



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Syscon Corporation

File: B-228915.3

Date: April 26, 1988

DIGEST

1. Under General Accounting Office Bid Protest Regulations protests based upon other than alleged solicitation improprieties must be filed not later than 10 days after protest basis is known or should have been known. Protester's allegation that it was entitled to more time to perform operational demonstration first raised in protester's comments on agency report is untimely when grounds for the allegations were evident almost 2 months before protest allegation was raised.
2. Protest allegations concerning improprieties in solicitation amendment first raised in protester's comments to agency report are untimely as Bid Protest Regulations require such allegations to be filed not later than the next closing date for receipt of proposals.
3. Protest that none of the designated agency representatives observed operational demonstration (OD) as required and therefore results of OD were not properly certified is denied where protester does not establish that attendance of such personnel was required by OD instructions and contracting officer did certify the results as authorized. Further record does not support protester's contention that presence of specific agency representative would have in any way altered the results of the test.
4. While agency did not follow operational demonstration (OD) instructions requiring protester to certify final OD results at its conclusion, protest that results are therefore invalid is nevertheless denied where record supports agency's determination that protester failed to successfully demonstrate certain requirements.
5. While protester has established that minor procedural flaws existed in final operational demonstration (OD), the record is clear that agency properly determined that

042002/135679

protester failed each of the disputed OD requirements. Therefore rejection of protester's proposal was proper under the OD instructions which required offerors to pass all requirements to be acceptable.

DECISION

Syscon Corporation protests the determination that its proposal submitted in response to request for proposals (RFP) No. DAE26-87-R-0003 issued by the Army Information Systems Selection and Acquisition Activity (ISSAA) for various items of Automatic Data Processing Equipment (ADPE) was technically unacceptable. Syscon contends that the final operational demonstration (OD) conducted by the agency and used by it in rejecting the protester's proposal was improperly conducted. Essentially, Syscon objects to the failure of certain agency personnel to attend and certify the results of the final OD and disputes the agency's conclusion that it failed some of the demonstrations.

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

BACKGROUND

The RFP was issued on January 2, 1987 and sought ADPE which would capture data using bar code technology for the Army's LOGMARS (NT) II program. The solicitation set forth requirements for equipment such as portable data collection devices, fixed bar code readers, port concentrators, portable bar code analyzers, and various compilers, scanners, and bar code printers. The solicitation provided that award would be made to that offeror whose proposal was found to be technically acceptable and whose cost proposal demonstrated the lowest total system life cost. Under the RFP as originally issued, the method for evaluation and verification of technical proposals had three elements: (1) evaluation of written proposals and supporting documentation; (2) "hands-on" evaluation of portable equipment and software by agency personnel and (3) offeror demonstration of laser printers.

Several offers including one from the protester were received by the April 13 closing date. Due to a number of technical problems, the agency decided that a "hands-on" evaluation by its technical personnel, either alone or with offerors' assistance, would not be sufficient. Consequently, the agency amended the solicitation to require a formal OD of portable equipment and the laser printers by the apparent winning offeror. Prior to requesting best and final offers, the agency determined that all remaining proposals including that of Syscon were technically acceptable subject to verification at the OD.

Subsequently, however, the agency reopened negotiations and issued a series of letters identifying the equipment and capabilities that were to be demonstrated in the OD and establishing the guidelines to be followed. The agency decided that an OD should be held for each offeror submitting an acceptable written proposal rather than just for the apparent winner. The OD instructions provided that offerors would be given 1 day to perform the OD (called the full OD) and, if necessary, a second opportunity (the final OD) at a later date to demonstrate items which had not been demonstrated at or which had failed the full OD. According to the instructions, failure to demonstrate all proposed equipment and software as required would result in the offeror's disqualification. The instructions further provided that the OD was to be conducted on a pass/fail basis and the results were to be recorded on the checklist provided. The checklist included space for certification of the results by the offeror's team leader and one of four authorized ISSAA personnel.

There is no dispute that Syscon did not pass all the tests in its full OD. The record shows, and Syscon agrees, that it either did not attempt to meet or otherwise failed 16 requirements.

Syscon's final OD was conducted on December 11. Based upon the results of the final OD, the agency notified Syscon by letter dated December 18 that its proposal was technically unacceptable. This determination was based upon Syscon's failure to successfully demonstrate all the required capabilities of its portable data collection device, full function compiler, port concentrator and battery charger/discharger unit in accordance with the OD requirements. Specifically, the agency concluded that Syscon failed OD requirement 1.4.2.1 because it could not successfully download a compiled program from an IBM personal computer (PC) into its portable data collection device. Syscon failed OD requirement 3.1.1, according to the agency, because it could not simultaneously transmit data in the portable data collection device to a Wyse PC and failed requirement 3.1.3 because it never attempted this test with the Intel PC as specified. The agency also states that the protester failed to demonstrate a fully compliant battery charger/discharger unit.

