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DECISION

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

FILE: B-220423, B-220423.2 **DATE:** March 18, 1986

MATTER OF: Datron Systems, Inc.

DIGEST:

1. Protest alleging that agency failed to conduct meaningful discussions because deficiency, for which proposal was rejected, was not raised by agency in clarification requests or deficiency notices is denied where clarification requests and deficiency notices were intended only to be part of the ongoing evaluation process to determine which proposals were acceptable.

2. Although an agency should make reasonable efforts under step one of a two-step procurement to qualify proposals for participation in the second round, technically unacceptable proposals may, nonetheless, be rejected in step one.

3. Allegation that proposal for a telemetry antenna system complied with a reasonable interpretation of the solicitation's requirement for automatic tracking and that agency advised protester that such an approach would be acceptable is denied where the record fails to show that either the specification or the agency mislead the protester concerning the requirements imposed.

4. Allegation that proposal should not have been found technically unacceptable nor reasonably susceptible of being made acceptable is denied where, despite protester's disagreement, agency reasonably concluded that a major redesign of protester's proposed system would be required to correct the deficiency.

5. Allegation that agency should have disclosed additional information concerning the intended use of the solicited telemetry antenna is denied where there is no showing

that specification was insufficient to apprise protester of what was required and where full compliance with the specification would have satisfied the agency's requirements.

Datron Systems, Inc. (Datron) protests the rejection of its technical proposal under step one of a two-step sealed bid acquisition conducted by the Air Force under request for technical proposals (RFTP) No. F08606-85-R-0007. The RFTP was issued for the design, fabrication and installation of a telemetry antenna system and associated technical data, training and information, with an option for three additional units. The antenna system is to be utilized as part of the integrated tracking system in direct support of the Trident D5 missile program. Arguing that the Air Force failed to conduct meaningful discussions with the firm, or to reasonably evaluate its proposal, Datron contends it was wrongfully excluded from the procurement.

We deny the protest.

Background and Protest

The two-step process is a hybrid method of procurement combining the benefits of sealed bids with the flexibility of negotiation. The step one procedure is similar to a negotiated procurement in that the agency requests technical proposals and any needed clarifications. After evaluation, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with sealed bid procedures, with the exception that the competition is limited to only those firms that submitted acceptable proposals under step one. See, e.g., Lockheed Califorina Co., B-218143, June 12, 1985, 85-1 CPD ¶ 676.

The RFTP was issued on August 2, 1985, and included a requirement (paragraph 3.2.4.7) that the system include an Automatic Tracking Mode, in which the antenna automatically tracks radiating sources under specified conditions--including velocities to 10 degrees per second and accelerations to 5 degrees per second squared in winds up to 55 miles per hour--with a tracking error no greater than .05 "RMS" (basically an average error). The offerors were advised to document their understanding of the requirements and the technical soundness of their approach, specifically including documentation of antenna tracking capabilities. The RFTP's evaluation critria were soundness of approach

and understanding of the job, to be applied to three technical area items: Antenna Hardware Engineering; Installation and Checkout; and Logistic Support.

A preproposal conference, attended by representatives of Datron and Toronto Ironworks Systems, Inc. (TIW), was held on August 12, at which the Air Force responded to a variety of questions raised by the two offerors. The record shows that Datron contacted the Air Force on August 20 and 21 with additional questions including a request for clarification of the Automatic Tracking Mode requirement about which Datron was unclear. The Air Force orally advised Datron that the requirement would not be changed, and on August 23 sent a letter to all offerors addressing the other questions raised by Datron. Both Datron and TIW submitted proposals by the September 3 closing date for receipt of proposals.

A Technical Evaluation Board (TEB) was convened to evaluate the proposals and after an initial review, clarification requests (CRs) and deficiency notices (DNs) were sent to Datron and TIW. Datron received 5 DNs and 18 CRs while TIW received 1 DN and 31 CRs. Both offerors submitted additional information and the TEB completed its evaluation.

On October 17, Datron was notified that its proposal was not technically acceptable nor reasonably susceptible of being made acceptable, and that the firm would be excluded from further consideration. The TEB found that Datron had failed to comply with paragraph 3.2.4.7 and that a major redesign of Datron's proposal would be required to remedy the defect.1/

Datron protested this determination to our Office on November 5, arguing that the Air Force's actions were improper because the Air Force failed to discuss with Datron the deficiency on which the determination of unacceptability was based. Datron also asserted that it complied with a reasonable interpretation of this requirement and that, in any event, its proposal was susceptible to being made acceptable through discussions. Based on the information contained in the agency's report, Datron filed an additional protest alleging that the Air Force's evaluation relied on unstated solicitation requirements and placed undue

1/ The TEB also found that Datron had proposed an inadequate "confidence level" for meeting the required delivery schedule. The Air Force no longer asserts this reason as justification for excluding Datron's proposal.

weight on the Automatic Tracking Mode requirement. Despite the pending protest, the Air Force commenced sole-source negotiations with TIW and awarded the contract to the firm on January 8, 1986, because of urgent and compelling circumstances.

Whether Meaningful Discussions Were Required

Regarding its protest that the Air Force failed to conduct meaningful discussions, Datron alleges that it was not until receipt of the Air Force's October 17 letter rejecting its proposal that the firm first received any indication that its response to the RFTP's Automatic Tracking Mode requirement was considered unacceptable. Datron states that it had two telephone conversations with the Air Force prior to submitting its proposal, that it advised the Air Force of its proposed response to paragraph 3.2.4.7 and, that if the response was technically unacceptable, the Air Force should have advised Datron of this fact. The Air Force did not issue the firm a deficiency notice concerning its technical response to paragraph 3.2.4.7., and issued only one clarification request for two additional diagrams which Datron had failed to provide and which, according to Datron, illustrated the textual material already contained in its proposal.

Datron argues that the Air Force was required to make reasonable efforts to qualify as many technical proposals as possible and, since there was only one other offeror in the competition, the Air Force should have advised Datron of the problem and provided the firm an opportunity to correct the deficiency.

The Air Force asserts that it did not conduct technical discussions and that the information it requested from both Datron and TIW was required by the TEB in order to complete the technical evaluation of the proposals. The Air Force states that CRs and DNs were issued for this purpose only, and argues that the Air Force was under no obligation to conduct discussions with Datron in view of its subsequent determination that Datron's proposal was not technically acceptable nor reasonably susceptible of being made acceptable. The Air Force points out that the RFTP advised offerors that a final determination concerning acceptability could be made without discussions and contends that its actions were consistent with this provision.

The essential purpose of discussions is to advise offerors whose proposals are deemed acceptable or reasonably susceptible of being made acceptable of deficiencies in their proposals and give them an opportunity to revise their

proposals. See Burroughs Corp., B-211511, Dec. 27, 1983, 84-1 CPD ¶ 24. In negotiated procurements, once the agency has determined which offers are acceptable or reasonably susceptible to being made acceptable and stand a reasonable chance for award, the agency must conduct discussions with those offerors, whose proposals are in the competitive range, except when it is clear from the existence of full and open competition or accurate prior cost experience that the acceptance of an initial proposal without discussions would result in the lowest overall cost to the government. See 10 U.S.C.A. § 2305(b)(4) (West Supp. 1985).

Of course, in step one of two-step sealed bids there is no competitive range determination as in negotiated procurements since step one does not include price offers. The agency must determine, however, which proposals are acceptable or reasonably susceptible of being made acceptable. While an agency may enter into discussions for that purpose, it is not required to do so. The requirement for meaningful discussions generally is not applicable where the agency requests information to complete its evaluation of which proposals are acceptable or reasonably susceptible of being made acceptable through subsequent discussions. Anchor Conveyors, Inc. et al., B-215624 et al., Oct. 23, 1984, 84-2 CPD ¶ 451.

Here, the Air Force issued the CRs and DNs to aid the TEB in the ongoing evaluation process, and prior to the receipt of the information requested, no determination as to the acceptability of Datron's proposal was made. The information requested, such as the diagrams illustrating Datron's response to paragraph 3.2.4.7, were considered necessary by the TEB in order to complete its technical evaluation and decide whether the proposals were technically acceptable, reasonably susceptible of being made acceptable or technically unacceptable. Under these circumstances, the Air Force was not required to voice its concern regarding Datron's proposal, either in its conversations with Datron or in the CRs or DNs which were issued. Id.; See also Metric Systems Corp., B-218275, June 13, 1985, 85-1 CPD ¶ 682.

Once an offeror's proposal is found so deficient that it is not reasonably susceptible of being made acceptable, there is no requirement that the agency conduct discussions, informing the offeror of deficiencies in its proposal and affording it an opportunity to revise the proposal. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.503-1(e)(2) (1984); Anchor Conveyors, Inc. et al., B-215624 et al., supra; Burroughs Corp., B-211511, supra. Although an agency should make reasonable efforts under step one to qualify proposals for participation in the second round of the competition, unacceptable proposals nonetheless may be

rejected in step one. Lockheed California. Co., B-218143, supra. Accordingly, we believe the sole remaining issue for our review is whether the Air Force's evaluation of Datron's proposal was reasonable and in accordance with the specifications and stated evaluation criteria.

Reasonableness of Evaluation

Datron argues that its proposal should have been deemed at least susceptible of being made acceptable because the Automatic Tracking Mode requirement was subject to several plausible interpretations and Datron complied with a reasonable interpretation of the requirement. Datron contends that it sought clarification of the automatic tracking requirement because the specification could be interpreted as imposing requirements that its proposed system could not meet. Datron apparently assumed that the conditions set forth in paragraph 3.2.4.7 defined a worse-case situation that need not be met in all circumstances, and that proposing a reasonably compliant system would satisfy the Air Force. Datron argues that its interpretation was confirmed during the August 21 telephone conversation, the fact that the Air Force's August 23 letter made no mention of the inquiry concerning the automatic tracking provision, and the Air Force's failure to issue a DN regarding Datron's proposed automatic tracking.

The August 21 conversation was recorded by the Air Force contract negotiator in a contemporaneous memorandum as follows:

> "DATRON QUESTION: . . . Can the spec be altered because the requirement of tracking error of .05 degrees with an acceleration rate of 3 degrees per second squared . . . cannot be achieved? We (Datron) expect to achieve . . . approximately .6 to .7 degrees tracking error. This amount of error could possibly cause loss of automatic track.
>
> "ESMC ANSWER: No change in the requirement in the specification. Include in proposal Max tracking error that can be tolerated and still maintain automatic track. Include what acceleration rate that the proposed system

> would support and not exceed the tracking error, and would allow the system to maintain automatic track."

Datron states that it understood this exchange to mean that its best efforts would be acceptable to the Air Force. As a result, Datron contends that it reasonably believed it submitted a proposal which met the Air Force's stated requirements.

The Air Force argues that the automatic tracking requirement was clearly stated. The Air Force contends that this should have been clearly evident from the August 21 conversation in which the Air Force advised Datron that the specification would not be changed. The Air Force contends that it never withdrew or altered the specification and that there was no basis for Datron to assume that its proposed system would be acceptable. With respect to the failure to include this particular question and answer in the August 23 letter, the Air Force states that the information was not included because Air Force personnel believed that its disclosure might harm Datron's competitive position by indicating Datron's proposed design.

It is undisputed that in response to Datron's repeated requests to change the specification, Datron was advised that no change would be made, and the plain language of paragraph 3.2.4.7 was that its requirements had to be met. Moreover, it is clear that Datron believed that the Automatic Tracking Mode requirement could be interpreted in a manner that its proposed system could not meet. While the protester did inquire to the agency about this, the protester admits that it received what it considered insufficient clarification from the Air Force. The protester therefore contributed to the situation in which it finds itself, and cannot rely on its own interpretation. See Avantek, Inc., 55 Comp. Gen. 735 (1976), 76-1 CPD ¶ 75. Datron should have protested the allegedly ambiguous specification prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1985); GM Industries, Inc., B-216297, May 23, 1985, 85-1 CPD ¶ 588.

Furthermore, while Datron relies on the Air Force's failure to address the Automatic Tracking Mode requirement in the August 23 letter or in a DN, these circumstances merely bolstered Datron in its own assumptions, and did not change the requirement or the reasonableness of Datron's interpretation. Accordingly, we do not conclude that Datron's interpretation was reasonable, or that the firm was misled concerning the requirements of paragraph 3.2.4.7.

Datron also contends that, even based on the Air Force's interpretation of the requirement, its proposal was clearly susceptible of being made acceptable. Datron points out that the only area in which the Air Force considered its proposal unacceptable was tracking error performance and that in all other aspects its proposal completely complied with the RFTP's requirements. Datron argues that to comply fully with the Automatic Tracking Mode requirement, it would have needed only to revise 10 pages of its proposal and change a small handful of components on one circuit board. Under these circumstances, Datron contends that there was no reasonable basis for the Air Force to conclude that its proposal was not reasonably susceptible of being made acceptable.

Furthermore, Datron argues that the Air Force's determination of unacceptability was based on an evaluation which was not consistent with the stated requirements. Datron contends that the RFTP did not indicate that the Air Force required a telemetry antenna capable of providing metric data, which basically defines the position of a target in space, or that the system's function included tracking launches to quickly assess the danger of the launch vehicle returning over land (range safety). Datron suggests that if it had known these facts, its proposal would have fully complied with the requirements of paragraph 3.2.4.7.

Datron also complains that the Air Force placed undue weight on the Automatic Tracking Mode requirement by equating the evaluation of this provision to one-third of the total. Since there were no weights specified in the RFTP, Datron states that it was reasonable to assume that all requirements were of equal importance. Since the specification for the automatic tracking requirement was only two pages long and Datron complied with part of the provision, Datron contends that its proposal should have received a sufficient number of points to be considered reasonably susceptible of being made acceptable.

The Air Force argues that Datron's proposal was properly determined to be technically unacceptable and not reasonably susceptible of being made acceptable. The Air Force states that when the entire specifications for the antenna system is considered, there are three main structural requirements which include tracking and reliability. As a result, the Air Force contends that one-third of the overall design objectives that must be taken into account directly involve the antenna's tracking capability. The Air Force argues that tracking and tracking accuracy must be treated on a design system approach

and that Datron's proposed system falls approximately 800 percent below the solicitation's specified performance requirements. In addition, the Air Force contends that to allow Datron to merely change a few pages in its proposal without a full system design analysis would present a significant technical risk since the required redesign will place much more stress on the system.

The Air Force also contends that Datron's proposal was evaluated in conformance with the RFTP's requirements and that the specification provided Datron with sufficient information to provide a conforming proposal. In this regard, the Air Force argues that a telemetry antenna is a generic term, often including metric capabilities, and that the use of that term should not have been misleading since the nature of the data required was specified in the solicitation.

Regarding the allegedly undue weight on paragraph 3.2.4.7 in the evaluation, the Air Force states that it did not assign heavy weight to this requirement by itself but, consistent with the RFTP's evaluation criteria, recognized that the deficiencies in this area had a deleterious effect on the entire Antenna Hardware Engineering area of the technical evaluation. In summary, the Air Force argues that the solicitation requirements were not changed, and that Datron's proposal was fairly evaluated and properly rejected as unacceptable.

Our review of an agency's technical evaluation under an RFTP is limited to the question of whether the evaluation is reasonable. Rapistan, A Division of Lear Seigler, Inc., B-215837, Nov. 23, 1984, 84-2 CPD ¶ 549. In making this assessment, we will accept the considered judgment of the procuring activity unless it is shown to be erroneous, arbitrary or made in bad faith. Guardian Electric Mfg. Co., 58 Comp. Gen. 119 (1978), 78-2 CPD ¶ 376; Herblane Industries, Inc., B-215910, Feb. 8, 1985, 85-1 CPD ¶ 165. Moreover, we have consistently held that it is not the function of our Office to resolve technical disputes between the parties. Lockheed California Co., supra.

The protester, who bears the burden of proof, has not shown that the Air Force unreasonably determined Datron's proposal to be unacceptable. The agency may reject a proposal that fails to meet essential requirements, FAR, § 14.503-1(e)(2), and the record indicates that Datron's proposed system could lose automatic track under the conditions specified in the RFTP. The Air Force imposed the

stringent tracking requirements to ensure that the Trident II missiles, which the system is to track, are not lost during flight since the loss of the data to be gathered could lead to delays in the developmental testing program. Automatic tracking also is an essential safety feature since it alerts the agency to deviations in the planned flight-path so that the agency can take the necessary corrective action. The Air Force maintains that Datron's proposed system cannot be modified to achieve tracking under the RFTP's specified flight conditions without basically changing the system. The Air Force states that such a change would not be satisfactory without a total system design analysis.

Although Datron strongly disagrees with the Air Force's assessment of the level of effort required to modify Datron's proposal, Datron has not disputed the Air Force's determination that the required changes would place many times more stress on Datron's proposed system or that the tracking performance of its current design is more than 800 percent below the performance specified in the RFTP. While Datron contends that it could convince the Air Force that the changes would not pose a significant technical risk, we find that a proposed design which falls that far below the solicitation's requirements may properly be rejected as unacceptable.

In addition, we see no merit to Datron's allegations that its proposal was evaluated based on unstated requirements or evaluation criteria. While Datron asserts that it should have been advised expressly that the Air Force required an antenna with metric capabilities and that range safety was an important consideration, we see no reason to require that the Air Force disclose this information where full compliance with the specifications would have satisfied the agency's requirements in these areas.

Furthermore, the record shows that the Air Force did not unduly weigh paragraph 3.2.4.7, but rather determined that the deficiency in Datron's proposed system was of such a magnitude that it impacted on over one-third of the specifications. The RFTP indicated that technical proposal would be evaluated for soundness of approach and understanding of the job, and we see nothing improper in the Air Force's rejection of a proposal where its proposed design for tracking and tracking accuracy is seriously flawed and impacts on one-third of the overall design objective.

Finally, we note that Datron also alleged that the Air Force failed to evaluate the limits of permissible tracking error on the basis stated in the RFTP, which provided for an average error rate of .05. The protester believed that the Air Force used an absolute limit of .05 variation since the Air Force repeatedly used the .05 limit in its report. The Air Force responded that it did use the average rate, and presented calculations to support its position that Datron's proposal was technically unacceptable based on an average error rate. Datron has not disputed this analysis and we therefore conclude that the permissible tracking error was properly evaluated.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel