

DECISION



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

Wojcik

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FILE: B-215426

DATE: February 6, 1985

MATTER OF: Magnavox Advanced Products and Systems
Company

DIGEST:

1. Protest by sole offeror that its proposal was improperly found to be technically unacceptable is not rendered academic by agency's resolicitation for requirement with relaxed specifications, where only reason for resolicitation is that no one in industry, including protester, could meet specifications of initial solicitation.
2. Agency technical evaluation that concluded that protester's proposal was technically unacceptable is reasonable where protester's proposal did not meet some requirements and needed substantial clarification in other areas. Even though protester's proposal was not grossly deficient, decision to reject proposal without discussions was reasonable because protester was sole offeror and competition would not be enhanced by resolving doubt in favor of conducting discussions with protester. On the contrary, competition is enhanced by strict application of rules of technical acceptability.
3. Fact that some individual evaluators' ratings did not agree with final ratings is not sufficient to discredit evaluation because evaluators' ratings were only initial input into final evaluation, and individual evaluators did not have access to entire proposal in making judgments.
4. Fact that individual evaluators stated that protester's proposal did not evidence understanding of an area in which its technical approach was rated susceptible of being made acceptable is not necessarily an inconsistency. A rating of "susceptible" evidences a deficiency and

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evaluators may well have thought that the deficiency in technical approach was caused by a lack of full understanding of the requirements.

Magnavox Advanced Products and Systems Company (Magnavox) protests the Army's determination that its offer in response to request for proposals (RFP) DAAB07-84-R-J508 was technically unacceptable.

We find that the Army's determination was reasonable and deny the protest.

Background

The RFP was issued by the Army Communications Electronics Command, Fort Monmouth, New Jersey. The Air Force will be using the equipment and wrote the specifications. The Army is procuring the equipment because it has responsibility for procuring all ground satellite terminals. The solicitation requested offers for a quantity of antijam control modulator/demodulators (modems), ancillary equipment and technical data for use in the NATO Air Base Satellite (NABS) communications program. The NABS program is to provide the United States and NATO with a secure wartime communications network in Europe. The NABS network consists of a NATO satellite supporting approximately 100 transportable network terminals, each of which is capable of supporting traffic connections to any of the other terminals in the network. These traffic links are to support a mixture of low rate data, voice, and teletype traffic by use of a modem in each terminal. The solicitation required the modems to interoperate with OM-55 modems, which Magnavox provides to the Navy.

The Army solicited 20 sources, but received only one proposal--Magnavox's. The Army conducted a technical evaluation of Magnavox's proposal and found it to be technically unacceptable. No discussions were conducted. The reasons were provided to Magnavox in a letter dated April 17, 1984. Magnavox protested the determination of technical unacceptability to the Army and requested a debriefing. The Army denied the protest and debriefed Magnavox on May 30. According to Magnavox, at the debriefing, the Army did not discuss some of the deficiencies stated in the April 17 letter and added several new deficiencies. Magnavox then protested to GAO, requesting that GAO overturn the determination of technical unacceptability and recommend that the

Army enter into technical discussions with Magnavox or, alternatively, that GAO award proposal preparation costs to Magnavox.

In December 1984, while the record in the protest was still being developed, the Army issued a new solicitation for the NABS modems with apparently relaxed specifications. On December 17, 1984, Magnavox filed suit in the United States Claims Court (Docket No. 667-84C) to enjoin the Army from continuing with the new solicitation until the issue of the acceptability of its proposal had been resolved. The court has requested GAO to provide it with an advisory opinion.

Academic Nature of Protest

As a preliminary matter, we must address the question of whether Magnavox's protest under the first solicitation was rendered academic by the Army's issuance of a second solicitation for the same requirement. Generally, a protest under a solicitation is rendered academic if the solicitation is properly canceled because, even if the protest is sustained, there is no possible corrective action. See e.g. Jackson Marine Companies, B-212882, B-212882.2, Apr. 10, 1984, 84-1 C.P.D. ¶ 402. While the Army never officially canceled the initial solicitation, the rejection of the sole offeror and the resolicitation may be seen as a de facto cancellation.

When a protested solicitation is canceled, the relevant issue is the propriety of the reason for cancellation, not the initially protested action. When GAO learned that the Army intended to resolicit for the requirement, it asked the Army whether the new solicitation had different technical requirements and whether an award under the initial solicitation would still satisfy its needs. The Army's response was that an award under the initial solicitation would satisfy its needs if the equipment met the specifications, and that the new solicitation had somewhat different technical requirements because no member of industry could meet the requirements of the initial solicitation. Since the reason for the new solicitation was essentially Magnavox's alleged technical unacceptability, that is the core issue that still must be resolved, even if the question is now viewed as the propriety of the Army's de facto cancellation of the initial solicitation. Consequently, Magnavox's protest is not academic.

Evaluation of Magnavox's Proposal

The solicitation provided that award would be made to the responsible offeror who submits the lowest priced, technically acceptable proposal. A proposal would be deemed technically acceptable only if all factors and subfactors on which the technical proposal was evaluated were rated acceptable. The factors and subfactors listed were:

1. Technical Approach

- a. System performance
(5 elements were listed)
- b. Effectiveness of design for:
(8 elements)
- c. Test
(3 elements)
- d. Software development support
(3 elements)
- e. Manufacturing
(2 elements)
- f. Demonstrate overall understanding of
statement of work requirements
- g. History of past performance on
contract of comparable complexity
- h. Work breakdown structure

2. Support

- a. Logistics
(4 elements)

Each factor, subfactor and element was to be evaluated against the following evaluation criteria:

- 1. Understanding of Requirements
- 2. Soundness of Technical Approach
- 3. Past Performance and Related Experience

4. Comprehensiveness, Clarity, Adequacy
of Presentation and justification of
Approach.

The technical evaluation was performed by Air Force and Army personnel. Magnavox's proposal was rated unacceptable on the technical approach factor. Within that factor, the system performance and effectiveness of design subfactors were rated unacceptable. Three other subfactors were rated susceptible of being made acceptable, and three subfactors were acceptable. The five subfactors rated unacceptable or susceptible contained 19 elements, of which seven elements were rated unacceptable and nine were rated susceptible.

The deficiencies underlying the above ratings were set forth in the April 17, 1984, letter to Magnavox and were expanded and clarified at the debriefing on May 30. Approximately 22 deficiencies were set forth in the letter. Six additional deficiencies were discussed at the debriefing. The Army states that no one unacceptable element or deficiency standing alone would have necessitated a major revision to the proposal, but that when all unacceptable elements or deficiencies were viewed together, a major proposal revision would have been required to make the proposal acceptable. The evaluation board determined that approximately 50 percent of the two proposal volumes containing the heart of the technical description would need to be rewritten in order to sufficiently correct deficiencies.

Based on the solicitation requirement that all factors and subfactors be rated acceptable and on the cumulative effect of the deficiencies, the Army determined that Magnavox's proposal was technically unacceptable.

Magnavox's Arguments

Magnavox contends that its proposal was at least susceptible of being made acceptable with only minor revisions and, therefore, that the Army had a legal duty to conduct discussions with Magnavox and to permit it to revise its proposal in response to those discussions. In its legal argument, Magnavox cites 10 U.S.C. § 2304(g) (1982), Defense Acquisition Regulation (DAR) §§ 3-805.1 and 3-805.2, reprinted in 32 C.F.R. pts. 1-39 (1983), several GAO decisions and a Claims Court decision in support of its argument.

Essentially, the statute and DAR provisions require contracting agencies to conduct discussions with all offerors in a competitive range. DAR § 3-805.2 provides that all proposals which have a reasonable chance of being selected for award shall be included in the competitive range, and that doubt concerning the inclusion of proposal should be resolved in favor of including it.

