



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harris Corporation

File: B-274566; B-274566.2

Date: November 27, 1996

Dorn C. McGrath III, Esq., and Richard L. Moorhouse, Esq., Holland & Knight, for the protester.

Kenneth S. Kramer, Esq., and Nancy R. Wagner, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Raytheon Electronic Systems, Raytheon Company, an intervenor. Vera Meza, Esq., and Walter Harbort, Jr., Esq., Department of the Army, for the agency.

Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation required offerors to propose fixed prices and provided that options, if exercised, would not necessarily be exercised in a manner to guarantee continuous production, and where the protester states in its best and final offer, after discussions regarding these requirements, that it reserved the right to recover additional costs associated with breaks in production in the option periods, the protester's proposal is properly rejected as technically unacceptable since the firm took exception to the solicitation's material fixed-price and option requirements.

DECISION

Harris Corporation protests the award of a contract to Raytheon Electronic Systems, Raytheon Company, under request for proposals (RFP) No. DAAB07-96-R-A509, issued by the Department of the Army for the fabrication, integration, test, and delivery of Tri-Band Tactical Terminals (T3(H)s) for battlefield satellite terminal communications. Harris challenges the rejection of its proposal as technically unacceptable.

We deny the protests.

The RFP contemplated the award of a firm, fixed-price contract for the T3(H) units for a basic contract period and five 24-month option periods to the offeror whose proposal represented the best value to the government, technical evaluation factors,

price, and performance risk considered.¹ As relevant to these protests, the RFP included clause H-4, captioned "Option for Increased Quantity--Separately Priced Line Item." Paragraph (e) of this clause provides that the "[e]valuation of options will not obligate the Government to exercise the option(s)," and paragraph (g) provides that:

"[t]he Government may exercise subsequent options if prior option years are not exercised (i.e. [(sic)] if the Government does not exercise Option I, the Government still has the right to exercise Option II). Exercise of subsequent years is not dependent upon exercise of the prior year option."

In its initial proposal, submitted in April 1996, under a section captioned "Other Conditions and Assumptions," Harris addressed clause H-4, stating that:

"The prices for the Option Period hardware CLINS/SLINS do not contain startup or non-recurring cost[s] provided for in the basic period, but are dependent upon steady work flowing through the T3(H) Focused Factories. Consequently, Harris reserves the right to recover cost[s] associated with breaks in the T3(H) production flow associated with loss of learning, idle resources and personnel disruptions." (Emphasis added.)

By letter dated June 24, the contracting officer notified Harris that the agency had completed its initial evaluation. The contracting officer enclosed with this letter, among other things, items for negotiation (IFN) and responses to Harris's terms and conditions. With regard to the above quoted condition in Harris's initial proposal, the contracting officer stated that:

"The Government does not warrant that options will be exercised so as to facilitate a steady production flow. As stated in RFP Section H-4, Option for Increased Quantity--Separately Priced Line Item, option quantities are not guaranteed and the 'exercise of subsequent [option] years is not dependent upon exercise of the prior year option.'" (Emphasis added.)

The contracting officer also enclosed with her June 24 letter a model contract for Harris, explaining that "if [Harris] is the successful offeror, [Harris] will be required to sign this document. Therefore, please review the model contract and provide

¹The RFP contemplated a fixed-price contract with an economic price adjustment for the T3(H) units during the fourth option period and a time-and-materials contract for contractor support services.

comments as necessary with your IFN responses." Harris's model contract contained RFP clause H-4, "Option for Increased Quantity--Separately Priced Line Item," including paragraphs (e) and (g) as quoted above.² In addition, in response to a previous question posed by Harris concerning the submission of alternate proposals, the contracting officer responded that "alternate proposals are acceptable with the exception of: a) an alternate proposal that changes the contract type." The contracting officer afforded Harris an opportunity to revise its proposal by submitting proposal revision change pages. With respect to RFP clause H-4 and the fixed-price contract-type requirement of the RFP, Harris expressly continued to reserve the right to recover additional costs associated with breaks in the T3(H) production in the option periods.

In July and August, the contracting officer conducted three more rounds of written discussions with Harris. During these discussions, the contracting officer furnished additional IFNs to Harris and responses to Harris's unresolved terms and conditions. As discussions proceeded, the contracting officer also furnished any amendments to the RFP and change pages to Harris's model contract to reflect terms and conditions accepted by the agency. During this time, the contracting officer did not issue any change pages involving RFP clause H-4 or the fixed-price contract-type requirement of the RFP. After each round of written discussions, Harris was afforded an opportunity to revise its proposal by submitting proposal revision change pages. As reflected in Harris's proposal revisions, after the second round of discussions, Harris expressly continued to reserve the right to recover additional costs associated with breaks in production in the option periods; however, Harris's proposal revisions after the last two rounds of written discussions were silent regarding this condition.

