



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ST Aerospace Engines Pte. Ltd.

File: B-275725.3

Date: October 17, 1997

Arthur I. Leaderman, Esq., and Claire E. Kresse, Esq., Smith, Pachter, McWhorter & D'Ambrosio, P.L.C., for the protester.

Karl A. Oliver, Esq., Mahoney, Hagberg & Rice, for Standard Aero Ltd., and David R. Johnson, Esq., and James C. Dougherty, Esq., Gibson, Dunn & Crutcher, for National Airmotive Corporation, the intervenors.

B. J. Braun, Esq., U. S. Coast Guard, for the agency.

Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where, in response to General Accounting Office decision sustaining protest, discussions are reopened after offerors' prices have been revealed, agency may properly limit the scope of revisions offerors may make to their proposals and not allow offerors to revise their prices.
 2. Agency reasonably reopened limited technical discussions with, and requested new limited best and final offers (BAFO) from, all offerors in the competitive range in response to General Accounting Office decision sustaining protest and recommending a reopening of limited technical discussions with, and the solicitation of a new limited BAFO from, one of the offerors.
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DECISION

ST Aerospace Engines Pte. Ltd. (STA Engines) protests the decision of the U.S. Coast Guard to reopen technical discussions with, but not to allow the submission of revised price proposals from, all competitive range offerors under request for proposals (RFP) No. DTCG38-94-R-30006, for the overhaul and repair of C-130 T56 engine reduction gearboxes and torquemeters. The protester contends that, if offerors are allowed to revise their technical proposals, they should also be allowed to revise their prices.

We deny the protest.

BACKGROUND

On March 19, 1997, we sustained a protest by STA Engines against award under this solicitation to Standard Aero Ltd., whose proposal had been selected as representing the best value to the government. ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161. We found that the agency had improperly downgraded STA Engines' proposal, to its competitive prejudice, based on past performance information¹ pertaining to one of its affiliates, ST Aerospace Systems, without clarifying the relationship between the companies and without affording STA Engines an opportunity to comment on the information during discussions. We recommended that the agency reopen discussions with STA Engines to clarify the extent of involvement of STA Systems in its proposed effort, and that it then solicit another round of best and final offers (BAFO) and evaluate them to determine which offer represented the best combination of technical merit and price.

STA Engines subsequently requested that we modify our decision to delete the recommendation for another round of BAFOs. The protester argued that a reopening of the price competition would create the risk of an auction since offerors' prices had been disclosed by the agency during the debriefing process; it also argued that the impropriety could otherwise be remedied without impairment to the integrity of the procurement process by limiting the scope of reopened negotiations. We agreed with the protester, and, accordingly, modified our decision to recommend that discussions with the protester be confined to clarifying the extent of involvement of STA Systems in STA Engines' proposed effort (*i.e.*, that the protester not be allowed to revise other aspects of its technical proposal or its price), and that a new BAFO then be solicited from STA Engines only.

The agency decided to reopen discussions addressing past performance issues with all offerors in the competitive range and to solicit BAFOs from all addressing this area only. The contracting officer explains, in responding to the protest, that another offeror whose proposal was in the competitive range had experienced the same lack of opportunity to discuss past performance as the protester, and that to remedy this error and to ensure maximum fairness to all competitors, he had determined that our recommendation should be expanded. By letter dated June 12, the contracting officer advised offerors that discussions bearing on past performance would be reopened and that they could submit updated past performance information, but that they would not be permitted to revise other aspects of their technical proposals or their prices. The letter also asked offerors to revalidate their offers (which had expired), and advised them that if they had not done so by June 20, the offers would not be considered during the reevaluation process.

¹Past performance was the most important of five technical evaluation factors.

STA Engines responded to the agency's communication by letter dated June 20. The protester objected to the agency decision to reopen discussions with all offerors in the competitive range, but stated that it would participate in the competition if the agency would allow offerors to revise their prices as well as their technical proposals. The protester argued that the agency should adhere to either the original recommendation (which called for the submission of new BAFOs from all competitive range offerors) or to the revised recommendation (which called for the submission of a new limited BAFO from STA Engines only), but that it should not develop a hybrid calling for the submission of new limited BAFOs by all competitive range offerors. All of the other competitive range offerors responded by revalidating their BAFOs.

By letter dated July 3, the Coast Guard notified STA Engines that, because it had failed to revalidate its BAFO, the agency did not have a valid offer from it, and that its offer was therefore excluded from the competitive range. On July 10, STA Engines protested to our Office.

DISCUSSION

STA Engines argues that the agency should allow offerors to revise their prices if it allows them to revise their technical proposals. The protester maintains that "[a] contemporary technical submittal should, as a matter of law, be correlated with contemporary prices." Protest, July 10, 1997, at 6.

As a preliminary matter, the agency argues that STA Engines' protest is untimely since STA Engines was informed of the agency decision to reopen discussions with, and to solicit limited BAFOs from, all offerors on June 12, but did not file its protest with our Office until July 10. In this regard, our Bid Protest Regulations require that protests based on other than solicitation improprieties be filed within 10 days after the basis of protest is, or should have been, known. 4 C.F.R. § 21.2(a)(2) (1997). The Coast Guard argues that the only way that STA Engines' protest would be timely would be if we considered the protester's June 20 letter to the agency an agency-level protest. The agency insists that we should not regard the June 20 letter as such because STA Engines emphasized throughout the letter that it hoped to avoid a protest. Rather than a protest, the Coast Guard contends, the letter should be viewed as an attempt by the protester to have its concerns resolved informally, consistent with the mandate of Federal Acquisition Regulation (FAR) § 33.103(b) that "[p]rior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions."

We think that the protester's letter of June 20 effectively constituted an agency-level protest. A letter does not have to state explicitly that it is intended as a protest--and indeed may contain references to a forthcoming protest--for it to be so considered; it need only express dissatisfaction with an agency decision and request

corrective action. Mammoth Firewood Co., B-223705, Sept. 4, 1986, 86-2 CPD ¶ 261 at 2. STA Engines' letter of June 20 did both; thus, in our view, it may properly be characterized as an agency-level protest. Since STA Engines filed its protest with our Office within 10 days of the adverse agency action on its June 20 letter, its protest is timely. 4 C.F.R. § 21.2(a)(3).

Regarding the protester's argument that an agency must allow offerors to revise their prices if it allows them to revise aspects of their technical proposals, it is true that, as a general rule, offerors may revise any aspect of their proposals in response to discussions, including portions of their proposals that were not the subject of discussions. Krueger Int'l, Inc., B-260953.4, Oct. 4, 1995, 96-1 CPD ¶ 235 at 4. Where discussions are reopened after an award has been made to remedy a defect in the procurement process, and aspects of offerors' technical and/or price proposals have been revealed, the scope of discussions and proposal revisions may be limited, however. Serv-Air, Inc., B-258243.4, Mar. 3, 1995, 95-1 CPD ¶ 125 at 2-3; System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3-4; URS Int'l, Inc., et al., B-232500, B-232500.2, Jan. 10, 1989, 89-1 CPD ¶ 21 at 6-7. For example, where the awardee's price has been revealed (so that a reopening of the price competition would lead to the risk of an auction), and where the technical matters to be discussed during the reopened negotiations are unlikely to have an impact on price, offerors may be prohibited from revising their prices. Krueger Int'l, Inc., supra, at 4-5.

The Coast Guard maintains that this is such a case: offerors' prices have been revealed, meaning that a reopening of the price competition would lead to the risk of an auction, whereas permitting offerors to discuss and update their past performance information is unlikely to have a material impact on their prices. The protester has offered no rebuttal to the agency position. Although it asserted in its initial letter of protest that offerors' prices are now stale, it has offered no support for this argument in any of its submissions; thus, we have no basis upon which to conclude that prices are now so stale as to outweigh concern over the possibility of an auction. Further, the protester has offered no explanation as to why discussing and updating past performance information should be expected to have an impact on prices. Absent evidence that either of the agency's conclusions is unfounded, we see no basis for questioning the agency determination that not reopening the price competition would best preserve the integrity of the procurement process.

In commenting on the agency report, STA Engines raises an additional argument: that the contracting officer's justification for reopening discussions with, and requesting revised BAFOs from, all offerors in the competitive range is merely a pretext, and that his real goal is to circumvent our recommendation in order to undermine the ascendant position that STA Engines would allegedly achieve in the competition if our recommendation were implemented. The protester insists that the sole infirmity in the process was the agency's failure to discuss with it the nature of its affiliation with STA Systems, and that the agency should therefore have

implemented the corrective action that we recommended, which was tailored to remedy this defect.

First, to the extent the protester is now objecting to the agency's failure to implement the precise corrective action that we recommended, its protest is untimely. Although the protester complained about the agency's failure to adhere to our recommendation in its agency-level protest, it did not raise the issue in its July 10 protest to our Office; in the latter letter, it argued only that, if offerors were to be permitted to revise their technical proposals, they should also be permitted to revise their prices. Since the protester did not object to the agency's failure to implement the corrective action that we recommended within 10 days after receiving the agency's letter of July 3, which placed it on constructive notice that its agency-level protest had been denied, but instead waited until it filed its comments on the agency report on August 21, its protest on this issue is untimely. See 4 C.F.R. § 21.2(a)(3).

In any event, the contracting officer emphatically denies that his purpose in reopening discussions with, and requesting an additional round of BAFOs from, all competitive range offerors was to undermine the protester's competitive position, and we find no support in the record for the protester's allegation. Moreover, we think that it was within the agency's discretion to go beyond our recommendation and reopen discussions with all offerors in the competitive range, regardless of whether or not there was a defect in the process relating to another offeror. In this regard, we have held that the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency, and we will not question an agency's ultimate manner of compliance, so long as it remedies the procurement impropriety that was the basis for the decision's recommendation. QuanTech, Inc., B-265869.2, Mar. 20, 1996, 96-1 CPD ¶ 160 at 2. Further, the solicitation of an additional round of BAFO from all offerors in the competitive range is consistent with our original recommendation for corrective action and with the guidance in the FAR on which that original recommendation was based. See FAR § 15.611(c) ("If discussions are reopened [after receipt of BAFOs], the contracting officer shall issue an additional request for [BAFOs] to all offerors still within the competitive range.") We revised our original decision to delete the recommendation for another round of BAFOs and to instead recommend the reopening of discussions with, and the solicitation of a new limited BAFO from, STA Engines only, not because we thought that it would be improper to solicit new limited BAFOs from all offerors in the competitive range, but rather to avoid a price auction and because a reopening of discussions with, and the

solicitation of a new limited BAFO from, STA Engines was the minimum that was required to remedy the defect in the process. To the extent that the agency wishes to do more than the minimum, we see no basis for objecting to its actions.

The protest is denied.

Comptroller General
of the United States