Magnavox recognizes that GAO's role in reviewing agency technical evaluations is limited to whether the agency evaluation had a reasonable basis. See e.g. Coherent Laser Systems, B-204701, June 2, 1982, 82-1 C.P.D. ¶ 517. However, Magnavox points out that GAO has stated that a proposal should be included in the competitive range unless it is so technically inferior that discussions would be meaningless, Eastern Marine, Inc., B-213945, Mar. 23, 1984, 84-1 C.P.D. ¶ 343, or unless deficiencies are so material that major revisions would be required to make the proposal acceptable. Texas Medical Instruments, Aug. 10, 1982, 82-2 C.P.D. ¶ 122. According to Magnavox, GAO has defined major revision as tantamount to the submission of a new proposal. Spectrum Leasing Corporation, B-205781, Apr. 26, 1982, 82-1 C.P.D. ¶ 383.

Initially, Magnavox agreed with the rule that the government need not conduct discussions with an offeror whose proposal contains so many deficiencies susceptible to correction that the agency is prevented from making an intelligent evaluation. Radiation Systems, Inc., B-211732, Oct. 11, 1983, 83-2 C.P.D. ¶ 434. However, in its comments on the agency report, Magnavox contends that the Claims Court in Isometrics, Inc. v. United States, _____ F. Supp. ___, 5 Cl. Ct. 420 (1984), declined to follow the rule when it stated:

"The Court rejects this cumulative effect theory, at least under these facts, and instead chooses to review the deficiencies individually considering only those it considered major." p. 425

Magnavox contends that the Isometrics case is factually similar to this protest in that the agency has changed its position on several deficiencies and other deficiencies have proven to be correctable with minor changes. Magnavox also points out that the Army has admitted that none of the deficiencies alone would render the proposal unacceptable.

Magnavox argues that the Army evaluators missed or misunderstood portions of its proposal that clearly responded to alleged deficiencies. Also, Magnavox contends that, in certain areas, it was penalized solely for proposing an alternative design approach, even though the solicitation permitted alternative approaches. In the same vein, Magnavox points out that the delivery time and cost provisions of the solicitation mandated a technical approach that used its OM-55 modem as a design baseline and that minimized redesign. Yet it contends that it was harshly penalized when design limitations of the OM-55 led to minor deficiencies.

Finally, Magnavox claims that inconsistencies in the evaluation itself and in the Army's reporting and characterization of alleged deficiencies diminish the credibility of the Army position. In support of its argument, Magnavox points to the individual ratings of its proposal by Air Force evaluators. Magnavox was not rated unacceptable by those evaluators on the same factors, subfactors, and elements that were cited by the Army as deficiencies. Also, even though those evaluators stated that Magnavox did not understand a requirement, they rated its technical approach susceptible of being made acceptable. Magnavox thinks that such a position is logically inconsistent.

Further, Magnavox contends that some deficiencies cited in the April 17 letter were changed or dropped at the debriefing, and new deficiencies were suddenly discovered. Magnavox also argues that, in the Army's defense of the protest, it has continued to modify deficiencies to suit its own purposes.

In addition to the above arguments, Magnavox has provided a detailed factual response to each of the claimed deficiencies. Generally, that response purports to show that Magnavox's proposal is fully compliant in 16 of the allegedly deficient areas, that at worst it needs only minor clarification in four other allegedly deficient areas, and that in the other seven areas, while it does not meet the strict letter of the specifications, it can be easily made compliant.

The detailed factual analysis consists of proprietary material. Consequently, it will not be discussed in the body of this decision, but will be considered in an appendix

that will be provided only to the court, the Army, and Magnavox. The same treatment will be given to the Army's rebuttal of that material and of our discussion of the merits of those analyses.

Army's Rebuttal

Generally, the Army contends that the technical evaluation was performed in accordance with the criteria set forth in the solicitation, and that Magnavox's proposal was carefully and fairly evaluated.

The Army cites Decilog, B-198614, Sept. 3, 1980, 80-2 C.P.D. ¶ 169, for the proposition that the fact that a protester disagrees with the agency's technical evaluation does not render it unreasonable. Also, the Army cites the standard that for an evaluation to be determined unreasonable, it must clearly appear from the record that there is no rational basis for the agency's determination. Joanell Laboratories, Inc., 56 Comp. Gen. 291 (1977), 77-1 C.P.D. ¶ 51. The Army asserts that the protester has the burden of affirmatively proving its case. C.L. Systems, Inc., B-197123, June 30, 1980, 80-1 C.P.D. ¶ 448. The Army also relies on Radiation Systems, Inc., B-211732, supra, for the proposition that a proposal may be found unacceptable if it contains a number of deficiencies which standing alone would not be sufficient to render the proposal unacceptable.

Concerning the alleged inconsistencies within the Air Force evaluation and between the Air Force evaluation and the Army's list of deficiencies, the Army claims that the documents relied on by Magnavox are merely input into the final Air Force evaluation and are not significant by themselves. The Army states that individual evaluators were given only portions of a proposal section and that while that portion alone might appear to comply with the solicitation requirements, when it is read in conjunction with related proposal sections, it may be found to be unacceptable. The Army asserts that the final Air Force evaluation was in agreement with the Army evaluation.

The Army also provided a detailed factual analysis of the allegedly deficient areas of Magnavox's proposal but, as stated above, that will be discussed in the proprietary appendix to this decision.

GAO Analysis

A number of the cases cited by both Magnavox and the Army involved standards concerning when a proposal is to be included in the competitive range for discussions. However, Competitive range selection contemplates a selection from more than one offeror. The issue in this case is simply does the Army's determination that Magnavox's proposal was technically unacceptable have a reasonable basis? To the extent that standards in the cited cases are concerned with the question of an offeror's technical acceptability, the standards are applicable here. However, to the extent that the standards are designed primarily to include offerors in the competitive range in order to enhance competition or to avoid disparate treatment of offerors, they are inapplicable. For example, the standard that a proposal should be included in the competitive range unless it is so technically inferior as to render discussions meaningless is not applicable. In that regard, Eastern Marine, Inc., B-213945, supra, at 343, states:

"In view of the regulatory preference for maximum competition, a proposal must be included in the competitive range unless the proposal is so technically inferior . . . that any discussion would be meaningless."

The decision implies that even a technically unacceptable proposal should be included in the competitive range, even though it may be rejected later for failure to become acceptable.

Additionally, the standard that any doubt should be resolved in favor of including a proposal in the competitive range is inapplicable here, as its purpose is to enhance competition and ensure equal treatment of all offerors.

The rule in Radiation Systems, Inc., B-211732, supra, that a proposal may be rejected without discussions due to the aggregate number of deficiencies that alone would not be sufficient to render the proposal unacceptable is applicable as it deals primarily with technical unacceptability. As discussed above, Magnavox asserts that the Claims Court repudiated that rule in Isometrics, Inc., supra. We disagree. Unlike this case, in Isometrics, one-third of the alleged deficiencies were stipulated by the parties as having no substantive basis. Most importantly, the decision really turned on the court's finding that the plaintiff had

been treated unfairly in the evaluation when compared to another offeror. The court stated:

"There is sufficient evidence to persuade the Court for purposes of this motion that there was disparate or unequal treatment of similarly situated offerors justifying preliminary injunctive relief in favor of plaintiff."

