

Pietrovito



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Besserman Corporation
File: B-237327
Date: February 14, 1990

David P. Metzger, Esq., Kirkland & Ellis, for the protester.
Wanda Rappaport, PhD., for the interested party, General Research Corporation.
James Trickett, Deputy Assistant Secretary for Management and Acquisition, Department of Health and Human Services, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency failed to conduct meaningful discussions with the protester where the agency's technical concerns, which resulted in the elimination of the protester from the competitive range, were discovered during an on-site demonstration of the protester's software conducted after receipt of best and final offers and the agency failed to point out these concerns to allow the protester the opportunity to explain or retest the questioned aspects of the software.

DECISION

Besserman Corporation protests the award of a contract to General Research Corporation (GRC) under request for proposals (RFP) No. 273-89-P-0012, issued by the National Institute of Environmental Health Sciences (NIEHS), Department of Health and Human Services, for software and services in support of the agency's occupational health and safety database. Besserman contends that NIEHS improperly evaluated its proposal and failed to conduct meaningful discussions.

We sustain the protest.

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NIEHS conducts research concerning the effects of chemical, physical, and biological agents on man and the environment. In performing this research, NIEHS's employees are potentially exposed to toxic chemicals, radioisotopes, and biological materials. NIEHS has developed a comprehensive occupational health and safety program for its employees which includes exposure monitoring, employee education and training, hazardous material inventory tracking and control, use of engineering controls and personal protective equipment, and occupational health surveillance. Each of these activities requires the collection and maintenance of large quantities of information.

The RFP contemplates the award of a firm, fixed-price contract for software and services necessary to operate NIEHS's health information system for a base year and 4 option years. The RFP stated that paramount consideration would be given to the evaluation of technical proposals rather than price. The RFP listed the following weighted evaluation criteria:

	<u>Points</u>
1. <u>System Performance Capacity and Technical Support</u> : availability and ability of the system modules to function as described in the statement of work, ease of operation, and availability of technical support.	40
2. <u>Report Generation, Statistical Capability and Documentation</u> : ability of system to generate standard reports as well as ad hoc reports with user defined data elements and formats.	15
3. <u>Data Entry, File Interface and Compatibility</u> : ability to interface with NIEHS system, capability to generate error messages to data entry personnel, and ability to accept fixed format files.	15
4. <u>System Security and Back-up</u> : ability to protect confidential information by restricting system, module and data element access for individual users.	15

5. Maturity and Stability of the Company: number of current and satisfied customers using the specified system.

15

100

The statement of work provided that the required software must be capable of running on Digital Equipment Corporation MicroVAX II computers and at a minimum must include comprehensive personnel, medical, industrial hygiene and safety, health physics, and hazard communication modules.^{1/} The RFP further described each of the specified modules. For three of the modules, the RFP informed offerors that provisions must be made for accepting free text responses and comments.

NIEHS received proposals from Besserman and GRC and, after evaluation of initial proposals, found both proposals to be acceptable and within the competitive range. Written discussions were conducted with each offeror, and best and final offers (BAFOs) requested. After receipt of BAFOs, a demonstration of each offeror's software package was performed on-site at NIEHS.

NIEHS reevaluated the offers on the basis of the BAFOs and the on-site technical demonstration as follows:

	<u>Points</u>	<u>Price</u>
GRC	89.4	\$174,450
Besserman	62.8	\$101,656

The contracting officer determined that GRC's technical proposal was superior to Besserman's and that Besserman, although technically acceptable, no longer had a reasonable chance of receiving award. NIEHS eliminated Besserman from the competitive range and reopened discussions with GRC for the purpose of negotiating price. Award was made to GRC on September 25, 1989. Besserman, after receiving a written debriefing from NIEHS, protested to our Office on October 6.^{2/}

^{1/} A module is a self-contained component of a "building block" designed software system.

^{2/} Performance of GRC's contract has not been suspended since Besserman's protest was not filed within 10 calendar days of contract award. 31 U.S.C. § 3553(d)(1) (Supp. IV 1986); 4 C.F.R. § 21.4(b) (1989).

Besserman protests that meaningful discussions were not conducted with it and that it did not receive an opportunity to revise its proposal in response to the agency's concerns. Specifically, the protester argues that NIEHS's discussions letter did not identify the technical deficiencies listed in the agency's debriefing letter. Besserman also argues that the deficiencies identified in its debriefing are inaccurate and contends that if the protester had notice of the agency's technical concerns, it could have demonstrated that its software would fully satisfy the government's needs.

NIEHS contends that Besserman was informed of the agency's technical concerns in the discussions letter and during the on-site demonstration. NIEHS argues that Besserman had ample opportunity in its BAFO and during the demonstration to respond to the agency's concerns and show the suitability of its software. The agency contends that its determination to eliminate Besserman from the competitive range was reasonable because "it was apparent that [Besserman] could not overtake the successful offeror with regard to the superiority of its technical offer."

The determination of whether a proposal is in the competitive range is principally a matter within the contracting agency's reasonable exercise of discretion. Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273. Further, the fact that an agency initially included a proposal in the competitive range does not preclude it from later excluding the proposal from consideration if it no longer has a reasonable chance of being selected for award. Supreme Automation Corp., et al., B-224158, B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83. However, we will closely scrutinize an agency determination which results in a competitive range of one. Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451. As we stated in Comten-Comress, B-183379, June 30, 1975, 75-1 CPD ¶ 400, at 6:

"Determinations by contracting agencies that leave only one proposal within the competitive range are closely scrutinized by our Office. If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposal; if the informational deficiency could be reasonably corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order."

Here, we think NIEHS's determination to remove Besserman from the competitive range when it did was unreasonable. We further find that meaningful discussions were not conducted with Besserman.

In order for discussions in a negotiated procurement to be meaningful, contracting officials must furnish information to offerors in the competitive range as to the areas in their proposals which are believed to be deficient, so that the offerors have an opportunity to revise their proposals to fully satisfy the government's requirements. Federal Acquisition Regulation § 15.610 (FAC 84-16); Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. In this regard, we have found that where, as here, a performance demonstration, or benchmark, is an inherent part of the negotiation process, deficiencies which only come to light during the benchmark should be pointed out and offerors given the chance to correct them if possible. CompuServe Data Sys., Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374, at 11.

NIEHS argues that Besserman was informed of the areas of weakness in its proposal in the agency's discussions letter and again during the on-site demonstration. The record shows, however, that Besserman's proposal was eliminated from the competitive range primarily for deficiencies that were only discovered during the post-BAFO, on-site demonstration, and thus these deficiencies could not have been included in the discussions letter. Specifically, NIEHS's concerns about Besserman's software during the demonstration were that: (1) the software's free text handling capabilities were limited; (2) macros (or memorized procedures) appeared to be used only during report generation and not during other program functions such as data entry; (3) the number and type of data elements appeared limited; (4) the program did not allow security access to the individual data element, and (5) the medical module did not adequately provide for retrieval and analysis of multiple types of data normally associated with worker's compensation.

Besserman argues that it was not informed of these concerns during the written discussions or at the demonstration. In this regard, Besserman has provided us with the affidavit of its technical manager, who demonstrated Besserman's software at NIEHS. He states that he demonstrated all of the features of Besserman's software package and that the technical evaluators did not identify, or seek clarification of, the deficiencies mentioned in the debriefing letter. Specifically, the demonstrator states that the evaluators did not seek clarification of the

system's handling of free text and data elements, which were technical concerns that the technical evaluation committee chairman identified as significant. He also contends that Besserman's software, as demonstrated, is not limited in the fashion described by the agency.

Although NIEHS states that it discussed its technical concerns with Besserman's demonstrator at the demonstration, it has not filed any affidavits to rebut the statement of Besserman's demonstrator. Moreover, while NIEHS argues generally that discussions in each of the technical areas of concern occurred at the demonstration, it does not indicate the kind or specificity of information that was purportedly conveyed to Besserman. Furthermore, in response to our inquiry, NIEHS informed us that while its evaluators had taken notes of the demonstration, these contemporaneous records were not retained by the agency. NIEHS states that the notes were not retained since the BAFO technical evaluation report, which was prepared by the technical evaluation committee chairman, incorporated the perceptions of the evaluators. This report, however, does not indicate that any discussions occurred during the demonstration.

We conclude from this record, including Besserman's affidavit and NIEHS's failure to provide documentation concerning the benchmark test, that the agency did not reasonably convey its specific technical concerns about Besserman's software which arose at the benchmark. While NIEHS argues in this regard that it was only obligated to lead Besserman into its areas of concern, we think the evaluators' concerns, in the context of a benchmark, should be as specific as possible since many concerns can be resolved during the benchmark process. See The Computer Co.--Recon., 60 Comp. Gen. 151 (1981), 81-1 CPD ¶ 1. We further think that if Besserman had been informed of NIEHS's specific concerns at the benchmark, Besserman may very well have been able to explain the questioned system features or demonstrate that its software would satisfy the government's needs.^{3/}

For example, NIEHS states that its evaluators observed at the demonstration that Besserman's free text handling capability was limited to free text of 7 lines by 25 characters and that this limitation was considered to be a major concern since much of the information the agency

^{3/} NIEHS states that the evaluators met immediately following the benchmark and identified the strengths and weaknesses of the offerors' software. Therefore, NIEHS clearly knew of Besserman's weaknesses at the benchmark.

needed to place in the system was in free text. Besserman states that the agency's conclusion is incorrect because its software is not limited to free text of only 7 lines by 25 characters and that Besserman could have explained or demonstrated that its system was not so limited if it had been given the opportunity at the demonstration.

Also, NIEHS was concerned with the types and number of data elements available in report generation and that data elements appeared limited to three synonyms. Besserman states that its software handles an unlimited number of synonyms through the use of a synonym table. This table is composed of three synonym types, each of which can handle an unlimited number of synonyms. We think these concerns, as well as NIEHS's other concerns (that its use of macros appeared to be utilized only during report generation, that the program did not allow security access to the individual data element and that the software did not adequately provide for the retrieval and analysis of worker's compensation data), are by their nature reasonably susceptible to explanation and demonstration during the benchmark and that Besserman therefore might have been able to satisfy the agency had NIEHS made Besserman adequately aware of these concerns.

Given the close scrutiny applicable to determinations that result in a competitive range of one, we do not think that NIEHS could reasonably eliminate Besserman's proposal from the competition for deficiencies which the protester did not have a fair opportunity to address. This would seem to be particularly the case where, as here, the agency after eliminating Besserman from the competition, decided to conduct further discussions with GRC concerning its 42 percent higher price.

Accordingly, we sustain the protest.^{4/}

The appropriate remedy where an agency fails to conduct meaningful discussions would ordinarily be for the agency to do so and request BAFOs. However, because GRC's software was purchased and installed and NIEHS's data converted from flat files to the purchased software, it is impracticable to terminate GRC's contract or to refrain from exercising the contract options for technical support of the installed software.

^{4/} We need not address the improper evaluation of Besserman's proposal since we sustain the protest on other grounds.

Under the circumstances, we find that the protester is entitled to recover its costs of proposal preparation and the costs of filing and pursuing the protest, including reasonable attorneys' fees, because Besserman was unreasonably excluded from the competition by the agency's failure to provide meaningful discussions. 4 C.F.R. § 21.6(d) (1989); Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. Besserman should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

Milton J. Foster

for
Comptroller General
of the United States