



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dowty Maritime Systems Inc.,
Resdel Engineering Division

File: B-237170; B-237173

Date: February 2, 1990

Peter B. Jones, Esq., Foster, Jones & Donovan, for the protester.
Edward J. Korte, Esq., Office of Command Counsel, Department of the Army, for the agency.
V. Bruce Goddard, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency erroneously advised protester that its proposals were acceptable and within the competitive range in conducting discussions before the evaluation was completed, the protester was not prejudiced when the agency ultimately and reasonably determined that the proposals were unacceptable, even though the protester had not been apprised of all cited deficiencies during the discussions, since the portions of the proposals which the protester clarified during discussions showed its lack of understanding of the request for proposals (RFPs) requirements.

DECISION

Dowty Maritime Systems Inc., Resdel Engineering Division, protests the awards of contracts to General Electric Co., under requests for proposals (RFPs) Nos. DAAB07-89-R-S056 and DAAB07-89-R-S057, issued by the United States Army Communications Electronics Command (CECOM). The two solicitations were issued for the development, fabrication, and testing of separate subsystems of the Improved Remotely

047668/140563

Monitored Battlefield Sensor System (I-REMBASS). RFP No. DAAB07-89-R-S056 called for 12 monitor programmers and RFP No. DAAB07-89-R-S057 called for 12 mini-repeaters. Both acquisitions are a part of the Army's effort to downsize the current I-REMBASS system for use by the special operations forces. Although the solicitations call for two different electronic components, we have consolidated the protests in one decision since the facts, bases of protest, RFPs' evaluation factors, and evaluations are virtually identical.

We deny the protests.

Both RFPs provided that award would be made to the offeror whose proposal represented the best value to the government and listed six factors to be evaluated: (1) system design; (2) produceability; (3) price; (4) quality assurance; (5) logistics; and (6) management. Of these factors, system design was the single most important factor with produceability and price being of equal weight and together more important than quality assurance, logistics and management combined. Quality assurance, logistics and management were all of equal weight. Subfactors were listed for each factor in descending order of importance. The four subfactors for system design were miniaturization, logic design, operational suitability, and vulnerability assessment. The three subfactors for management were past performance, management plan, and work-breakdown structure. Both RFPs stated that all aspects of the proposals would be evaluated for the amount of risk involved in each approach, method, or technology proposed.

Only Dowty and General Electric submitted responses to these RFPs. By letters dated July 25, 1989, on both solicitations, the contracting officer advised Dowty as follows:

"A competitive range has been established for this solicitation, and your proposal is considered to be within this range. Although your proposal has been determined to be acceptable, there are several areas in your proposal which require further clarification in order to provide sufficient information for completion of the Government's evaluation. . . . You are not expected to make major revisions to your proposal. This letter constitutes the initiation of technical discussions within the meaning of

paragraph 15.610 of the Federal Acquisition Regulation [FAR]."

Dowty responded to the questions and requests for further information stated in the letter. On September 20, Dowty was informed that its proposals on both RFPs were rated unacceptable primarily because they were unacceptable in the most important "system design" evaluation factor. Among other things, the Army found that Dowty's proposals (1) did not demonstrate with sufficient details that it could successfully meet the miniaturization requirements and (2) did not demonstrate any understanding or give the Army any confidence that Dowty could comply with the Ada software requirements, even though Dowty's approach was heavily software reliant.^{1/}

Dowty contends that none of the deficiencies listed in the Army's September 20 letters, informing Dowty that its proposals were unacceptable, were discussed or mentioned in the Army's earlier letters requesting clarifications of Dowty's "acceptable" proposals. Dowty consequently contends that the Army never held meaningful discussions with it even though it was in the competitive range and that the Army wrongfully failed to request best and final offers (BAFOs) from Dowty.

The Army states, and the record confirms, that although Dowty was informed on July 25 that its proposals were acceptable, the technical evaluation of Dowty's proposals had not yet been completed; they were still ongoing and the use of the term "acceptable" to describe Dowty's proposals was premature and a mistake on the contracting officer's part. The Army states that the technical evaluations were not completed until September 7, after the Army had reviewed the clarifications submitted by Dowty. The Army contends that once the evaluation was completed and Dowty was found unacceptable, Dowty was properly excluded from any further discussions since Dowty had no reasonable chance of being selected for award.

Discussions, as opposed to clarifications, are defined by regulation as any oral or written communications between the government and an offeror involving "information essential for determining the acceptability of a proposal." FAR § 15.601(a) (FAC 84-28). In order for discussions in a

^{1/} Ada is a standard high order language of the Department of Defense.

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 the government's requirements. FAR § 15.610 (FAC 84-16); Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

It is apparent that CECOM's July 25 letters notifying Dowty that it was in the competitive range and transmitting numerous specific questions concerning Dowty's proposals constituted discussions and not mere clarifications. While the contracting officer acted prematurely in notifying Dowty that its proposals were acceptable, the plain language of the Army's July 25 letters and the content of the Army's questions demonstrated that discussions were conducted. Moreover, Dowty is correct that the Army did not discuss several aspects of Dowty's proposals on which the Army's decision to find Dowty unacceptable was partly based. As the record shows, these problems were not raised because the technical evaluation had not been completed. For example, Dowty was not advised of the Army's concerns about Dowty's proposals in the "miniaturization" subfactor of the most important, "system design" evaluation factor. Nevertheless, for the reasons set out below, Dowty was not prejudiced by any flaws in the Army's conduct of discussions.

One overall reason Dowty was properly considered unacceptable was that its proposals were found to demonstrate a lack of understanding of the RFPs' software requirements. Indeed, the Army states that Dowty's responses to the questions in discussions confirm Dowty's lack of Ada development experience, as well as a lack of understanding and knowledge needed to successfully develop the software.

Specifically, since Dowty has no company experience in Ada software development nor an in-house Ada compiler and, because this high order language was required to be used to fulfill the RFPs' requirements, Dowty proposed to use an outside consultant to supervise Dowty's non-Ada trained software programmers in developing the required software for both the monitor programmers and mini-repeaters. The Army has stated that its experience demonstrates that a failure to properly develop Ada-based software jeopardizes the success of the entire program. Thus, the Army reasonably

regarded Dowty's approach as presenting an unacceptably high risk to successfully accomplishing the contract work on schedule. We have 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., 66 Comp. Gen. 2 (1986), 86-2 CPD ¶ 377.

The Army also notes that Dowty's proposals significantly underestimated the amount of time to compile and develop software to accomplish the RFPs' work which demonstrated its lack of understanding of Ada software development. Since Dowty's design was "driven by" the software, Dowty's demonstrated lack of understanding and apparent lack of experience in developing Ada software was especially critical. Moreover, Dowty does not specifically dispute the Army's assessment of Dowty's lack of understanding and experience in software development in Ada and our review of the evaluation documents does not give us any basis to find the Army's assessment unreasonable.

The Army was not limited in assessing an offeror's use of Ada, as Dowty contends, to the management factor.^{2/} In this regard, both RFPs explained that under the logic design subfactor, "proposals will be evaluated to assess the proposed design (e.g. software, . . .) and the degree to which it meets the electrical performance requirements. If a software design is chosen, the high order language, Ada, must be used." Since Dowty proposed a software design, the understanding of the Ada language was an important element under the "logic design" subfactor, and a demonstrated lack of understanding of this factor could reasonably be severely penalized under this evaluation subfactor.

Dowty argues that the mere requests for clarification of its "acceptable" proposal did not alert it to any deficiency in the "logic design" subfactor. However, the Army directed Dowty to the logic design and management areas with questions relating to Dowty's knowledge and experience in software development. Even though the Army stated, at the time it requested clarifications, that Dowty's proposals were acceptable, Dowty was apprised, nevertheless, that the Army needed further clarification in these crucial areas,

^{2/} As noted above, Dowty's lack of Ada development experience was noted in finding its proposals for the management factor unacceptable as well as the logic design subfactor unacceptable.

among others. Since Dowty's responses showed no doubt of Dowty's inability in the crucial Ada software area, even after the Army had specifically requested Dowty to address this area, only confirms that Dowty's proposals were so deficient as being not susceptible to being made acceptable. The Army's subsequent finding that Dowty's proposals were no longer in the competitive range was accordingly proper. Supreme Automation Corp.; Clay Bernard Sys. Int'l, B-224158; B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83.

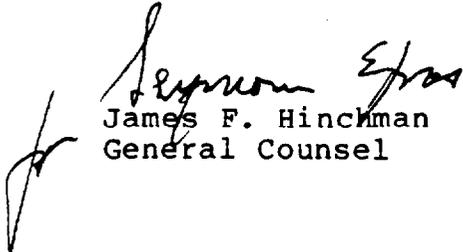
Consequently, we find Dowty's "unacceptable" ratings in "logic design" and "management" reasonable support for overall "unacceptable" ratings. This is in contrast to General Electric's generally outstanding ratings. Specifically, for both of its proposals, Dowty was rated unacceptable in system design and management, marginal in quality assurance and acceptable in produceability and logistics. For its proposals, General Electric was rated outstanding in the three most important criteria--system design, produceability, and quality assurance and acceptable in logistics and management. General Electric's proposals, therefore, were substantially superior to Dowty's. Even if it is assumed that Dowty would have received "acceptable" ratings in the area in which discussions were not held, specifically "miniaturization," its proposals would still be considered unacceptable because it was reasonably found unacceptable in several areas in which discussions were held, the management factor and the logic design subfactor. That is, Dowty could not have supplanted General Electric's substantially superior proposals, even assuming Dowty was able to persuade the Army of the feasibility of its miniaturization approach because crucial portions of its proposal remained unacceptable.^{3/} Questech Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. Compare Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100.

In any case, since the record shows that the evaluations which resulted in Dowty's unacceptable ratings were in accordance with the RFPs evaluation criteria, the agency's erroneous designation of Dowty's proposals as acceptable did not prejudice Dowty. See RDW Sys., Inc., B-204207, July 20, 1982, 82-2 CPD ¶ 61. Moreover, the fact that an agency

^{3/} Although the Army has documented fundamental flaws in Dowty's miniaturization approaches, Dowty has indicated that it could furnish further unspecified data in this area if it had been given the chance.

initially included proposals in the competitive range does not preclude it from later excluding the proposals from consideration, if proposals no longer have a reasonable chance of being selected for award. Supreme Automation Corp.; Clay Bernard Sys. Int'l, B-224158; B-224158.2, supra. In addition, Dowty's technically unacceptable proposals could properly be excluded from the competitive range irrespective of its low offered prices. Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94; Supreme Automation Corp.; Clay Bernard Sys. Int'l, B-224158, B-224158.2, supra.

The protests are denied.


James F. Hinchman
General Counsel