



Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED VERSION*

Matter of: Eldyne, Inc.

File: B-250158; B-250158.2; B-250158.3

Date: January 14, 1993

Ronald K. Henry, Esq., Jeffrey A. Stonerock, Esq., Sue Ann Dilts, Esq., and Kimberlee Ann Scalia, Esq., Baker & Botts, for the protester.

John A. Tarantino, Esq., W. James McKay, Esq., and Joseph Avanzato, Esq., Adler, Pollack & Sheehan, for McLaughlin Research Corporation, an interested party.

Eric A. Lile, Esq., Candice Fox-Wilson, Esq., Department of the Navy, 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

Meaningful discussions were not provided the protester regarding perceived weaknesses in the protester's technical proposal (relating to the lack of detail in the firm's proposed technical and management approaches) where agency did not inform offeror of concerns which significantly affected its proposal's point score; protester would have had a reasonable chance at being in line for award if the areas of concern had been pointed out and corrected.

DECISION

Eldyne, Inc. protests the award of a contract by the Department of the Navy to McLaughlin Research Corporation under request for proposals (RFP) No. N66604-92-R-0060. Eldyne, the incumbent contractor of the technical support services required by the RFP, contends that the agency failed to conduct meaningful discussions with the firm. Eldyne also challenges the agency's evaluation of proposals,

*The decision issued on January 14, 1993, 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]."

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particularly the awardee's improper use of the protester's proprietary proposal information and the failure of the agency to evaluate the proposals on an equal basis.

We sustain the protest due to the agency's lack of meaningful discussions.

The RFP, issued on December 13, 1991, contemplated the award of a cost plus fixed fee, level of effort, indefinite delivery/indefinite quantity contract for technical services to support the agency's role as the Navy's Electromagnetic Compatibility/Electromagnetic Interference (EMC/EMI) agent for the Shipboard Electromagnetic Compatibility Improvement Program. The contractor is to provide engineering, technical, instructional and software support for submarine shipboard electrical/electronic systems related to navigation, communications, sonar, fire control, power distribution, ship control and interior communications systems, and their associated input/output systems. The RFP provided for an estimated level-of-effort of 368,810 manhours to be performed over a 5-year period.

Offerors were informed that award would be made to the offeror whose proposal, conforming to the solicitation, was determined to offer the greatest value to the government. Section M of the RFP provided two evaluation factors for award, technical capability and cost. The RFP listed the following five subfactors to the technical capability criterion: (a) technical approach (worth 25 points); (b) personnel (worth 25 points); (c) management approach (worth 20 points); (d) corporate experience (worth 15 points); and (e) facilities (worth 15 points).

The RFP stated that technical capability was "significantly more important than [c]ost." In this regard, the solicitation also provided that:

"[a]lthough [c]ost is the less important evaluation factor, it is important and will be seriously considered. The degree of its importance will increase with the degree of equality of the proposals in relation to [t]echnical [c]apability, or when it is so significantly high as to diminish the value of the technical superiority to the government."

Two proposals (Eldyne's and McLaughlin's) were received by the scheduled February 11 closing date. The three members of the technical evaluation panel (TEP) independently reviewed and rated the proposals under each of the RFP's five technical capability evaluation subfactors. During the evaluation, a member of the TEP noticed similarities between the technical approaches of the two proposals and brought

the matter to the attention of the contracting officer. Pursuant to a request from the contracting officer [deleted], the TEP member prepared a memorandum citing examples of the similarities between the two proposals and then compared the proposals to the proposal Eldyne submitted in 1989 under the previous RFP for these services. [deleted]

The contracting officer determined that the evidence did not support any wrongdoing by McLaughlin [deleted]. Concluding that the matter essentially involved a private dispute between the offerors, the contracting officer directed the TEP to continue its proposal evaluations.

After the evaluation of the initial technical proposals, both offerors' proposals were rated as unacceptable, but susceptible to being made acceptable. The unacceptable aspect of Eldyne's offer concerned the firm's proposal of an individual who rescinded his letter of intent for performance under the contract after the closing date for initial proposals. Although it did not render Eldyne's proposal unacceptable, the TEP also found a lack of detail in Eldyne's proposed technical approach and management approach [deleted].

[deleted]

A cost realism analysis was conducted for each proposal; [deleted]. Discussions were then held with each offeror.¹ During discussions, McLaughlin was asked several questions about its technical and cost proposals; the protester was asked several questions about its cost proposal, but was asked only one question regarding its technical proposal

¹Eldyne was informed during discussions that the agency rejected certain of the protester's and its subcontractors' proposed rates (e.g., for direct labor and overhead). On July 20, after the agency reviewed the protester's responses to the discussion questions, Eldyne was again told that its proposed rates were unacceptable. Eldyne thus knew, or should have known, at that time, that its final offer would be evaluated at the government rates; the protester had no reason to believe the government would change its stated position. In its comments filed with our Office on October 28, 1992, approximately 2 months after it learned of the award to McLaughlin [deleted] and filed its initial protest, Eldyne challenged, for the first time, the agency's failure to conduct a cost realism analysis of Eldyne's proposal using the protester's proposed rates. We will not consider this untimely allegation. 4 C.F.R. § 21.2(a)(2) (1992); Labat-Anderson Inc., B-246071.5, Aug. 31, 1992, 92-2 CPD ¶ 136.

(i.e., concerning the rescission of the letter of intent of one of its proposed personnel). Shortly thereafter, proposal revisions were received and evaluated.

Best and final offers (BAFO) were requested and received from the two offerors. The BAFOs did not change the terms of the offerors' revised proposals and were not separately evaluated. The point scores (i.e., the average scores of the three evaluators' individual scores) assigned to each offeror's revised proposal under each of the stated technical subfactors for award (out of the 100 points available for each subfactor) are presented below:

	<u>Eldyne</u>	<u>McLaughlin</u>
Technical approach	[deleted]	
Personnel		
Management approach		
Corporate experience		
Facilities		

The only rating for Eldyne that changed from the evaluation of its initial proposal was the subject of the agency's discussions with the firm (i.e., regarding personnel). Based upon the above final point scores, the TEP determined the final technical rating (i.e., the total evaluated point score) for the protester's technical proposal to be [deleted]; McLaughlin's technical proposal received a final rating of [deleted].

The proposals were then compared, in accordance with the RFP's terms, to determine which offered the greatest value to the government. The agency determined that McLaughlin's proposal presented the greatest value to the government. That determination primarily resulted from the TEP's findings that the above stated scores indicated there was "very little to distinguish the technical capability of one offeror from the other" [deleted]. (Other than the comparison of the numerical point scores, there is no narrative in the record supporting a technical equality determination.) [deleted]

[deleted] The agency awarded a contract under the RFP to McLaughlin on August 25 for \$10,633,552. Eldyne's protest followed. The agency has advised our Office of its determination that it was in the best interest of the government, due to urgent and compelling circumstances, for performance of the contract to continue pending the current protest. Two delivery orders have been issued.

Eldyne protests the agency's failure to conduct meaningful discussions with the firm concerning perceived weaknesses in its initial proposal and, as a result, contends that the

agency's evaluation of proposals was flawed.² The protester contends that if the agency had informed it that its proposal required amplification and that its point score could have been improved by providing additional detail regarding its proposed technical and management approaches, it would have corrected the perceived weaknesses and its revised proposal would have received a higher technical evaluation score. Eldyne contends that this would have caused a greater disparity in technical scores between the offerors and, ultimately, would have resulted in an award to the protester under the RFP (which assigned more importance to technical factors than cost).

In response, the agency states that it satisfied its obligation to conduct meaningful discussions, arguing that it was not required to discuss every element of the protester's proposal that received less than the maximum possible score. The agency maintains that the protester was not prejudiced by its failure to discuss all perceived weaknesses in its proposal since, despite the weaknesses noted by the evaluators (but not discussed with Eldyne), those sections of the protester's proposal were rated as acceptable. [deleted] the agency contends that Eldyne had a reasonable chance of receiving the award under the RFP and, therefore, further discussions were not required.

We think the discussions conducted by the agency were flawed and that the protester was prejudiced by the agency's actions since the firm reasonably could have increased its technical and management approach scores had it known the reasons why its initial proposal was downgraded. The effect of this on the selection decision is unclear. However,

²By letter of September 2, supplemented by letters of September 4 and 25, Eldyne filed other miscellaneous challenges to the award to McLaughlin--most of which, the protester admits, it hoped to support with information it obtained from the agency report in response to its protests. The protester's various allegations included, for example, assertions of bias by--and a lack of qualifications of--the agency's technical evaluators, improper technical leveling and transference by the agency, and unlawful "bait and switch" proposal preparation tactics of the awardee regarding its personnel. Based upon a minimum of information presented in the protest submissions, we requested a response from the parties regarding these issues. A review of the full record shows that the protester has failed to support the validity of these allegations. The record now also confirms the mere speculation upon which these protest contentions were apparently initially based. Therefore, further discussion of such issues is not warranted here.

given that technical capability was more important than price, a higher score by Eldyne, especially in the technical approach subfactor, [deleted] could have affected the award decision.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. 10 U.S.C. § 2305(b)(4)(A)(i) (Supp. IV 1992); Federal Acquisition Regulation (FAR) § 15.610. Although the discussions need not be all-encompassing, discussions are required to be meaningful; that is, the agency must lead offerors into the areas of their proposals which require amplification or correction. Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. In this regard, the agency is required to point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in technical transfusion or leveling. FAR § 15.610(c), (d); Manekin Corp., B-249040, Oct. 19, 1992, 92-2 CPD ¶ 250; Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527. Discussions cannot be meaningful if an offeror is not advised, in some way, of the weaknesses, excesses, or deficiencies in its proposal that must be addressed in order for the offeror to be in line for award. See id.; Price Waterhouse--Recon., 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333.

Here, the record shows that the protester's initial technical proposal was criticized and downgraded by each member of the TEP for perceived weaknesses related to the proposal's lack of detail regarding the offeror's technical approach and management approach [deleted]. The TEP members' worksheets contain numerous notations of their concerns regarding the lack of detail in the technical approach section of the protester's initial proposal which caused Eldyne's point score to be downgraded in this area. Examples of these evaluators' findings follow:

[deleted]

(This latter example was specifically noted to be a "deficiency" by one evaluator, not merely a weakness in need of clarification.)

[deleted] four specific examples of proposal paragraphs considered weak for lack of detail were cited in the TEP summary.

[deleted]

No other reason, besides the above concerns, was given by any of the three evaluators as to why each evaluator downgraded Eldyne's proposal by only assigning it a

relatively low, acceptable average technical score of [deleted]. Conversely, the awardee's technical approach section of its proposal received the highest score given by the TEP for any technical capability subfactor solely due (according to the narratives on the same evaluators' worksheets) to the extensive detail given.

Our review of the record shows that these weaknesses in the protester's technical proposal, which evidently gave the evaluators serious concern, but were not conveyed to the protester during discussions, significantly affected Eldyne's proposal score. In accordance with the selection criteria which emphasized the technical capability factor, Eldyne would have had a reasonable chance to be in line for award [deleted] had it been given the opportunity to improve the technical aspects of its proposal found to be lacking in detail. Simply stated, offerors cannot be expected to improve the technical merit of their proposals when they do not know which areas in their proposals need to be clarified and addressed in greater detail. Securiguard, Inc., B-249939, Dec. 21, 1992, 92-2 CPD ¶ ____; Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 539. Agencies must conduct meaningful discussions with all offerors in the competitive range, whether their proposals are acceptable, outstanding or only susceptible of being made acceptable. Columbia Research Corp., supra.

We cannot find that the agency's discussion questions here were sufficient to lead Eldyne to the central areas of concern about its proposal--which significantly affected its scores--so to afford the firm a reasonable opportunity to improve those aspects of its proposal. See id. Based upon the evaluation record before us, including the serious criticism of Eldyne's proposal and the resulting significant impact on the scoring, it is clear that the source selection decision here could have been different if the agency had given the protester a meaningful opportunity to improve its proposal. Accordingly, we find the lack of meaningful discussions was prejudicial. Id.; Jaycor, supra.

We sustain the protest. By letter of today, we are recommending that the agency reopen discussions with the awardee and protester, conduct appropriate discussions with those offerors, and request and evaluate new BAFOs in accordance with the solicitation's evaluation criteria.³

³In view of the fact that McLaughlin's overall cost to perform has been disclosed to Eldyne and the weaknesses in Eldyne's proposal do not appear related to its cost of performance, the agency might consider whether revised cost proposals are warranted. See System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516.

If after the evaluation of the new BAFOs McLaughlin's proposal is no longer considered to offer the greatest value to the government, the agency should terminate McLaughlin's contract for the convenience of the government and award the contract to Eldyne, if otherwise proper. However, if Eldyne does not prevail in the reevaluation, the agency should continue performance of the original contract. We also find that the protester is entitled to recover the costs it incurred in filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1992).⁴

The protest is sustained.

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⁴Eldyne also protests that the agency allowed McLaughlin to obtain an unfair competitive advantage by accepting the awardee's proposal which Eldyne alleges contained the protester's proprietary proposal information. The Navy responds that this claim involves a dispute between private parties which does not provide a basis for protest to the General Accounting Office since the agency took no part here in the alleged acts of the employee. The record shows that the technical evaluators expressed their concern that the awardee's proposal included information which was derived from (and, at times, was a verbatim copy of) the protester's prior proposal for these services. Without explanation, the contracting officer concluded that there was no reason to believe that the awardee could not successfully accomplish the effort and directed the evaluation to proceed accepting the awardee's proposal as its own. Since the agency must be assured that it will receive what is being offered (e.g., see generally ManTech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309, aff'd ManTech Field Eng'g Corp.--Recon., B-249886.5, Aug. 7, 1992, 92-2 CPD ¶ 89), in accordance with our above corrective recommendations, we believe the agency should confirm during discussions that the offeror's technical approach is properly its own and reflects the offeror's ability to successfully perform the contract.