

DECISION



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

FILE: B-219684

DATE: December 23, 1985

MATTER OF: Nicolet Biomedical Instruments

DIGEST:

1. In a brand name or equal procurement, the contracting agency improperly found the awardee's product technically acceptable where it failed to comply with two salient characteristics in the request for proposals. Specifically, the awardee's product (1) did not comply with the requirement for an "impedance meter," where the product offered a device which only measured, but did not register, the data being monitored; and (2) did not comply with the requirement for "digital filtering," where the product offered only one of various techniques ("digital smoothing") necessary to provide the full range of capabilities contemplated by digital filtering.
2. Issue regarding agency's technical evaluation of awardee's product first raised in protester's comments on agency report is timely, where protester first had access to awardee's proposal when the agency included it as part of the agency report; protester's comments were filed within 10 days after receiving the report; and agency and awardee had full opportunity to respond to the protester's allegation.
3. Protester is entitled to recover the cost of filing and maintaining its protest, including attorney's fees, as well as its proposal preparation costs, where protester was unreasonably excluded from the procurement but corrective action is not feasible in light of agency's decision not to suspend performance during pendency of the protest.

034122

Nicolet Biomedical Instruments protests the award of a contract to Tracor Northern under request for proposals (RFP) No. DLA120-85-R-0023, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA). The solicitation sought proposals for three electrodiagnostic systems. Nicolet contends that the product offered by Tracor did not satisfy all the salient characteristics listed in the brand name or equal purchase description.

We sustain the protest.

The solicitation, originally issued on October 11, 1984, after a notification was published in the Commerce Business Daily (CBD), was initially intended as a sole-source procurement for three Nicolet Pathfinder II Evoked Potential Systems. In addition to receiving an offer from Nicolet, the agency received offers from three unsolicited sources in response to the CBD notice, including one submitted by Tracor. Nicolet's unit price was \$94,930; Tracor's price was \$68,882.66. (The other two offers were found technically unacceptable and were not considered in the final evaluation for award.)

The agency's technical personnel determined that Tracor's product, its model TM-3500, could satisfy the agency's needs, based on Tracor's proposal and a previously scheduled demonstration of Tracor's product. Consequently, the agency decided to amend the solicitation to add a brand name or equal purchase description. The amended solicitation listed the Nicolet Pathfinder II model as the brand name product.

The agency issued amendment No. 1 to the solicitation on March 11, 1985, adding the brand name or equal purchase description, including numerous salient characteristics. In an attempt to make the requirements less restrictive, the agency subsequently issued three additional amendments, changing several of the salient characteristics and extending the date for receipt of offers.

Only Nicolet and Tracor submitted offers in response to the amended solicitation. Both were found to be technically acceptable. The agency awarded the contract to Tracor as the low offeror on August 5.

Nicolet contends that Tracor's equipment cannot comply with the solicitation's salient characteristics in five areas: (1) Multi-tasking; (2) Dual Averaging with Bilateral Somatosensory Stimulation; (3) Electrode Impedance Testing; (4) EEG Analysis with Trending; and (5) Digital Filtering. In support of its position,

Nicolet initially relied on its familiarity with the capabilities of Tracor's product, and specifically cited areas where Tracor's product does not conform to its own. After receipt of the agency report, the protester based its contentions in part on Tracor's offer under the RFP. The protester argues that the agency necessarily must have either waived or relaxed the requirements which the Tracor product allegedly does not meet, in order to find Tracor's product technically acceptable. The protester says that if the requirements were so relaxed, the agency was required to amend the solicitation and to afford it an opportunity to propose less sophisticated equipment at a lower price.

The agency maintains that Nicolet's protest should be dismissed for failure to state a basis for protest that is reviewable by our Office. The agency views Nicolet as essentially contesting Tracor's capability to satisfy the solicitation's minimum requirements. Consequently, the agency considers this protest as a challenge to the contracting officer's affirmative determination of Tracor's responsibility. The agency correctly states that we do not review such challenges absent a showing of possible fraud or bad faith on the part of procuring officials or of a failure to apply definitive responsibility criteria, neither of which is alleged here. See Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1985).

