



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Pacific Consolidated Industries

File: B-260650.2

Date: October 25, 1995

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for the protester.
Robert A. Brunette, Esq., for Cosmodyne, Inc., an interested party.
Commander R. B. McKenna and Timothy Lasko, Esq., Department of the Navy, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where solicitation for liquid oxygen/nitrogen generators required offerors to demonstrate that their proposed generators were protected against nuclear, biological, and chemical warfare agent contamination, and record does not support the agency's determination that the proposed awardee's proposal complied with the requirement.

DECISION

Pacific Consolidated Industries (PCI) protests the Department of the Navy's selection of Cosmodyne, Inc. for award under request for proposals (RFP) No. N68335-95-R-0003, a small business set-aside for liquid oxygen/nitrogen generators. PCI contends that Cosmodyne's proposal should have been rejected as technically unacceptable because it failed to demonstrate compliance with two solicitation requirements: (1) that the generators be capable of operating, without decontamination, in an environment contaminated with biological or chemical warfare agents or radiological fallout; and (2) that the generators, without the minor modifications necessary to meet the requirements of this solicitation, have been previously deployed.

We sustain the protest.

The RFP, as amended, sought offers on a base quantity of 6, and an optional quantity of 14, non-developmental, 2-ton capacity liquid oxygen/nitrogen generators. The solicitation provided for award to the offeror submitting the lowest-priced, technically acceptable offer. Offerors were advised that to be determined

technically acceptable, their proposals must clearly demonstrate compliance with the design and performance, reliability and maintainability, and quality assurance requirements specified in the RFP. Among the performance requirements specified was the following:

"Nuclear, biological, and chemical (NBC). The generator shall be capable [of producing] oxygen or nitrogen to the requirements of paragraph 3.3 [which sets forth required minimum production rates and purity/quality standards] while operating in a[n] environment contaminated with the following NBC agents: E.K., Mustard, Lewisite, GB, GD, and radiological fallout.¹ⁿ

Offerors were also advised that to be determined technically acceptable, their proposals must demonstrate that the generators, without the minor modifications necessary to meet the requirements of this solicitation, had been previously deployed, either commercially or militarily.

Three proposals were received by the March 6, 1995, closing date. The agency included two of the three, PCI's and Cosmodyne's, in the competitive range and, after discussions were conducted, both offerors submitted best and final offers (BAFO) prior to the designated closing date of May 30. On June 1, the contracting officer notified PCI that Cosmodyne was the apparent successful offeror and had certified itself as a small business.² On June 7, PCI protested Cosmodyne's small business status to the agency, and on June 19, it filed the instant protest with our Office. By letter dated July 6, the Small Business Administration determined that Cosmodyne is a small business.

In its proposal, Cosmodyne proposed to furnish [deleted].³ The proposal stated that the plant proposed complied, without exception, with the solicitation, and that [deleted]. The proposal further represented that the following filtration systems would keep the products from being contaminated while in the plant:

¹The Navy provided the following clarification of this requirement in amendment No. 0007: "The sealed personnel enclosure does not have to withstand the challenge of NBC agents. The unit must be able to be operated after NBC weapons have been issued and not require any decontamination in order to operate it."

²This notice was furnished in accordance with the requirements of Federal Acquisition Regulation § 15.1001(b)(2).

³[Deleted]

"[Deleted]"

Although there was no indication in Cosmodyne's proposal that any of the foregoing systems were not standard [deleted].

PCI contends that Cosmodyne's proposal fails to demonstrate compliance with the solicitation's NBC requirements, and that the evaluators could therefore not have reasonably determined it to be technically acceptable. The protester maintains that [deleted] have not been proven to, and will not, protect the plant's products against contamination by chemical warfare agents. In addition, PCI alleges that Cosmodyne has never previously deployed a 2-ton capacity liquid nitrogen/oxygen generator with NBC protection and that major modification to its previously deployed model would be required to protect it effectively.

Where an RFP provides for award to the lowest-priced, technically acceptable offeror, each offeror must include sufficient information in its proposal to establish compliance with the solicitation's technical requirements. SBS Technical Servs., B-259934, Apr. 19, 1995, 95-1 CPD ¶ 205. The procuring agency is responsible for evaluating the data submitted by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's item; we will disturb this technical determination only if it is shown to be unreasonable. Inframetrics, Inc., B-257400, Sept. 30, 1994, 94-2 CPD ¶ 138. While we do not make an independent determination of the merits of a technical proposal, the agency's judgment must have a rational basis and be consistent with the stated evaluation criteria, even in cases such as this, where technically complex systems are involved. Bendix Oceanics, Inc., B-247225.3, July 27, 1992, 92-2 CPD ¶ 54, aff'd, B-247225.4, Nov. 24, 1992, 92-2 CPD ¶ 368. Consistent with this requirement, an agency must document its technical determinations in sufficient detail to show they are not arbitrary. Northwest EnviroService, Inc., 71 Comp. Gen. 453 (1992), 92-2 CPD ¶ 38.

Here, we find that the agency's determination that Cosmodyne had demonstrated compliance with the solicitation requirement for NBC protection was unreasonable. The proposal contained no technical literature, test data, or other information establishing the effectiveness in protecting against NBC contamination [deleted]. Further, there is no evidence in the contemporaneous record that the agency's technical evaluators had any reasonable basis for concluding [deleted] would provide effective NBC protection; the record is devoid of any discussion of either the requirement or Cosmodyne's proposed approach to complying with it. In fact, based on our review of Cosmodyne's proposal, we do not see how the evaluators could reasonably have concluded that it demonstrated compliance with the requirement. [Deleted]

We also do not think that the evaluators could reasonably have concluded, based on their experience with [deleted] other oxygen-generating systems, that [deleted]

would be effective in protecting against NBC contamination. In this regard, the technical evaluation team leader responded to a question from our Office as to whether she had previously seen the filtration systems proposed by Cosmodyne used successfully in other oxygen/nitrogen air separation plants by pointing to two systems, the On-Board Oxygen Generating System (OBOGS) used in the F/A-18, F-14, AV-8B, and T-45 Naval aircraft and the Expeditionary Oxygen/Nitrogen System (EONS) used by the Marine Corps, and arguing that the Navy considered [deleted] to be an effective device in preventing NBC contamination based on its experience with those systems. We do not think that [deleted] can reasonably be compared to [deleted] used in the OBOGS or the EONS, however, since--according to the protester and as unrebutted by the agency--these systems [deleted]. The protester asserts--and the agency does not dispute--that there is a significant difference between [deleted].

In sum, the technical evaluators simply did not have enough information concerning Cosmodyne's proposed system to reasonably conclude that it would offer effective protection against NBC contamination. The record thus does not establish that the agency's determination--that Cosmodyne's proposal demonstrated compliance with the solicitation requirement for NBC protection--was reasonable. We therefore recommend that rather than proceeding with award to Cosmodyne, the agency reopen discussions [deleted], followed by submission of BAFOs. If, upon further consideration, the agency determines that Cosmodyne's proposal is not technically acceptable, we recommend that it proceed with award to PCI, if that firm is otherwise eligible for award.⁴ We also find that the protester is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). In accordance with 4 C.F.R. § 21.6(f), PCI's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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⁴Given that the RFP calls for award to be made to the lowest priced, technically acceptable offeror, even if Cosmodyne is found to be technically acceptable, it would be in line for award only if its proposal remained the lowest priced after submission of BAFOs. [Deleted]