In any event, our basic standard in reviewing a contracting agency's technical evaluation is that we will not perform a new technical evaluation in order to determine the correctness of the agency evaluation. Coherent Laser Systems, Inc., B-204701, supra. Rather, we will examine the record to determine if the agency's evaluation had a reasonable basis. Essex Electro Engineers; ACL-Filco Corporation, B-211053.2, B-211053.3, Jan. 17, 1984, 84-1 C.P.D. ¶ 74. The protester has the burden of proving that the agency's evaluation is unreasonable. Potomac Scheduling Company; Axxa Corporation, B-213927, B-213927.2, Aug. 13, 1984, 84-2 C.P.D. ¶ 162.

Our review is, by necessity, even more limited in a case such as this one, where the equipment being procured is highly technical and the expertise to resolve such technical questions is not readily available to our Office. Coherent Laser Systems, Inc., B-204701, supra. Magnavox recognizes that technical expertise in this area does not exist outside a limited number of companies and the cognizant government agencies. However, Magnavox characterizes the issue in this case as not requiring a technical analysis, but rather as requiring only the application of rules of contract interpretation, and that, therefore, we need not grant the Army's view great deference. That is, we need only read the RFP requirement and then examine Magnavox's proposal to see if it complies. We think, however, that the process involves a considerable degree of technical interpretation of what is contained in the proposal, and we must grant the Army's view great deference.

Using these review standards, we have examined all of the alleged deficiencies in Magnavox's proposal in the area of Technical Approach (System Performance-subfactor) and several deficiencies in other areas. A detailed analysis is provided in the proprietary appendix to the decision. We were able to conclude that the Army had a reasonable basis for finding Magnavox's proposal deficient in 12 areas. Two

of those areas involved requirements that Magnavox could not meet without substantial design and cost consequences. We think that this is sufficient to find the Army's technical evaluation to be reasonable. However, for the benefit of the court we also summarized the arguments in those areas in which we found that the Army's evaluation was not reasonable, and in those areas in which we were unable to resolve the technical issues and deferred to the Army's technical judgment.

On the whole, we think that, considering the complexity of the project, Magnavox's proposal does not appear grossly deficient. If there were other offerors in the competitive range and competition would be enhanced by including Magnavox, we might have been inclined to recommend that Magnavox be included. However, since Magnavox was the sole offeror and clearly did not initially meet some requirements and since the Army is attempting to encourage competition by resoliciting with relaxed requirements, we think that the Army's decision to reject Magnavox's proposal without discussions was reasonable. Other offerors might well have declined to offer on the first solicitation because they felt that they could not meet some of the requirements that Magnavox did not meet. See e.g. Security Assistance Forces and Equipment International, Inc., B-195196, B-195196.2, July 20, 1980, 80-2 C.P.D. ¶ 24; System Development Corporation, B-193487, May 1, 1979, 79-1 C.P.D. ¶ 303.

We see no merit in the other arguments raised by Magnavox to attempt to discredit the evaluation. Magnavox alleged that the Army's statement of deficiencies changed substantially, from the April 17 letter to the debriefing, and again during the protest. The record shows, however, that most of the "changes" in the deficiencies were more in the nature of explanations or elaborations and not changes in the substance of the deficiency.

Magnavox also alleged that there were inconsistencies between the Air Force evaluators' individual ratings and the Army ratings. In particular, Magnavox points to areas in which the Army found its proposal unacceptable, yet Air Force evaluators found it acceptable or susceptible of being made acceptable. We do not think that it is unusual for individual evaluators to have disparate views in technical evaluations, particularly on a procurement of this complexity. Also, as the Army pointed out, the evaluators were provided only portions of the proposals and were unable to examine the interrelationship between proposal sections that

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had a bearing on acceptability. In this regard, we note that the Air Force evaluators found Magnavox to be unacceptable in areas in which the Army ultimately found no deficiency. The fact that some evaluators found that Magnavox did not fully understand a requirement, yet proposed a technical approach that was susceptible of being made acceptable, does not seem to us to be a major inconsistency. A rating of susceptible means that the factor was deficient in some way. An evaluator could reasonably think that a lack of clear understanding of the requirement resulted in the deficiency.

We deny the protest.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel