



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Unisys Corporation

File: B-231704

Date: October 18, 1988

DIGEST

1. The proposal of an offeror, whose proposed products could not pass pre-award performance tests, and who consequently made apparently untested, design modifications, was reasonably found unacceptable and outside the competitive range, where the agency has documented its determination that the offeror's technical proposal represented an unacceptably high risk that technical requirements could not be met in a timely manner and the offeror has not clearly established the feasibility of its approach.
2. A technically unacceptable proposal can be excluded from the competitive range irrespective of its low evaluated cost.
3. An agency can exclude from the competitive range an offeror initially included in the competitive range if it is determined the offeror no longer has a reasonable chance for award.
4. An agency has not misled an offeror during discussions, where the offeror necessarily responded to the opportunity to revise its proposal after receiving almost completely negative pre-performance test results, even though the offeror was ultimately found unacceptable, in part, because these untested design revisions caused the agency to determine that they represented an unacceptably high risk that the offeror could not timely meet the contract technical requirements.

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DECISION

Unisys Corporation protests its exclusion from the competitive range under request for proposals (RFP) No. DAAB07-87-R-B0766, issued by the United States Army Communications-Electronics Command, Fort Monmouth, New Jersey, for the Army Command and Control Systems Common Hardware and Software system.

We deny the protest.

The stated purpose of the acquisition is to buy, over a 5-year period, compatible non-developmental items (NDI) of computer hardware, software, and associated services, including hand-held terminal units, portable terminal units, transportable computer units and various peripheral devices. These items are to be used by the United States Army in the field for tactical operations.

The RFP provided that award would be made "to the offeror whose proposal, as verified by the performance test, represents the best overall proposal," and listed the evaluation factors and subfactors. The technical and cost factors were said to be approximately equal and significantly more important than any of the other three evaluation factors: reliability and maintainability; logistics; and management. There were eight subfactors of the technical factor, including operational suitability, hardware, software, programming support environment, software portability, tests, technology insertion, and technical assistance for engineering support. Operational suitability was said to be the most important of the subfactors, while the other subfactors were said to be equal. The RFP also stated that "[to] be eligible for award, an offeror must receive a rating of no less than acceptable in each of the factors and the operational suitability subfactor."

The RFP stated that the evaluation of the above listed technical factors would be based on three criteria: (1) adequacy of response; (2) feasibility of approach; and (3) performance test demonstration. The RFP also stated:

"As the government will not be able to verify all performance items during the pre-award performance demonstration, the offeror's proposed performance warranty will provide a degree of realism to the claims for his products' performance. Performance warranty is, therefore, very important and will be considered in evaluating all factors, as appropriate."

Three proposals were received on September 8, 1987, from Unisys, Miltope Corporation and Magnavox Government and Industrial Electronics Company, and all were found "susceptible" by the Source Selection Evaluation Board (SSEB) and Source Selection Advisory Council (SSAC). The Source Selection Plan defines a "susceptible" proposal as one that--

"does not clearly meet the requirements of the RFP and/or appears to be an unacceptable approach. Offeror can correct without a major rewrite of the proposal."

The offerors' units were subjected to in-plant performance test demonstrations in November 1987 and user troop demonstrations at Fort Huachuca, Arizona, from November 1987 to January 1988. Extensive written and oral discussions were conducted with all offerors, where numerous weaknesses and deficiencies were pointed out and additional information obtained, both before and after the tests, from October 1987 through May 20, 1988. By letter dated April 11, 1988, all offerors were furnished draft contracts for their review; that letter stated that after May 20, a competitive range determination would be made in order to determine which offerors would be requested to submit best and final offers (BAFOs).

By May 24, 1988, the SSEB, the SSAC and the Source Selection Authority determined, and Unisys was notified, that Unisys was no longer considered in the competitive range. Unisys was subsequently provided a debriefing that elaborated on the reasons that Unisys' proposal was rejected. The other two offerors were found in the competitive range and BAFOs were solicited from them. After the protest was filed, award was made to Miltope.

The Army determined that any award to Unisys would result in an unacceptably high risk that Unisys would not supply conforming products that meet required delivery schedules. The Army primarily based its high risk assessment on Unisys' unsuccessful pre-award tests of its originally proposed equipment and the resultant constantly changing hardware baselines, which included many newly designed items, very little of which had been verified by the pre-award tests or any other independently validated test data. The Army also found that too much software development and integration had

yet to be done by Unisys, particularly the "Ada" compiler,^{1/} which the Army did not believe could be timely validated to meet contract requirements, and that Unisys proposed "generic" product specifications without specifically offering brand names. Finally, the Army determined that Unisys' proposal and conduct during discussions demonstrated a lack of understanding regarding the Army's needs in a tactical environment. The cumulative effect of all these risk considerations, as well as the "excessive" weight of the hand held terminal unit, provided the Army with little or no confidence in Unisys' successful performance of the contract. This translated into an "unacceptable" rating in the "operational suitability" and "hardware" subfactors as well as serious disadvantages in the "software" and "program support environment" subfactors. When Unisys' proposal was rejected, its proposal was evaluated as having the lowest cost.

Unisys protests on the basis that since its proposal was acceptable, as evidenced by the Army forwarding it a draft contract, it was unreasonable to eliminate it from the competitive range. Unisys claims that its proposal was not evaluated in accordance with the RFP evaluation criteria, since the performance test results were excessively relied upon, and Unisys' proposed warranty and low cost were disregarded in the decision to eliminate it from the competitive range. Unisys also protests that meaningful discussions were not held with it, since it was encouraged by the Army during discussions to make changes in its proposed units and then, because it did so, it was penalized for having an unacceptably "high risk."^{2/}

The evaluation of technical proposals and the resulting determination of whether an offeror is in the competitive range is the responsibility of the contracting agency and

^{1/} An Ada compiler is software that translates Ada code, a standard high order language of the Department of Defense, into machine readable language.

^{2/} Unisys also asserts that although the Army claimed the hand-held computer unit was an NDI item, it actually required a developmental project to "ruggedize" this unit to meet RFP requirements. This contention is not only untimely raised under our Bid Protest Regulations, 4 C.F.R.

§ 21.2(a)(1) (1988), since the claimed NDI nature of this procurement was proclaimed in the RFP, but it is not germane to the basic issue whether Unisys' proposal was reasonably evaluated in accordance with the RFP criteria.

will be questioned by our Office only if it is shown to be unreasonable or not in accordance with the evaluation criteria or applicable statutes or regulations. GTE Government Systems Corp., B-222587, Sept. 9, 1986, 86-2 CPD ¶ 276. Unisys has not met its burden of showing the evaluation was unreasonable.

Unisys first contends that the Army gave too much weight to performance test results and not enough weight to the proposed performance warranty. It is true that the proposed warranty was an important evaluation criterion on which the evaluation of the technical subfactors would be based. However, the performance tests, as well as the adequacy of the response and the feasibility of the approach, were each equally important evaluation criteria. Moreover, the RFP indicated that more credit would be given to offerors whose technical proposals were "verified" by the performance test demonstrations, and that an offeror who was unable to successfully demonstrate all claimed capabilities was required to demonstrate in its proposal how the offered units would be modified to meet specification requirements. Consequently, we do not agree that a sufficiently attractive proposed warranty can be substituted for a proposal that has unacceptable operational suitability and hardware.

Here, the record clearly shows that Unisys' proposed warranty was considered in making the competitive range determination, but Unisys' proposal was otherwise unacceptable. Also, as Unisys admits, its performance tests were generally unacceptable in that its compliance with specification requirements was not and could not be demonstrated for almost all requirements. Unisys was given an opportunity after the tests to revise its proposal to demonstrate that it could meet the specification requirements, but the Army found Unisys did not convincingly do so. Under the circumstances, we find that appropriate weight was given to both Unisys' performance test results and its proposed warranty.

The primary focus of the Army determination to eliminate Unisys' proposal was its finding that Unisys' technical proposal represented an unacceptably high risk that technical requirements could not be met in a timely manner. We have consistently viewed an agency's reasonable concerns as to the levels of risk created by a particular proposal approach as proper factors to be considered in the selection process. Space Communications Co., B-223326.2; B-223326.3, Oct. 2, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 377; Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21. Therefore, an agency's judgment that a proposed approach

presents high or unacceptable risk generally will not be questioned unless the offeror has clearly established the feasibility of the approach within the confines of the proposal. Id.

Here, the record shows that Unisys did make numerous, apparently untested, design changes in its proposal as a result of the extensive discussions following its poor pre-performance testing. While Unisys argues that its basic units remained the same, the Army disagrees and has carefully documented its determination in this regard. Specifically, the Army found that many of Unisys' last proposed units were proposed in concept only without any detailed design, e.g., its communications units; and that Unisys' proposed Ada compiler could not be validated in time to meet contract schedule requirements. Moreover, as outlined above, the Army enumerated and documented other reasons that adversely impact the critical "operations suitability," "hardware," and "software" subfactors that the Army found cumulatively led to Unisys' unacceptable rating. In addition, Unisys' proposal and responses in discussions were found to demonstrate a lack of understanding of the Army's operational requirements in a tactical environment.

In contrast, although Unisys was provided much of the documentation regarding the Army's determination after the intervention of our Office in response to Unisys' request for documents pursuant to section 21.3(f) of our Bid Protest Regulations, 4 C.F.R. § 21.3(f), Unisys failed to respond in depth to the Army's determination that its proposal represented an unacceptably high risk. With two exceptions, Unisys has made only general assertions disagreeing with the Army's decision; only the acceptability of the Ada compiler and the weight of the hand-held terminal unit have been contested by Unisys.

With regard to the Ada compiler, the Army evaluated Unisys' last proposal as indicating that it would not have a "fully tested" compiler until 300 days after date of contract. The RFP required a validated compiler 90 days after date of contract. Moreover, Unisys did not demonstrate the capabilities of the Ada compiler at the pre-performance tests. Consequently, the Army found that it "did not believe" Unisys could provide a fully validated compiler by 90 days after date of contract. Timely delivery of a validated Ada compiler is critical to operation of the system because otherwise there would be no confidence the system would work, if the compiler has not been validated, which may necessitate later corrective action.

Unisys says that if it knew the Army was critically concerned, it would have offered an earlier release of the compiler that has been validated and would fully meet the RFP schedule requirements. However, the Army says, without rebuttal, that Unisys did not mention this alternative until after its proposal was rejected when it was debriefed, even though the RFP requirements on this point are clear.

With regard to its failure to demonstrate its Ada compiler's capabilities, Unisys concedes that it did not do this at the pre-performance tests, but claims that the Army should have been aware that this was Unisys' plan prior to the tests. The Army disputes Unisys' claim and has furnished documentation indicating that it apprised Unisys that it should demonstrate the overall Ada compiler capability at the pre-performance tests, even if the compiler had not yet been validated. Therefore, we find the Army's concern about Unisys' Ada compiler was reasonable and that Unisys has been treated fairly in this regard.

Unisys claims it was unfairly penalized because its hand-held terminal unit, which was intended for use by soldiers in the field, was considered too heavy. The RFP stated the weight of the unit "is desired to be no more than eight (8) pounds." Unisys' finally proposed hand-held unit was considerably heavier, 12.9 pounds, including batteries. The Army found that Unisys' unit did not just exceed the desired weight, but was so heavy as to interfere with the operational suitability of the unit. Because of the expressed desire in the RFP, the Army could reasonably penalize Unisys for not proposing a hand-held unit within the optimum weight.

Unisys claims the major reason that its unit was too heavy was it was advised only in May 1988 by the Army that it could not use standard "C" size alkaline batteries and had to utilize the much heavier lithium batteries. Unisys explains that alkaline batteries are far cheaper, can be used for almost all tactical operations, and would allow the hand-held terminal unit to weigh close to 8 pounds. However, when asked on May 2 by the Army whether the alkaline batteries met the stated RFP requirements, Unisys conceded that the batteries could not operate at minus 25 degrees fahrenheit as required by the RFP, although Unisys then attempted to persuade the Army (unsuccessfully) that alkaline batteries were suitable for use for ordinary garrison duty at other than arctic temperatures.

Unisys claims that it was never furnished the operating environmental information regarding the use of the hand-held units. However, the RFP clearly stated that the hand-held

units must be suitable for use in temperatures ranging from minus 25 degrees to 120 degrees fahrenheit. The record does not show why the Army did not earlier discover this problem and point it out to Unisys. However, it appears that Unisys consciously decided not to comply with the lower temperature range requirements in formulating its proposal. Since the weight of the hand-held unit was only one of many factors leading to the rejection of Unisys' proposal, we find that Unisys was not prejudiced, even assuming the Army should have earlier apprised Unisys of its problem.

Unisys argues that its low price was not considered in the decision to eliminate it from the competitive range. The record shows, however, that Unisys' low evaluated cost was taken into account in the decision to eliminate it from the competitive range. We have long held that a technically unacceptable proposal can be excluded from the competitive range irrespective of its low offered price or evaluated costs. 52 Comp. Gen. 382 (1972); Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.

Unisys argues that it is not possible for it to be declared outside the competitive range when its initial proposal was admittedly inside that range and continued to be so, as is evidenced by the Army's forwarding it a draft contract. However, the record indicates that Unisys' proposal was never considered acceptable and that Unisys was advised by the Army that the forwarding of the draft contract did not mean that it would be requested to submit a BAFO or that its proposal was in the competitive range. In any case, we have consistently found that an agency can exclude from the competitive range an offeror initially included in the competitive range, if it is determined that the offeror no longer has a reasonable chance for award. Mark Dunning Industries, Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364; Space Communications Co., 66 Comp. Gen. supra. Here, given Unisys' documented deficiencies, we find the Army's decision to exclude Unisys from the competitive range was reasonable.

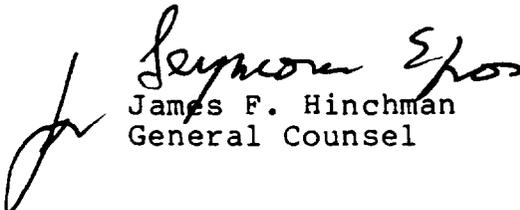
Unisys finally claims that the Army did not comply with its obligation to conduct meaningful discussions. The record shows that extensive discussions covering all aspect of the offerors' proposals were conducted, where under weaknesses and deficiencies were pointed out by the Army. Unisys claims these extensive discussions were the cause of its substantially modifying its proposal after the performance tests. Unisys claims that its revisions were then cited as the primary basis for determining it was too risky and untested and thus unacceptable. Unisys states that therefore the discussions were "meaningless," if not affirmatively misleading.

We have consistently stated that in order for discussions in a negotiated procurement to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to the areas in which their proposals are believed to be deficient, so that offerors may have an opportunity to revise their proposals to fully satisfy agency requirements. Proprietary Software Systems, B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143. It is axiomatic that the government does not satisfy its obligation to conduct meaningful discussions by consciously misleading an offeror into lowering the evaluated quality of its proposal. Fairchild Weston Systems, Inc., B-229843, Apr. 1, 1988, 88-1 CPD ¶ 331 (where agency did not mislead offeror in discussions).

Here, the discussions were not misleading. As Unisys well knew, the pre-performance test results were almost completely negative. Consequently, Unisys necessarily responded to the opportunity to revise its units during discussions, since this was the only way its proposal was going to be made acceptable. In this regard, the RFP specifically warned that undemonstrated features must be documented in the proposal. As discussed above, any belief by Unisys that a superior warranty would save an otherwise unacceptable proposal was unreasonable. Therefore, since Unisys was still considered in the competitive range, these discussions were appropriate and not misleading.

Unisys speculates that it may have been in a "no win" situation after its units performed poorly in the pre-performance tests, since the modifications it made caused it to be disqualified as being too risky. The Army concedes that Unisys had an "uphill battle" to persuade the Army that its units were acceptable after the poor pre-performance test results, but it believed that Unisys could still demonstrate that its units could meet the Army's requirements and it thought it should offer Unisys the opportunity to submit an acceptable proposal in view of Unisys' low cost. Under the circumstances, we cannot conclude the Army acted unreasonably in this regard.

The protest is denied.


James F. Hinchman
General Counsel