On December 22, Syscon protested the Army's rejection of its proposal and argued that it was deprived of a full and fair opportunity to demonstrate its equipment. In particular, Syscon stated that the final OD was not conducted in accordance with the published OD procedures because none of the four authorized ISSAA personnel attended the final OD,

and because it was never informed during the OD or at its conclusion that it failed any of the tests. The protester also complained that the evaluators imposed a new data base requirement at the final OD which contributed to Syscon's failure of OD requirement 3.1.1. In addition, Syscon claimed that it was improperly disqualified for using an alternate PC to perform OD requirement 3.1.3 even though its use was authorized by the agency personnel. Finally, the protester maintained that the evaluators improperly concluded that it did not successfully demonstrate the functional capabilities of its battery charger/discharger unit when in fact it did. In the alternative, the protester stated that this requirement was not on the final OD checklist.^{1/}

Throughout Syscon's two rather voluminous submissions, one filed on February 8, 1988 in response to the agency report and the other on March 1, the protester argues in the context of several of the OD requirements that it was entitled to more time to conduct its demonstration during the final OD and that this lack of time may have contributed to the unsatisfactory results. This premise is based on the protester's view that the required time sequence of the various demonstrations combined with the failure of some of the government's computers resulted in a hurried OD environment which was not conducive to a successful demonstration. We will not consider any of these related contentions because they are all untimely raised.

Under our Bid Protest Regulations, protest contentions based upon other than alleged solicitation improprieties must be filed not later than 10 days after the protest basis is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1987). The basis of the contention concerning the time allowed for the demonstration should have been evident to the protester at the latest when it was informed by the agency's December 18 letter that it had failed the final OD. Thus, these contentions raised initially almost 2 months later are untimely and will not be considered in our review of OD requirements at issue in the protest.

^{1/} Syscon also contended in its December 22 protest that the OD instructions were subject to different interpretations by various agency test personnel and that the OD instructions were not clear because the agency never defined the terms "items" and "demonstrate." Since the Army in its report disputed each of these claims and Syscon never responded, we consider these issues to have been abandoned by the protester. Pac Ord, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7.

Similarly, Syscon also argues for the first time in its February 8 submission that it was prejudiced during both ODs because of the agency's delay in issuing amendment 0014 concerning changes in the government's requirements for some of the equipment. Our regulations require the protests based upon alleged solicitation improprieties which are subsequently incorporated into the solicitation must be protested prior to the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Since the amendment was issued on November 13 and required proposed revisions to be submitted by November 30, any protest involving the content or impact of amendment 0014 should have been filed by November 30. Since there is nothing in the record indicating that Syscon filed a written protest with the agency or our Office prior to February 8, we will not consider this argument.

ANALYSIS

OD Attendance of ISSAA Representative and Failure to Certify OD Checklist.

The protester argues that the final OD was flawed because it was not attended by an ISSAA representative as required by the OD instructions. The protester attributes many of the problems it had during the final OD to the lack of a central government "spokesperson." In this regard Syscon states that had the ISSAA representative been present, alleged government caused delays because of faulty equipment would have resulted in a time extension for Syscon and the problems concerning the proper PC to be used in conjunction with OD requirement 3.1.3 remedied. Further, Syscon maintains that since the ISSAA representative was not present, the individual test results and the overall OD checklist were not certified by both Syscon and agency representatives as required by the OD instructions. This, according to the protester, resulted in a confusing and inclusive final OD checklist which at the time of the completion of the final OD did not show that Syscon had failed all the requirements which were cited in the agency's December 18 letter rejecting its proposal.

First, the agency states that while it did in fact have an "authorized" ISSAA representative attend the full OD and certify its results, it admits that there was no such representative at the final OD. The agency explains that while it intended to have such a representative at the final OD the employee was injured and could not attend. The agency reports that the ISSAA representative's attendance at the final OD was not essential as his only purpose was to ensure that the OD instructions were observed. It states that since the test team had successfully performed the full

OD the agency was convinced that the procedures would be followed. The agency also states that the designated ISSAA representatives were not technical employees and that in both cases the actual demonstrations were conducted and observed by agency technical representatives who were responsible for evaluating the written proposals.

We agree with the agency that there was no legal requirement for the attendance of an "authorized" ISSAA observer at the final OD. The alleged requirement for an ISSAA observer is contained in a letter dated November 2 which transmitted the OD instructions to all offerors. That letter merely states that in addition to the contracting officer, three other ISSAA representatives "are authorized to certify the OD results . . . for the government." There is nothing which specifically requires the attendance at or the observation of the OD by a particular individual or representative. The letter only authorizes certain individuals to certify OD results. In this case the contracting officer himself actually certified the results of the final OD as required. Further, we can find no basis for Syscon's position that the attendance of the contracting officer or one of the other three listed individuals would have in any way altered the results of the tests.

As far as the problems relating to the certification of the results of the final OD are concerned, it is true, as the protester contends, that the OD checklist provides spaces for the initialing of individual demonstration results by the parties and for an overall certification by both the government and the offeror. The OD instructions also state that the offeror would be asked to verify and acknowledge "all items not demonstrated." While the record shows that Syscon was asked to sign the checklist in connection with the full OD, it was not asked to sign the checklist after the final OD. The agency explains that Syscon was not asked to sign the results of the final OD because the agency representative did not believe that Syscon would do so, because the failed OD requirement would eliminate it from the competition.

While we recognize that from a practical standpoint it may well be difficult to get an offeror to certify its own failure, we think that had the OD instructions been followed some of the matters raised by the protester concerning the results of the final OD may well have been resolved without the filing of a protest. Nevertheless, we think that the questions raised by the protester concerning the results of particular OD requirements must be resolved based on the record before us. The fact that the protester was not asked to certify the test results at the required time does not itself invalidate the OD results.

OD Requirement 3.1.1

This requirement tested the port concentrator to determine if it would support simultaneous transmission of data from two bar code readers to a Wyse PC. According to the agency, Syscon failed this demonstration because only one of the two portable data collection devices would upload data. The protester argues that its failure to transmit the data, which consisted of agency supplied bar code labels, was not due to the failure of its equipment but to the agency's insistence on requiring it to process 20 bar code labels. It is the protester's view that this was a new and unspecified requirement as the OD instructions only provided that bar code labels containing 32 byte records would be provided for transmission. This lack of specificity, according to the protester, made it impossible to determine the "pass/fail" criteria for the requirement. The protester also argues that its failure may also have been due to noisy telephone lines provided by the government during the test.

The OD instructions do not specify the number of labels to be processed, although the instructions do refer to the plural "labels." This characteristic of the instructions was obvious from their face at the time they were issued on November 2. To the extent that Syscon is arguing that the number of labels to be processed should have been specified Syscon's protest is untimely. As indicated earlier, under our regulations protests based upon alleged solicitation improprieties which are subsequently incorporated into the solicitation must be protested prior to the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). In the context of this case November 17, the full OD date, is the date by which the protest should have been submitted. Micro Research, Inc., B-220778, Jan. 3, 1986, 86-1 CPD ¶ 9. We therefore dismiss this contention, which was not raised until after Syscon was notified on December 18, that its proposal had been rejected because it failed the OD. It is simply not fair to permit an offeror such as Syscon to participate in a demonstration under written rules and then permit it to contest those rules after the demonstration has been completed.

Similarly, we think that Syscon's contention that its failure was due in part to noisy government telephone lines is untimely. This allegation was first raised in the protester's February 8 response to the agency report. Syscon should have been aware of this protest ground at the latest when it was informed of its rejection in the agency's December 18 letter. Since our regulations require that protests other than those concerning alleged solicitation improprieties must be filed within 10 days after the protest

basis is known or should have been known this contention is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

To the extent that the protester is arguing that under the OD instructions the agency should not have required the protester to process 20 labels the contention is simply not convincing. The protester does not clearly explain the exact nature of the alleged negative impact on its demonstration of the requirement that it process a large number of labels. It does not complain that the agency acted unreasonably by requiring it to process 20 labels; it merely states that it had to process a "previously unspecified" number of labels. There is nothing in the record upon which we could conclude that under the OD instruction as within it was unreasonable or improper for the agency to require Syscon to process 20 labels. Further, notwithstanding the untimeliness of the contention concerning the telephone lines the record does not show that during the OD Syscon raised any objection to the quality of the government telephone lines. It seems to us that if these lines prevented Syscon from successfully demonstrating its equipment Syscon's representatives should have complained at that time and sought to use another telephone line. Thus, we have no basis to question the agency's conclusions concerning this OD requirement.

OD Requirement 3.1.3.

This requirement is similar to OD requirement 3.1.1., but pertains to the simultaneous transmission of bar code data through a port concentrator to an Intel 310 PC. The OD instructions state that this must be accomplished using two different equipment configurations. According to the agency's December 18 rejection letter, Syscon failed this requirement in both configurations because it conducted the demonstration on a Wyse PC rather than on the specified Intel 310 PC.

Syscon disagrees with the agency's conclusion. The protester argues that it did pass both of the required demonstrations and states that the OD checklist in fact so indicates. While the protester admits that it conducted the demonstrations using the Wyse PC it insists that it was given permission to do so by the government evaluation officials.

We agree with the agency's conclusion that Syscon did not pass OD requirement 3.1.3 as described in the OD instructions. The agency explains that it was indeed aware that Syscon was using a Wyse PC but indicates that its representatives told the Syscon representative that Syscon could use the Wyse PC to debug software and otherwise

prepare for the test. According to the agency, it informed Syscon that the Wyse PC could not be used in place of the Intel unit.

While the protester maintains that the agency evaluators "authorized [Syscon] to use the Wyse PC during the 3.1.3 benchmark event," Syscon does not specifically dispute the agency's assertion that the protester was told that it could not use the Wyse PC in lieu of the Intel unit to meet the 3.1.3 requirements. In fact, we think that a reasonable offeror would question any such oral assurance in view of the fact that the written OD instructions regarding OD 3.1.1 specify at six different places in the text that the Intel 310 must be used.

Syscon argues further in this regard that even if the evaluators did not specifically authorize the use of the Wyse PC in fulfilling OD 3.1.1, they acted improperly by failing to intervene and inform Syscon that it could not use the Wyse PC. While we have recommended, in certain limited instances, that an agency conduct a second benchmark test where an offeror failed to pass because of a relatively minor operator error which could easily have been pointed out to the offeror during the initial test, see The Computer Co., B-198876, Oct. 3, 1980, 80-2 CPD ¶ 240, we do not believe the circumstances warrant such a recommendation here. First, it appears that Syscon was told that it could not pass the OD using the Wyse PC. Moreover, even if Syscon was not so warned, the problem here was not a minor operator error. The protester used a PC other than that which the written OD instructions clearly set out as the basis of the demonstration. The fact that the protester passed the demonstration using the Wyse PC is irrelevant. Further, there is nothing in the record which indicates Syscon could have passed the OD using the Intel PC had the evaluators stopped Syscon and insisted that it use the Intel. According to the agency, Syscon's representative had been working throughout the OD with the specified Intel PC and the agency representative assumed that after the protester ran the test on the Wyse PC the Intel demonstration would follow. It never did and the evaluators just assumed that the Intel demonstration was not attempted because Syscon was not able to perform it.

We have no basis upon which to conclude that Syscon passed the OD or that the protester should be granted another opportunity to demonstrate its equipment.

Battery Charger/Discharger Units

The solicitation requires that two battery charger/discharger units be supplied; a ten battery unit for the portable data collection device and a four battery unit for the portable bar code analyzer. The agency states that the unit proposed by Syscon was not demonstrated in the final OD.

Syscon argues that since the battery charger/discharger was not listed on the OD checklist and not specifically included as an OD requirement its alleged failure to demonstrate the unit at the final OD was not a proper basis upon which to reject its proposal.

While the OD checklist does not have a separate space for a battery charger/discharger demonstration, the OD instructions do provide that offerors are expected to be able to demonstrate their proposed battery charger/discharger units. Further in this regard, the OD checklist from the November 17 full OD specifies that "new charger/discharger to be demo'd 12-11-87." Finally, in a letter dated November 20, the agency informed Syscon that it must be prepared to demonstrate a compliant battery charger/discharger at the final OD. Thus, to the extent that Syscon argues that it was not required to demonstrate a battery charger/discharger at the final OD its position is not supported by the record.

In fact it is not entirely clear what the protester's position is in regard to the battery charger/discharger. It seems to argue that it met the requirements by demonstrating its ten battery unit. Apparently the protester intended to meet the requirement for a separate four battery unit by showing that its ten battery unit could also operate as a four battery unit. As far as we can determine it never conducted a demonstration of that unit during the final OD. It appears to be the protester's view that since it was not specifically asked during the OD to demonstrate its four battery unit, that omission should not be used as a basis for concluding that the protester failed the final OD.

We disagree. We think that the OD instructions and the subsequent letters made clear that Syscon was to demonstrate a compliant unit. It was up to the protester to show that its unit meet the RFP requirements. Since the protester did not demonstrate its unit, we cannot fault the agency for concluding that the protester's unit did not meet the RFP requirements.

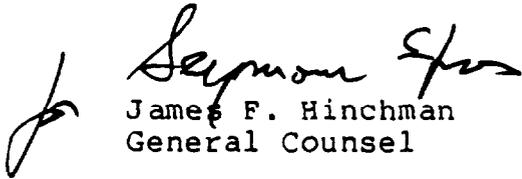
O.D. Requirement 1.4.2.1.

The protester has not raised a specific timely objection to the results of this demonstration, which concerns the operation of the offeror's portable data collection device in conjunction with an IMB PC.

CONCLUSION

While the protester has been able to show that there were indeed some flaws in the final OD procedure (i.e. the failure to have the offeror certify the results) and that it strongly disagrees with the agency's conclusions, we think that the record is clear that Syscon failed each of the disputed demonstration requirements. Thus we conclude that the rejection of Syscon's proposal was proper under the terms of the OD instructions which state that to be acceptable an offeror must pass all of the OD requirements.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel