The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Norden Systems, Inc.; Sperry Marine, Inc.; Department of the Navy -- Reconsideration

File: B-227106.3, B-227106.4, B-227106.5

Date: October 16, 1987

DIGEST

1. Prior decision that the Navy improperly changed certain formulas contained in the request for proposals (RFP) at the time of award in what amounted to an improper relaxation of mandatory requirements is affirmed, where the Navy's argument that the formulas were not mandatory requirements of the RFP is plainly contradicted by the express terms of the RFP.

2. The request for proposals (RFP) expressly directed that offers must meet certain formulas no matter which of two types of transmitter technologies (linear beam tube or magnetron oscillator tube) was proposed. The Navy subsequently determined that the RFP formulas did not apply to an offer using a magnetron oscillator tube transmitter and, therefore, awarded a contract to that offeror and simultaneously modified the formulas as proposed by the awardee. The General Accounting Office affirms a prior decision holding that the award and simultaneous contract modification on behalf of only one offeror amounted to an improper relaxation of mandatory RFP requirements, because other offerors may have been misled by the RFP into reasonably concluding that only a transmitter which could meet the mandated RFP formulas would be considered acceptable.

3. Prior decision sustaining protest and recommending that the competition be reopened is affirmed notwithstanding that the awardee's price and technical formulas were revealed by the contracting agency through the award and during development of the original bid protest. The importance of correcting the improper award through further negotiations overrides any possible competitive disadvantage accruing to the prior awardee by the disclosures.

4. Interested party's request that the General Accounting Office modify recommendation that the agency reopen the competition so that award will be made to the lowest priced, technically acceptable offeror under the original solicitation is denied, where the record shows that the

agency's needs can be met under relaxed and potentially less costly requirements. Therefore, the recommendation that the competition be reopened so that all offerors will be allowed to compete to the relaxed specifications is proper.

DECISION

Norden Systems, Inc., Sperry Marine, Inc., and the Department of the Navy request reconsideration of our decision in Sperry Marine, Inc.; Aydin Radar & E. W. Division, B-227106 et al., Sept. 14, 1987, 87-2 C.P.D. ___, sustaining protests of the Navy's award of a contract to Norden to design and fabricate a radar system pursuant to request for proposals (RFP) No. N00024-86-R-5664(Q). We affirm our decision.

The decision centered on two formulas set out in the original RFP under the headings "frequency stepping" and "system bandwidth," which were related to the Navy's desire for a radar system that would work properly even in a rain storm. The frequency stepping and system bandwidth formulas set forth a method for measuring a radar system's capability to meet the requirement for decorrelation of rain clutter. The RFP stated that an offeror could propose to use either a magnetron oscillator tube or a linear beam tube transmitter. However, the RFP also specifically stated that only "available" magnetron tubes would be acceptable and that offered magnetron tubes must meet the performance requirements of paragraph 3.2.1.2, including the frequency stepping and system bandwidth formulas.

Norden proposed a radar system using a magnetron tube transmitter, and it submitted documentation including its own formulas to show how its radar system would meet the decorrelation of rain clutter requirement. The Navy had many reservations about Norden's ability to decorrelate rain clutter adequately but ultimately agreed that a magnetron tube transmitter, though riskier than a linear beam tube transmitter, could do the job using an entirely different approach from the one that would apply to linear beam tube transmitters. The Navy also recognized that the RFP formulas for frequency stepping and system bandwidth were simply not applicable to the magnetron tube technology. Accordingly, the Navy awarded the contract to Norden in part because of its lower price, and, simultaneous with the award, issued a contract modification (No. P00001) which incorporated the new formulas proposed by Norden to show the method by which its radar system would decorrelate rain clutter.

We found that the Navy had improperly issued a contract modification that relaxed certain mandatory performance specifications simultaneous with the award to Norden without informing other offerors of the change in its requirements or allowing them an opportunity to submit revised proposals in response to the relaxed requirements. We recommended that the Navy reopen the competition by issuing an amendment to the RFP informing all offerors of its actual needs and then allowing all offerors to revise their proposals in another round of best and final offers (BAFO's). We further recommended that, if Norden loses the reopened competition, the Navy should terminate Norden's contract and award a new one to the appropriate firm; if Norden wins, we recommended that its contract be amended to reflect any revisions in the firm's BAFO's.

The Navy argues that our decision was legally incorrect, because we conducted our own technical evaluation and substituted our judgment for that of the Navy with regard to the technical acceptability of Norden's proposal and the significance of the specification formulas. In support, the Navy cites a number of our decisions which stand for the proposition that our Office does not conduct a de novo review of technical proposals, but, rather, recognizes that the responsibility for evaluating proposals and determining technical merit rests primarily with the procuring agency.

Contrary to the Navy's assertion, our Office did not substitute our judgment for that of the Navy's technical evaluators, although we did thoroughly review all of the evaluation materials provided to us by the Navy in order to understand more completely the relevance of the frequency stepping and system bandwidth formulas. Nowhere in the decision did we find that the Navy's technical evaluation of proposals was unreasonable. Our holding in that decision was simply that the Navy changed the formulas at the time of award in what amounted to an improper relaxation of the RFP's requirements.

Both the Navy and Norden point out that the RFP specifically provided that alternate approaches, including magnetron tube design, would be considered if properly supported with adequate documentation to show that they could meet the RFP's performance requirements. The Navy further asserts that the system bandwidth and frequency stepping formulas were not mandatory requirements, but merely set forth one method of achieving the RFP requirement that the proposed radar system be able to decorrelate rain clutter.

Even though the RFP indicated that offerors could use either linear beam tube or magnetron oscillator tube technology, the specifications clearly stated that, whichever technology

was offered, the transmitter tube must meet the performance requirements of paragraph 3.2.1.2 entitled "Electrical Performance." The electrical performance requirements in paragraph 3.2.1.2 included the formulas for both frequency stepping and system bandwidth. Thus, while the Navy now contends that these RFP formulas are only set out to show how an offer based upon linear beam tube technology can achieve the goal of decorrelating rain clutter, there was nothing in the specifications to show that they would only be applied to linear beam tube transmitters or that an offeror could propose its own formulas if its radar system used a magnetron oscillator tube. In other words, the RFP plainly contradicts the Navy's position, because it establishes the frequency stepping and system bandwidth formulas as mandatory electrical performance requirements for either magnetron tube or linear beam tube designs.

Offerors were not free to ignore the specification's express directions that the frequency stepping and system bandwidth formulas must be met. In our opinion, this RFP mandate may have misled the protesters as well as other offerors into reasonably concluding that only linear beam tube technology would be considered acceptable. Thus, when the Navy issued contract modification No. P00001 at the time the contract was awarded to Norden, the Navy improperly relaxed the RFP's mandatory performance requirements on behalf of Norden alone, to the prejudice of the protesters.

Norden further contends that its magnetron tube design was technically acceptable because the RFP specifically allowed offers using a magnetron tube design and because rather than relaxing the RFP's performance specifications, the contract modification actually made the RFP's requirements more stringent. Norden submits a technical discussion and an independent expert's opinion regarding the effects of the change in the RFP formulas in support of its argument that the requirements were not relaxed.

This same argument was made by Norden in response to the protests initially filed by Sperry and Aydin. We held a conference on those protests and Norden was given the opportunity to participate fully and to air its views during all phases of the protest procedure. We carefully considered all arguments raised by all interested parties and we reviewed all the supporting documentation in light of those arguments. Essentially, Norden has merely restated arguments previously presented and considered by our Office, which is not a proper basis for reconsideration under our Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1987). Concerning the technical discussion and independent expert's opinion submitted in support of Norden's request for reconsideration, Norden could have presented them during the

development of the initial protest and, therefore, they also do not provide a basis for reconsideration. See NCR Corp.--Request for Reconsideration, B-222037.3, July 30, 1986, 86-2 CPD ¶ 126; WEMS, Inc.--Request for Reconsideration, July 30, 1986, 86-2 CPD ¶ 127. In any event, as stated above, we believe that the express language of the solicitation may have misled some or all of the other offerors because the RFP did not state that offerors proposing magnetron tube transmitters were free to propose their own formulas showing how they would meet the decorrelation of rain clutter requirement.

Norden next argues that the Navy should not reopen negotiations because: (1) Norden's prices have been revealed while other offerors' prices have not, thereby resulting in an unfair and unlawful auction; and (2) the Navy would have to appropriate the proprietary formulas developed by Norden in order to evaluate any other offers it receives based upon a magnetron design.

With regard to Norden's concern that the Navy will use Norden's formulas, we merely recommended that the Navy inform all other offerors that the RFP's original formulas were not applicable to magnetron tubes designs and allow those firms an opportunity to devise their own formulas and to demonstrate that their magnetron designs will meet the Navy's requirements. We did not recommend that the Navy appropriate or reveal Norden's proprietary data. However, to the extent that Norden's formulas and prices have been revealed to its competitors by the Navy by the contract award, through the protest reports, or otherwise in the bid protest process, we believe that the importance of correcting the improper award through further negotiation overrides any possible competitive disadvantage accruing to Norden by the disclosures. See Harris Corp., B-204827, Mar. 23, 1982, 82-1 CPD ¶ 274.

Sperry argues that the recommendation in our decision is improper because Norden's proposal was technically unacceptable under the original RFP specification. In Sperry's opinion, since Norden proposed a magnetron tube transmitter in its radar system, Norden's proposal could not meet the frequency stepping and systems bandwidth formulas as they are only applicable to linear beam tube technology. Sperry wants us to modify our decision so as to recommend termination of Norden's contract and that the Navy make award to the lowest priced, technically acceptable offeror under the original RFP.

We cannot agree with Sperry's argument. It is obvious that the Navy believes its needs can be met by a radar system utilizing a magnetron tube transmitter. Otherwise, the Navy

would not have awarded the contract to Norden and changed the formulas relevant to decorrelation of rain clutter. Moreover, in its initial protest Sperry stated that magnetron tube technology costs less than linear beam tube technology. Accordingly, we believe that our recommendation that the Navy reopen the competition and allow all offerors an opportunity to propose to the relaxed requirements is proper and will best fulfill the Navy's requirements.

Finally, Sperry wants our Office to specify that the Navy should allow all offerors time to prepare initial proposals based on the relaxed requirements, that discussions must be held with all other offerors, and that only then should revised BAFO's be allowed. In essence, Sperry wants our Office to tell the Navy in detail exactly how to procure the radar systems based on its relaxed requirements. This we will not do. It is within the discretion of the Navy to decide how best to implement our recommendation that the competition be reopened.

We affirm our prior decision.

Milton J. Socolar

Acting Comptroller General
of the United States