



The Comptroller General
of the United States

Washington, D.C. 20548

Godford

Decision

Matter of: Radiation Systems, Inc.
File: B-222585.7
Date: February 6, 1987

DIGEST

1. Protest that a technical proposal was improperly evaluated will not be subject to de novo review at GAO. Our review is limited to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria.
2. An agency may differentiate between proposals based on the degree of risk involved since the element of risk is clearly related to the evaluation of capability and approach.
3. The protester has a heavy burden of proving bias on the part of evaluators or the selection official, and unfair or prejudicial motives will not be attributed to those individuals on the basis of inference, supposition or generalized speculation.
4. In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the solicitation specified that cost will be the determinative factor.

DECISION

Radiation Systems, Inc. (RSI), protests the award of a contract to Electronic Space Systems Corporation (ESSCO), under request for proposals No. N41756-85-R-8511 issued by the Navy Engineering Logistics Office for an antenna tracking system.

The protest is denied.

RSI states that ESSCO's price of \$4,618,175 is more than 30 percent higher than RSI's price of \$3,375,975. RSI alleges that the Navy treated the procurement as a sole-source to ESSCO in violation of the regulations. RSI's basis for this allegation is the disparity in price and its contention that the Navy improperly found three significant deficiencies in RSI's proposal.

037981

The first deficiency involved RSI's response to amendment A00007's request for a description of RSI's relevant experience with similar systems. The Navy found that RSI's response failed to indicate an appreciable amount of background or experience with large antennas that have a high level of dynamics as required by the antenna tracking system.

The second deficiency also involved amendment A00007 and its request for data to support RSI's design margin for the dynamic tracking error. The Navy evaluation of RSI's response concluded that the locked rotor resonance of RSI's proposed system will not permit the required effective Ka (acceleration constant) to be achieved without extreme reliance on the rate feed forward technique. The Navy found that this represents an area of major performance risk for proper dynamic tracking.

The Navy found a third major deficiency in RSI's proposal in that RSI's system significantly increases the level of risk for the Navy to develop a feed system that is compatible with the overall system requirements.

RSI argues that the Navy's concerns are irrelevant since this is a fixed-price procurement and the risk of performing to the contract's specifications rests squarely on the contractor and not on the government. RSI states that the Navy's explanation of RSI's deficiencies does not state that RSI's technical proposal did not meet a requirement of the specifications. RSI states that the Navy's concern is merely that RSI's method of complying with the solicitation involves an increased level of risk to the government. RSI does not view risk as an acceptable criterion for evaluation.

In addition, RSI disputes the Navy's finding with regard to the second deficiency on the basis that its subcontractor has determined that RSI's antenna design and the control system provided would meet the requirements of the solicitation's specifications. With regard to the third deficiency, RSI contends that the Navy's concern of risk is unfounded.

RSI further protests the Navy's failure to negotiate price and technical matters with RSI and the fact that the Navy based its evaluation on additional features offered by ESSCO which were not required by the solicitation.

The Navy contends that the award to ESSCO was the result of competitive negotiation procedures. The Navy states that five offerors competed in this procurement and three, including RSI, were included in the competitive range.

Amendment A00007 was issued to ESSCO, RSI and the other offeror in the competitive range, setting forth deficiencies in their particular proposals. The Navy states that verbal discussions were then held with each offeror further explaining and clarifying these deficiencies. Best and final offers were then requested and after they were received they were reviewed and award was then made to ESSCO on the basis of its technically superior offer.

Section "M" of the solicitation listed the evaluation criteria and stated the areas to be evaluated in descending order of importance as Technical, Management and Cost. Each of the five subcriterion under technical approach was also to be evaluated in descending order of importance as follows:

1. Design approach
2. Risk
3. Past performance and related experience
4. Types and levels of technology employed
5. Design data

Under the subcriterion "Risk," the following was to be evaluated:

"Degree to which the contractor determined and then assessed the technical risk in the design, how much technical risk is associated with the proposed approach, and identification of alternative technical approaches to reduce cost or risk. How a(n) alternative approach(es) will be implemented, and if the contractor estimated the impact of these alternatives will be considered. The practicality of meeting the development schedule proposed and manpower utilization will also be considered."

In considering protests such as this, we do not conduct a de novo review of the technical proposals or make an independent determination of their acceptability or relative merit. Cadillac Gage Co., B-209102, July 15, 1983, 83-2 C.P.D.

¶ 96. That is the function of the selection official who is to exercise informed judgment and sound discretion. Macmillan Oil Co., B-189725, Jan. 17, 1978, 78-1 C.P.D. ¶ 37.

Our review is limited to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. Cadillac Gage Co., B-209102, *supra*. We will question a selection official's determination concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 C.P.D. ¶ 607. The fact that the protester disagrees with the selection official's conclusion does not itself render the evaluation unreasonable. Kaman Sciences Corp., B-190143, Feb. 10, 1978, 78-1 C.P.D. ¶ 117.

The selection of a contractor which can best perform a contract involves a choice between methods of operation and the acceptance of a certain level of risk. RSI's argument regarding risk in a fixed-price contract is couched in terms of cost risk. However, the Navy's use of the term risk clearly relates to technical risk, whether the item, when furnished to the government, will comply with the specification. We have held that an agency may differentiate between proposals based on the degree of risk involved since the element of risk is clearly related to the evaluation of capability and approach. Consolidated Group, B-220050, Jan. 9, 1986, 86-1 C.P.D. ¶ 21 at 7, 8. We have condoned the evaluation of risk in a technical evaluation of a proposal for a firm, fixed-price contract. Litton Systems, Inc., Electron Tube Division, B-215106, Sept. 18, 1984, 84-2 C.P.D. ¶ 317. In this case, RSI had notice that the Navy would assess the element of risk in ranking the proposals and we find nothing improper in the Navy's use of risk as an element of the evaluation. Consolidated Group, B-220050, *supra*.

Moreover, we do not agree with RSI's challenge to the Navy's technical analysis. The Navy found that the antenna tracking system required a high degree of dynamic tracking accuracy and obtaining this high degree of accuracy is, perhaps, the most difficult aspect of this project. The Navy considered that the accuracy required, along with the dynamics, make necessary that the antenna accurately track at high velocity and accelerations and this is extremely difficult. Therefore, a type of enhancement known as rate feed forward is

necessary. The Navy's calculations showed that, with regard to rate feed forward, an acceleration constant of a certain magnitude is necessary in order to meet the dynamic tracking requirement under highest accelerations. The Navy concluded that the resonant frequencies proposed by RSI indicated that it would be extremely difficult for RSI to achieve the required acceleration constant. On the other hand, the Navy found that the ESSCO design can achieve the required acceleration constant due to its higher resonant frequency.

RSI has not shown that the Navy's analysis and finding that RSI's proposal involved a high degree of risk is unreasonable. Moreover, RSI had the opportunity, through discussions and the submission of its best and final offer to improve or correct its proposal on this aspect, but it did not do so.

RSI also raises the point that this solicitation had previously been the subject of a number of protests and that this shows that the Navy has not held a competitive procurement. The prior protests, which were either dismissed or withdrawn, are not determinative of RSI's present protest. The Navy had made an earlier award under this solicitation but, subsequent to a protest against the award, the Navy withdrew it, reopened the negotiations and called for discussions with the three offerors (including RSI) in the competitive range. Whatever deficiency may have existed in this procurement in the past, the Navy subsequently took some corrective action. Accordingly, we do not agree with RSI that the protest history of this solicitation proves any improper action by the Navy with regard to RSI's instant protest, nor that this procurement was actually a sole-source procurement in the guise of a competitive solicitation.

In its comments to the Navy's report RSI raises the possibility of bias on the part of the Navy's technical review board. RSI's evidence on this aspect is generalized and speculative at best. The protester has a heavy burden of proving bias on the part of evaluators or the selection official, and unfair or prejudicial motives will not be attributed to those individuals on the basis of inference or supposition. Consolidated Group, B-220050, supra. We find no merit to RSI's generalized speculation.

Finally, it is clear that given the evaluation criteria stated in the solicitation, the Navy could award the contract to a higher priced offeror, which was technically superior. In a negotiated procurement, the government is not required

to make award to the firm offering the lowest cost unless the RFP specified that cost will be the determinative factor. The Communications Network, B-215902, Dec. 3, 1984, 84-2 C.P.D. ¶ 609. We have upheld awards to higher rated offerors with significantly higher proposed costs where it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268. The procuring agency has the discretion to select a more highly rated technical proposal if doing so is in the government's best interests and is consistent with the evaluation scheme set forth in the solicitation. Haworth, Inc., B-215638.2, Oct. 24, 1984, 84-2 C.P.D. ¶ 461.

In this case, the solicitation clearly stated that price was the least important factor. The Navy considered the price differential among the offerors, but concluded that the price differential was not sufficient to warrant awarding the contract to any offeror but ESSCO. The Navy made this decision because it viewed ESSCO's technically superior proposal as best satisfying the requirements of the solicitation.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel