

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

D. Luster
Proc II

77/7

FILE: B-191731

DATE: September 20, 1978

MATTER OF Proprietary Computer Systems, Inc.

DIGEST:

1. Contrary to protester's contention, record reveals that agency advised protester ahead of time of established common cutoff date for submission of second best and final offers (BAFO). Protester submitted timely BAFO and initial protest letter asserted that pre-cutoff date advice was given. Based on above, and contradictory statements by protester and agency, protester has failed to meet burden of proof.
2. Technical acceptability of proposals is within discretion of agency and such determination will not be disturbed absent clear showing that determination was unreasonable. Protester did not directly challenge or offer any evidence to show unreasonableness of agency determination that its proposal was technically unacceptable.
3. Protester's contention that, by requesting it to submit second best and final offer, agency admitted that proposal was technically acceptable is without merit. Determination that proposal is in competitive range does not imply that proposal is acceptable but may indicate only that it can be improved without major revisions to point where it becomes acceptable. Agency never advised protester that proposal was technically acceptable and states that advice to the contrary was given. Negotiations were reopened, in part, to resolve matter of proposal's acceptability.
4. Agency included protester's first best and final offer (BAFO) in competitive range as one reason for reopening negotiations because doubts as to BAFO's acceptability were resolved in protester's favor. Reliance on prior GAO decision and tight timeframe apparently resulted in request for and submission of second BAFO from protester. However, because prior GAO decision was modified, agency

need not have requested second BAFO where discussions made it clear that proposal was effectively no longer in competitive range. Failure to award to protester, which submitted the lowest-priced second BAFO, was proper.

Proprietary Computer Systems, Inc. (PCS), protests the Department of Commerce's (Commerce) award of a contract to another offeror under request for quotations (RFQ) No. 78-0078. The RFQ, issued on February 21, 1978, was for a correspondence tracking system to assist Commerce's Executive Secretariat in monitoring, controlling, and composing correspondence throughout the Office of the Secretary of Commerce. It was issued pursuant to the General Services Administration (GSA) Teleprocessing Services Program. GSA's Basic Agreement was incorporated into the RFQ.

Commerce states that 10 timely offers were received and that discussions were conducted with all offerors. By letters dated March 27, 1978, all offerors were advised of their technical and contractual deficiencies and provided the opportunity to clarify, amplify and/or modify their proposals by the common cutoff date for the submission of a best and final offer (BAFO), March 28, 1978. Among other things, PCS was informed that the existence of a turnkey correspondence tracking system in place was not evident from its proposal and that PCS's system appeared to be a general text editing system only.

After reviewing the BAFO's submitted on March 28, 1978, Commerce determined that six of these were technically unacceptable and that three were technically acceptable. Commerce states that PCS's BAFO was borderline. While some members of Commerce's technical evaluation party felt that PCS should be eliminated along with the other six technically unacceptable offerors, other members felt that a live demonstration might show that PCS had the type of correspondence tracking system called for by the RFQ even though on paper PCS's system appeared to be unacceptable. Furthermore, one of the three technically acceptable offerors had made an apparent pricing error on its "online storage charges." This error was such that a correction

could not be permitted without reopening negotiations. Therefore, discussions were reopened with PCS and the three technically acceptable offerors. The six offerors who were technically unacceptable were so advised by letters dated April 7, 1978, and no further discussions were held with them.

PCS performed a live test demonstration for Commerce on the afternoon of Friday, April 7, 1978. The protester was the last of the offerors with whom negotiations had been reopened to have a demonstration. Commerce states that the last-minute scheduling of PCS was caused by the company's inability to have a demonstration at an earlier date.

Commerce relates the following circumstances surrounding the submission of PCS's second BAFO. During the time arrangements were being made with PCS for the live demonstration, Commerce advised PCS that time was of the essence and that a BAFO would have to be submitted shortly after the demonstration. At the demonstration on April 7, 1978, PCS was verbally advised of its system's technical deficiencies and of the Monday, April 10, 1978, closing date for the submission of a BAFO. A letter setting forth these deficiencies was prepared that afternoon. The next working day, April 10, 1978, Commerce telephoned PCS that this letter was ready for pickup at Commerce. The letter was also read in its entirety to PCS over the telephone and contained a word-for-word restatement of the two matters mentioned above in the March 27, 1978, letter.

A three-page BAFO from PCS was timely received by Commerce on April 10, 1978. PCS's price was low. However, Commerce found as a result of the live demonstration that PCS's system was technically deficient. Commerce indicates that the technical deficiencies in PCS's system were of such a magnitude and nature that they could not readily be corrected without a complete system redesign. The other three offerors with whom negotiations were reopened were found by Commerce to be technically acceptable as the result of their live demonstrations and revisions to their proposals. Award was made on April 11, 1978, to the lowest priced of the three technically acceptable offerors.

In a letter dated April 18, 1978, and received by us on April 19, 1978, PCS protested the award on the following grounds:

- (1) No common cutoff date was established for best and final offers which were submitted by various bidders on various dates.
- (2) By requesting that PCS submit a best and final offer, the United States Department of Commerce thereby acknowledged that the PCS proposal was technically acceptable and within a competitive range; consequently, PCS, being the low-price offeror, should have received the award.
- (3) Although PCS was notified verbally on April 10, 1978, to submit a best and final offer, PCS did not receive the written confirmation of the Government request for best and final offer until April 13, 1978, 2 days after the contract award was made on April 11, 1978. The letter request for a best and final offer contained an attachment requesting comment on the Government technical evaluation, which, of course, could not be made in time for consideration by the United States Department of Commerce prior to award.

Commerce responds to PCS's protest allegations by stating that common cutoff dates for BAFO's were established, March 28, 1978, initially, and April 10, 1978, after negotiations had been reopened, and that all offerors were treated the same in this regard. As to all requests for PCS to submit a BAFO, Commerce indicates that such requests do not imply that a proposal is technically acceptable. A request for a BAFO also advises offerors of their technical and contractual deficiencies. Commerce states that PCS was verbally advised of the April 10, 1978, closing date for second BAFO's, on both April 7, 1978, and the morning of April 10, 1978. On both these occasions, PCS was also advised of its system's technical deficiencies.

In a letter to us dated June 29, 1978, PCS denied that at any time prior to April 13, 1978, was it advised either of its system's technical deficiencies or that BAFO's were due on April 10, 1978. In addition, PCS argued that on March 28, 1978, PCS's first BAFO was accepted by Commerce without any indication to it that this BAFO was technically unacceptable. If it was technically unacceptable, PCS contended that it should have been notified of this on April 7, 1978, along with the other six technically unacceptable offerors. Finally, PCS argued that even if it was notified early on the morning of April 10, 1978, of its technical deficiencies, there was little it could do at that time to correct these deficiencies. PCS's June 29, 1978, letter requested memoranda from Commerce's files as to whether the three offerors who were technically acceptable were notified of the April 10, 1978, BAFO date in the same manner as PCS. PCS also requested memoranda from Commerce supporting the assertions that PCS was advised prior to April 13, 1978, of its technical deficiencies and the April 10, 1978, second BAFO cutoff date.

Commerce commented on these matters in a letter dated July 14, 1978, with several enclosures. We forwarded these comments and enclosures to PCS in a letter dated July 21, 1978. Our July 21, 1978, letter informed PCS that if it was not satisfied with the information contained in the enclosures to Commerce's letter, any requests for further information should be sought directly from Commerce under the Freedom of Information Act, 5 U.S.C. § 552 (1976). We indicated that we would delay rendering a decision on the protest pending whatever action Commerce took on the request. In a letter dated August 4, 1978, and received by us on August 8, 1978, PCS requested a decision from us on all issues raised by the protest.

Our Office has consistently held that to properly terminate negotiations, all offerors must be advised that any revisions to their proposals must be submitted by a common cutoff date. University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201. Moreover, the Federal Procurement Regulations (FPR) specifically provide that all offerors shall be informed of the specified date of the closing of negotiations and that any revisions to their proposals should be submitted by that date. FPR § 1-3.805-1(b) (1964 ed. FPR circ. 1).

From the record, we believe that Commerce did notify PCS ahead of time of the April 10, 1978, common cutoff date for submission of BAFO's. Of particular significance, we note that PCS submitted a timely second BAFO. Also, PCS contradicts itself concerning when it was notified that BAFO's were due on April 10, 1978. As mentioned above, PCS stated in the April 18, 1978, protest letter that it was notified verbally on April 10, 1978, to submit a BAFO, but did not receive written confirmation of the Government's request for a BAFO until April 13, 1978. In a later submission, PCS categorically denied that it was advised prior to April 13, 1978, that a BAFO would be due on April 10, 1978. Based on the above, as well as the contradictory statements by the protester and the contracting agency, with respect to this disputed question of fact, we find that the protester has failed to meet its burden of proof. See The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, August 15, 1977, 77-2 CPD 116, and the cases cited therein.

With regard to the technical acceptability of the system that PCS offered, the determination of technical acceptability of proposals is within the discretion of the procuring agency and the agency's determination will not be disturbed absent a clear showing that the determination was unreasonable. AAA Engineering and Drafting, Inc., B-188851, November 16, 1977, 77-2 CPD 377. We will not regard a technical evaluation as unreasonable merely because there is a substantial disagreement between the contracting agency and the offeror. See Joanell Laboratories, Incorporated, 56 Comp. Gen. 291 (1977), 77-1 CPD 51, and the cases cited therein.

The RFQ issued by Commerce asked for a system with two separate and distinct capabilities: (1) a word-processing capability, and (2) a correspondence tracking capability. Commerce's letter of March 27, 1978, requesting first BAFO's by March 28, 1978, informed PCS that its system appeared to be only a general editing system and not a correspondence tracking system. Commerce's doubts as to whether PCS had a viable correspondence tracking system were not dispelled after the submission of PCS's first BAFO. Not until after negotiations had been reopened and PCS had

given a live demonstration of its system did it become apparent to Commerce that PCS's system was so technically deficient that it could not be readily corrected to meet RFQ requirements.

PCS does not directly challenge Commerce's determination that its system was not compliant with the RFQ. Instead, PCS argues that, by requesting that PCS submit a second BAFO, Commerce, in effect, admitted that PCS's system was technically acceptable. PCS cited FPR § 1-3.805-1(a) (1964 ed, amend. 52), which requires that written or oral discussions be conducted with all responsible offerors submitting proposals within a competitive range, price and other factors considered. From this, PCS contends that it must have been within the competitive range, price and technically, if it was invited to submit a BAFO.

A determination that a proposal is in the competitive range for discussion does not necessarily mean that the proposal is acceptable as initially submitted, but may indicate only that there is a real possibility that it can be improved without major revisions to the point where it becomes most acceptable. Baden & Co., B-190386, December 21, 1977, 77-2 CPD 493. Commerce never considered PCS's initial proposal and first BAFO technically acceptable. Since it was not clear that what PCS was offering was susceptible of being made technically acceptable, Commerce resolved all doubts in PCS's favor and reopened negotiations, in part, to resolve this matter. Moreover, the record shows that Commerce never advised PCS that its system was technically acceptable. Rather, Commerce informed PCS on several occasions of the inadequacy of the PCS system, which PCS disputes, but has provided no objective evidence to the contrary. See The Public Research Institute of the Center for Naval Analyses of the University of Rochester, supra.

PCS also raises the inconsistency between Commerce's determination after PCS's demonstration that PCS's system had major deficiencies that could not be readily corrected and Commerce's request for a second BAFO from PCS. If Commerce found major deficiencies in its system on April 7, 1978, PCS questions Commerce's request that it submit a BAFO by the close of business on April 10, 1978. In this regard, PCS points out that if PCS's deficiencies

could not be readily corrected without a complete redesign of its system, it would have been impossible to do this in the few short hours following the time PCS was notified on April 10, 1978, to submit a BAFO.

Citing our decision Operations Research, Inc., 53 Comp. Gen. 593 (1974), 74-1 CPD 70, Commerce states that a proposal once determined to be in the competitive range may not subsequently be excluded from the competitive range on the basis of discussions without giving the offeror an opportunity to submit a revised proposal. Since it had determined that PCS was in the competitive range and had held discussions with PCS after negotiations were reopened, apparently Commerce in good faith believed that it was required to give PCS the opportunity to submit a second BAFO.

The record shows that Commerce included PCS's first BAFO in the competitive range for purposes of discussions after the reopening of negotiations because all doubts as to its acceptability were resolved in PCS's favor. Commerce was not, however, required to proceed with PCS up to and through the receipt of a second BAFO from PCS. Concerning proposals such as PCS's first BAFO, we modified the above decision on reconsideration, Operations Research, Inc. (Reconsideration), 53 Comp. Gen. 860 (1974), 74-1 CPD 252, as follows:

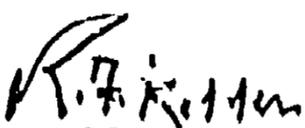
"* * * Accordingly, in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission of a revised proposal."

Therefore, we conclude that, after the April 7, 1978, demonstration, PCS was effectively no longer in the competitive range technically. Although it is unfortunate that reliance on our decision and the tight timeframe apparently resulted in the request for and submission of the second BAFO, from PCS, the failure of Commerce to make an award to that firm was proper under the circumstances.

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Accordingly, the protest is denied.


Deputy Comptroller General
of the United States