



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gas Turbine Corporation

File: B-251265.2

Date: May 24, 1993

Robert Yoo for the protester.
Bernard J. Roan, Esq., United States Coast Guard, Department of Transportation, for the agency.
Katherine I. Riback, Esq., Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a competitor received an improper competitive advantage by virtue of having been given a copy of a report by the agency is denied where the agency allowed the competitor to review the report because of its experience as the original equipment manufacturer, and its review of the report did not provide it an unfair competitive advantage.
2. Protest that the agency failed to set a common cut-off date for the receipt of best and final offers is denied because the protester was not prejudiced by the agency's failure to comply with the procedural requirement.

DECISION

Gas Turbine Corporation (GTC) protests the conduct of a procurement under request for proposals (RFP) No. DTCG80-93-R-3FA868, issued by the United States Coast Guard for turbine engine repairs. Specifically, the protester contends that the awardee, Turbo Power & Marine Systems Inc. (Turbo), was provided an improper competitive advantage by virtue of having been given a copy of an inspection report, which the agency refused to make available to the protester. GTC also argues that the agency failed to set a common cut-off date for the receipt of best and final offers (BAFO).

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

To assist in preparing the statement of work for the RFP, the Coast Guard issued a purchase order in mid-1992 to Energy Maintenance Corporation (EMC) to inspect a turbine in need of repair and to deliver a condition report detailing the inspection results, necessary repairs, and parts that needed to be replaced. After EMC prepared the condition report, the Coast Guard requested that Turbo, the original equipment manufacturer (OEM) of the turbine, review the condition report to ensure that it was technically correct. Turbo reviewed the condition report, compared the condition of the parts of the turbine with the condition described in the report, and stated that the report was accurate. Turbo did not provide the Coast Guard with any other information, such as a written report, beyond its statement that the condition report was accurate. The condition report drafted by EMC was then used as a basis for the repair specifications in the RFP.

In letters dated September 22 and October 21, 1992, GTC protested to the agency concerning the planned procurement for repair services for the turbine. GTC argued that two potential offerors, Turbo and EMC, had a competitive advantage. GTC asked to review the turbine in question and to review the condition report. Both requests were denied.

The RFP was issued on October 26. The Coast Guard prohibited EMC from competing for the repair work because it had prepared the RFP's work statement.¹ Turbo was allowed to compete for the repair work of the turbine. As amended, the RFP set November 12 as the date for receipt of initial proposals.

GTC filed this protest on November 9, alleging that Turbo and EMC had advance information regarding the RFP that gave them an unfair competitive advantage. GTC submitted a proposal by the November 12 due date, but did not quote a price for a number of parts for which Turbo, the OEM, had advised GTC that "none were in stock or on order."

After conducting discussions, the Coast Guard requested that GTC submit its BAFO by December 4. GTC's BAFO, which was submitted on that date, did not include prices for seven parts because of the unavailability of those parts. The agency found GTC's proposal unacceptable.

¹Firms involved in the preparation of a solicitation's work statement, defined broadly as including the furnishing of information leading directly, predictably, and without delay to the work statement, generally may not be awarded a contract to supply the requested system or services. Federal Acquisition Regulation (FAR) § 9.505-2(b)(1).

Turbo submitted information to the agency on December 8, which the offeror modified on December 9. On December 14, Turbo declared the December 8 submission, as modified, to be its BAFO.²

GTC argues that the RFP fails to provide for competition on a common basis because it did not contain the condition report, and that Turbo had a competitive advantage because its review of the turbine and the condition report gave it advance notice of which parts were needed for repair, thus affording it additional time to obtain those parts. After the agency proceeded with award, GTC supplemented its protest, challenging the agency's failure to establish a common cut-off date for the receipt of BAFOs.³

GTC is essentially arguing that Turbo should have been barred from the competition because of its advance review of the turbine and condition report, or, if Turbo was allowed to compete, that GTC should have been provided with the same information which Turbo obtained from that review. Firms directly involved with the preparation of a solicitation's work statement generally may not be awarded a contract to supply the system or service covered by the work statement. FAR § 9.505-2(b)(1). The principles underlying that prohibition are the need to preclude: (1) bias in situations where a contractor would be in a position to favor its own capabilities and (2) unfair competitive advantage arising from the contractor's advance knowledge of the agency's requirements. Person-System Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546. See also FAR § 9.505.

It is clear that Turbo's inspection of the turbine and review of the condition report did not place Turbo in a

²Pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2) (1988), the head of the contracting activity determined that urgent and compelling circumstances that significantly affect the interests of the United States would not permit awaiting our decision in the protest. Accordingly, on December 17, the agency made award to Turbo.

³In its supplemental protest, GTC also argues that the RFP favored Turbo by requiring new parts rather than fully overhauled used parts. We dismiss this protest ground as untimely because it concerns an alleged solicitation impropriety and was not raised before the time set for the receipt of initial offers. See 4 C.F.R. § 21.2(a)(1) (1993). Additionally, we will only consider the issue of whether Turbo was afforded an unfair competitive advantage, because the agency did not permit EMC to compete for the repair work under the RFP.

position to shape the statement of work in the RFP in a manner that would favor its own capabilities. Turbo reviewed EMC's condition report, which was the basis for the statement of work, but Turbo did not change any aspect of the report. By studying inconsistencies between the RFP statement of work and the EMC condition report, the protester concludes that Turbo had more of a role in the final work statement requirements. The agency responds that it relied on its "own substantial internal engineering expertise, as well as its experience in operating and repairing these engines" to prepare the statement of work from EMC's report. We have no basis to question this representation. Not having written or otherwise contributed to any part of the report, Turbo cannot have shaped that report or the resulting statement of work.⁴

While the agency's action may have provided Turbo with advance knowledge of the agency's requirements--that is, the identity of the needed parts--the record does not establish that this advance knowledge gave Turbo an unfair advantage. By virtue of its status as the OEM, Turbo was familiar with the parts at issue and there is no evidence in the record that Turbo needed, or derived any benefit from, advance knowledge of the parts needed here. Accordingly, we find that there was no conflict of interest which required an agency determination that Turbo was ineligible to participate in this procurement.

The gravamen of the protest is the assertion that GTC would have been able to prepare an acceptable proposal if it had been given access to the condition report. That assertion is unsupported by the record. The RFP clearly stated the agency's requirements without any need by potential offerors to refer to the underlying condition report. In our view, GTC's main problem in preparing its proposal was not that it lacked advance notice of information contained in the condition report, but that GTC apparently needed to purchase several new parts for the turbine from Turbo, the OEM, which was unwilling to supply GTC with all of those parts.⁵ Except for stating that it would have sought to have one new

⁴Even if Turbo had provided material leading directly to the statement of work, there might have been no conflict requiring exclusion of Turbo from competing because, where more than one contractor is involved in the preparation of the statement of work, the agency need not exclude the preparing contractors from the resulting contract. See FAR § 9.505-2(b)(1)(iii).

⁵Turbo's action in this regard involves a business matter beyond the scope of our bid protest function. Massa Prods. Corp., B-236892, Jan. 9, 1990, 90-1 CPD ¶ 38.

part returned from where it had been sent overseas, GTC has not alleged that it would have had any other source than Turbo for the other new parts it needed if the firm had the same advance notice as Turbo. Thus, even if the agency's action did provide Turbo with advance notice of the needed parts, there is no reason to assume that equal notice would have led to GTC's being able to obtain the parts. Accordingly, the agency's action did not prejudice GTC. Prejudice, however, is an essential element of every viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

GTC's argument that the agency failed to set a common cut-off date for the receipt of BAFOs highlights the same difficulty faced by GTC: the protester argues that, had it been afforded the additional time that Turbo received to prepare its BAFO, it would have continued attempts to locate sources for the parts.

The agency concedes that it did not set a common cut-off date for the receipt of BAFOs, as required by FAR § 15.611(b)(3). The agency states that it conducted discussions with GTC on its proposal first because GTC's proposal was the most "problematic." Only after these discussions were complete and a BAFO requested from GTC did the agency begin discussions with Turbo. The agency contends that its failure to set a common cut-off date for the receipt of BAFOs was solely a procedural deficiency. It argues that the purpose of the common cut-off dates in negotiated procurements is to eliminate the danger of premature disclosure of information during the course of the competitive process. See The B.F. Goodrich Co., 67 Comp. Gen. 414 (1988), 88-1 CPD ¶ 471. The agency asserts that because there was no such premature disclosure here, GTC was not prejudiced by the "sequential" discussions held with the two offerors.

We agree that the Coast Guard's failure to set a common cut-off date caused no prejudice here. There is no allegation that any aspect of GTC's proposal was disclosed to Turbo. Moreover, as noted above, there is no basis to conclude that, even if the agency had afforded GTC the few extra days provided to Turbo, the protester could have obtained the seven parts which it did not propose to provide in its BAFO. On the current record, it appears implausible that an additional few days would have enabled GTC to obtain the missing seven parts from the OEM (Turbo) or any other source. Accordingly, GTC was not prejudiced by the absence

of a common cut-off date for the submission of BAFOs, and we therefore deny this ground of protest.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel