



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TIW Systems, Inc.

File: B-222585.8

Date: February 10, 1987

DIGEST

1. Receipt by protester of agency report on its protest 1 day after the 25 working day time allowed the agency for submitting its report to the General Accounting Office does not prejudice the protester as it is still allowed 7 working days to file its comments with GAO. Accordingly, we will consider the agency's report.
2. Our Office limits its review of the agency's evaluation of proposals to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question a selecting 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. The fact a protester disagrees with the selecting official's conclusions does not itself render the evaluation unreasonable.
3. The content and extent of discussions are matters within the judgment of the agency involved and are not subject to question by our Office unless they are clearly without a reasonable basis.
4. A protest against the use of cost as an evaluation factor of past experience for a firm-fixed-price contract is untimely where the factor was contained in the solicitation and the protest was not filed by the closing date of the amendment which changed the contract type from cost-plus-fixed-fee to firm-fixed-price.
5. The element of risk is clearly related to the evaluation of capability and approach. It is permissible to evaluate risk in a technical evaluation of a proposal for a firm-fixed-price contract.

6. In a negotiated procurement the burden is clearly upon the offeror to submit sufficient information with its proposal so that the agency can make an intelligent evaluation.

7. Where an agency official accused protester's representative of lying and behaved rudely at a meeting with the protester, but the agency took action on the same day, prior to the request for best and final offers, to remove the individual from the contract award review panel and terminate all of the individual's involvement with the procurement, the agency has taken necessary corrective action which militates against an inference of bias.

DECISION

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

TIW contends that since its proposal was not deficient in any way and since it was the low offeror, TIW should have been selected for contract award. It also argues that even if its proposal was deficient, the Navy failed to conduct meaningful discussions with TIW. TIW states that the Navy improperly applied the solicitation's evaluation criteria. Finally, TIW argues that there is serious doubt as to whether TIW's proposal was evaluated in an unbiased manner.

The protest is denied in part and dismissed in part.

Initially, TIW insists that the agency report be excluded from the record in this protest. TIW states that the Navy did not submit its report to either this Office or TIW within 25 working days of when TIW filed its protest as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1986). Our Office did, in fact, receive the Navy's report on November 20, 1986, 25 working days after TIW's filing of the protest. Although TIW did not receive its copy of the report until 1 day later, TIW was provided 7 days from the date it received the report to submit its comments. Accordingly, TIW was not prejudiced by the Navy's failure to provide it with a copy of the report within 25 days and we will consider the Navy's report in reaching our decision. Delcor International, B-221230, Feb. 13, 1986, 86-1 C.P.D.
¶ 160.

The Navy issued this solicitation on September 13, 1985, and the RFP called for award of a cost-plus-fixed-fee contract. Proposals were received from five offerors and three offerors (including TIW) initially were determined to be in the competitive range. The solicitation was amended to change the contract type to a firm-fixed-price contract. Subsequently, the Navy determined that TIW and another offeror were so technically deficient that they had no reasonable chance for award so they were eliminated from the competitive range.

ESSCO was awarded the contract, but in response to a protest to this Office filed by TIW alleging that the Navy did not hold meaningful discussions with TIW, the Navy terminated the ESSCO contract for convenience and reinstated the solicitation. Amendment A00006, dated June 26, 1986, reinstating the solicitation and reopening discussions, was issued to the three offerors, including TIW, originally in the competitive range. TIW then withdrew its original protest.

On July 29, 1986, the Navy issued amendment A00007 to the three offerors setting forth deficiencies in their particular proposals. The Navy states that it held oral discussions, during August, with each offeror further explaining and clarifying the deficiencies. After best and final offers (BAFOs) were requested and received, the Navy's Technical Evaluation Board (TEB) rated the proposals and determined that ESSCO had submitted a clearly superior technical proposal and award was made to ESSCO.

The Navy found TIW's proposal deficient because TIW did not have any background or experience with large antennas that have a high level of tracking. TIW states, however, that in its BAFO, it included a 3-page table which described 16 separate programs involving similar ATS's in which TIW has participated. Of these, three programs involved large antennas with a high level of dynamics. Thus, TIW argues it did have the experience which the Navy wanted and included the information in its proposal.

TIW also alleges that the Navy did not hold meaningful discussions because it was not until after the contract was awarded that the Navy told TIW it was seeking information regarding an offeror's experience with such antenna systems. TIW contends that the Navy's request for information on TIW's experience on similar systems failed to convey the Navy's desire to receive information on TIW's experience on systems with a high level of dynamics.

TIW also contends that the Navy impermissibly applied the evaluation criterion regarding experience. TIW states that the evaluation subfactor of Past Performance and Related Experience stated that the Navy would evaluate the offeror's (a) technical performance on similar programs and whether such performance was (b) within costs and (c) within schedules. It contends, however, that at the time that the Navy changed the type of contract to be awarded pursuant to the solicitation from cost-plus-fixed-fee to firm-fixed-price, the government's concern with performing within costs vanished and could not be considered since, in a fixed-price contract, the impact of overrunning anticipated costs falls solely on the contractor. Moreover, TIW alleges that with respect to the performance and experience evaluation factor, even if the Navy should have considered the technical performance of the offeror and whether such performance was within schedule, the Navy never requested any information from TIW with respect to either one of these issues. TIW concludes that the Navy could not have applied the experience evaluation subfactor properly since it did not have, and never requested, the data necessary to complete the analysis.

TIW makes similar arguments with respect to the second deficiency the Navy found in TIW's proposal; that the locked rotor frequency resulted in extreme reliance on the rate feed - forward technique and presented an unacceptable level of risk. TIW states it provided results of extensive computer studies, which confirmed that the specifications could be met with a 3.0 Hz locked rotor frequency antenna. TIW states that the rate feed forward technique is a time-tested technique and there cannot be any reasonable concern with the risk associated with its use. Moreover, TIW contends that the Navy never expressed its concern with the risk associated with the rate feed forward technique until after a contract had been awarded. Thus, TIW argues that to the extent that the design constituted a deficiency in the proposal, the Navy was required to raise the issue during negotiations and its failure to do so precluded meaningful discussions. TIW also argues that the Navy should not have evaluated a risk factor for this firm-fixed-price contract.

Finally, with respect to the third deficiency, that TIW failed to provide data regarding its tracking error budget, TIW states that it had submitted a comprehensive computer simulation of the tracking system which showed that the tracking error would meet the specification. TIW contends that to the extent that its proposal may have been deficient, it was a direct result of the Navy's failure to engage in meaningful discussions with TIW.

Regarding the first deficiency, the Navy responds that TIW's experience, demonstrated in its BAFO, involved radio telescopes or tracking of communications satellites and antennas used for those purposes and that these are all slow moving antennas. The Navy asserts that none of the listed large antenna programs involve the necessary high level of dynamics.

Further, the Navy points out that all of TIW's experience involves closed loop systems which means the target has an emitter which the antenna uses as an aid in acquiring and tracking the target. However, paragraph 1 of the specification for this system states there are no beacons or downlinks to aid in acquiring and tracking the targets. The Navy concludes that, although TIW believes it has equivalent experience to ESSCO, ESSCO had experience which was unique among the offerors for high dynamics and ESSCO alone had actual experience building an antenna with similar dynamics required by the solicitation.

With regard to TIW's argument that it was not until after the contract was awarded that it was informed that the Navy was seeking information regarding experience with antennas which have a high level of dynamics, the Navy states that the solicitation clearly spelled out this requirement numerous times. For example, the above-referenced paragraph 1, "Scope," of the development specifications calls for a high accuracy ATS and emphasizes the lack of beacons or downlinks to aid in acquiring and tracking the targets. The Navy also points to paragraph 3.1's call for a high-accuracy ATS. The Navy concludes that the requirement for a high accuracy ATS was clearly set forth in the specification.

Further, the Navy states that the initial RFP clearly requested in clause L-30 information on past experience on "similar or related efforts, unique capabilities, or company operating procedures that would facilitate the design, development, and implementation of the Antenna Tracking System." Given that the specification for the ATS clearly emphasized the requirement for high dynamic tracking accuracy the Navy contends that past experience on "similar or related efforts" meant efforts requiring high dynamic tracking accuracy.

Additionally, the Navy states that during discussions it was pointed out that TIW's description of its experience was incomplete. The Navy states that TIW was requested to provide descriptions of all antenna systems TIW had completed with designs that had parameters similar to a given list.

The Navy states that those parameters clearly indicated that a large antenna with a high dynamic tracking accuracy was required. TIW responded with above-cited information regarding a number of systems none of which the Navy found technically equivalent to the system required for the ATS. The Navy concluded, therefore, that TIW's experience did not involve the same parameters required for the ATS.

With regard to whether the Navy properly applied the evaluation criteria, the Navy points to the third subcriterion under technical approach which states:

"3. Past Performance and Related Experience - This deals with how the offeror performed technically and within costs and schedules on similar programs."

The most important aspect of this subcriterion, the Navy states, was in determining whether offerors possessed related experience on similar programs, meaning programs with similar design parameters, since this gives some indication of an offeror's ability to meet the requirements of the instant procurement. The Navy considered significant whether an offeror had performed within the cost and schedule constraints since, although the contractor bears the burden of financial risk under a fixed-price contract, the fact that it costs more than the fixed price may indicate the contractor had serious technical problems. The risk of schedule slippages, the Navy adds, is squarely on the government regardless of contract type since the Navy is left without a system to meet its requirement on time.

The Navy also states that it requested and received the data necessary to complete its analysis regarding past performance and related experience. It states that information relating to antenna surface tolerance, antenna pointing accuracy and dynamic tracking performance was provided enabling the Navy to determine whether the experience was relevant. Also, the offerors were requested to submit a name and phone number of the technical contact for the customer. The Navy TEB spoke with the more pertinent contacts asking them about the performance of the particular offeror and, through these conversations, information on how the offeror performed technically was obtained.

With regard to the second deficiency, the Navy states that the TEB determined that TIW did not show they could meet the dynamic pointing accuracy requirements. The Navy found that

TIW did not convincingly prove that they could obtain the locked rotor frequency of 3.0Hz, which number was a result of preliminary calculations and studies which would be finalized by TIW during contract performance. Moreover, even if TIW could attain 3.0Hz, the TEB found that this design still presented a great deal of technical risk as a result of TIW's over-reliance on the rate feed forward technique. As a result of these technical deficiencies, in the judgment of the TEB, it was doubtful whether TIW could meet the pointing accuracy requirements. The Navy also states that this issue was raised during discussions and it was pointed out in two questions in TIW's list of deficiencies.

In regard to the third deficiency, the Navy states that TIW failed to provide meaningful data regarding its tracking estimates. The Navy states that in its BAFO, TIW simply improved its estimates of tracking performance by a factor of approximately three without indicating any corresponding design changes and none of the data submitted indicated how this improvement would be accomplished.

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 selecting official's conclusion does not itself render the evaluation unreasonable. Kaman Sciences Corp., B-190143, Feb. 10, 1978, 78-1 C.P.D. ¶ 117.

Although TIW presented evidence of its experience with various antenna systems, the Navy has presented a cogent argument that TIW's proposal did not show the desired experience with antenna programs involving the necessary high level of dynamics. Moreover, the Navy has shown that during discussions it requested that TIW provide it with information on

its experience with antenna systems with designs that had parameters similar to a given list of systems which require a large antenna with high dynamic tracking accuracy.

Ultimately, the content and extent of discussions are matter within the judgment of the agency involved and are not subject to question by our Office unless they are clearly without a reasonable basis. Chemonics International, B-222793, Aug. 6, 1986, 86-2 C.P.D. ¶ 161. We think that the Navy's request during discussions for information on TIW's experience with antenna systems having the parameters similar to given list of systems requiring the necessary high dynamic tracking accuracy was sufficient to alert TIW as to what was required.

TIW's protest that the solicitation contained and the Navy improperly used cost as an evaluation factor of past experience is untimely as it was not filed by the closing date of the amendment which changed the type of contract from cost-plus-fixed-fee to firm-fixed-price. Radiation Systems, Inc. B-222585.2, June 6, 1986, 86-1 C.P.D. ¶ 534; Radiation Systems, Inc., B-222585.5, Aug. 6, 1986, 86-2 C.P.D. ¶ 160. With respect to the second deficiency, the Navy has stated that TIW's reliance on the rate feed forward technique presented great technical risk and in any event TIW did not prove that the locked rotor frequency of 3.0Hz could be obtained. TIW's belief that it could meet the specification merely amounts to disagreement with the Navy's findings so will not disturb the Navy's determination. Kaman Sciences Corp., B-190143, supra.

As to TIW's argument that a risk factor should not be evaluated in a firm-fixed-price contract, we have held that 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; 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, 63 Comp. Gen. 585 (1984), 84-1 C.P.D. ¶ 317. In this case, TIW had notice that the Navy would evaluate 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.

Similarly, as to the third deficiency, the Navy has adequately explained its concern of TIW's tracking error budget. TIW did not show how it managed a threefold increase in tracking performance even though this improvement was put into its BAFO. In a negotiated procurement the burden is clearly upon the offeror to submit sufficient information with its proposal so that the agency can make an intelligent evaluation. The Communications Network, B-215902, Dec. 3, 1984, 84-2 C.P.D. ¶ 609. TIW has not shown that the Navy did not hold meaningful discussions with TIW on this deficiency.

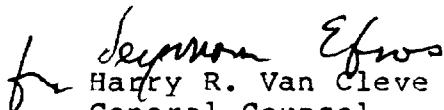
Even though TIW's price was less than ESSCO's, the Navy considered that ESSCO's technically superior proposal warranted the award. The evaluation criteria in descending order of importance were technical, management and cost. The government is not required to make an award to the low offeror in a negotiated procurement unless the solicitation so specifies. A. B. Dick Company, B-207194.2, Nov. 29, 1982, 82-2 C.P.D. ¶ 478. Accordingly, we see nothing objectionable in the contract award to ESSCO, the higher priced, but technically superior offeror. The Communications Network, B-215902, supra.

Finally, TIW charges that during negotiations, a key Navy representative was rude and accused a TIW representative of lying about whether TIW would file a protest. TIW expresses doubt as to whether it received an unbiased evaluation.

The Navy admits that one of its representatives acted as TIW stated, but it contends that the incident did not have an impact on the contract award. The Navy states that the individual was not a member of the TEB and therefore did not score any of the initial proposals. Moreover, the Navy explains that the individual was removed from the contract award review panel on the same day, August 15, 1986, that he made the remarks and all involvement by him with this competition was terminated on that day, which was prior to the request for BAFOs.

We think that this prompt corrective action taken by the Navy militates against an inference that the Navy allowed its personnel to exercise any bias against TIW.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel