



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technology Research International

File: B-245174

Date: November 18, 1991

Dr. Rabindra N. Ghose for the protester,
Robert B. Wesson, Ph.D., for Wesson International, an
interested party.
David H. Doro, Esq., and Lt. Col. William H. Spindle,
Department of the Air Force, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protester is not entitled to submit a best and final offer after its technical proposal under modified two-step procurement is found to be unacceptable; protester was given notice of deficient areas and an adequate opportunity to make its proposal acceptable.
2. Where firm is informed that its technical proposal is rejected as unacceptable, its subsequent reliance on alleged oral agreement that agency would consider a best and final offer from the firm was misplaced since the solicitation (which stated that revision of proposals found to be unacceptable would not be permitted) provided that only written (and not oral) instructions were binding on the agency.

DECISION

Technology Research International (TRI) protests the proposed award of a contract to Wesson International under request for proposals (RFP) No. F42650-91-R-0048, issued by the Air Force for the design and production of the Air Traffic Control Training Device (ATCTD). TRI contends that the rejection of its proposal, after the agency's consideration of written responses to clarification questions, was premature since the agency failed to consider the best and final offer (BAFO) the firm submitted subsequent to the agency's unacceptability determination.

We deny the protest.

The RFP, a small business set-aside, was issued on March 19, 1991, and was amended four times prior to the May 24 extended closing date for the receipt of proposals. The RFP was essentially a modified two-step procurement where offerors submitted separate technical and price proposals simultaneously; however, only the (step-two) price proposals of the (step-one) technically compliant offerors were to be subsequently evaluated. The RFP advised offerors "to submit technical proposals which are clear and comprehensive without additional explanation or information" and provided that:

"the government may, at its sole discretion, request additional information from offerors of proposals which the government considers reasonably susceptible to being made acceptable by inclusion of additional information clarifying or supplementing, but not substantially changing, any proposal as submitted."

Section M-900 of the RFP provided that:

"[o]nly those technical proposals determined to be acceptable either initially or as a result of discussions will be considered for award. Award shall be made to the technically qualified responsible offeror who submits the lowest priced proposal. . . . Offerors whose proposals are determined unacceptable by the government will be notified promptly of the basis of the determination. Proposal revisions will not be considered."

The Air Force received four step-one technical proposals (each submitted with a separate step-two price proposal) in response to the RFP, all of which were determined to be reasonably susceptible of being made acceptable. The agency issued questions to each offeror seeking clarifications or supplementing information to the technical proposals. By telephone conversation of June 4, later confirmed in writing, the Air Force requested written answers from TRI to 44 questions regarding its technical proposal. TRI, which claims that its technical proposal "satisfied the overall ATCTD requirement but did not comply with each and every paragraph of the specification," states that its proposal "included a few areas that were marginally compliant with the specification." During the June 4 conversation, TRI informed the Air Force that "it could fully comply; however, it would have a cost impact" on its proposed price. TRI was then invited to include in its written responses to the agency's questions any concerns the protester had regarding the specifications. TRI was informed that if the specifications were modified, all offerors would have an

opportunity to submit a BAFO to reflect any changes in price. On June 10, TRI submitted its written responses to the agency's clarification questions.

By letter of June 17, after the evaluation of TRI's written responses to the agency's questions, the Air Force notified TRI that its technical proposal was found to be unacceptable and provided the firm with a list of the deficiencies which resulted in the rejection of its proposal. TRI thereafter requested an opportunity to further revise its proposal to comply with the RFP's requirements. The agency denied that request. On June 24, having learned that the two remaining acceptable offerors were invited to submit BAFOs, the protester filed an agency-level protest challenging the premature rejection of its proposal since it was not given the opportunity to submit a BAFO.

TRI claims that on June 25, during a telephone conversation with the Air Force buyer for this procurement, TRI was invited to submit a BAFO (pursuant to an alleged agreement that the protester would withdraw its agency-level protest if its BAFO were considered unacceptable).¹ The protester submitted a BAFO on June 26, which was not evaluated by the Air Force. By decision of August 1, the agency denied TRI's June 24 protest stating that the firm's technical proposal was properly rejected, after clarifications, as unacceptable in six areas of the system specifications. In that decision, the Air Force explained that the RFP had not been modified and that since TRI's proposal was unacceptable, the firm was not entitled or permitted to submit a BAFO. BAFOs were requested only from the two technically acceptable offerors and were limited to the offerors' step-two (price) proposals.

TRI filed its protest with our Office on August 12, challenging the agency's rejection of its proposal without considering the BAFO it submitted subsequent to the agency's unacceptability determination. TRI does not refute the technical findings of the agency regarding the six areas of its proposal which were found to be unacceptable. Rather, TRI contends that the agency failed to conduct meaningful discussions with the firm since the Air Force did not characterize the clarification questions as deficiencies, and the agency did not provide the protester a reasonable

¹The Air Force denies that such an agreement was made with the protester. The agency explains that a BAFO was not requested from the firm because its proposal had been rejected as technically unacceptable.

opportunity to revise its proposal. TRI further contends that the Air Force was required to consider the protester's BAFO because an employee of the agency allegedly orally agreed to do so.²

The RFP informed offerors that the agency could request additional information from offerors of proposals that it considers reasonably susceptible of being made acceptable, and that it could discuss proposals with the offerors. This solicitation language is identical to that of Federal Acquisition Regulation (FAR) § 14.503.1, which sets forth the procedures agencies are to follow in requesting technical proposals under step one of a two-step procurement. FAR § 15.610, regarding discussions with offerors, provides that the content and extent of the discussions is, generally, a matter of the contracting officer's judgment. That provision directs the contracting officer to:

"[a]dvice the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the government's requirements. . . [and to provide] the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions."

FAR §§ 15.610(c)(2) and (5).

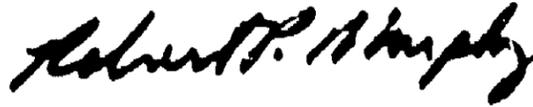
Although TRI argues that the Air Force did not identify the clarification questions as proposal deficiencies, we believe the questions, particularly those questions regarding the six areas of TRI's technical proposal that were ultimately found to be technically unacceptable, reasonably identified the areas in the proposal that were considered to be deficient. Our review of these clarification requests shows that additional information was needed for TRI to comply with the stated specifications (e.g., the majority of questions cite the solicitation requirement, indicate that the protester's response to that requirement is unclear or insufficient, and then request information about how the protester proposes to meet the requirement.) TRI's written responses to the agency's clarification questions, which we think provided a reasonable opportunity to establish TRI's acceptability, were evaluated by the Air Force prior to the agency's determination of the proposal's technical

²Although the protester also generally alleges bias by the agency and a possible conflict of interest, the agency has provided a detailed response establishing that these allegations are not true. The protester has not provided any rebuttal to the agency's response to these allegations.

unacceptability. We believe the protester was given sufficient notice of its proposal deficiencies and an adequate opportunity to satisfy the agency's requirements. See Litton Sys. Int'l, Inc., and Unisys Corp., B-237166; B-237166.2, Feb. 8, 1990, 90-1 CPD ¶ 163. The Air Force was not required to afford the protester another opportunity to further revise its proposal. See Digital Equip. Corp., 68 Comp. Gen. 708 (1989), 89-2 CPD ¶ 260. Further, since TRI has not refuted the specific technical findings of the agency's evaluators, we have no reason to question the propriety of the technical evaluation. We also consider the protester's insistence on review of its BAFO as implicitly conceding that its revised proposal was deficient and required further revisions to be made acceptable.

To the extent TRI argues that the agency is required to review its BAFO because an Air Force employee (the buyer for the procurement) allegedly orally agreed to consider it, we find that the protester's reliance on such oral statement, if made, was misplaced. Section L-40 of the RFP (incorporating FAR § 52.215-14), advised that only written advice and instructions would be binding on the government. Section M-900 of the RFP advised that no further revisions would be permitted once a proposal was rejected as technically unacceptable. Where, as here, an offeror relies on oral advice or instructions to alter the written terms of the solicitation, it does so at its own risk. See Record Press Inc., B-229570.2, Feb. 17, 1988, 88-1 CPD ¶ 161. Accordingly, we find that TRI unreasonably expected that the additional technical revisions in its BAFO would be considered since the RFP expressly notified offerors that such further revisions would not be permitted. The Air Force was under no obligation to consider the protester's BAFO.

The protest is denied.



 James F. Hinchman
General Counsel