

DOCUMENT RESUME

03594 - [A2453608]

[Protest against Procurement Irregularities]. B-188556.
September 1, 1977. 5 pp.

Decision re: PFMR, Inc.; by Robert P. Keller, Deputy Comptroller
General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Internal Revenue Service; Scope Data;
Triformation Systems, Inc.

Authority: 4 C.F.R. 20.2(b)(1). 51 Comp. Gen. 498. 54 Comp. Gen.
1021. 2-185137 (1976).

The protester objected to the award of a contract, alleging that: the awardee's proposal was materially nonresponsive, an amendment to the request for proposals was unreasonable and unfair, and alterations of proposals were improperly allowed. The allegation that the successful offeror was unable to perform was not considered. The determination of solicitation evaluation factors was primarily for consideration by the contracting agency. A proposal subject to two interpretations need not be rejected since in negotiated procurement the contracting officer may seek clarification from the offeror as to what was intended. The record did not establish that the procuring activity acted in an arbitrary or capricious manner, so the claim for proposal preparation costs was denied. (kuthcr/SC)

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DECISION



Przybylek
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-136526

DATE: September 1, 1977

MATTER OF: FPMR, Inc.

DIGEST:

1. Allegation by protester that successful offeror is unable to perform will not be considered.
2. Protest of solicitation estimate filed after award is not untimely where protester did not possess information as to the basis of the estimate until after award was made.
3. Determination of solicitation evaluation factors is matter primarily for consideration by contracting agency.
4. Proposal subject to two interpretations need not be rejected since in negotiated procurement contracting officer may seek clarification from offeror as to what was intended.
5. Where record does not establish that procuring activity acted in arbitrary or capricious manner, claim for proposal preparation costs is denied.

FPMR, Inc. (FPMR) protests the award by the Internal Revenue Service (IRS) of a contract for Integrated Data Retrieval System (IDRS) printers and related supplies and maintenance to Triformation Systems, Inc. (Triformation). FPMR believes that Triformation's proposal was materially nonresponsive to request for proposals (RFP) No. IRS-77-5 as amended. Furthermore, the protester challenges Amendment No. 0001 to the RFP as unreasonable and unfair. Finally, FPMR alleges that the contracting officer improperly permitted both Triformation and Scope Data to alter their proposals after the submission of best and final offers.

Briefly, FPMR, Triformation and Scope Data submitted proposals which were found to be technically acceptable. The contracting officer determined, however, that Triformation proposed the lowest overall cost, and award was made to that firm on February 28, 1977. Following a debriefing on March 7, 1977, FPMR submitted a protest to our Office on March 9, 1977.

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FPMR's first contention is that the Triformation proposal was materially nonresponsive. The protester charges that Triformation did not take into account Amendment No. 0001 to the solicitation and, therefore, its proposal did not offer to meet all the mandatory requirements of the solicitation. Amendment No. 0001 provided:

"FOR EVALUATION PURPOSES ONLY, assume that there will be one maintenance call per month outside the Principal Period of Maintenance."

FPMR maintains that this provision changed the following requirements of the solicitation:

"On-call maintenance shall be provided 5 days a week, 9 hours a day. Personnel shall arrive at the site within two hours after notification that the equipment is inoperable. Hourly per call rates shall be shown in Section I."

FPMR argues that the effect of the amendment is to change the above paragraph to require the inclusion of one maintenance call outside the Principal Period of Maintenance per machine per month.

Based on its understanding of the effect of the amendment FPMR renegotiated its contract with Sorbus (its maintenance subcontractor) to include the after-hours service call in the basic maintenance charge. FPMR alleges that Triformation, on the other hand, did not take the amendment into account, since it believes that Triformation's contract with Sorbus does not include a commitment for maintenance outside the Principal Period of Maintenance.

The contracting officer contends that FPMR is in error with regard to the effect of Amendment No. 0001 on the mandatory maintenance requirement. That requirement is stated in the RFP as follows:

"The Contractor shall provide maintenance (labor and parts) at the prices shown in Section I and shall keep the equipment in good operating condition."

The solicitation, the contracting officer argues, required on-call maintenance as noted above. At the same time, however, since the equipment was to be offered on an unlimited use basis, remedial maintenance, although not on-call maintenance, might be required outside the principal period of operation. In the agency's view

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the amendment in question "did not in any way change the mandatory requirements for maintenance services which had been specified in the basic RFP."

We agree. The amendment clearly stated that its provisions applied for evaluation purposes only. The solicitation requirement to provide maintenance remained the same. FPMR's position that Amendment No. 0001 changed the mandatory requirement for on-call maintenance simply is not supported by the record. Moreover, it is clear from the record that Triformation understood this mandatory requirement and offered to meet it.

FPMR next challenges Amendment No. 0001 on the basis that it permitted Triformation to obtain an unfair competitive advantage, since as incumbent Triformation "had reason to know that the amendment grossly overstated the Government's actual needs for service calls outside the Principal Period of Maintenance." The IRS maintains that such an allegation is untimely raised after the award. See Section 20.2(b) (1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977).

We believe that the protest is timely. The impropriety of which FPMR complains could not have been apparent on the face of the amendment without further information which was not supplied by the agency until after the award was made. Once FPMR became aware of the basis upon which the estimate was made by the agency, it promptly protested. Accordingly, we will consider the protester's allegations concerning the amendment.

FPMR, as noted above, states that the effect of Amendment 0001 was to project 12 service calls per machine per year outside the Principal Period of Maintenance, or a total of 17,160 service calls over the 5-year systems life. This service is in addition to the service provided on-call during regular business hours. FPMR finds this estimate to be totally unreasonable based on the information obtained by the protester as to expected usage of the machines. In support of its view FPMR presents evidence from various suppliers of teletype-style printers who, based on a typical set of usage parameters (admittedly not necessarily reflective of IRS usage conditions), all conclude that the estimate of Amendment No. 0001 is excessive and unrealistic.

The IRS administrative report includes a memorandum composed by the IRS Equipment Management branch which contains the following rationale for the estimate used in Amendment No. 0001:

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- "1. Several service centers have already extended real-time availability by instituting Saturday work or second shift work. The increased hours of real-time availability implies an increased requirement for remote printer availability.
- "2. Several major programs have been approved or projected for inclusion on IDRS. These new programs, along with the projected workload growth will have an impact on the capability of the present system to effectively handle the increased workload. As a result of these new applications, we anticipate further extensions of real-time availability at all service centers.
- "3. One of the provisions of the Tax Reform Act of 1976 requires the Service to make available to the taxpayer, upon request, any levy information concerning that taxpayer within 24 hours after the information is obtained. This means that each morning, the field offices must have a listing of all levy actions that have transpired in their jurisdiction. Since these listings will be generated on the installed high speed printers, it is mandatory that these printers be operational when the designated field offices open each morning.

The agency reports that its estimate was based on anticipated increases in printer usage, which had already increased 50 percent during the third and fourth quarters of calendar year 1976, and was projected to increase further.

Both protester and agency agree that maintenance requirements are dependent upon the usage and it is apparent that the agency expects to increase its printer usage significantly in the future. It is reasonable, in our view, to project an increase in maintenance requirements outside the Principal Period of Maintenance since the increased usage will reasonably require printer usage outside of the regular business hours and therefore outside of the Principal Period of Maintenance. Based on the foregoing, we see no reason to object to the substance of Amendment No. 0001.

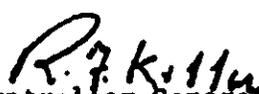
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FPMR also objects to the contracting officer's action in seeking clarification of Triformation's proposal after best and final offers had been submitted. Clarification was sought because the contracting officer was not certain if the systems life costs table in the proposal included certain maintenance requirements. The protester, relying on 51 Comp. Gen. 498 (1972), maintains that if the contracting officer had determined that the proposal was subject to two possible interpretations as to total systems life cost, the proposal should have been disregarded by the contracting officer.

Protester's reliance on 51 Comp. Gen. 498 (1972) is misplaced. There, in a formally advertised procurement where a bidder created in itself the option to withdraw its bid, request bid correction, or insist upon the correctness of the bid, we held that the preservation of the integrity of the competitive bidding system precluded giving the bidder the right to make such a choice after the results of the bidding are known. In the present situation we are concerned with a negotiated procurement in which there was no public bid opening and no offeror knew of its position relative to its competitors prior to award. In negotiated procurements, contracting officers may ask offerors to clear up any questions regarding their proposals. For example, Federal Procurement Regulations (FPR) § 3-804 requires the contracting officer "to resolve uncertainties relating to the purchase or the price to be paid." Thus, we find no merit to the contention that Triformation's proposal should have been disregarded.

Finally, FPMR claims that it "should be entitled at the very least to reasonable costs for preparation of its proposal in light of the questionable actions of the Contracting Officer revealed in this proceeding." We do not agree. Since the record does not establish that the procuring activity acted in an arbitrary or capricious manner, FPMR's claim for proposal preparation costs will not be considered. Augmentation, Incorporated, B-185137, March 16, 1976, 76-1 CPD 179 and T & H Company, 54 Comp. Gen. 1021

The protest and the claim for proposal preparation costs are denied.


Deputy Comptroller General
of the United States