



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Multi-Spec Products Group Corporation

File: B-245156.2

Date: February 11, 1992

Marc Stec, Esq., Bogle & Gates, for the protester.
John C. Newlin, Esq., for FL Aerospace Corporation, Grimes Division, an interested party.
Phillip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency improperly waived a first article testing requirement for awardee and improperly accepted the awardee's otherwise nonconforming proposal.

DECISION

Multi-Spec Products Group Corporation protests the award of a contract to FL Aerospace Corporation (FLAC) under request for proposals (RFP) No. DLA400-90-R-3286, issued by the Defense General Supply Center, Defense Logistics Agency (DLA), for navigational lights. Multi-Spec principally alleges that, since the agency improperly waived first article testing (FAT) for FLAC and award was made on the basis of a nonconforming proposal, the protester should receive the award since it submitted the next-low, conforming offer.

We sustain the protest.

The RFP was issued on February 8, 1990, and amended three times, with the final date for receipt of initial offers set on April 8, 1991. As amended, the RFP required offerors to submit unit prices for an overall quantity of 673 navigational lights to be delivered between 555 and 570 days of award, depending upon whether delivery was to be on a destination or origin basis.

Offerors were required to submit a price for FAT. The RFP also provided that FAT could be waived if the government determined that identical or similar supplies had been previously tested and accepted. If FAT was waived, the

price submitted for the testing would be deducted from the overall price for evaluation purposes.

Of the four proposals initially received, two were rejected for reasons not germane to this protest. Multi-Spec's initial price was \$119 per unit; it requested a FAT waiver and priced the FAT at \$2,000. FLAC's initial price was \$138.60 per unit with no price given for FAT; FLAC also requested a FAT waiver.

The other significant difference between the two offerors involved how each addressed the item description for navigational lights contained in the RFP:

"LIGHT, NAVIGATIONAL, AIRCRAFT

EXCEPT - BODY SHALL BE A356.2 ALUMINUM ALLOY
PER FED SPEC QQ-A-371 WITH IRIDITE FINISH PER
MIL SPEC MIL-L-5541, UPPER BACK SIDE OF LIGHT
SHALL HAVE A MIN. RAD. OF .92 IN BOTH H. & V.
FIRST ARTICLE/PREPRODUCTION CONTRACTOR INSPECTION
REQUIRED."

While Multi-Spec took no exception to the description, FLAC lined through the text concerning the body, finish and radii of the lights, as follows:

"LIGHT, NAVIGATIONAL, AIRCRAFT

EXCEPT - *****

FIRST ARTICLE/PREPRODUCTION CONTRACTOR INSPECTION
REQUIRED."

FLAC also wrote the following next to its deletion: "Delete this information from item description. This is not required."

Discussions began on May 20 and 21, and a response date for information requested by the contracting officer was set for May 28. Multi-Spec acknowledged the changes discussed and affirmed its previous prices. On May 28 and May 29, FLAC revised its prices and conformed its offer to the questions raised by the contracting officer. The matter of FLAC's exception to the item description was not addressed during discussions.

On May 31, best and final offers (BAFO) were requested from both offerors. Multi-Spec confirmed its earlier offer and FLAC affirmed an earlier price change to \$107.50 per unit

with all other terms and conditions to remain as originally proposed.

The agency subsequently waived the FAT requirement for both firms and awarded the contract to FLAC. Since Multi-Spec's initial protest was filed more than 10 calendar days after award, performance was not automatically stayed pursuant to 31 U.S.C. § 3553(d)(1) (1988); nevertheless, the agency ordered the contractor to stop performance by letter dated September 13.

Multi-Spec argued in its initial protest that it was improper for the agency to waive FAT requirements for the awardee since the firm's previously-furnished products had been tested to less stringent requirements than those contained in the RFP. In response, the agency agreed that it had improperly waived the FAT requirement for FLAC and proposed to reopen negotiations with both offerors, permit FLAC to submit a price for FAT, and let both offerors submit revised unit prices. If the protester was low after this process, the agency proposed to "consider the feasibility of terminating" FLAC's contract but, in the event that termination proved impractical, the agency recommended that Multi-Spec be granted appropriate relief by this Office.

Multi-Spec objects to the proposed corrective action and maintains that it is entitled to award. In addition, based upon its review of FLAC's proposal, which was contained in the agency's initial protest report, Multi-Spec argues that the competition was not conducted on an equal basis principally because FLAC had been permitted to submit a proposal which did not conform to material terms of the RFP since it took exception to the item description.

With respect to FLAC's deletion of a portion of the item description in its proposal, the agency states that, on the basis of an approved deviation for an improved iridite finish on an earlier contract, the contracting officer understood that the firm's deletion was intended only to refer to the requirement for iridite finish and was not intended to affect the rest of the item description. DLA further notes that the contract was subsequently amended to insure that FLAC was required to perform in accordance with the RFP specifications.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for an award and the fact that the awardee may, after award, agree to be bound to the conditions of the solicitation does not render the proposal acceptable or the award proper. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. The appropriate course of action when an agency

discovers that a proposal within the competitive range is nonconforming is to advise the offeror of the deficiency during discussions and provide it an opportunity to submit a revised proposal. See Chadwick-Helmuth Co., Inc., 70 Comp. Gen. 88 (1990), 90-2 CPD ¶ 400. If, however, an agency decides during the evaluation process that features of a proposal which render it nonconforming are, in fact, acceptable to the government, it is required to amend the solicitation and afford all offerors in the competitive range an opportunity to respond to its revised requirements. ManTech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336.

We find that FLAC submitted a materially nonconforming proposal and that DLA improperly accepted that proposal. The firm's deletion to the RFP requirements does not simply concern the iridite finish requirement; it also affects the basic requirements to provide navigational lights with a specified aluminum alloy body with defined dimensions. It was clearly improper for the agency to accept FLAC's proposal on this basis. While it may be, as the agency and the awardee argue, that the firm only intended to propose an alternatively compliant iridite finish, FLAC's proposal as submitted in fact took exception to all three of the requirements in the item description. No party argues that any of the three requirements was not material and the record shows that DLA took post-award action in an attempt to insure that FLAC would, in fact, perform in full accordance with the RFP specifications.

The agency should have been aware that it could not accept FLAC's proposal with the deletion. Since FLAC was included within the competitive range, the agency should have pointed out the deletion during discussions as a deficiency and allowed the firm to amend its proposal. In the alternative, if the agency decided that the deletion was acceptable, it should have amended the solicitation and provided both offerors in the competitive range an opportunity to respond to the changed requirements.

In view of the concededly improper waiver of the FAT requirement for FLAC, and the agency's failure to either conduct appropriate discussions or to amend the solicitation--a failure which led to the improper award based on a nonconforming offer--we sustain the protest. See Omatech Serv., Ltd., 70 Comp. Gen. 99 (1990), 90-2 CPD ¶ 411.

While the protester seeks the award, we do not believe that this is an appropriate remedy. Because it is unclear from the record why the agency failed to properly consider the waiver of FAT requirements, or to discuss the deficiencies apparent in FLAC's proposal, or to appropriately amend the solicitation if it believed that its requirements had changed, we believe the errors can best be corrected by pursuing a course of corrective action similar to that which DLA proposed to remedy the improper waiver of the FAT requirement. Instruments S.A., Inc.; VG Instruments, Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476.

Therefore, we recommend that the agency reopen negotiations with both offerors after clearly stating its actual requirements. FLAC should be requested to submit a price for the FAT requirement and both offerors should be permitted to revise their unit pricing for the navigational lights. After new BAFOs are evaluated, if the protester is determined to be eligible for award, the agency should terminate FLAC's contract. Martin Marietta Corp., supra.

In making this recommendation, we are mindful of the agency's concern that termination might not be practical since it has been advised by the awardee that the firm incurred \$50,000 in material costs during the 6 weeks of its performance until the stop work order was issued; however, this has neither been substantiated nor verified. Moreover, we note that deliveries are not due under the contract until February 1993 and no items have been delivered to date. Therefore, we do not believe that FLAC's informal advice to the agency regarding the costs it may have incurred should, at this juncture, affect our recommended corrective action.

We also find that Multi-Spec is entitled to be reimbursed for the reasonable costs incurred in filing and pursuing its protests. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1991).

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