



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Herley Industries, Inc.

File: B-251792.2

Date: April 16, 1993

Jacob H. Fischman, Esq., for the protester.
Dudley E. Garner, Jr., for Symetrics Industries, Inc., an interested party.
Edward B. Hanel, Jr., Esq., Department of the Navy, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly may consider risk of proposed technical approach in evaluation, even where risk is not a stated technical evaluation factor, since the risk involved is inherent in an offeror's technical approach.

2. Where protester's technical approach involved substantially more risk than awardee's, agency reasonably considered awardee's low-risk proposal worth a 2.56 percent cost premium.

3. Protest allegation that agency improperly failed to consider awardee's financial condition in evaluation is dismissed as it concerns the contracting officer's affirmative determination of the awardee's responsibility, which General Accounting Office will not consider except in limited circumstances.

DECISION

Herley Industries, Inc. protests the award of a contract to Symetrics Industries, Inc. under Department of the Navy request for proposals (RFP) No. N00019-91-R-0052, for AN/DKT-61A telemetry sets. Herley essentially objects to the Navy's determination that Symetrics's proposal was technically superior to Herley's such that award at a higher price was justified. Herley also challenges the contracting officer's affirmative determination of Symetrics's responsibility.

We deny the protest in part and dismiss it in part.

The AN/DKT-61A telemetry set is used by the Navy's Pacific Missile Test Center in connection with training and testing on the SPARROW air-to-air/surface-to-air missile. The device is used in place of the SPARROW warhead to transmit data which is used to evaluate how the missile is performing in simulated combat. Since the device is used in place of the warhead, it is destroyed with the missile upon impact. Because it is only used once, reliability of the transmitter is deemed very important.

Section M of the RFP provided that award would be made on the basis of the proposal offering the best value to the government. In this regard, the RFP advised that price and technical factors were of equal importance, and explained further that the lowest priced, technically acceptable proposal would not be chosen if a technically superior, higher priced proposal would afford greater overall benefit to the government. The RFP listed six technical evaluation factors that would be considered in making this determination: (1) technical competency and experience; (2) program schedule; (3) personnel qualification and availability; (4) facilities and equipment; (5) product assurance, and (6) corporate experience. Of these, the technical competency and experience factor was described as the most important. The RFP explained that evaluation under this factor would address the offeror's understanding of the technical, operational and schedule requirements of the RFP; it emphasized that the proposal must clearly and completely demonstrate how the offeror proposes to comply with each requirement of the statement of work.

Five offerors submitted proposals by the August 25, 1992, closing date. Based on the results of the initial proposal evaluation, Herley, Symetrics, and one other offeror were included in the competitive range. The technical evaluation team (TET) had concerns about all three technical proposals, which it raised in written discussion questions.

The TET found that Herley's technical proposal did not show that the firm had experience building the type of transmitter (known as an S-band transmitter) used in the AN/DKT-61A telemetry set. Instead, the proposal stated that Herley had experience with a "similar" transmitter that uses an L-band configuration. The proposal also stated that Herley would develop, build and test the required transmitter in 3 months; the TET was concerned that this timeframe was unrealistically short for the effort required. Further, the proposal did not discuss the timeframe for certification of a test transmitter set. The contracting officer therefore asked Herley, in the written discussion questions, to describe its experience with S-band transmitter design and fabrication, to explain how it could develop and produce a transmitter in 3 months as proposed, and to address the

timeframe for certification of the required testing equipment.

Herley's response explained that the firm proposed to modify its L-band transmitter to meet the requirements for the S-band transmitter but did not, in the Navy's view, provide any significant technical details about the transmitter design, and did not include any performance data. Although Herley stated that it was "confident that the design cycle for this effort would be less than three months," the limited information Herley provided did not convince the TET that this was the case. Further, Herley's response raised concern because it indicated that Herley essentially planned to spend 3 months designing the unit, whereas its initial proposal had offered to design, build and test the transmitter in 3 months. As to the timeframe for certification of testing equipment, Herley stated that it would develop the test set during the first 3 months of the program--that is, at the same time it was developing the transmitter set--so that it could be certified during the fourth month. While the proposed timeframe itself met the RFP requirements, the TET considered it unrealistic. In particular, the TET noted that in developing the test set concurrently with the transmitter set, Herley apparently would not have a completed transmitter set available for debugging the test set software. Based on these concerns, the TET concluded that Herley's proposal presented a "medium" risk level for the most important technical evaluation factor, technical competency and experience, as well as for the program schedule and facilities and equipment factors.

The TET also had concerns about Symetrics's proposal which the contracting officer raised in written discussion questions. First, although Symetrics had performed successfully as the incumbent contractor for transmitter sets, it proposed to use a different vendor for the transmitters this time. The TET was concerned that the new vendor was not a qualified supplier for the transmitters. Symetrics responded with details about the vendor's qualification process, and added that some of the transmitter sets it had delivered to the Navy under its current contract contained the same transmitter model. The TET also questioned Symetrics's offer to furnish only two units for first article testing (instead of the required six); Symetrics responded that it would furnish six units. Finally, the TET noted that Symetrics's test set, which it was currently using in support of its ongoing production effort, was only conditionally certified; the contracting officer therefore asked Symetrics if it planned to obtain full certification of its test set. Symetrics replied that it did. Based on the information Symetrics provided in response to the discussion questions, the TET concluded that Symetrics's proposal presented a low-risk level for all evaluation factors.

Upon completion of discussions, both Herley and Symetrics were asked to submit best and final offers (BAFO). Herley offered the low price of \$5,595,198; Symetrics's price was \$5,709,666. The Navy's source selection authority (SSA) determined that the small cost saving that would be realized with an award to Herley (approximately 2 percent) did not warrant assuming the risk that Herley's proposal presented, and concluded that Symetrics's proposal represented the best value to the government. The Navy awarded the contract to Symetrics on December 17. Based on the quantities ultimately awarded, Symetrics's price was \$3,551,499.66, 2.56 percent higher than Herley's price for the same quantities.

At a debriefing given by the Navy on January 7, Herley learned the basis for the award to Symetrics. Herley then filed this protest on January 21.¹ Herley essentially asserts that the selection official ignored the RFP's stated evaluation factors in making its "best value" determination. In this regard, while Herley concedes that the solicitation permitted an award to a higher priced offeror if such an award afforded the government a greater overall benefit, it maintains that the RFP did not provide for consideration of risk factors in this determination. Herley concludes that the Navy's decision to reject Herley's proposal in favor of a higher priced proposal based on their relative risk levels was contrary to the terms of the solicitation.

Agencies have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results. In reaching an award decision, an agency may make price/technical tradeoffs, subject only to the test of rationality and consistency with the established evaluation factors. Shirley Constr. Corp., 70 Comp. Gen. 62 (1990), 90-2 CPD ¶ 380. In this connection, it is well established that consideration of the risk involved in an offeror's approach is inherent in the evaluation of technical proposals. See S-TRON, B-244767.2, May 1, 1992, 92-1 CPD ¶ 409. This is because the degree of risk present is clearly related to the technical approach proposed and the ability of the firm to perform the contract. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21. Thus, an agency properly may find one technical proposal superior to another based on their relative levels of risk, and make a price/technical tradeoff decision in favor of

¹Herley originally protested the award on December 24, before it knew the Navy's basis for the award decision, essentially alleging that it should have received the award based on its low price. We dismissed the protest by decision dated January 4, finding it an untimely challenge to the RFP's stated award criteria.

that technically superior proposal. See S-TRON, supra. That is what the Navy did here. Given that technical factors were considered as important as cost in the evaluation, moreover, we think the agency reasonably concluded that the relative strength of Symetrics's proposal--based on its low risk--under the most important evaluation factor and two other factors warranted paying Symetrics's 2.56 percent higher price. See S-TRON, supra.

Herley disputes the TET's risk assessment of its proposal to some extent. We find that the record supports the Navy's findings. First, Herley asserts that modifications required to convert its existing L-band transmitter to the required S-band configuration were "minor," and therefore easily could have been completed within the proposed 3-month time-frame. Based on its own experience with transmitters, the TET did not agree. Moreover, the TET noted that Herley's characterization of the required effort was not supported by any detailed technical information in the proposal; our review of Herley's proposal and discussion response supports the Navy's conclusion. Herley next asserts that it easily could have completed the required effort in 3 months because it had already spent 9 months on the transmitter design at the time of award. This information, however, was not included in the proposal; the proposal referred only to the 3-month development period. Finally, Herley does not challenge the Navy's conclusions about its proposed test set development. We therefore have no basis to question the agency's assignment of risk to the relevant areas of Herley's proposal. In contrast to Herley's medium-risk approach, Symetrics proposed to furnish a transmitter that the Navy had already accepted under an ongoing production contract, and a test set that already had been conditionally approved. The record thus supports the agency's conclusion as to the relative technical merit of the two proposals. Again, based on this conclusion, we find reasonable the Navy's price/technical tradeoff in favor of Symetrics's proposal.

Herley contends that Symetrics is not a financially stable company, and argues that this fact should have been considered in evaluating the firm's responsibility.² While

²Herley also appears to suggest that the agency should have considered the offerors' relative financial conditions in the technical evaluation. This would have been improper, however, as the RFP did not provide for evaluation on this basis. To the extent that Herley appears to be arguing that offerors' financial stability should have been considered, Herley was required to protest the omission of such a provision from the RFP prior to the closing date. See 4 C.F.R. § 21.2(a)(1) (1993).

the Navy responds that it did consider Symetrics's financial condition in its responsibility determination, Herley asserts that the Navy has offered no evidence that this is the case. We will not consider Herley's allegation, as it concerns the contracting officer's determination that Symetrics is a responsible contractor. Our Office will not review such an affirmative responsibility determination absent a showing of bad faith or a failure properly to apply definitive responsibility criteria in the RFP. Neither circumstance is alleged here. 4 C.F.R. § 21.3(m)(5); ALM, Inc., B-225679.3, May 8, 1987, 87-1 CPD ¶ 493.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel