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

FILE: B-213661 **DATE:** June 22, 1984

MATTER OF: Falcon Systems, Inc.

DIGEST:

1. Elimination of a proposal from the competitive range, thereby leaving a competitive range of one, is improper where the record shows that informational deficiencies in the proposal were not so material that major revisions and additions to the proposal would have been required to make it acceptable.

2. Proposal preparation cost may be covered where: (1) the agency's rejection of the proposal was unreasonable, and thus arbitrary and capricious; and (2) the offeror should have been determined by the agency to be in the competitive range with a reasonable chance at the award, but the agency's arbitrary action makes it impossible to determine precisely how substantial that chance was.

Falcon Systems, Inc. protests the award of a contract to International Business Machines Corporation (IBM) under request for proposals (RFP) No. MDA903-83-R-0069 issued by the Defense Supply Service-Washington (DSS), Department of the Army, Washington, D.C. Falcon contends that DSS acted unreasonably in determining its lower-priced proposal to be technically unacceptable without holding any discussions, and in awarding the contract to IBM which, with the elimination of Falcon, was the only firm that remained in the competitive range. Falcon also maintains that various procedural irregularities occurred during the selection process. We sustain the protest.

Background

The RFP, issued May 6, 1983, solicited proposals for data processing equipment and associated items and services. Specifically, the RFP was for the two-phased

029237

acquisition of a mainframe central processing unit (IBM 3083 series, AS 7000/9000 series, or Amdahl 470 series) and IBM or equal compatible peripheral equipment for use in office management and word processing.

While 52 firms were solicited, DSS received proposals from only 2 firms, Falcon and IBM, by June 24, the closing date for receipt of initial proposals. The two proposals were forwarded to a Technical Evaluation Panel (TEP) for evaluation in accordance with the RFP's technical evaluation criteria. The TEP, in its report dated July 13, determined that Falcon's technical proposal was "unresponsive" because of numerous deficiencies which, in the opinion of the TEP, could not be remedied without major revisions to the proposal. Shortly thereafter, the contracting officer, based on the TEP's determinations, concluded that Falcon's proposal was so technically deficient that there was no basis for discussions; subsequent negotiations were therefore limited to the only firm remaining in the competitive range, IBM.

Despite repeated inquiries by Falcon, the firm was not notified that its proposal had been excluded from the competitive range until September 27, when the contract was awarded to IBM, approximately 60 days after DSS made its determination that Falcon's proposal was technically unacceptable.

Interested Party Status

As a preliminary matter, DSS argues that Falcon is not an interested party eligible to protest under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984), because Falcon's proposal failed to meet all RFP requirements and thus was unacceptable.

Falcon, however, is clearly an interested party. The substance of Falcon's protest concerns the propriety of its exclusion by DSS from the competitive range. Obviously, before we reach the conclusion that a proposal was reasonably determined by an agency to be technically unacceptable and that the unsuccessful offeror is no longer interested to protest agency procurement actions, we must examine the propriety and reasonableness of the agency's actions with respect to the rejected proposal.

Accordingly, we find no merit to the agency's position. Falcon, by protesting its exclusion from the competitive range and by requesting a properly conducted resolicitation of this requirement, clearly has that direct and substantial economic interest that makes it an interested party under our Procedures. See generally Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD ¶ 374.

Evaluation of Proposals

Essentially, DSS contends that Falcon's proposal was technically deficient in many individual areas which, when viewed in their totality, made it clear that Falcon's proposal was so defective as to make discussions meaningless. Falcon alleges that the deficiencies cited by DSS were minor and correctable; that Falcon's proposal was sufficiently meritorious to be included in the competitive range; and that DSS could have realized potential savings of approximately $2 million by accepting its proposal rather than that of IBM.

There is no requirement that an agency permit an offeror to revise an initial proposal when the revisions required to make the proposal acceptable are of such magnitude as to be tantamount to the submission of another proposal. See Decilog, B-198614, Sept. 3, 1980, 80-2 CPD ¶ 169. Generally, however, a proposal must be considered to be within the competitive range unless it is so technically inferior or out of line as to price as to render discussions meaningless. 53 Comp. Gen. 1 (1973). This is particularly the case if there otherwise would be only one offeror remaining. 50 Comp. Gen. 670 (1971). Thus, while the initial determination of whether a proposal is in the competitive range, particularly with respect to technical considerations, is primarily a matter of administrative discretion which will not be disturbed by our Office absent a clear showing that the determination lacked a reasonable basis, Dynalectron Corporation, B-185027, Sept. 22, 1976, 76-2 CPD ¶ 267, we will closely scrutinize any determination that results, as here, in only one offeror being included in the competitive range. Id.; Comten-Comress, B-183379, June 30, 1975, 75-1 CPD ¶ 400. As we said in Comten-Comress, supra:

> "If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposal; if the

> informational deficiency could be reasonably corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order. . . ."

The following are the major deficiencies the TEP found in Falcon's proposal. We list them briefly simply to indicate the nature of the deficiencies, together with Falcon's responses and our observations:

Deficiency #1

DSS: DSS states that Falcon failed to indicate its understanding of RFP requirements for a total integrated system because while Falcon listed numerous available items of equipment and features in its technical proposal, the firm did not specify the exact equipment, features, options, or capabilities that it was offering for either phase one or phase two requirements.

Falcon's response: Falcon states that its cost proposal specified the exact equipment that it was offering in both phase one and phase two, and that its omission of this information from the technical portion of its proposal was a deficiency of form, not substance.

GAO observation: The agency does not contend that any particular combination of the various equipment and optional features described in Falcon's technical proposal, properly selected and identified, would have been technically unacceptable. Rather, the gist of this deficiency is that Falcon failed to identify the exact items and features it was offering from otherwise potentially acceptable choices described in the technical portion of Falcon's proposal. We think this omission, at most, is an informational deficiency that could have been easily corrected by a telephone call even if Falcon had not otherwise identified the items in question in its cost proposal. The agency does not argue otherwise.

Deficiency #2

DSS: The agency states that Falcon failed to include 41 necessary multiplexers in its proposed system configuration. The system architecture is incomplete without these devices.

Falcon's response: Falcon states that this inadvertent omission from its technical proposal was wholly insignificant since the procurement involves $10 million worth of equipment and services, and the questioned item has a list price of $822. Further, Falcon states that the omitted items were included in its cost proposal.

GAO observation: We find it difficult to accept that an $822 item in a $10 million procurement constitutes any ground for rejection of a proposal where, as here, a minimal effort at discussions would have remedied the problem.

Deficiency #3

DSS: The agency states that Falcon failed to include in its system configuration provisions for the use of eight existing IBM 3370 disk drives and other unspecified equipment currently on line.

Falcon's response: Falcon acknowledges that it omitted a discussion of the disk drives, which were required to be used only transitionally in transferring the existing software to the new system. Falcon also states that it did not show an IBM controller (valued at approximately $1,000 per month) on the proposal's schematic. Falcon, however, notes that this deficiency did not affect any integral part of its proposed system. Falcon further states that this deficiency was minor and could have been corrected by a minimal alteration to the schematic.

GAO observation: We question whether the omission of a technical discussion concerning a transitional requirement, related only to the proposed transfer of existing software to the new system, is a major defect where the equipment is otherwise satisfactory. Falcon's offered system is IBM-compatible, and nothing in the record suggests that minimal discussions would not have corrected the omission.

Deficiency #4

DSS: Falcon's proposal failed to reflect a capability to provide a video output feature as required; Falcon offered only a Memorex 2079 color display station. In all, 28 of these items are required.

Falcon's response: The video output feature is available as an option for the Memorex 2079 at a price of $20. One additional sentence to Falcon's lengthy technical proposal would have corrected the problem.

GAO observation: The contracting agency does not dispute Falcon's position as to the insignificance of this deficiency in terms of price, or the ease of correction.

Deficiency #5

DSS: Falcon did not address whether the capabilities of its Amdahl controller are equivalent to the specified IBM controller, and did not adequately discuss the features and options offered.

Falcon's response: Falcon disputes the agency's conclusion and points to sections of its proposal where the technical equivalence of its controller was discussed.

GAO observation: The proposal did identify the controller being offered, and there is nothing in the record to suggest that simple discussions could not have clarified the capabilities of the questioned item.

Deficiencies #6 and #7

DSS: Falcon failed to explain adequately how IBM software would be processed on its Amdahl central processing unit. Falcon also failed to discuss adequately how it proposed to integrate the equipment from its three major vendors to provide a complete functional system. The agency further questions Falcon's experience and general capability to accomplish the delivery of an integrated system.

Falcon's response: Falcon argues that the software processing requirements are discussed in various portions of its proposal. Falcon also states that it did address its hardware integration approach and that, in any event, this matter improperly questions its responsibility as a prospective contractor, which is beyond the scope of a technical evaluation.

GAO observation: We have reviewed Falcon's proposal and find these matters to be the only serious information deficiencies, since Falcon's discussion of these matters in its proposal was cursory and brief. However, we also note that the agency has never argued that any one or two individual deficiencies were so serious as to warrant rejection of Falcon's proposal.

Deficiency #8

DSS: Falcon failed to provide a list of training courses available.

Falcon's response: The list of training courses was inadvertently omitted. However, the list could have easily been provided upon request and would certainly not have required major revision of the proposal.

GAO observation: DSS does not suggest that the alleged deficiency was significant or not readily correctable.

Deficiency #9

DSS: Falcon's functional schematic, system configuration table, electrical requirements table, and environmental table were inadequate and incomplete. Falcon failed to show where its central processing unit fit in its proposed configuration, and the existing disk drives and multiplexers were missing from the configuration for phase one. DSS suggests that while the addition of these items to Falcon's proposal might have been simple, the agency had to assume that Falcon's proposal, as initially submitted, was accurate and complete since Falcon did not formally take any exception to the RFP's requirements.

Falcon's response: The functional schematic does show its central processing unit in the configuration. As stated previously, the multiplexers and disk drives, omitted from the proposal's text, were also missing from the schematic. The electrical and environmental tables needed minimal change to make them acceptable.

GAO observation: We agree with the agency that the schematics were incomplete and made no distinction between phase one and phase two requirements. However, we do not agree with DSS' assumption that the proposal must have been complete as submitted. The very purpose of negotiations after receipt of initial proposals is to remedy proposal defects and omissions.

Deficiencies #10 and # 11 and #12

DSS: Falcon did not address "Tab D" of the RFP, which required a discussion of system interfaces in the proposal. Further, Falcon did not address quality assurance requirements or installation of the system.

Falcon's response: No additional discussion of interface was required by the RFP; there were no operational demonstrations or benchmarks required for quality assurance purposes; and installation was a simple procedure requiring no modification of the site.

GAO observation: It is clear from the record that these items are of peripheral importance and none materially affected the potential acceptability of Falcon's system.

GAO Conclusions

In our view, it is apparent that DSS did not find the equipment and services offered by Falcon to be inherently technically unacceptable or unsuitable for the agency's actual requirements; rather, DSS' position is that Falcon did not provide enough technical information for subsequent discussion to be meaningful.

As stated previously, with the elimination of Falcon, only one firm remained in the competitive range, thereby effectively creating a sole-source procurement. We think that under such circumstances, it is incumbent upon an agency, in the interest of maximizing competition, to keep an informationally deficient proposal in the competitive range unless further discussions based on that proposal would be truly meaningless. Here, based on the record, we do not think that Falcon's proposal, either in its individual elements or in its totality, was so materially deficient from an information standpoint that discussions would have been meaningless or that any revisions would have constituted a new proposal. It is clear that a number of the alleged deficiencies simply reflect omissions from the technical proposal of items that were included in the cost proposal, while other deficiencies seem insignificant either as to price or function.

We are not saying that an agency may never reject a proposal for informational deficiencies when to do so would leave only one offeror in the competitive range. However, such instances are rare, and the deficiencies would have to be so irremedial that the agency has no reasonable alternative but to proceed with a sole-source procurement. In our view, DSS, at best, evaluated Falcon's proposal as if numerous competitive offers had been received, and concluded that any additional effort to secure more information from Falcon was, on balance, not worthwhile. The procurement regulations, however, state that when there is doubt as to whether a proposal is within the competitive range, that doubt must be resolved by including the proposal. See Defense Acquisition Regulation (DAR) § 3-805.2(a). Under the circumstances, we find the

agency's rejection of Falcon's proposal unreasonable, and we sustain the protest on this issue.

Procedural Irregularities

The protester also complains that it was seriously prejudiced by the agency's failure to give notice, despite weekly telephone inquiries by Falcon, that Falcon's proposal had been excluded from the competitive range, until approximately 60 days after DSS determined the proposal to be technically unacceptable. The protester states that had it been properly notified in a timely manner, it could have immediately protested the unreasonable exclusion of its proposal to our Office so that corrective action could have been effected prior to award.

The agency relies on the following regulation (DAR § 3-508.2 (a)):

> "In any procurement . . . in which it appears that the period of evaluation of proposals is likely to exceed 30 days or in which a limited number of suppliers have been selected for additional discussion . . . the contracting officer, upon determination that a proposal is unacceptable, shall provide prompt notice of that fact to the source submitting the proposal. Such notice need not be given where the proposed contract is to be awarded within a few days and [post-award notice] would suffice. In addition to stating that the proposal has been determined unacceptable, notice to the offeror shall indicate, in general terms, the basis for such determination and shall advise that, since further negotiation with him concerning this procurement is not contemplated, a revision of his proposal will not be considered."

The contracting officer states that she did not expect the evaluation of proposals to exceed 30 days, so that notice was not required. The agency admits that Falcon did telephonically request information about the status of its proposal during the 2 months following rejection of its proposal. The agency states that it advised Falcon on these occasions as follows: "If you are found to be in the competitive range, we will hold discussions with you."

We think the agency's reliance on the above-quoted regulation is misplaced. In our view, the reason the regulation permits dispensing with immediate notice when the period of evaluation is not likely to exceed 30 days is that post-evaluation notice would also constitute a timely rejection notice. When the period of evaluation actually exceeds 30 days or more, we believe the regulation requires prompt notice to the source submitting the unacceptable proposal since the contracting officer's initial expectation of a short evaluation period, the basis for dispensing with immediate notice, is no longer valid. Further, where, as here, an offeror repeatedly requests information about the status of its proposal, we do not believe it is sufficient for the agency merely to parrot general negotiation principles in response to a specific question concerning a technical proposal that has already been found to be technically unacceptable. We therefore find the lack of notice to have been procedurally improper.

Falcon makes several other complaints, such as that the agency made material changes in the RFP without affording Falcon an opportunity to revise its proposal, and that the contract awarded to IBM contained material deviations from the RFP concerning specification and pricing provisions. Since we have already sustained Falcon's protest on other grounds, we need not consider these matters.

Recommendation For Corrective Action

We understand that the major portion of phase one equipment has been delivered. However, a portion of phase one equipment is optional and has not been delivered, nor has any phase two equipment. Further, the contract for fiscal year 1985 is renewable solely at the option of the government.

In view of our findings above, we recommend: 1) that DSS not exercise any options under the contract; 2) that DSS immediately cease all discretionary purchases of phase one and phase two equipment under the contract; and 3) that DSS resolicit any unfulfilled requirements.

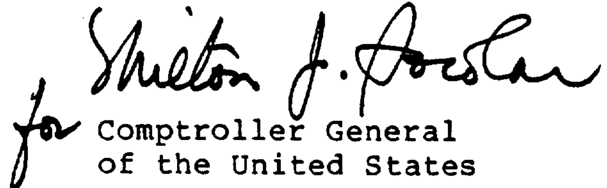
We also believe Falcon is entitled to recover the costs of preparing its proposal. The basic criterion for such recovery is whether the agency has acted arbitrarily or capriciously in evaluating the claimant's proposal, and the claimant would have had a substantial chance of receiving the award but for the agency's improper action.

See System Development Corporation and Cray Research, Inc. --Request for Reconsideration, B-208662.2, April 2, 1984, 63 Comp. Gen. ____, 84-1 CPD ¶ 368.

We have held that where an agency's arbitrary action makes it impossible to calculate the claimant's chances for the award, and the claimant had a colorable chance at the award, fairness dictates that we adopt a presumption favoring the claimant. See M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 CPD ¶ 587. Here, Falcon's proposal clearly should have been included in the competitive range. By definition, a proposal in the competitive range has a reasonable chance for award. DAR § 3-805.2. We therefore believe fairness requires a finding that Falcon's chance at the award is sufficient to support recovery of proposal preparation costs based on DSS' arbitrary and capricious action. System Development Corporation and Cray Research, Inc.--Request for Reconsideration, supra. Falcon should submit substantiating documentation to DSS to establish the amount it is entitled to recover.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

The protest is sustained.



for Comptroller General
of the United States