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DECISION



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

[Protest of Technical Proposal Rejection]

FILE: B-197346, B-197346.2, DATE: April 13, 1981
B-197346.4

MATTER OF: Timeplex, Inc., General Datacomm Systems
and Bowmar/ALI, Inc.

DIGEST:

1. Where request for technical proposals in step one of two-step formal advertising requires specific information in written proposals and that offeror pass demonstration, passing demonstration is not substitute for information missing from proposal.
2. Technical evaluation is based on information submitted with proposal and not offeror's reputation or qualifications.
3. Agency need not conduct discussions with offeror whose proposal is determined not to be reasonably susceptible to being made acceptable due to material informational deficiencies, and there is nothing unfair in permitting offerors whose proposals are so susceptible the opportunity to submit clarifications, regardless of volume.
4. Where General Services Administration (GSA) has not yet taken definitive position with respect to necessity of agency's obtaining delegation of procurement authority (DPA) for procurement of time division multiplexers, GAO will not rule on issue since GSA has primary jurisdiction. However, recommendation is made to GSA and agency that matter be promptly resolved to effect purpose of Brooks Act.
5. Department of Defense directives do not have effect of law and violation thereof does not provide valid basis for protest.

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6. Request for reconsideration is dismissed where protester fails to timely submit detailed statement detailing errors of fact or law in prior decision.

[Timeplex, Inc. and General Datacomm Systems, Inc. (GDSI) protest the Army Communications and Electronics Materiel Readiness Command's (Army) rejection of their technical proposals submitted in response to request for technical proposals (RFTP) No. DAAB07-79-R-0603 under step one of a two-step formally advertised procurement. The Army determined that both Timeplex's and GDSI's technical proposals were so informationally deficient in several critical areas as to be unacceptable. Thus the basis of this portion of the protests is the elimination of the protesters from the competitive range without discussion.]

[The protesters also contend that the items being procured -- low speed time division multiplexer/demultiplexers (LSTDM's) -- are general purpose automatic data processing equipment (ADPE) for which the General Services Administration (GSA) has statutory procurement authority, and that the Army failed to obtain a delegation of procurement authority (DPA) from GSA authorizing the procurement. Therefore, the protesters maintain that the procurement should be declared null and void.]

[Bowmar/ALI, Inc. -- whose proposal also was rejected and its subsequent protest to this Office dismissed. Bowmar/ALI, Inc., B-197346.3, April 7, 1980, 80-1 CPD 257 -- joins Timeplex and GDSI in protesting the Army's failure to acquire a DPA, and requests reconsideration of our prior decision based on the DPA issue as well as other matters.]

We find no basis to object to the Army's actions.

Background

This case involves the Army's procurement of its requirements for approximately 1200 LSTDM's, including spare parts and other ancillary equipment, for a five year period. The

LSTDM's basically are telecommunications devices which provide a means of transmitting and receiving a number of channels over a single transmission line by allotting each channel its own intermittently repeated time slot. The time slots are repeated at intervals to permit the transmission of data from several channels over the same line.

The Army initiated step one on March 19, 1979, when it issued the RFTP. Step one is similar to a negotiated procurement and entails the request for, and the submission, evaluation, and, if necessary, discussion of a technical proposal, without pricing, to determine the acceptability of the items offered. The second step consists of a formally advertised procurement, confined to those offerors who submitted an acceptable proposal in step one. Defense Acquisition Regulation (DAR) § 2-501 (1976 ed.).

The RFTP detailed the Army's evaluation factors and their relative importance, and required offerors to submit detailed information with their proposals. To participate in step two an offeror had to receive an acceptable rating in the following major areas of evaluation, listed in order of importance: (1) Technical; (2) Logistics; and, (3) Management. The technical evaluation factor was stated to be of "greater importance than all other factors combined." In addition, offerors had to receive an acceptable rating in two technical subfactors of equal importance -- Demonstration and Engineering Approach.

The demonstration consisted of equipment tests to show the LSTDM's ability to meet certain criteria selected from the technical requirements of the RFTP. The selected requirements were described either as "most critical" or "critical," and failure to successfully demonstrate any most critical requirement or two critical requirements would result in an unacceptable rating.

The RFTP required that written proposals "address all specification and solicitation technical requirements" and provide a "detailed description of how equipment complies." The RFTP warned that "Terse statements such as 'will comply', 'noted and understood', etc., are not acceptable and may cause the offeror to be declared unacceptable."

The Army received eight proposals in response to the solicitation, only three of which were found susceptible of being made acceptable through discussions. Both the Timeplex and GDSI proposals were rejected without discussions because, while both offerors passed the required demonstration, the evaluation board gave them an unacceptable rating for the technical factor. The evaluation cited numerous informational deficiencies where the offerors failed to explain how their equipment would meet the technical requirements (engineering approach and quality assurance), and concluded that the magnitude of such deficiencies showed the offerors did not understand the requirements and that the Army would require essentially new proposals from Timeplex and GDSI to upgrade their rating to acceptable. (In addition, Timeplex's proposal received an unacceptable rating for Management. However, we will not discuss this factor because Timeplex's protest principally addresses the Army's technical rating of its proposal, which in itself was sufficient to reject the proposal.)

The Army determined that it urgently required the LSTDM's and proceeded with step two, awarding a contract on August 1, 1980.

Propriety of Evaluation

GDSI does not deny that its proposal contains the deficiencies cited by the Army; Timeplex does deny that its proposal was informationally deficient. Both protesters believe that under the RFTP evaluation plan an offeror which passed the demonstration should have had its proposal considered susceptible of being made acceptable regardless of informational deficiencies in it. The protesters argue that since they passed the demonstration which comprised almost one half of the technical factor, the Army should have conducted discussions with them and permitted an opportunity to supplement their written proposals. Both protesters further argue that the Army should have permitted that opportunity because the purpose of step one of two-step formal advertising is to maximize competition by qualifying as many sources as possible.

In addition, GDSI contends that the Army used undisclosed evaluation criteria in evaluating its proposal, and GDSI and Timeplex both contend that the Army unfairly allowed other offerors -- whose proposals were found susceptible to being made acceptable -- an opportunity to submit voluminous information.

[We will review whether an agency's evaluation was fair and reasonable, and whether it was consistent with stated evaluation criteria. See A.T. Kearney, Inc., B-196499, April 23, 1980, 80-1 CPD 289 at page 2.] We will also ordinarily accept the considered technical judgment of the procuring agency's specialists and technicians as to the adequacy of a technical proposal, unless it is shown that the agency action was erroneous, arbitrary, or not made in good faith. Guardian Electric Manufacturing Company, 58 Comp. Gen. 119, 125 (1978), 78-2 CPD 376 at page 8.

[Both protesters correctly point out that the first step of two-step formal advertising, in furtherance of the goal of maximized competition, contemplates the qualification of as many proposals as possible through discussions, and that an agency should make reasonable efforts to bring step-one proposals to an acceptable status. Angstrom, Inc., B-193261, July 9, 1980, 59 Comp. Gen. _____, 80-2 CPD 20. However, by "reasonable efforts" we mean that an agency should permit an offeror to remedy major proposal defects, including failure to comply with a material requirement, when such defects could easily be cured through discussion and not through extensive revision. Angstrom, Inc., supra.

§ Whether a proposal requires extensive revision is a function of the materiality of the proposal's deficiencies. Deficiencies are material to the extent they fail to show compliance with the solicitation's requirements and/or show a lack of understanding of such requirements. [If a solicitation expressly requires detailed information, it is the responsibility of offerors to provide adequate information for the evaluation of their proposals under the established criteria. Universal Design Systems, Inc., B-196682, April 23, 1980, 80-1 CPD 290. While individual deficiencies may be susceptible to correction, the aggregate of many such deficiencies may preclude an agency from making an intelligent evaluation, and the agency generally is not required to allow an offeror the opportunity to rewrite its proposal. See Informatics, Inc., B-194926, July 2, 1980, 80-2 CPD 8 at page 5.

Timeplex denies that its proposal was informationally deficient but argues that its proposal contained the information the Army found lacking with respect to only a few of the approximately score of informational deficiencies noted. For most of the other instances the protester relies

upon the demonstration to provide the supporting data, or uses the protest documents to introduce explanatory data for the first time.

We do not believe any useful purpose would be served by discussing each of the alleged deficiencies. While many of the deficiencies may have been minor, the deficiencies were numerous. [Upon reviewing them we find that the Army's determination that the proposal was informationally deficient, and could not be made acceptable except by major revisions, was reasonable.] Timeplex may not rely upon the demonstration and material submitted to this Office to show for the first time compliance with the RFTP's technical requirements since an evaluation must be based on the information submitted with the proposal. Informatics, Inc., supra at page 8.

Nonetheless, because Timeplex relies heavily upon its having passed the demonstration we do note a significant deficiency in its proposal as an example of the many informational deficiencies: Timeplex failed to show how its demonstration equipment would be transformed into a production model, contrary to the RFTP's express requirement for detailed information in this regard.

In addition to its general requirement for detailed information, the RFTP contained preproposal questions and answers, one of which explained that:

"If the unit to be demonstrated is to be changed for production the written technical proposal must define the changes in a complete and thorough manner so as to allow evaluation by the Government."

The Army's evaluation stated that Timeplex had used two of its own standard commercial models, T-96/HMs, in the demonstration but "programming was accomplished through the use of dip switches, 'jumper plugs' (U-links) and considerable card (module) pulling." In other words, Timeplex had to modify the units at the demonstration to perform demonstration requirements. The evaluation concluded that although these conditions made it possible for Timeplex to meet the demonstration requirements, the demonstration units did not constitute a final production model and Timeplex's proposal did not explain how the demonstration units would be upgraded to such a model.

Timeplex alleges that its demonstration test plan "annotated the differences" between the demonstration equipment and the production model. In addition, Timeplex's written proposal contained a summary sheet which listed the technical requirements along with the following notations:

- "M" for meets specification
- "E" for exceeds specification
- "(1)" for standard component
- "(2)" for a standard component which is modified to meet specifications,
- "(3)" for a component still to be designed, and
- "(4)" for a component which exceeds specifications.

For the 75 requirements contained in the summary sheet, Timeplex listed twelve "(3)"s and seven "(2)"s without explanation. Therefore, while the summary sheet alerted the Army to areas where Timeplex's standard T-96/HM would have to be upgraded, it did not explain how Timeplex would upgrade the T-96/HM to meet the RFTP's requirements. With the exception of one requirement concerning alarm functions and indicator lights, Timeplex's proposal did not attempt to explain how the T-96/HM would be upgraded. This is clearly deficient in light of the RFTP's requirement for information explaining how the demonstration unit would be changed into a production model. See Joule Technical Corporation, B-197249, September 30, 1980, 80-2 CPD 238; Informatix, supra at pages 3-6.

In the case of GDSI's proposal, GDSI does not deny that there were informational deficiencies, and concedes that its proposal may have required a substantial number of pages to furnish the information required by the Army. Therefore, we will not question the Army's evaluation that GDSI's proposal also would have required major revisions.

GDSI relies upon its contention, shared by Timeplex, that under the terms of the RFTP, a proposal from an offeror who passed the demonstration should have been considered susceptible to being made acceptable. We disagree.

The Army's evaluation was consistent with the terms of the RFTP which required that a proposal receive an acceptable rating in both the demonstration and the written engineering approach to be considered acceptable. Thus, the two technical subfactors were not interchangeable and were to be independently evaluated.

The purpose of a specific information requirement is to demonstrate to the agency that the offeror understands the technical requirements and to show how the offeror will meet the technical requirements. Failure to provide such information may preclude the agency from making an intelligent evaluation. In contrast, the primary purpose of a demonstration is to show that an offeror's equipment is capable of performing certain desired functions, not to provide information missing from a proposal. To the extent that together the demonstration and the written proposal enhanced the Army's ability to evaluate a proposal's technical merits, the two were interdependent. However, passing the demonstration could not rectify informational deficiencies in the written proposal. See Informatix, Inc., supra.

GDSI notes that the Army cited GDSI's failure to submit information regarding critical requirements besides those listed in the RFTP for demonstration purposes, and argues that the Army utilized undisclosed evaluation criteria since the RFTP did not specifically identify any other requirements as "critical." However, the RFTP's use of the terms "critical" and "most critical" requirements was confined to its explanation of demonstration evaluation criteria, and only differentiated between two categories of selected technical requirements which an offeror had to satisfactorily meet in a demonstration. The RFTP did not indicate that these selected requirements were of any more importance than the other technical requirements not selected for demonstration. On the contrary, the RFTP advised offerors that they must define an approach to meeting all requirements including those not demonstrated, and that the demonstration and the written proposal's engineering approach were of equal importance.

In addition, Timeplex's and GDSI's contention that they were treated unfairly because other offerors were permitted to submit voluminous information during discussions ignores the distinction between proposals which, as originally submitted, are either acceptable or reasonably susceptible of

being made acceptable and those which are deemed to be unacceptable. Under the regulation, discussions need not be held with those offerors whose proposals are unacceptable in the first instance. See DAR § 2-503.1(e), which provide for discussions with offerors submitting proposals which are reasonably susceptible of being made acceptable. Since the protesters' proposals were not in this category, the contracting officer was not required to permit them to submit additional information. On the other hand, there is nothing which limits offerors whose proposals are reasonably susceptible of being made acceptable from submitting many clarifications of their initial proposals, regardless of volume, if their proposals substantially complied with the specifications and the clarifications are substantially based upon data already contained in the proposals. Thus, we see nothing improper with the agency's actions in this respect.)

(Both Timeplex and GDSI also suggest that their reputations and qualifications as commercial suppliers of LSTDM's should have been a factor in the Army's decision whether or not to allow the protesters to supplement their proposals. However, a technical evaluation is made on the basis of information submitted with a proposal, and no matter how capable an offeror may be it will not be considered in line for discussions if it does not submit an adequately written proposal.) Informatics, supra at 6, 7; Servo Corporation of America, B-193240, May 29, 1979, 79-1 CPD 380.

In conclusion, we believe the Army's evaluation of Timeplex's and GDSI's offers was consistent with the stated evaluation criteria, and that the protesters have failed to show that the evaluation was clearly unreasonable, erroneous or made in bad faith.)

DPA

The Army argues that the DPA issue is untimely because it concerns an alleged solicitation impropriety. Our Bid Protest Procedures require that protests concerning a solicitation impropriety apparent prior to the closing date for receipt of initial proposals must be filed by that date. 4 C.F.R. § 20.2(b)(1)(1980). In other cases protests must be filed within 10 days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2). We are not aware of any reason, and the Army has not provided one, why the protesters prior

to the time they each individually raised the DPA issue should have known that the Army had not obtained a DPA. The solicitation did not indicate that the Army did or did not obtain a DPA for this procurement. Therefore, resolving any doubts with respect to timeliness in favor of the protesters, we find the protest timely. Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66.

{The Brooks Act} 40 U.S.C. § 759 (1976), [gives GSA exclusive Federal purchasing authority for all commercially available general purpose ADPE, which authority GSA may delegate to the Federal agencies.] 47 Comp. Gen. 275, 277, 278 (1967).

GSA has implemented this authority by publishing regulations which define ADPE and generally require that an agency seeking to purchase ADPE submit a documented Agency Procurement Request (APR) to GSA requesting a DPA. Federal Procurement Regulations (FPR) §§ 1-4.1103 and 1-4.1104 (1964 ed., amend 170). Absent a GSA-approved DPA the agency lacks procurement authority to effect the purchase. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 67 (1975), 75-2 CPD 35.

The GSA regulations define ADPE subject to its jurisdiction as:

"* * * general purpose commercially available, mass produced automatic data processing components and the equipment systems created from them * * * that are designed to be applied to the solution or processing of a variety of problems or applications and are not specially designed (not configured) for any specific application. It includes:

* * * * *

"Auxiliary or accessorial equipment such as plotters, communications terminals, tape cleaners, tape testers, data conversation equipment, source data automation recording equipment (optical character recognition devices, paper tape typewriters, magnetic tape cartridge typewriters, and other data acquisition devices), etc., to be used in support of digital, analog, or hybrid computer equipment * * *."

FPR § 1-4.1102-1.

Such equipment loses its status as ADPE over which GSA exercises jurisdiction if it "is modified to the extent that precludes future use of the equipment for the solution of a variety of problems or the processing of other applications." FPR § 1-4.1103-1.

[Timeplex contends that the LSTDM's being purchased by the Army are commercially available general purpose ADPE which is slightly modified, but not to such an extent as precludes future use at a variety of applications. The Army argues that the LSTDM's are not such ADPE.] In October 1979, after the Army had received initial proposals, GSA determined that commercially available general purpose LSTDM's are ADPE for the purpose of jurisdiction, and apprised the Army of its determination. This was accomplished by reclassifying LSTDM's on the Federal Supply Schedule (FSS) as Group 70 ADPE. Nonetheless, believing that LSTDM's were not properly classified as ADPE, the Army did not submit an APR, relying upon a memorandum from the Deputy Secretary of Defense (Acquisition) advising that the Army may continue to purchase a class of equipment including LSTDM's on its own authority until an agreement is reached between GSA and the Department of Defense as to what items should be reclassified as other than ADPE.

[We believe GSA's classification of commercially available general purpose LSTDM's as ADPE is consistent with the broad definition of ADPE in FPR § 1-4.1102-1, which appears to embrace any component or support equipment to a complete computer system. Furthermore, GSA's interpretation is entitled to significant weight because it promulgated the regulation. Xerox Corporation, B-193565, July 27, 1979, 79-2 CPD 59. [Since GSA has statutory responsibility and authority for Government ADPE procurement, its definition of ADPE takes precedence in this matter over the Army's.] Control Data Corporation, B-186501, February 2, 1977, 77-1 CPD 83.

