



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

Decision

REDACTED VERSION

Matter of: RJO Enterprises, Inc.
File: B-247241.2
Date: June 4, 1992

Leslie H. Lepow, Esq., D. Joe Smith, Esq., and Claude P. Goddard, Jr., Esq., Jenner & Block, for the protester. Steven W. Korell, Esq., for Paramax Systems Corporation, an interested party. Craig E. Hodge, Esq., and Tony K. Vollers, Esq., Department of the Army, for the agency. Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated proposal which allegedly satisfied solicitation requirements as technically unacceptable is denied where record establishes that, in fact, proposal was given full consideration through the source selection process, and award was made on the basis of detailed cost/technical tradeoff analysis.
2. Protest that agency improperly downgraded proposal for use of particular system architecture is denied where agency reasonably concluded that the architecture restricted the usefulness of the system for purposes encompassed by the solicitation requirements.
3. Protest that discussions were not meaningful is denied where agency repeatedly conveyed its concern about the restrictions inherent in the offeror's proposed system architecture.

DECISION

RJO Enterprises, Inc. protests the award to Paramax Systems Corporation of a contract for an integrated commercial intrusion detection system under request for proposals (RFP) No. DAAK01-91-R-0015, issued by the Department of the Army.

* The decision issued on June 4, 1992, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

RJO contends that the agency failed to conduct meaningful discussions and improperly excluded RJO's proposal from consideration for award.

We deny the protest.

The RFP, issued on January 24, 1991, by the U.S. Army Troop Support Command, stated that it was intended to lead to an indefinite delivery, indefinite quantity contract, with minimum and maximum quantities, for a base year and 4 option years. The RFP sought proposals for the supply and installation of commercially available security systems at Army facilities worldwide, of which 48 were named in the RFP, with a provision that the Department of the Air Force may also order systems under the contract. The RFP statement of work notified offerors that the system would have to be tailored to protect the unique combination of assets at each ordering facility and provided that the contractor would learn about the specific security needs of each facility through a site survey, which would be furnished after contract award when a specific facility initiated the ordering process. See also Video Transcript (VT) 14:51:00-40 (Gallagher). Accordingly, no information about the configuration required at any specific facility was provided to offerors prior to contract award.

Although the RFP left each offeror the flexibility to propose any system architecture that it deemed appropriate, all offerors were required to propose modular systems including a primary monitor console (PMC), a communications system linking remote areas with the monitoring location, remote area data collectors (RADCs), sensors (both interior and exterior), a closed circuit television system, and an entry control system.

Section M of the RFP stated that proposals would be evaluated "to judge the degree to which the offeror's product will serve the Army's intrusion detection mission and assess the quality of the offeror's proposed approach and ability to perform the . . . work described in the solicitation." As to the relative weight to be assigned technical and cost considerations in source selection, the RFP stated:

"Generally, award will be made to the offeror whose proposal is judged most superior in terms of the technical elements and factors set forth [elsewhere in Section M]. The offeror's cost/price proposal will be evaluated; but in this regard, the technical superiority of the offeror's proposal is significantly more important than its

cost/price aspects, . . . Under certain circumstances, award may be made to an offeror with lesser technical superiority in order that the Government may obtain the best value for the funds to be expended."

The RFP provided that the most important technical evaluation element was technical performance and engineering; the other elements were integrated logistics support, fielding, and management, each of which was equally important. The total proposed price was to be calculated by multiplying the unit price for each of the system components by an estimated quantity figure set forth in the RFP.

Six proposals were received, including those of RJO and Paramax. [deleted]

During the initial evaluation, technical evaluators reviewing each proposal were told to assign ratings of "excellent," "acceptable," "marginally acceptable," and "unacceptable" for each technical subfactor. Those subfactor ratings were then "rolled up" to a factor rating for each of the four technical factors. In rolling up the subfactor assessments to an overall factor rating, the evaluators apparently did not treat an "unacceptable" rating to mean that the proposal had to be rejected because of that score. In at least one instance, an "unacceptable" subfactor was rolled up to a "marginally acceptable" score (for an offeror other than RJO and Paramax). VT 15:22:10-34 (Gallagher). RJO's proposal was evaluated as "marginally acceptable" technically overall, as well as for two of the four technical factors.

After the initial evaluation, two of the proposals were excluded from the competitive range. Written questions were sent to the remaining four offerors, including RJO and Paramax. One of the questions sent to RJO on August 19, 1991, was the following:

[deleted]

RJO's September 6, 1991, response to this question presented further detail concerning the company's proposed system and stated that the system would be [deleted].

