



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

Decision

Matter of: Joannell Laboratories, Inc.; Nu-Way
Manufacturing Co., Inc.

File: B-242415; B-242415.3

Date: May 1, 1991

Paul Shnitzer, Esq., Crowell & Moring, for the protester,
Joannell Laboratories, Inc., and Herbert Bass, Esq., Schwartz,
Manes, & Ruby, for the protester, Nu-Way Manufacturing Co.,
Inc.

Thomas T. Basil, Esq., and Douglas P. Larsen, Jr., Esq.,
Department of the Navy, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest is sustained where record does not show that the
awardee's offer is technically acceptable in areas alleged by
protester. While agency argues that, by amendment, it
effectively waived solicitation test data requirement to
establish product acceptability until pre-production phase of
the contract, record shows that the amendment did not address
areas of noncompliance asserted by protester.

DECISION

Joannell Laboratories, Inc. and Nu-Way Manufacturing Co., Inc.
protest the award of a contract to EC Corporation under
request for proposals (RFP) No. N61339-90-R-0011, issued by
the Department of the Navy for Main Tank Gun/Weapons Effect
Signature Simulator (MTG/WESS) Systems,^{1/} which encompass both
a firing device and pyrotechnic. Joannell primarily challenges
the agency's determination that the awardee's proposed firing
device and pyrotechnic met the RFP specifications and was
technically acceptable. We sustain Joannell's protest and

^{1/} The simulator is intended to provide the capability to
train tank crews and infantry to recognize both hostile and
friendly tank fire during training exercises. Using a
pyrotechnic device, the simulator will provide up to a 60-shot
capability and will simulate the flash, smoke, and noise of
tank gun fire.

recommend reopening of the competition; we deny Nu-Way's protest.

The RFP was issued on April 20, 1990, as a 100 percent small business set-aside. It required the delivery of 50 simulators and 100,000 rounds of ammunition and first article testing with various option quantities of an additional 16,743 simulators and 3,637,500 rounds of ammunition. Options were to be evaluated. The RFP, as amended, provided for award on the basis of technical acceptability/lowest evaluated price. The RFP contained detailed specifications for the simulators and pyrotechnic devices. The RFP also required offerors to provide test data to demonstrate that their proposed devices met the functional and physical requirements of the specifications. This test data was to include results from humidity, drop, low and high temperature, electro-static discharge, reliability, vibration, pressure retention, and electromagnetic radiation tests. The RFP further provided for the performance of first article testing to verify compliance.

Three offerors, Joanel, Nu-Way, and EC submitted proposals by the July 24, 1990, closing date. After the initial technical evaluation, all three offerors were determined to be in the competitive range, although none were found to be technically acceptable. Written and oral discussions were held with each offeror, and revised proposals were received. The agency reports that it found some risk in each offeror's proposal in the areas involving the pyrotechnic requirements. The primary deficiencies were in terms of the pyrotechnic meeting the requirements of flash, thermal imaging optic detection, smoke characteristics, sound characteristics, fragmentation, and vibration.

The agency, in its evaluation, found that all offerors provided a description of solutions for the pyrotechnic requirement, but that it could not be certain that all offerors met the requirements until certain tests required by the solicitation were conducted. The agency states that initially it wanted the test information concerning the pyrotechnics to be supplied as part of the proposal submission so that it could be used in the determination of technical acceptability and had so advised potential offerors at the preproposal conference. The agency states that all three offerors had difficulty demonstrating the acceptability of their proposals concerning the pyrotechnic requirement because none had the complete test results required by the solicitation. Therefore, the agency issued amendment No. 12, which added ammunition lot testing requirements during the pre-production phase of the contract and which, according to the agency, delayed until contract performance the determination of pyrotechnic acceptability.

After the evaluation of the offerors' revisions to their proposals as a result of the discussions, all offerors were found to be technically acceptable and best and final offers (BAFOs) were requested. The agency found that of the three technically acceptable proposals submitted in response to the request for BAFOs, EC submitted the lowest price. The agency awarded a contract to EC on December 14, 1990. On December 20, Joannell filed its protest with our Office, and Nu-Way filed its protest on December 21. A stop-work order was issued pending a decision on the protests.

Joannell argues that the awardee's proposal did not meet material RFP pyrotechnic requirements which were relaxed by the agency for the benefit of that firm. Joannell contends that the awardee's proposal did not conform with the RFP requirements concerning electro-static discharge and electro-magnetic interference, hermetic seal and other specifications, and has presented detailed engineering analysis to support its position.

Concerning electro-static discharge, Joannell's data show that the awardee's pyrotechnic device will fire at electrical energy levels below that required by the RFP so that the primer could detonate by electro-static discharge created in the course of ordinary handling; that the awardee's primer is contained in a polyethylene shell which, unlike the ordinary metallic shell case, does not reflect electromagnetic radiation but absorbs it, again causing detonation by handling or loading; and that the awardee's proposal also reflects the substitution of a paper/foil disc for the metallic support cup used with the primer. Joannell has presented similar data concerning the awardee's noncompliance with the hermetic seal, the roll crimp on the polyethylene and the awardee's explosive powder which apparently has not been approved by the Army's Armament Research and Development Command and must allegedly be tested and evaluated before it can be shipped.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. National Medical Staffing et al., B-238694; B-238694.2, June 4, 1990, 90-1 CPD ¶ 530.

Here, the agency's only response to Joannell's detailed arguments is that amendment No. 12 gave notice that test data requirements were delayed to the pre-production phase of the contract so that possible performance problems with the pyrotechnic requirement could be identified prior to first article testing. In our view, however, amendment No. 12 does not provide notice that more than the test data requirements listed in the amendment were waived until contract award. Amendment No. 12 specifically provides that only six areas are

to be tested. They are: (1) flash, (2) thermal imaging optics detection, (3) smoke characteristics, (4) sound characteristics, (5) fragmentation, and (6) vibration. However, these are only a small portion of the numerous test results required to be submitted with an offeror's proposal. As Joanel maintains in its protest submissions, the record shows that the tests referred to in amendment No. 12 do not include electro-static discharge, electromagnetic interference, or the integrity of the roll crimp on the polyethylene. As stated above, these are all areas about which Joanel submitted detailed scientific and engineering arguments concerning the awardee's failure to meet requirements. The agency's only response to this protest was that while all proposals "indicated that the pyrotechnic device would meet the requirements," amendment No. 12 tests would determine ultimate compliance. However, the tests in amendment No. 12 do not address the areas in which Joanel alleges EC's product is noncompliant and, in fact, the record shows EC did not furnish test data in these areas.

We sustain the protest.

By letter of today to the Secretary of the Navy, we are therefore recommending that the agency reopen the competition, amend the RFP to state its requirement clearly, and request new BAFOs.^{2/} Following the new BAFOs, if EC is not the successful offeror, the agency should terminate its contract with the firm. We also find Joanel to be entitled to costs of filing and pursuing its protest including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

Nu-Way protests that it was misled by an executive summary included in the RFP which stated that the agency's primary objective was the substantial reduction in the per unit pyrotechnic price, currently priced in excess of \$2 each.

The record does not show that Nu-Way submitted a proposal with a substantially higher price than the other two offerors because it was misled by the language contained in the executive summary of the RFP. The executive summary was for "informational purposes only" and neither the summary or any of the RFP provisions indicated that offers proposing more than \$2 per unit for pyrotechnic would not be considered for award. Under the RFP, award was to be made to the technically acceptable, low-priced offeror, and our review of the

^{2/} Although the protester alleges its product is technically acceptable under RFP requirements, the record shows that the Navy did not find its product acceptable in all respects. Further, test data requirements were waived for the protester, none of which were covered by amendment No. 12.

evaluation documents demonstrates that the evaluation was performed in accordance with the solicitation provisions. Further, the record shows that Nu-Way submitted the highest BAFO price not because its pyrotechnic unit price was the lowest, but because of the specific mechanically initiated system it proposed.

Nu-Way's protest is denied.

for Milton L. Hoover
Comptroller General
of the United States