Even if the Army had initiated the procurement before GSA reclassified LSTDM's as ADPE or based on an understanding with GSA thereafter, GSA's regulations provide that an agency must submit an APR if the conditions of a contemplated procurement change during the procurement cycle so as to require a DPA. FPR § 1-4.1104. Therefore, [if the equipment being procured was commercially available and general purpose type ADPE, the Army should have submitted an APR after October 1979, when GSA reclassified the LSTDM's on the FSS to be Group 70 ADPE.]

The critical question is whether or not the RFTP's requirements were for commercially available and general purpose ADPE. The record shows that through informal contact with GSA in January and February 1980 the Army obtained GSA's informal advice that the items being procured were not ADPE because they were not mass produced or commercially available. However, GSA based its advice upon a comparison of equipment models offered in this procurement against GSA's ADP Schedule contracts, and not upon the thorough documentation which an agency is required to submit with an APR (see FPR § 1-4.1104).

Recognizing that GSA has primary jurisdiction in this area, we forwarded a copy of the RFTP and other documents submitted by the Army (not including the offeror's proposals) to GSA and requested its view on the matter. GSA responded that while the solicitation appeared to require equipment which was not commercially available and mass produced at that time, it is possible that the equipment offered and accepted by the Army may be ADPE. [GSA, therefore, has not taken a definitive position with respect to this procurement. Under this circumstance, we cannot conclude that the award was improper.] However, since under the resultant contract the Army will be periodically ordering LSTDM's for the remainder of the five-year contract term, we believe it is important for GSA and the Army to resolve this matter so that the purposes of the Brooks Act will be met with respect to these future orders, and are so recommending.

Miscellaneous Issue

[GDSI requests that this Office fully investigate the procurement to ascertain whether the Army complied with DOD Directive 5000.37, September 29, 1978, which states that DOD components shall attempt to purchase off-the-shelf products when such products will adequately serve the Government's requirements.] Like Timeplex, GDSI contends that the LSTDM's being procured are basically commercially available off-the-shelf items with some modifications, and GDSI implies that the Army failed to follow the DOD Directive.

[A DOD directive does not have the effect of law and does not provide this Office with a basis for determining the legality of an award.] See LTV Aerospace Corporation, 55 Comp. Gen. 307, 328 (1975), 75-2 CPD 203. Therefore, we will not consider this issue further.

Bowmar's Reconsideration Request

(Bowmar contends) that new facts and information came to light at a bid protest conference (see 4 C.F.R. § 20.7) on May 16, 1980, which representatives of Timeplex, GDSI, Bowmar, GSA and this Office attended, and (that based upon this "new information" we should reconsider Bowmar's original protest which we previously dismissed as untimely.)

Our Bid Protest Procedures require that (a request for reconsideration contain a "detailed statement" of the factual and legal grounds upon which reversal or modification of a prior decision may be warranted, and that such a statement must be submitted to this Office within ten working days after the basis for reconsideration was known or should have been known,) whichever is earlier. 4 C.F.R. § 20.9. (Without the detailed statement, our Office has no basis upon which to reconsider the decision.) Department of Commerce; International Computaprint Corporation, 57 Comp. Gen. 615, 618 (1978), 78-2 CPD 84.

Bowmar's submission fails to detail any factual or legal grounds for reconsideration, except as concerns the DPA issue (considered above) and one issue which we previously dismissed as untimely.

The previously considered issue concerns Bowmar's prior contention that the Army acted in bad faith by allowing Bowmar to incur demonstration costs when its proposal was deemed unacceptable. Bowmar alleges that the Army revealed at the bid protest conference that Army evaluators had determined Bowmar's written proposal to be unacceptable prior to the demonstration. However, in its original protest Bowmar untimely argued that the agency acted in bad faith by scheduling a demonstration with an offeror whose written proposal was not reasonably susceptible to being made acceptable. Therefore, the allegedly new information revealed at the conference did not provide Bowmar its basis for protest because the protester previously had raised the same issue.

(Since Bowmar has not submitted any other details to this Office, we have no basis to reconsider any of the other issues raised in the original protest.) Department of Commerce, International Computaprint Corporation, supra.

Conclusion

The protests of Timeplex and GDSI that the Army unreasonably rejected their proposals for informational deficiencies and Timeplex's, GDSI's and Bowmar's protest that the Army lacked a DPA are denied. We affirm our dismissal of Bowmar's earlier protest.

Milton J. Aocolan

Acting Comptroller General
of the United States

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DECISION

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DIGEST:

ADP LIBRARY
FGMSD - POLICY GROUP

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