

DECISION

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

FILE: B-220215 **DATE:** January 15, 1986
MATTER OF: Contel Information Systems, Inc.

DIGEST:

1. Protest alleging that agency improperly determined awardee's proposal technically acceptable since awardee's proposal did not offer to comply with a material technical requirement is denied where agency's overall evaluation indicates that awardee had not taken any exception to the requirement.
2. Protest alleging that agency improperly relaxed a material technical requirement is denied where record indicates that agency evaluated proposals based on the same requirement.
3. Protest alleging that awardee's proposed system does not meet the RFP's technical requirements is denied since agency's determination of technical acceptability has not been shown to be unreasonable.
4. Allegation that RFP required offerors to price the same maintenance services twice and that agency improperly evaluated the duplicative costs is denied where review of the RFP indicates that duplicative pricing was not solicited.
5. Protest alleging that awardee's proposal is materially unbalanced is dismissed as untimely when raised more than 10 working days after the protester received copy of awarded contract which indicated awardee's offered prices for the various contract line items.

Contel Information Systems, Inc. (Contel) protests the award of a contract to Ungermann-Bass, Inc. (U-B) under request for proposals (RFP) No. N00600-85-R-1291 issued by the Department of the Navy. The RFP was issued for the supply, installation and maintenance of six local area networks (LANs) at six Naval Air Rework Facilities (NARFs)

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across the United States. LANs are high-speed communications networking systems which connect information processing equipment over a limited geographic area. Contel argues that the system proposed by U-B does not meet the RFP's technical requirements. In addition, Contel alleges that several contract line item numbers (CLINS) for maintenance are redundant. Contel argues that the Navy's evaluation of the duplicative items added \$650,00 to its proposal and if the duplicative costs are eliminated, Contel's offer, rather than U-B's, is low. Also, Contel alleges that U-B's proposal is materially unbalanced and that the Navy favored U-B by eliminating a live test demonstration (LTD) requirement from the RFP.

We deny the protest in part and dismiss it in part.

The Navy issued the RFP on March 29, 1985. The solicitation divided the supplies and services to be provided at each NARF into sixteen separate lots. Lots 1-7 represented the initial work to be done at each installation, lots 8-14 specified additional phases of the work, and lots 15 and 16 represented option quantities. Each lot was further divided into a number of line items detailing the specific tasks to be accomplished and offerors were requested to submit their proposals on a fixed-price, indefinite quantity basis. The RFP advised offerors that all technical proposals would be evaluated on a pass/fail basis and that award would be made to the lowest cost, technically acceptable offeror.

The Navy received four proposals and initially none of the four offerors was found acceptable. Discussions were held and best and final offers were requested by August 15. The offers received were as follows:

Ungermann-Bass	\$13,516,846.49
Contel	\$14,017,484.23
Martin Marietta	\$14,894,311.74
ITT/Federal Electric	\$20,816,826.67

The Navy found the offers submitted by U-B and Contel acceptable and on August 30 awarded the contract to U-B, as the lowest, technically acceptable offeror. Performance has been suspended pending our resolution of the protest.

Technical Acceptability

Contel indicates that it is a systems integrator and, as such, tests all available standard commercial products. Although Contel admits that it has not tested all of the specific equipment offered by U-B for this procurement, Contel argues that based on its knowledge of U-B's system, U-B's proposal does not comply with the RFP's technical requirements in at least three major areas.

First, paragraph 2.2.15, as amended, requires that, after a power failure, the LAN be fully operable within 120 seconds after power is restored. Contel argues that U-B's Network Access Units (NAUs) (devices which provide terminal interface to the LAN) are started sequentially and that an increment of several seconds is required for each unit to become operational. Although U-B proposed a new Network Management Center (NMC), (devices which provide the means to deal with the normal operation of the LAN including initialization and which download the software for each NAU after each individual NAU completes its own internal diagnostic sequence) different from the NMC tested by Contel, Contel asserts that it is not likely that more than 10-15 units could be supported in a two-minute recovery period. Contel indicates that a typical NARF installation includes between 300-400 NAUs and that as a result, U-B could not possibly meet the requirement.

In addition, Contel alleges that U-B qualified its offer and did not commit itself to meet the required recovery time. U-B's response to paragraph 2.2.15 was as follows:

"The NAUs automatically load software to achieve operational effectiveness after power failure. Since the system has many components and may be quite large, the LAN will reload as close to 120 seconds as possible; the actual time to reload being dependent on final network configuration."

Contel argues that this statement does not obligate U-B to meet the 120 second recovery time requirement and that the Navy should have rejected the proposal for failing to comply with a mandatory technical requirement. At the very least, Contel complains that the Navy improperly relaxed a mandatory requirement and that Contel was not provided an opportunity to submit an offer based on the less restrictive specification.

Contel also alleges that U-B's commercially available devices do not provide "directory assistance" as required by the RFP (para. C.2.6.4) nor does the system permit selective priority of traffic for information in the system (para. C.2.6.10). Contel argues that the directory assistance, as it is known in the industry, requires a means for identifying which users are operating at any given time on which parts of the system and that this feature is not available on U-B's standard devices. With respect to U-B's traffic priority scheme, Contel argues that U-B's system provides for priority access to the system, but is not capable of providing priority transmittal of the information in the system as required by the RFP.

The Navy contends that U-B's offer was properly found acceptable. The Navy asserts that U-B's response concerning the 120 second recovery requirement complies with the specification and indicates that U-B may take as long as 120 seconds, but no longer. In addition, the Navy argues that U-B's system can meet the recovery requirement and that Contel's arguments are based on an incomplete knowledge of the capability of U-B's equipment.

Concerning the RFP's directory assistance requirement, the Navy contends that Contel has proposed its own definition of the term and then argued that U-B fails to meet that definition. The Navy says that the RFP simply required directory assistance and that the U-B system allows users to access any other user on the network by referring to a mnemonic name. The Navy contends that this system, as well as that provided by Contel, was satisfactory. In addition, the Navy argues that U-B's system incorporates a priority scheme which permits certain types of transactions to have precedence over others. The Navy contends that U-B took no exception to the RFP's requirements and that Contel's assertions regarding the acceptability of U-B's proposal are without merit.

As we have often stated, the determination of the merits of a proposal, particularly with respect to technical considerations, is primarily a matter of agency discretion, which will not be disturbed unless it is shown to be unreasonable or in violation of procurement laws or regulations. See, e.g., CD Systems, Inc., B-217067, Apr. 5, 1985, 85-1 CPD ¶ 396. The protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not in itself render the evaluation unreasonable. Litton Systems, Inc., Electron Tube Division, 63 Comp. Gen. 585 (1984), 84-2 CPD ¶ 317.

Based on the record, we find a reasonable basis for the Navy's determination that U-B's proposal was acceptable. With respect to the 120 second restoral requirement, we agree with Contel that the language in U-B's proposal concerning this provision is ambiguous and could be interpreted in a manner which would not obligate U-B to comply with this requirement. However, the concept of responsiveness does not generally apply to negotiated procurements, see, e.g., True Machine Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18, and the Navy indicates that its evaluation team considered the response acceptable because of the manner in which U-B's network was engineered. The Navy indicates that additional download servers (a standard component of the U-B network management center) could be added to improve response time as necessary and with U-B's new and more powerful network management center, the Navy determined that U-B's proposed system was in compliance with the required specification. Thus, although Contel's language was not the clearest, we believe the Navy was justified in concluding that U-B had not taken exception to the 120 second restoral requirement. Cf., South Central Bell Advanced Systems, B-216901, Aug. 19, 1985, 85-2 CPD ¶ 188.

Furthermore, we disagree with Contel's assertion that the Navy permitted U-B to submit a proposal based on a less restrictive specification. The systems proposed by both U-B and Contel were evaluated by the Navy based on the same requirement and both were found capable of meeting the 120 second restoral requirement. To the extent the language contained in U-B's proposal raised a question concerning U-B's intent to comply with the specification, the Navy has subsequently advised U-B that it expects U-B to comply with this requirement, and U-B has indicated that it fully intends to do so at its offered price.

Since the Navy was justified in concluding that U-B had not taken any exception to the requirement, we do not consider the post-award clarification of the language contained in U-B's proposal to be an issue which warrants the reopening of negotiations with all offerors.

Concerning Contel's disagreement with the Navy's technical conclusions regarding U-B's proposed system, Contel, has not, in our view, shown the agency's determination to be unreasonable. The Navy indicates that Contel's arguments do not take into account that U-B has offered a more powerful network management center nor considered that additional download servers can be added by U-B to ensure compliance with the 120 second restoral requirement. With respect to directory assistance, both the Navy and U-B

disagree with the "industry wide" interpretation of the term proposed by Contel and we see no basis to conclude that the directory assistance offered by U-B failed to comply with the requirement set forth in the solicitation. Also, the Navy indicates that U-B's proposed system is capable of providing priority transmittal of selective information in the system. Contel, as the protester, bears the burden of affirmatively proving its case and this burden is not met where the only evidence is the conflicting statements of the protester and the agency. RoIm Southern California, B-216955, Mar. 14, 1985, 85-1 CPD ¶ 327. The protest on this issue is therefore denied.^{1/}

Maintenance Services

Each NARF location had two separate installation periods (Phase I [Lots 1-7] and Phase II [Lots 8-14]) and the RFP set forth a separate CLIN for maintenance services for each phase. In addition, offerors were required to price maintenance services for two follow-on option periods: Lots 15 and 16. Contel argues that the maintenance services priced under Lot 16 duplicated the maintenance services required to be provided under Phase II for each respective installation. Contel's prices for Phase II maintenance and for maintenance services under Lot 16 are identical and Contel indicates that it assumed that the Navy would not evaluate the cost for the same services twice. Contel argues that the Navy improperly added together these costs in determining Contel's overall price and that as a result, its offered price was inflated by over \$650,00. Since this amount is more than the difference between the two proposals, Contel argues that it, rather than U-B, was the low offeror.

The Navy contends that its cost evaluation was proper. The RFP indicated that each offeror's overall cost, including option periods, would be considered and that in calculating Contel's costs, the Navy added Contel's proposed

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cost for Phase I and Phase II as well as the two option periods. The Navy argues that the CLINS under the second option period (Lot 16) do not represent the same maintenance effort for which prices were solicited under Phase II but rather represent maintenance support for Phase I. The Navy disagrees with Contel's assertion that the solicitation requested duplicative pricing information and argues that Contel's cost proposal was properly evaluated.

Our review indicates that Contel's allegations are without merit. For the Norfolk NARF installation for example, the RFP under Phase I (CLINS 0015AA and 0015AB) requires the maintenance of equipment identified in CLINS 0013AA-0013AR from contract award through the end of FY 1987. Under Phase II for that installation (CLINS 0055AA and 0055AB), offerors were required to provide maintenance for equipment identified in CLINS 0053AA-0053AP through the end of FY 1988. Under option II (CLINS 0081AC and 0082AC), offerors were required to provide maintenance services through the end of FY 1988 for the equipment identified in CLINS 0013AA-0013AR. Clearly, the line items under option II refer to maintenance services for Phase I equipment which differs from that required to be priced under Phase II. An analysis for the other NARF installations yields similar results and accordingly, we conclude that the RFP did not require offerors to price the same maintenance services twice as alleged by Contel.

We recognize that Contel has complained that the RFP directions were vague and has also indicated that no additional costs would be incurred to provide maintenance for the equipment identified under option II. However, the fact remains that the maintenance services solicited by the RFP under option II differed from those required under Phase II and the Navy acted properly in adding the total cost for the option periods to the costs proposed by Contel for Phase I and Phase II. In our view, the solicitation was not vague and clearly identified the different maintenance services required to be priced under each CLIN. To the extent Contel priced the same services twice, it was due to the protester's own error in preparing its proposal. Furthermore, if it is indeed an error, we are unable to conclude that the Navy should have been on notice of the mistake and failed in its obligation to conduct meaningful discussions by not raising the matter with Contel. Cf., American Management Systems, Inc., B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199.

Remaining Allegations

Contel has also alleged that U-B's proposal is materially unbalanced and that the Navy favored U-B by eliminating the live test demonstration provided for by the RFP.

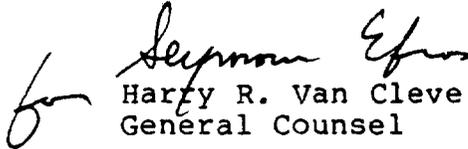
We find the unbalanced proposal allegation untimely. The record shows that the Navy conducted a debriefing with Contel on September 6, 1985 and at that time provided Contel with a copy of the contract awarded to U-B which showed U-B's offered prices for the various line items. Under our Bid Protest Regulations, a protest must be filed within 10 working days of the date the protester was aware or should have been aware of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1985). In our view, Contel was apprised on September 6 of the facts which form the basis for its unbalanced proposal allegation and since the protester did not raise this issue until the bid protest conference held on October 23, 1985, it is untimely and will not be considered. GFO-CON, Inc., B-214503, July 3, 1984, 84-2 CPD ¶ 13. Although Contel asserts that it is unreasonable to apply this rule in this case since the contract awarded U-B contained more than 500 line items and the materially unbalanced aspects of U-B's proposal were difficult to ascertain, our regulations do not contemplate the piecemeal development of protest issues and we see no reason why this issue could not have been raised at an earlier date. Ross Bicycles, Inc.--Request for Reconsideration, B-219485.2, July 31, 1985, 85-2 CPD ¶ 110.

With respect to the Navy's elimination of the RFP's preaward live test demonstration, Contel argues that commercially available equipment was required and that U-B's products were not commercially available at the time U-B submitted its proposal. Contel argues that the live test would have demonstrated that U-B's equipment was not satisfactory and that the Navy eliminated the test to provide U-B with additional time to comply with this requirement. In contrast, Contel argues that the Navy refused to consider a less expensive software solution proposed by Contel which was not available at the time initial proposals were submitted but would have been commercially available by the time of the live test demonstration.

The Navy indicates that both U-B and Contel were advised that "commercially available" or "off the shelf" equipment was required to be offered and that only commercially available equipment at the time proposals were submitted would be considered. The Navy states that U-B

provided information concerning previous installation of its equipment and that technical literature and brochures were provided which showed that U-B's offered equipment was commercially available. We cannot find the Navy's determination in this regard to be unreasonable and as a consequence, we do not view the Navy's actions in refusing to consider equipment proposed by Contel which was not yet available to be evidence of unfair treatment. To the extent Contel is arguing that the Navy improperly eliminated the live test demonstration, this allegation is untimely. This requirement was deleted by amendment No. 0004 to the solicitation and any protest concerning this change should have been filed prior to the closing date for receipt of best and final offers. 4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.


for Harry R. Van Cleve
General Counsel