

DECISION

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

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Caldery
119573*

FILE: B-208241

DATE: September 29, 1962

MATTER OF: Data Systems Division of Litton Systems

DIGEST:

Proposal was unjustifiably determined technically unacceptable because of deficiencies concerning the offeror's logistic support plan, request for Government furnished property, and quality assessment reporting requirements. Record indicates that offeror essentially met those requirements, or its failure to do so was readily resolvable. Rather than reject offeror's proposal because of uncertainties the agency should have reopened negotiations to resolve uncertainties.

The Data Systems Division of Litton Systems, Inc. (Litton), protests the award of a contract to Magnavox Government and Industrial Electronics Company (Magnavox) under request for quotations (RFQ) No. DAAK10-82-Q-0013, issued by the United States Army Armament Research and Development Command (Army), Dover, New Jersey. Litton contends that the Army improperly determined its proposal technically unacceptable.

Litton filed a motion for injunctive relief with the United States District Court for the District of Columbia under Civil Action No. 82-2044 and the court has requested our opinion in this matter. ICSD Corporation, the third offeror under this RFQ has filed a bid protest with this Office, but is not a party to this civil action.

For the reasons that follow, we sustain the protest.

The RFQ, issued on November 28, 1981, is for the preproduction engineering, and the production of, a hand-held, lightweight mortar ballistic computer (MBC) for use by soldiers in the field to calculate fire control information for directing mortar fire. Initial proposals were submitted on March 16, 1982. On April 23, 1982, the Army discussed its technical evaluation of Litton's proposal with Litton.

By letter to the Army dated May 5, 1982, Litton raised additional questions which the Army responded to on May 10, 1982. On May 25, 1982, the Army informed offerors that no further discussions would be held, and that the best and final offers (BFO) were due on June 4, 1982. Litton submitted its BFO on May 31, 1982. The final costs of each BFO were:

Magnavox	\$2,597,246
ICSD	\$2,495,610
Litton	\$1,182,500

Litton's cost proposal was based on estimated costs of \$3,900,000 of which Litton agreed to absorb \$2,800,000 as a management investment in the NBC program. (These prices have already been disclosed to the parties.)

The Army determined that Litton's and ICSD's proposals were technically unacceptable and awarded the contract to Magnavox.

Award was to be made to the lowest, acceptable offeror whose offer satisfied the RFG technical requirements. The Army determined that Litton's BFO contained three major technical deficiencies. The Army found that Litton had failed to address design freeze in its Logistic Support Analysis Plan (Plan), that Litton's request for additional Government-furnished equipment (GFE) was unacceptable and that Litton had changed the scope of the applicable data items to be included in the assessment quality report. Based on the technical evaluation staff's reports, the contracting officer found these technical deficiencies were so substantial that Litton's proposal was unacceptable.

The Army's position is that Litton's proposal was rejected as unacceptable only after these material deficiencies in Litton's initial proposal were specifically brought to Litton's attention during negotiations, and Litton failed to avail itself of the reasonable opportunity provided by the Army to correct these deficiencies in its BFO. The Army states that any one of these three deficiencies was sufficient to warrant rejection of the proposal.

Litton argues that the Army did not have a rational basis to disqualify Litton because these alleged deficiencies were so trivial that Litton should have been permitted to cure its proposal, or alternatively, the Army should have waived the deficiencies. Litton believes the Army's actions,

or inactions, in this matter constituted a failure to conduct meaningful discussions. Litton requests that we recommend that award to Magnavox be terminated and that the contract be awarded to Litton as the lowest cost, technically acceptable offeror.

With respect to the Army's position that Litton failed to address the design freeze in its Plan, Litton's response is that the Plan was not required as part of the proposal, even though Litton submitted the Plan with its BFO proposal, and it was therefore improper to downgrade Litton for failure to comply with this requirement. Furthermore, the Plan provided for a technical data package baseline which Litton asserts meets the design freeze requirement.

In the Army's evaluation summary presented both orally and in writing to Litton during the April 23, 1982, meeting, the Army advised Litton that:

"The following additional detail is required for the LSA plan. * * * (4) design freeze must be addressed, * * *."

Although never defined in the RFQ, the Army reports that a design freeze sets the end of the production and logistic phases of the contract and prescribes the physical form, fit, and function characteristics for production acceptance testing. The Army sought an assurance that at the "freeze" point the correct equipment would be in the correct spot for testing when needed. The Army states that if such a design freeze was not planned for, the program's schedule could constantly slip.

The Army, in an affidavit submitted to the court, acknowledges that Litton offered a proposed timetable to deliver the necessary configuration data to the Army as reflected in a chart in its BFO and in other references. Nevertheless, the Army contends the proposal lacked a specific binding commitment to institute a design freeze. The Army states that it sought from Litton an indication that the design freeze had been taken into account in making its Plan. Without this commitment, the Army feared delays in the procurement.

We note, however, that Litton's BFO sets out a chart (Figure 3-4) showing Litton's schedule for the program. It indicates that Litton would prepare the electronics package for engineering change proposal approval and submit it to Army by the close of the fourth month. The Plan also states

that changes to the configuration would be subject to Government approval. Since the chart indicates that Logistics Supply Analysis and Review data were to be delivered to the Government after 4 months, the physical form, fit and function characteristics for production acceptance testing would be set.

While the Army asserts that this presentation in the BFO does not show a binding commitment to a design freeze, we fail to see what else was needed. We do not think that Litton's failure to use the term "design freeze" in its proposal was a material deficiency since the chart in Litton's BFO establishes its commitment to have the physical form, fit and function characteristics set at the end of 4 months.

Further, in reviewing Magnavox's response to this same point in camera (because the proposals are proprietary), we find that Magnavox, in stating its plan for a design freeze, advises that delivery of data could slip in certain circumstances. We cannot see any material difference between the two proposals in this respect. In short, we do not find that the Army had a substantial basis to reject Litton's proposal because of the design freeze deficiency.

The Army's second basis for rejecting Litton's BFO was that the proposal contained a request for additional GFE beyond that offered in the solicitation. The Army contends it advised Litton in the course of negotiations that the Army could not and would not supply this additional GFE and that transferring responsibility for the equipment to the Army is unacceptable because it places the risk of providing this equipment with the Army.

Litton has responded that when the solicitation is read as a whole, it is clear that the Army did intend to provide additional GFE for training purposes that was not on the RFQ GFE list, and requested Litton to provide a list of GFE that Litton would need for training. Litton also argues the GFE requested was readily available. Therefore, Litton complied with the RFQ, and the GFE requested placed no undue burden on the Army.

With respect to the request for GFE, Litton's initial proposal to the Army included basically the same GFE requested in its BFO. During discussions on April 23, 1982, the Army advised Litton:

"The proposal that Government furnish equipment (GFE) for trials is not accepted. GFE provisions for trials were deleted in [Mod] 7."

Mod 7 deleted the following statement:

"Subject equipment required for trials shall be provided by the Government from the accepted production lots."

However, as Litton points out, on April 26, 1982, subsequent to discussions, Mod 8 provided that:

"The Government shall provide interfacing equipment to the * * * (MBC). This includes radios and digital message devices * * *."

Further, the RFP requested that the offeror submit:

"A list of all equipment to include quantity that will be required to support the development of the training program and the trials. The list shall be annotated to indicate which equipment will be GFE * * *."

Moreover, the RFQ GFE clause did not indicate it was all inclusive.

The record indicates that after the issuance of the Mod 7, deletion of GFE for trials, the revised RFQ could reasonably have been interpreted to include a request that offerors submit a list of equipment to support the development of the training program and trials, the list to be annotated to indicate which equipment would be GFE. The RFQ further provided that the Army would furnish the six MBC training units and interfacing equipment. Litton provided a GFE list and the Army found this unacceptable.

The Army apparently did not intend to supply additional GFE beyond that listed in the RFQ because it did not want to assume the risk of providing this additional equipment. The record does not show, however, that this concern was communicated to Litton. Rather the record indicates that Litton was first advised that GFE would not be provided for trials, and then, under Mod 8, the Army indicated that the Government would provide interfacing equipment. Apparently, Litton interpreted this to mean that additional equipment such as radios, batteries, adaptors and converters could be requested even if they were to be used for trials. In any event, the Army never clearly communicated to Litton its requirement that these items must be furnished by the contractor. We are persuaded that Litton regarded the question of who would furnish this equipment as unimportant since the cost was relatively insignificant (\$9,200). We think

the Army could have readily resolved this matter. Therefore, we do not think Litton's proposal was properly rejected because it requested additional GFE.

The Army also determined that Litton failed to comply with a requirement that certain quality assessment reports be furnished to permit the Army to evaluate the quality of materials furnished by subcontractors. This deficiency relates to the Contract Data Requirements List (CDRL) on the DD Form 1423's. CDRL A033 is for an Assessment Quality Report (Report) in accordance with Data Item Description DI-R-1756 (Modified). Litton originally proposed that this CDRL be deleted in its entirety. The Government informed Litton during the technical discussions that then it must comply with this CDRL.

The Army argues that while Litton in its BFO did propose to follow the guidelines of the reporting requirement, the contents of the BFO varied the requirement. For example, the Government requires that the contractor provide "statistical evidence that incoming supplies conform to established quality requirements. Each lot or serial number subject to inspection will be identified." Litton offered, "Results of vendor ratings and surveillance activities." In the Army's view, Litton was not providing the information necessary for the Government to insure Litton was performing necessary inspection and test monitoring of incoming supplies and analyzing the results to identify quality problems with the incoming supplies. We disagree with the Army's view of Litton's response.

Litton's statements of the reporting requirements does not vary significantly from the precise requirements. We cannot say that the differences are so material as to justify the determination that the response was unacceptable. Furthermore, Litton's proposal concerning the reporting requirement included the clear statement that Litton agrees to follow the reporting guidelines in the RFP. Any doubts concerning Litton's response easily could have been resolved by clarification.

Protest sustained.

In our view, Litton essentially has met the Army's concern for a design freeze and quality assessment report. We recognize the Army's legitimate concern that the contractor, not the Army, assume the risk of procuring the

GFE, particularly the batteries for the MBC, since the failure of the battery would eliminate portable field use of the MBC. This concern should be resolved prior to award to Litton. Because reopening of discussions most likely would result in an auction, we think the appropriate course is for the Army to hold "touch up" negotiations with Litton for the purpose of confirming that Litton will, in fact, accept responsibility for providing the batteries which will meet the Army's stated needs. We note that Litton has already indicated that it would have absorbed the "\$9,200 worth of GFE," had it been requested to do so by the Army. Based on the present record, if Litton agrees to this commitment to supply the equipment at issue, we recommend that the Army terminate the contract with Magnavox, and award the contract to Litton.

Since the Court's final decision may affect ICSD's entitlement to an award under this RFQ, we will hold ICSD's protest in abeyance pending the Court's decision.

Harry R. Van Cleave
for Comptroller General
of the United States