing, that it was a realistic option for HDT to reschedule its downselection testing for a future date, because (1) we believed that Mainstream had already tested its IECUs before HDT in early March, and that delay would reflect poorly on HDT, and (2) we believe[d] the Army would either not permit [the] delay or would hold [the] delay against HDT in its evaluation.

HDT's Supplemental Comments, Nov. 10, 2010, attach. B, at 2. However, notwithstanding HDT's subjective beliefs, nothing in the contracts specified when, within the 350 day period, testing should occur, and nothing precluded offerors from rescheduling their testing--within the larger window allowed for testing--to a later date. In addition, nothing in the contracts suggested that an offeror's decision to reschedule its testing would have a negative evaluation impact, since, as noted, offerors were free to select their own testing dates within the 350 day post-award period. Moreover, the COR for the HDT contract submitted an affidavit in which he states:

Had HDT requested that I (as COR) grant a postponement of all its scheduled official downselection testing to allow them to make additional improvements to its test units, I would have granted the request as long as test completion was not delayed beyond the contractually required date of 350 days after contract award.

Supplemental Agency Report, exh. C, at 1.

In our view, both firms made a business judgment concerning whether or not to request an extension of time to perform their official testing. In granting Mainstream's request, the agency did not waive or relax any contract requirement, or provide Mainstream an opportunity it would not also have provided to HDT had it made the same request, which it was free to do. Correspondingly, the agency was not under any legal obligation to spontaneously offer to reschedule HDT's testing, simply because Mainstream had rescheduled.

Finally, HDT asserts that the agency abused its discretion in not initiating discussions in connection with its downselection decision. Specifically, the record shows that, after determining that the HDT proposal failed to meet all of the official testing requirements and therefore was unacceptable, the agency considered proposed solutions to the deficiencies identified during the testing that were outlined in HDT's downselection proposal, but concluded that they were too vague. According to HDT, at that point, the agency was legally obligated to engage in discussions in order to afford HDT an opportunity to provide additional information that would demonstrate the soundness of its proposed solutions.

This argument is without merit. The contracts specifically advised, consistent with the requirements of the Competition in Contracting Act, 10 U.S.C.

§ 2305(a)(2)(A)(ii)(I) (2006), and Federal Acquisition Regulation § 15.209(a), that the agency intended to make its downselection decision without engaging in discussions. AR, exhs. D1, D2, at 130. Given the terms of the contracts, and in light of the fact that HDT has neither alleged nor demonstrated circumstances that would lead us to consider a possible abuse on the part of the agency in exercising its discretion not to open discussions, this argument provides no basis for questioning the award. Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3-4.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ HDT makes several additional assertions that we need not consider. For example, HDT asserts that the agency misevaluated its proposal under the performance risk factor. However, given our conclusion that its proposal was otherwise properly eliminated from consideration based on the sensible cooling capacity test failure, this argument is academic. HDT also asserts that the agency misevaluated Mainstream's cost proposal. Since HDT's proposal was properly eliminated from consideration, however, HDT is not an interested party to challenge the reasonableness of the evaluation of Mainstream's cost proposal; even if HDT were correct, it would not be eligible for award. 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2010).