In August, the contracting officer also conducted successive rounds of oral discussions with Harris. The matters focused on during oral discussions included, for example, previously unresolved terms and conditions in Harris's proposal, the agency's responses thereto, and the final dispositions. These matters were summarized and confirmed by the contracting officer by letter dated August 13. At this time, the contracting officer also furnished additional change pages to Harris's

²In the model contract, RFP clause H-4 was redesignated as clause H-9. However, there were no substantive changes to the RFP clause.

model contract. None of the information in the contracting officer's August 13 letter or in the change pages to Harris's model contract reflected acceptance by the agency of Harris's condition reserving the right to recover additional costs associated with breaks in production in the option periods or a decision by the agency to convert from a fixed-price contract to a cost reimbursable-type contract. Harris's senior contracts manager "agree[d] with the outcomes [contained in the contracting officer's August 13 letter]," as evidenced by his signature in the confirmation signature block at the end of this letter. Although afforded an opportunity prior to confirming the subject matter of oral discussions to express any disagreement with the contents of the contracting officer's August 13 letter, Harris did not contact the contracting officer "[to express any] disagree[ment] with any of the outcomes listed [in the letter]."

By letter dated August 14, the contracting officer requested a best and final offer (BAFO) from Harris. Harris was advised that major revisions to its proposal were not anticipated, but should it revise its proposal in any way, "complete and detailed support for each revision must be provided. The Government reserves the right to reject any proposal if this rationale is not submitted with a revision, or, if submitted, is inadequate to establish the acceptability of the revised offer." (Emphasis in original.) The contracting officer warned that "[r]eductions or increases to the [firm fixed price] . . . must be completely explained by element of cost/price with narrative rationale substantiating the reductions or increases. Generalized statements without this supporting rationale are not sufficient." (Emphasis added.)

In its BAFO submitted on August 19, Harris again expressly reserved the right to recover additional costs associated with breaks in the T3(H) production in the option periods.³ Harris also reduced its BAFO price by more than \$120 million, with a substantial portion of this reduction, \$64 million, attributable to materials and subcontracts. In this regard, Harris provided a one paragraph, seven sentence explanation of its significant BAFO price reduction based on materials and subcontracts, with the pertinent language as follows: "Preferred vendors were identified and tentative long term relations were established. If a particular part

³Harris contends that it never removed this condition from its proposal during the last two rounds of written discussions only to reinsert the condition in its BAFO. However, from the first round of discussions through the request for BAFOs, the contracting officer requested the submission of proposal revision change pages only. In light of these instructions, we think if Harris did not intend to remove this condition from its proposal, there would have been no need for Harris to expressly include this condition in any submission after its initial proposal, including its BAFO.

was driving cost, substitutes were found. If a substitute could not be found, where possible we modified the design to eliminated [(sic)] the item."

The agency rejected Harris's BAFO as technically unacceptable because, among other things, Harris failed to "adequately explain the rationale for th[e] dramatic price adjustment as was clearly required by the Government's request for BAFO." The agency determined to award a contract to Raytheon, the offeror whose proposal was deemed to represent the best value to the government.

During the pendency of these protests, the agency argued that Harris's reserving in its BAFO of the right to recover additional costs associated with breaks in the T3(H) production in the option periods constituted exceptions to the RFP's material fixed-price and option requirements. The agency maintained that such exceptions provide independent bases upon which to reject Harris's proposal as technically unacceptable. We agree.⁴

In a negotiated procurement, a proposal which fails to conform to one or more of an RFP's material terms or conditions is technically unacceptable and cannot form the basis for an award. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 (requirement for fixed prices is a material term or condition of an RFP requiring such pricing, and a proposal that does not offer fixed prices cannot be accepted for award); Peckham Vocational Indus., Inc., B-257100, Aug. 26, 1994, 94-2 CPD ¶ 81 (mandatory option provisions are material terms of a solicitation).

In its BAFO, Harris took exception to two material requirements of the RFP. First, Harris conditioned its option prices "upon steady work" with no breaks in production in the option periods. This condition is contrary to RFP clause H-4 which did not guarantee the sequential exercise of options to ensure a continuous production schedule. Second, Harris's reservation of the right, in the event of a break in production in the option periods, to recover additional costs associated with a loss of learning, idle resources, and personnel disruptions is inconsistent with the fixed-price contract contemplated by the RFP. Under a fixed-price contract, the risks associated with performance are to be borne by the contractor, not the government. See Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70. Harris's attempt to shift these risks from itself to the government is not in accordance with the RFP. Accordingly, we conclude that Harris took exception in its BAFO to the RFP's fixed price and option requirements, both of which are

⁴During the course of a protest, an agency may justify its rejection of an offeror's proposal on the basis of new or additional grounds so long as those grounds would have provided proper support at the time the proposal was rejected as technically unacceptable. See Bannum, Inc., B-271075 *et al.*, May 22, 1996, 96-1 CPD ¶ 248.

material terms of the RFP, thereby rendering its BAFO technically unacceptable and making the firm ineligible for award.

Harris contends that it was misled in discussions concerning the RFP's fixed-price and option requirements. Harris states that on June 26, 1996, 2 days after the contracting officer initiated written discussions by providing Harris with a model contract which included RFP clause H-4, by stating that the government would not warrant the exercise of options so as to facilitate a steady production flow, and by stating that alternate proposals would be accepted so long as they did not change the RFP's fixed-price contract type, three of Harris's contract negotiators had a phone conversation with the contracting officer to explain the firm's approach regarding RFP clause H-4. According to Harris, the contracting officer told these individuals that there was "no problem [and that she] underst[ood] and [would] get back [to Harris] if [she] need[ed] more info[rmation]."⁵ Since there were no further conversations concerning RFP clause H-4, Harris states that it believed its condition had been accepted by the agency and would not be a basis upon which the agency could subsequently reject its proposal as technically unacceptable.

Harris's position that discussions were misleading is belied by the extensive record of discussions. Reading the record in a light most favorable to Harris by assuming that RFP clause H-4 was discussed with the contracting officer on June 26, we believe that Harris was clearly on notice that the agency had not accepted its proposed condition reserving for itself the right to recover additional costs in the event of noncontinuous production in the option periods. Specifically, Harris's model contract as initially issued during the first round of written discussions on June 24 contained RFP clause H-4. During this round of discussions, the contracting officer specifically responded to Harris's proposed condition by stating that the government would not warrant the exercise of options to facilitate a steady

⁵The contracting officer maintains that during the June 26 conversation, RFP clause E-4 involving production qualifications testing, not RFP clause H-4 involving the exercise of options, was discussed. (Following this conversation, on June 27, RFP clause E-4 was amended and this amendment was reflected in a change page to Harris's model contract.) In any event, during these protests, Harris submitted declarations from the individuals who participated in the conversation with the contracting officer. The contracting officer points out a number of internal inconsistencies in these declarations. In response, Harris simply states that these individuals "stand by their statements" and offers no substantive rebuttal.

production flow, citing RFP clause H-4 and would not accept alternate proposals that made changes to the fixed-price contract type contemplated by the RFP. At no time after the June 26 conversation did the contracting officer take any action which could be deemed to evidence acceptance by the agency of Harris's condition. In this regard, the contracting officer did not issue any change pages to Harris's model contract addressing either RFP clause H-4 or the fixed-price contract type contemplated by the RFP. Further, these requirements were not the subject of any amendments to the RFP. Because RFP clause H-4 was in Harris's model contract from the beginning of discussions through the request for BAFOs and because the RFP's fixed price contract type was never amended, we think Harris reasonably should have been aware that the agency never agreed to Harris's proposed condition for the reimbursement of additional costs. We conclude that Harris was not misled during discussions, but rather, unreasonably failed to express any concern to the contracting officer during discussions that its model contract had not changed to reflect its proposed condition.

Further, to the extent Harris complains about the contracting officer's "use of very loose 'model contracts'" as "some sort of control document putting each offeror on notice as to the status of all proposed terms and conditions," its post-award complaint is untimely since Harris is essentially challenging a defect in the procurement process which should have been raised well before discussions were concluded and an award was made. Bid Protest Regulations, section 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1)). We do agree, however, with Harris's characterization of a model contract as a type of "control document" so that an offeror, like Harris, would know precisely what the terms and conditions of the contract would be if the firm were selected for award. In light of the successive rounds of written and oral discussions held with Harris, we think it was incumbent upon Harris to take advantage of the opportunities afforded during discussions to seek clarification of any matters in its model contract that it did not understand or did not agree with prior to the conclusion of discussions, not after the award had been made.

Because Harris's BAFO is properly rejected as technically unacceptable on the basis that Harris took exception to the RFP's material fixed-price and option requirements, both of which were subject to discussions, we need not address Harris's allegations concerning the reasonableness of the agency's evaluation of its BAFO.⁶

The protests are denied.

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⁶Harris's protest submissions are replete with mischaracterizations and distortions of the contents of its proposal and the agency's evaluation record. For example, Harris states that when it lowered its BAFO price, the agency "unreasonably assumed" that the firm changed its technical proposal, "making a series of unilateral assumptions, while refusing to read, or acknowledge, the Harris statement in its BAFO that '[t]here [were] no changes to'" its technical proposal. We point out that the "no changes" statement appears in the cover letter to Harris's BAFO and is explicitly contradicted by Harris's brief BAFO narrative attributing a substantial portion of its BAFO price reduction to parts substitutions/eliminations and design modifications. We think the agency reasonably read the substantive content of Harris's BAFO and reasonably concluded that Harris did not provide the requisite "complete and detailed" explanation for this price reduction. We agree with the agency that Harris did not identify in its BAFO the "parts" that were substituted/eliminated (and we note that Harris did not specify "piece parts" or "electronic piece parts") or explain how its design was modified to achieve such savings without compromising its technical approach which, prior to the submission of its BAFO, was considered technically acceptable.