



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Vistron, Inc.

File: B-277497

Date: October 17, 1997

Allan Johnson for the protester.

Col. Nicholas P. Retson and Capt. Bryant S. Banes, Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to evaluate and consider the alleged technical superiority of a proposal for a commercial item is denied where the solicitation did not include any technical evaluation factors and it is clear that award was to be made on the basis of low price.

DECISION

Vistron, Inc. protests the award of a contract to Paging Network of Philadelphia (Pagenet) under request for proposals (RFP) No. DAKF29-97-R-0011, issued by the Department of the Army for the lease of pagers and related services. Vistron alleges that the agency improperly failed to consider the technical superiority of Vistron's proposal and instead made award on the basis of low price.

We deny the protest.

The requirement at issue was originally solicited by the Army under invitation for bids (IFB) No. DAKF29-97-B-0009, which was canceled on January 17, 1997, because all bidders had failed to acknowledge an amendment. Thereupon, the procurement was converted to competitive negotiation procedures under RFP No. DAKF29-97-R-0006 (R-0006).

Proposals under R-0006 were submitted by January 29. On February 3, Vistron was informed that its prices were too high, that it needed to sign a procurement integrity certification, and that best and final offers (BAFO) were due on February 12. Three amendments were issued to R-0006 in response to questions submitted by Vistron. Amendment 0001, issued on February 7, deleted three line items; amendment 0002, issued on February 10, postponed BAFOs indefinitely; and amendment 0003, issued on February 20, revised the schedule and set March 6 as the new closing date for BAFOs.

On March 13, Pagenet was awarded a contract under R-0006 on the basis of its lowest-priced offer. On March 24, Vistron filed an agency-level protest challenging the award. In considering Vistron's protest, the Army discovered that it had mistakenly mailed amendment 0003 calling for BAFOs to Intel Corporation (which the agency believed to be Vistron's proposed subcontractor) instead of to Vistron. As a result of this error, Vistron did not have an opportunity to submit a BAFO under R-0006. Accordingly, the agency terminated the award to Pagenet and planned to resolicit its requirement; on March 27, Vistron was notified of the corrective action taken in response to its agency-level protest.

The requirement was resolicited on April 23 under RFP No. DAKF29-97-R-0011, which contemplated a fixed-price delivery contract for a 3-month base period beginning July 1, with two 1-year options.

Six offers were received as follows:

Offerors	Price
Pagenet	\$115,947.84
Offeror A	\$128,008.65
Offeror B	\$212,116.79
Offeror C	\$340,471.55
Offeror D	\$412,769.48
Vistron	\$919,365.92

The Army awarded a contract to Pagenet on June 26 on the basis of its low price and notified Vistron of the award the same day. Vistron filed another agency-level protest on July 3 raising various allegations which are repeated in this protest. The agency denied Vistron's protest on July 10, and this protest was filed with our Office on July 14, principally alleging that, in its decision to select Pagenet, the agency improperly failed to take into account the superior technical merits of Vistron's proposal.¹ Vistron essentially alleges that the technical superiority of its

¹Vistron also raised a number of other issues which we dismiss for failure to state a valid basis of protest. Bid Protest Regulations, 4 C.F.R. § 21.5 (1997). In particular, the protester's allegation that Pagenet submitted a below-cost offer is not for consideration on its merits because the submission of a such an offer is legally unobjectionable and the question of whether an offeror can perform at its proposed (continued...)

proposal should have been evaluated as outweighing the substantial price advantage presented by Pagenet's proposal.²

Vistron's argument is misplaced because the solicitation neither contained any technical evaluation factors nor provided for an evaluation of the relative technical merits of the proposals. This acquisition is for commercial items and, as such, falls under Federal Acquisition Regulation (FAR) Part 12. FAR Subpart 12.3 sets forth four clauses which must be incorporated into solicitations for commercial items and one clause which is optional. As a general rule, such solicitations are to include "only those clauses . . . [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items . . . or . . . [d]etermined to be consistent with customary commercial practice." FAR § 12.301(a).

FAR § 12.301(b) lists the four mandatory clauses: (1) "Instructions to Offerors--Commercial Items" (FAR § 52.212-1); (2) "Offeror Representations and Certifications--Commercial Items" (FAR § 52.212-3); (3) "Contract Terms and Conditions--Commercial Items" (FAR § 52.212-4); and (4) "Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items" (FAR § 52.212-5). All of these clauses were either set forth or incorporated by reference in the RFP.

¹(...continued)

price concerns the offeror's responsibility. Shel-Ken Properties, Inc.; McSwain and Assocs., Inc., B-261443, B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139 at 3. Here, by virtue of the award, the agency made an affirmative determination of the awardee's responsibility--a matter which this Office will not review absent circumstances not present here. Id.

The protester also alleges various errors in the conduct of the predecessor procurements, including a failure to send Vistron a BAFO request. To the extent that the allegations of the procurement errors are intended to call into question the propriety of the procurement under protest, they are irrelevant, since each procurement stands on its own. SEAIR Transp. Servs., Inc., B-274162, Nov. 25, 1996, 96-2 CPD ¶ 198 at 3 n.2.

²We also note that, in lieu of filing comments on the agency report, the protester challenged our determination that because Vistron was not represented by counsel, we would not issue a requested protective order. Our Regulations do not contemplate admitting anyone other than counsel or consultants retained by counsel to a protective order; accordingly, since Vistron was not represented by counsel, no useful purpose would have been served by issuing a protective order here. See 4 C.F.R. § 21.4(c).

FAR § 12.301(c) provides for the optional use of technical evaluation clauses "[w]hen the use of evaluation factors is appropriate." That section permits the inclusion of a clause set forth in FAR § 52.212-2 entitled "Evaluation--Commercial Items" or a "similar provision containing all evaluation factors required" The contracting officer elected not to include any technical evaluation clause in the RFP at issue. In short, the solicitation contained no technical evaluation factors and otherwise did not contemplate the type of evaluation of technical proposals now urged by Vistron.³

Because this is a commercial item acquisition which did not include the technical evaluation clause called for by FAR § 12.301(c) where a relative technical evaluation is contemplated, it is clear that award to the lowest-priced offeror submitting a technically acceptable proposal is contemplated. Further, where a solicitation does not contain evaluation factors other than price, the general rule is that price is the sole evaluation criterion. AMBAC Int'l, B-234281, May 23, 1989, 89-1 CPD ¶ 492 at 3 n.2. Since the agency made the award after determining that Pagenet's technically acceptable proposal offered the low price, we have no basis to disturb that decision.

The protest is denied.

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³To the extent that Vistron is alleging that the solicitation should have provided for a comparative technical evaluation, the allegation is untimely. Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1).