We do not agree that Nicolet is protesting the agency's responsibility determination. Although in its initial protest submission Nicolet used terms which more appropriately relate to such a determination, the protest, when viewed in its entirety, is a challenge to the agency's technical evaluation of Tracor's product. It is therefore appropriate for our review.

As to the agency's technical evaluation, our decisions generally recognize that the procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's product. International Systems Marketing, Inc., B-215174, Aug. 14, 1985, 85-2 CPD ¶ 166. The overriding consideration in determining the equivalency of an offered product to the named product for purposes of acceptability is whether the "equal" product performs the needed function in a like manner and with the desired results, see Lanier Business Products of Western Maryland, Inc., B-214468, July 23, 1984, 84-2 CPD ¶ 84; it need not be an exact duplicate of

the brand name product in design or performance. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. Rather, the product must meet the salient characteristics as they are set forth in the solicitation; it need not meet features of the brand name product that are not specified in the solicitation. Security Engineered Machinery, B-220557, Sept. 27, 1985, 85-2 CPD ¶ 353. We will not disturb the technical determination by the agency unless it is shown to be unreasonable. Automated Production Equipment Corp., B-210476, Mar. 6, 1984, 84-1 CPD ¶ 269.

We have reviewed Nicolet's contentions regarding the evaluation of Tracor's offer, along with the agency's and Tracor's responses. As discussed in detail below, we find that it was unreasonable for the agency to conclude that Tracor's product satisfied the RFP requirements with regard to impedance meters and digital filtering.

Electrode Impedance Testing

The salient characteristics listed in the solicitation concerning impedance testing are as follows:

"(17) The remote jack box (electrode montage) shall have built-in impedance meters for each input channel for monitoring and electrode-subject interface. Electrode montage must be programmable at console.

(18) Must have impedance meter for each channel at each amplifier recording channel and at electrode interface box so that cable and electrode integrity can be fully analyzed remotely at console."

Nicolet argues that Tracor's offer fails to comply with this requirement because Tracor's system provides for impedance checking only at the console, rather than at both the console and the jack box as required by the solicitation. The protester maintains that the jack box impedance testing capability is necessary because the patient is normally prepared for monitoring outside the operating room and the jack box meters are used to check electrode-patient interface at the time the electrodes are being placed on the patient.

The agency responds that the protester has misinterpreted the requirement. Specifically, according to the agency, the requirement in salient characteristic No. 17 that impedance meters be built into the jack box does not

mean that the meter readings must also be available at the jack box; rather, the agency states, the meter readings need only be displayed at the system console. Consequently, in the agency's view, Tracor's product with a reading site at the console only was acceptable.

We find DLA's position to be unreasonable. In our view, the only reasonable interpretation of the term "impedance meter" is that it refers to a device which both measures and displays data. See Random House College Dictionary 841 (1980) (a meter is "an instrument that automatically measures and registers a quantity consumed, distance traveled, degree of intensity, etc."). The agency argues that Tracor complied with this requirement by offering a "meter" which merely transmits the data it measures to the console, where it then is actually displayed. The device referred to by the agency cannot reasonably be described as a meter, however; rather, the agency describes a sensor-like mechanism which simply transmits data to a metering device. See Institute of Electrical and Electronics Engineers, Inc., Standard Dictionary of Electrical and Electronics Terms 626 (2d ed. 1978) (a sensor "converts a parameter at a test point to a form suitable for measurement by the test equipment"). Moreover, Tracor itself states only that its jack box contains "impedance checking circuitry"--i.e., a sensor device as described by the agency--which then transmits the data to the console. While the Tracor proposal concludes that this arrangement provides an "equivalent method" for complying with the impedance checking requirement, Tracor itself does not contend that its product actually includes an impedance meter in the jack box or that readings can be made at the jack box.

Since Tracor's product did not provide an "impedance meter" in the jack box as, in our view, that term is reasonably construed, Tracor's offer did not comply with salient characteristic No. 17.

Digital Filtering

Salient characteristic No. 24 provides as follows:

"Must have zero-phase shift digital filtering allowing evaluation of spectrum of acquired waveform with specific filtering out of information with certain frequencies defined by user and reconstruction of waveforms with unique filter characteristics without destroying original data."

In essence, this characteristic requires a capability to filter out certain frequencies chosen by the user at the time of use. Tracor's proposal stated that its product complies with this requirement by offering "digital smoothing."

The protester contends that Tracor did not comply with the salient characteristic because "digital smoothing" is insufficient to meet the requirement for user flexibility as to filter type and frequencies. Specifically, Nicolet contends that digital filtering requires the capability to implement high-pass, low-pass, band-pass, and band-reject filtering where the user can specify all frequency breakpoints. According to the protester, the method offered by Tracor, digital smoothing, consists of low-pass filtering only.

The agency first contends that the issue of Tracor's compliance with salient characteristic No. 24 is untimely and should not be considered because it was first raised in Nicolet's comments on the agency report. Since those comments were filed more than 10 days after Nicolet knew or should have known this basis of its protest, the agency argues, the issue was untimely raised under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

As the agency states, Nicolet did not raise this issue in its original protest letter. We do not find the issue untimely, however, because Nicolet did not have access to Tracor's actual proposal until the agency provided the proposal as part of the agency report. Thus, while Nicolet based the allegations in its original protest letter on its general familiarity with the Tracor product, Nicolet was not on notice of the specific features specified in Tracor's proposal on which the protest is based until it had access to the Tracor proposal. Since Nicolet's comments on the report were filed within 10 days of the filing of the agency report, this ground of protest is timely. In addition, these comments were filed before the conference on the protest was held so both the agency and Tracor had a full opportunity to respond to Nicolet's contention both in the conference and in their subsequent comments to our Office.

The agency does not take issue with Nicolet's description of the methods required to fully provide digital filtering. The agency's only response to Nicolet's contention is to agree that Tracor's method is a type of "low-pass filtering," and to conclude, without further explanation, that Tracor therefore complied with the

salient characteristic. We disagree. Low-pass filtering permits the exclusion of only certain combinations of frequencies. As the protester points out, other frequency combinations can be filtered out, but only by use of other types of filters. Since we read the specifications as calling for user capability to define the frequencies that are to be filtered, and given that the agency concedes that the Tracor product offers only low-pass filtering, we fail to see how such a product could provide the user with the capability specified in the salient characteristics.

In view of our conclusion that Tracor failed to comply with the salient characteristics regarding the jack box impedance meters and digital filtering, we find that the agency improperly found Tracor's product to be technically acceptable. If the requirements for an impedance meter and digital filtering as described in the salient characteristics exceeded the agency's minimum needs, the agency should have amended the RFP to reflect the agency's actual needs and to afford Nicolet the opportunity to offer a lower-priced product which complied with the less stringent requirements. See Sargent Industries, B-216761, Apr. 18, 1985, 85-1 CPD ¶ 442. By accepting Tracor's proposal under these circumstances, the agency unreasonably excluded Nicolet from any chance of receiving the award.

Because the agency determined, pursuant to 31 U.S.C.A. § 3553(d)(2) (West Supp. 1985), not to suspend performance of the contract by Tracor during the pendency of the protest, and the equipment has been delivered, we cannot recommend corrective action in the form of resolicitation. See Bid Protest Regulations, 4 C.F.R. § 21.6(b); Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 CPD ¶ 624. Based on our conclusion that the agency unreasonably excluded Nicolet from any chance of receiving the award, however, we find that Nicolet is entitled to its costs. Our regulations, implementing the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3554(c), provide that the costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. The recovery of costs for bid or proposal preparation may be allowed where the protester has been unreasonably excluded from competition and where

other remedies as enumerated in our regulations are not appropriate. See 4 C.F.R. § 21.6(d), (e). Accordingly, by separate letter we are advising the head of the contracting agency of our determination that Nicolet be allowed to recover its costs of filing and pursuing the protest, including reasonable attorney's fees, as well as its proposal preparation costs. Nicolet should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel