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DECISION



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

[Protest Alleging Improper Rejection of Proposal]

FILE: B-197306

DATE: September 29, 1980

MATTER OF: Okaw Industries, Inc.

DIGEST:

1. Although in procurement for radomes written list of deficiencies did not mention agency's concern with protester's method of panel construction, record indicates that agency orally requested sample of protester's panel construction and revised proposal addressed matter of panel construction. Thus, it appears that agency's concern over this matter was communicated to protester and that was sufficient to constitute meaningful discussions.
2. It is not improper for agency to ask offeror to furnish samples during discussions nor is agency required to request samples of other offerors whose proposals clearly meet solicitation requirements.
3. Agency is not required to reopen negotiations to provide protester further opportunity to revise its proposal.
4. Protest alleging solicitation defect apparent prior to closing date for receipt of proposals, but filed thereafter, is untimely and not for consideration on merits.

Okaw Industries, Inc., protests the award of a contract to another firm under request for proposals (RFP) No. N00123-79-R-1328 issued by the Naval Regional Contracting Office (Navy), Long Beach, California. The solicitation was for two radomes, which are fiberglass enclosures used to protect radar equipment.

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Okaw contends that the Navy improperly rejected its revised proposal without giving it an opportunity to respond to the Navy's objections. The protester also alleges that it was treated differently from other offerors because it was required to submit samples and other substantiation of its offer. In addition, Okaw maintains that the RFP specifications were ambiguous, and also that the awardee's proposal does not meet the RFP specifications. For the reasons stated below the protest is denied.

Four proposals were received and evaluated in response to the solicitation. The protester submitted the low offer at an evaluated price of \$20,560. J. W. Downs was the awardee at an evaluated price of \$23,500. The Navy reports that Down's proposal offered radomes meeting the RFP specifications, but a number of technical deficiencies were noted in Okaw's offer. The Navy advised Okaw by letter that its proposal was appraised "technically marginal" and furnished Okaw a listing of the areas of deficiency.

Subsequently, the Navy and Okaw had conversations regarding Okaw's proposal. As a result of the Navy's list of deficiencies and these discussions, Okaw submitted a revised technical proposal, as well as samples of material and technical data. The Navy believed that the samples illustrated the material which would be used in radome construction if a contract were awarded to Okaw. Okaw's revised proposal was evaluated and determined to be unacceptable for the following reasons:

- "a. The radomes as proposed would be constructed from panels of thin layers of unicellular foam sandwiched between two thin layers of resin impregnated fiberglass cloth. Analysis has concluded that panels of this construction would not meet the reliability standards called for in paragraph 2.1.2 of the original specification, as they could easily be damaged.
- "b. The panels as proposed are further in conflict with paragraph 2.2.2 of the specification which specifically calls for fiberglass panels. Samples provided with [Okaw's] proposal consist of the construction described above and as such do not comply with the specification.

"c. The radomes proposed consisting of the panels described above would not satisfactorily meet the Quality Assurance requirements stated in paragraph 3.1 of the specification. The rigid foam panels when flexed may destroy the resin seal. The panels will crack or break, joints will separate, hardware will shear, and the panels will not return to the original shape. In summary, the construction proposed is too thin to be reliable as it would not withstand normal abuse."

[It is the Navy's position that Okaw's offer was rejected because neither its initial or revised proposal nor the samples submitted indicated compliance with the specifications for construction of the radome panels.] Okaw indicated in its initial proposal and in the samples submitted with the revised proposal that it would furnish fiberglass skins separated by a structural foam core. However, the Navy states this construction technique was unacceptable, and that the construction needed was a layering process to create a self-supporting one piece panel. Okaw thinks the Navy should have given it an opportunity to "refute" the rejection of its revised proposal.

[The real question is whether Okaw was given a fair opportunity during discussions to correct these deficiencies.]

[Meaningful discussions, either oral or written, are normally required in negotiated Federal procurements. The agency must usually furnish information to offerors concerning the areas of deficiency in their proposals, so that offerors are given the opportunity to satisfy the solicitation requirements.] WASSKA Technical Systems and Research Company, B-189573, August 10, 1979, 79-2 CPD 110.
[The context and extent of discussions needed to satisfy the requirement for meaningful discussions is a matter primarily for determination by the contracting agency, whose judgment will not be disturbed unless it is without a reasonable basis.] Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61.

The written list of deficiencies in Okaw's initial proposal provided by the Navy did not specifically identify the construction, reliability and quality assurance deficiencies for which Okaw's proposal was ultimately rejected. The Navy's internal evaluation memorandum did indicate that Okaw's method of construction was "undesirable." The record indicates, however, that as a result of telephone conversations between the Navy and Okaw that firm supplied, along with its revised proposal, samples of the its fiberglass panel construction.

The Navy reports that it asked Okaw to furnish samples of radome panels to help resolve any questions as to Okaw's proposed method of construction. The Navy states that it "clearly understood that the method of radome construction demonstrated by the sample would be used if a contract was made to Okaw." On the other hand, Okaw asserts that its sample submission was not intended to represent material that would be used under this contract, but only to show "the type of work that Okaw does."

[Although neither party has supplied us with a written account of what transpired during the oral discussions, the fact that the Navy maintains that it requested the sample to study Okaw's method of panel construction along with the fact that Okaw submitted samples of panel construction with its revised proposal indicates that these discussions did indeed raise the Navy's concern in this area.]

[It is our view that the Navy was not required to do more than raise the issue of panel construction with Okaw in order to meet its obligation to conduct meaningful discussions.] See WASSKA Technical Systems and Research Company, supra; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404. We note, however, that had the agency maintained a written record of its conversations with the offeror this issue could have been more easily resolved. See PRC Information Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD 11.

[The Navy's position regarding the purpose of the sample seems more reasonable than Okaw's. It would be clearly useful for the Navy to ask for samples of panels that would be used under the contract in connection with discussions of the deficiencies in Okaw's proposal. At the same time, there is no obvious reason, and Okaw has offered none, for the Navy to ask for samples of material unrelated to the procurement.]

With respect to Okaw's statements that it was told that its deficiencies had been resolved, the Navy clearly believes that major deficiencies were uncorrected and that Okaw's proposal did not comply with the specifications. Even if, as Okaw contends, Navy personnel informed Okaw that its revised proposal was acceptable, Okaw was not prejudiced by such a statement since the oral discussions appear to have involved the construction deficiencies and Okaw clearly had an opportunity to modify its proposal. Moreover, we cannot agree that the Navy had to allow Okaw a further opportunity to correct the deficiencies. We know of no requirement for the agency to afford an offeror a second opportunity to amend its proposal or submit additional samples. See National Puerto Rican Forum, Inc., B-189338, November 23, 1977, 77-2 CPD 400.

[Further, we do not think it was improper, as Okaw has alleged, for the Navy to ask it to furnish samples and data, even if the agency did not ask for similar material from the other offerors. The Navy was conducting discussions with Okaw and these discussions properly included those areas, like panel construction, which the Navy viewed as deficient in Okaw's proposal. The fact that the agency did not choose to solicit samples from the other offerors is not significant as we are aware of no rule requiring that the same matter be discussed with each offeror.] See CEL-U-DEX Corporation, B-195012, February 7, 1980, 80-1 CPD 102. Here, for example, the Navy would have no reason to solicit a sample from the awardee, since it was clear to the agency from the awardee's proposal that its panel construction complied with the specifications.

[Regarding Okaw's contention that the awardee's proposal did not conform to the RFP, the protester states

that the successful offeror proposed a geodesic (made up of straight-sided polygons) radome while the RFP called for a spherical radome. However, we do not believe that the use of the term "spherical" in the context of the RFP could reasonably be interpreted to preclude radomes of geodesic design. In any event, the sketch included with the RFP to serve as "the design concept" for the radomes clearly pictures a geodesic dome, and thus the RFP indicated that such dome would be acceptable.

Finally, as to Okaw's contention that the specifications were ambiguous, this issue is untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980). Our Procedures require that protests based upon alleged improprieties in a solicitation, which are apparent prior to the closing date for receipt of proposals, be filed "prior to * * * the closing date for receipt of initial proposals." Okaw's objection to the specifications is, of course, an allegation of a defect in the RFP. Since the alleged defect was apparent prior to the closing date, but the protest was not filed until after award, this aspect of the protest is untimely and not for consideration on the merits. SmithKline Clinical Laboratories, B-198090, April 4, 1980, 80-1 CPD 252. In any event, we note that the areas of alleged ambiguity do not seem to relate to the rejection of Okaw's proposal.

The protest is dismissed in part and denied in part.



For the Comptroller General
of the United States