Again, however, RJO was forthright in conceding the limitations of its system. [deleted].

On September 12, 1991, a few days after receipt of RJO's responses; based on a review of those responses, the contracting officer notified RJO on September 12, 1991, that its proposal had been determined to be technically unacceptable and that it would not be further considered for

award--effectively, that it was being eliminated from the competitive range. Telephonic Hearing Transcript (T. Tr.) 9-10 (Schrader); VT 14:44:00 (Gallagher). The contracting officer specifically informed RJO that the decision was related to the [deleted]. VT 10:28:45-29:08 (Lipnick).¹ The next day, RJO requested permission to make an oral presentation to the technical evaluation committee. The agency granted that request and the meeting was held on September 25, 1991.

At this meeting, the contracting officer told RJO that its proposed system had serious limitations from the government's point of view. RJO made an extensive presentation of the capabilities of its system and emphasized, in particular, the system's flexibility. In its presentation, RJO said that it knew that one of the agency's concerns was the "worst case scenario" of needing to position a substantial number of sensors to be distributed over a large area.² [deleted]

RJO's representative understood that the government "liked" the [deleted]. VT 10:35:01-08 (Lipnick). The leader of the agency's Technical Performance and Engineering evaluation team specifically asked whether RJO was going to propose the [deleted]. He told RJO that he could only evaluate what was actually proposed, rather than the capabilities of the system in general. In response, the RJO representative said that RJO was not proposing the system that RJO had just explained. He then said that:

"it is harder for us to express ourselves on this ID/IQ bid where we do not know [the agency's requirements], that is why we went through this scenario bit where we said, OK, given that we have these requirements, how would we solve them, see. . . . But, that is why it is so difficult for us and I tried to make the point this morning that we did not price [deleted]."

To this, the Technical Performance and Engineering evaluation team leader replied:

¹The agency has alleged that RJO's proposal contained a significant number of additional technical shortcomings. Because we view the technical disadvantages of RJO's proposal in the area associated with sub-RADCs to be dispositive, we do not address those other technical issues.

²References to the content of the discussions during the September 25, 1991, meeting are taken from the transcripts of the meeting provided by RJO and the Army.

"I understand what you are saying and what I am saying is that if I go with what was proposed in [RJO's proposal] assuming that doesn't change [in] your Best and Final, OK, it seems like your system has serious limitations from the Government's point of view. . . ."

RJO's representative was concerned that his company could not know what to propose unless offerors were told the government's requirements in terms of the needed distribution of security coverage on government installations. VT 10:35:20-28; 13:40:40 (Lipnick). His view was that RJO needed to know the government's intended distribution in order to tailor a proposal to meet those requirements. VT 10:35:20-28; 10:37:10-30; 10:45:01; 13:30:02-15 (Lipnick). He therefore asked the agency to define its requirements, so that RJO could be sure that its proposal responded to those requirements. An agency official said that the Army recognized that there were some difficulties interpreting its requirements and that the agency would relay its exact requirements to all offerors during negotiations.

Shortly before the meeting adjourned, RJO's representative asked the contracting officer if the agency would ever want RJO to "completely upgrade the proposal to reflect what we offer at the end" and the contracting officer indicated that the difference between "your original quote versus the additional capability" that RJO presented at the meeting would have to be reflected in RJO's best and final offer (BAFO). In concluding the meeting, the contracting officer said that, "based on the additional capability information you presented today," the agency was rescinding its earlier determination to eliminate RJO's proposal from further consideration, and that it would be considered for award.

The only further relevant communication between the parties was a package of material dated November 4, 1991, in which the agency instructed offerors concerning preparation of BAFOs. [deleted]

The contracting officer's cover letter to the November 4 package stated that the additional CLINs discussed in this quoted paragraph "will not be considered as part of the evaluation for the total price for contract award--only the primary CLINs will be evaluated."

No further explanation of the agency's requirements was provided to any offeror, nor were further negotiations conducted. Instead, by a November 26, 1991, letter, the agency requested BAFOs from the remaining four offerors, including RJO.

RJO's BAFO did not include any mention of the [deleted].³ Instead, it was identical in the areas relevant here to the company's initial proposal. The agency's technical evaluators rated three of the proposals acceptable, but, on December 10, 1991, RJO's technical proposal was assessed "unacceptable," for reasons essentially identical to those discussed with RJO during the written and oral negotiations.⁴ Of particular importance to the evaluators was the concern that the [deleted].

As with the initial technical evaluation, the agency did not treat the "unacceptable" rating as meaning that a proposal could not be considered for award.⁵ Accordingly, despite the "unacceptable" assessment given RJO's technical proposal, the Co-Chairmen of the Technical Evaluation Committee (TEC) proceeded to perform a detailed cost/technical tradeoff analysis which took that proposal into consideration. The analysis took into account the disparity among the BAFO prices: RJO's proposal was low, [deleted] lower than Paramax's \$52.62 million price; those two proposals were approximately \$30-\$40 million below the remaining two proposals. The result of the cost/technical tradeoff analysis was a recommendation to the source

³We note that RJO's protest states that RJO's BAFO "included copies of all of the handouts that it had distributed at the September 25, 1991, meeting." That statement does not appear to be accurate, since a diagram showing [deleted] was apparently distributed at the September meeting.

⁴Actually, when its "acceptable" ratings for Integrated Logistics Support, Fielding, and Management were taken into account, RJO's overall technical rating was "unacceptable plus." "Plus" and "minus" gradations were used in the BAFO evaluations to compensate for the drop in the number of available ratings from four to three due to the deletion of the "marginally acceptable" level. See VT 16:40:38-43 (Petcu).

⁵Indeed, the Co-Chairmen of the Technical Evaluation Committee had explicitly decided, in advance of the scoring of proposals, that an "unacceptable" Technical Performance and Engineering rating could be averaged with "excellent" ratings in the other technical subfactors to lead to an "acceptable" rating overall. VT 16:43:50-43:55 (Petcu).

selection authority, who was also the contracting officer, that, once past performance and cost were taken into account, RJO's proposal be ranked third (out of four), ahead of one of the offerors whose technical proposal had received an "acceptable" rating.⁶ VT 17:04:49-55 (Petcu).

The source selection authority adopted the TEC recommendation. Thus, if the top two ranked proposals had not been accepted for any reason (e.g., the offerors had been found nonresponsible), award would have been made to RJO. T, Tr. 23-24 (Schrader). That was not the case, in fact, and award was made to Paramax on January 3, 1992. At a debriefing held on January 14, 1992, the agency informed RJO that its proposal had been found technically unacceptable.

RJO contends that the agency evaluated proposals as if the RFP prohibited use of [deleted], even though neither the RFP nor any other information provided to offerors barred the use of [deleted]. Accordingly, the protester argues that the discussions conducted were not meaningful and that its proposal was improperly found technically unacceptable and denied full consideration for award. The Army contends that the evaluators used the term "unacceptable" to mean "weak" or "inferior" and that, although RJO's proposal could have been found technically unacceptable, the proposal was treated as acceptable in the sense that it was given full consideration throughout the source selection process. VT 14:29:30-40, 14:30:23-53 (Army counsel); 14:40:01-29 (Gallagher).

The agency's use of the term "unacceptable" is inappropriate, since generally that term means that a proposal cannot be considered for award. JEM Assocs., B-245060.2, Mar. 6, 1992, 92-1 CPD ¶ 263. If, in fact, the Army had excluded RJO's proposal from consideration for award on the basis of technical noncompliance, we would have had to consider whether the RFP, as amended, prohibited the use of [deleted]. Here, however, the record establishes that the agency considered RJO's proposal for award throughout the evaluation and source selection process: RJO was involved in every stage of negotiations and was invited to submit a BAFO, and the contemporaneous cost/technical tradeoff documents demonstrate that the agency fully considered awarding the contract to RJO, and presumably would have done so, if Paramax and one other offeror had been eliminated.

⁶The cost/technical tradeoff also led to Paramax's proposal rising from third place in the technical evaluation to first place once past performance and cost were taken into account. See VT 16:58:35-17:04:30 (Petcu).

In our view, the fact that RJO's BAFO was ranked above a technically "acceptable" proposal conclusively establishes that, notwithstanding its ostensible "unacceptable" rating, the proposal was not eliminated from consideration.

Accordingly, we assume, for purposes of our analysis, that offerors were not prohibited from proposing systems using, and even dependent on, [deleted].⁷ The relevant questions are whether the agency could properly downgrade RJO's technical proposal on the basis of the [deleted], and whether discussions in this area were meaningful.

Generally, the evaluation of technical proposals is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381. In reviewing an agency's technical evaluation, we will not reevaluate the proposal, but will examine the record of the agency's evaluation to ensure that it was reasonable and in accord with stated evaluation criteria and not in violation of procurement laws and regulations. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. An offeror's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

It is clear from the record that RJO's proposed system placed constraints on the government's flexibility. We assume, for purposes of this analysis, that RJO is correct in claiming that [deleted]. RJO conceded during discussions, however, that due to what RJO termed the [deleted]. Accordingly, the agency had good cause to

⁷It is for this reason that no impropriety arose from the agency's failure to provide the guidance concerning its requirements that it appeared to promise RJO during the September 25, 1991, meeting. RJO contends that the agency later created a requirement (that is, [deleted]) but failed to inform offerors of that requirement. The record does not support that contention. The agency did not, in fact, require that offerors rely solely on [deleted]. Accordingly, we reject RJO's contention that there was a requirement which the agency failed to disclose. For the same reason, we reject protester's reading of the November 4, 1991, package as approving RJO's [deleted]. Instead, the November 4 documents neither added nor subtracted from the RFP's requirements: RJO remained free to propose its original system, although the agency had clearly, and repeatedly, expressed its concerns about the limitations that [deleted] imposed on the government.

conclude that RJO's system would present technical problems or higher cost, or both, in installations where widely separated remote areas need to be protected. Whether there will actually be such areas is not certain. However, taking into account the large number of Army and Air Force installations which may order under the contract, it does not appear that the Army could know with confidence how significant the limitations inherent in RJO's proposed system would be.

RJO's representative testified at the hearing before our Office that he understood the systems would only have to protect the Army installations named in the RFP as priority sites.⁹ VT 13:33:30-40; 13:34-35-52 (Lipnick). Nothing in the RFP supports such an approach, which would, in any event, not establish that RJO's proposal was technically satisfactory, since RJO does not have access to site surveys and does not know the security needs even of that limited universe of Army installations. RJO's position is apparently that, since the Army did not disclose the required distribution of RADCs and sensors, RJO was free to propose the minimum configuration which could support the stated number of RADCs (256), [deleted]. See VT 13:30:28-37 (Lipnick). Consequently, RJO proposed a solution that would cover what its representative describes as "normal" distribution. VT 10:33:55-34:20 (Lipnick).

It is true that the RFP did not commit the government to any particular installations or to any particular configuration at any installation. Instead, it left the government the discretion to order from the contractor for any Army installation, and possibly any Air Force installation, in the world. If RJO believed that the RFP was deficient in not providing adequate guidance to offerors concerning the location of government installations where the system might be needed and the required distribution of RADCs and sensors at those installations, it was required to protest that perceived defect in the solicitation prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992). RJO cannot now object to the open-ended nature of the RFP, which left the universe of potential installations undefined and gave no guidance as to the required configuration of RADCs and sensors on any particular installation.

To summarize this issue: RJO, and apparently the agency as well, did not know whether any installation, even among those named in the RFP, might have security needs requiring widely dispersed distribution of sensors. Even if it is

⁹RJO's representative referred in his testimony to 21 installations listed in the RFP. In fact, the RFP names 48 bases.

assumed that RJO's proposed system would offer a [deleted], as RJO contends, the agency could properly find (and indeed RJO apparently concedes) that the system has disadvantages in [deleted]. The agency's taking those disadvantages into account in evaluating RJO's proposal was both reasonable and fully consistent with the RFP.

Finally, we see no deficiency in the agency's conduct of discussions regarding this issue. During discussions, an agency is only required to lead an offeror into areas of its proposal which require correction. Hill's Capitol Sec., Inc., B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274. In so doing, an agency is required to do no more than express its concerns in a manner that would reasonably be viewed as communicating the nature and gravity of the concerns. Mark Dunning Indus., Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364.

The agency's August 19, 1991, written question directly and explicitly raised the issue of the [deleted] limitation and informed RJO that the government viewed that limitation as a [deleted]. RJO's September 6 response to that question demonstrates that the protester understood the agency's concern. RJO's recognition of the nature and gravity of the government's concerns is further evidenced by RJO's discussion of the [deleted] at the September 25 meeting. The agency personnel reasonably left that meeting confident that RJO understood the agency's concern and expecting that RJO would submit a BAFO that would cure the [deleted] limitation, either through use of [deleted] or through some other means. VT 14:54:35-57 (Gallagher). Why RJO declined to do so, despite the agency's having explicitly communicated its serious concern, is unclear. What is clear is that the discussions put RJO on notice that the agency would evaluate the subsequent BAFO just as RJO had been told repeatedly the agency had rated the initial proposal: the government viewed the [deleted] limitation as a significant restriction. In short, discussions on this critical point went beyond the minimum required to be adequate.

The protest is denied.

James F. Hinchman
General Counsel