

Matter of: Fisons Instruments

File: B-254787

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Graham Gibson for the protester.
Irene Atney-Yurdin, Esq., and George Gehrman, Department of Energy, for the agency.
Linda S. Lebowitz, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation instructed offerors to address technical requirements in sufficient detail by submitting descriptive materials demonstrating the firm's understanding of the requirements and how its system would satisfy the requirements, the agency reasonably excluded the protester's proposal from the competitive range where the protester failed to substantiate narrative claims in its proposal that its system would satisfy the requirements and reasonably led the agency to believe that major design changes would be needed before the proposal would be technically acceptable.

DECISION

Fisons Instruments protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. DE-AC17-93EV-90123, issued by the Department of Energy (DOE) for an inductively coupled plasma mass spectrometer (ICP/MS) system for use at the Environmental Measurements Laboratory (EML) in New York. Fisons contends that the agency improperly and unfairly evaluated its proposal.

We deny the protest.

The EML is a DOE research and development facility which conducts research on radioactive and other energy-related pollutants which have an effect upon human health and the environment. The ICP/MS system will be used in research programs to study the distribution and transport of certain power-generated chemical elements in the environment at very low concentrations, at or near background levels. The system also will be used in connection with the EML's quality assessment program for laboratories that supply analytical data in support of various DOE programs.

The RFP, issued on April 19, 1993, contemplated the award of a firm, fixed-price contract for an ICP/MS system consisting of eight standard commercial components. Relevant to this protest, the RFP, as amended on May 28,¹ required that one component be a detector system "that best meets the [RFP's technical] requirement" for simultaneously measuring isotopes with both higher and lower count rates.

The RFP listed 18 technical requirements for the ICP/MS system. Again, relevant to this protest, the RFP listed a sensitivity requirement (that the system be able to measure very low, trace concentrations of elements in various environmental samples using a particular numerical count rate); a linear dynamic range requirement (that the system be able to measure total concentrations and isotopic ratios for environmental samples without reoptimizing or reprogramming the system for every sample variation run, at a range meeting or exceeding 10 orders of magnitude); a signal response requirement (as amended on May 28, that "best addresses the system[']s need for high sensitivity"); and finally, a detection limit requirement (that the system be able to measure extremely low concentrations of elements using a measurement of "0.6 parts

¹The contracting officer amended the RFP by generalizing some of the requirements after Fisons allegedly filed a protest with our Office, (this Office has no record of the protest), essentially challenging the RFP's technical requirements as restrictive and as favoring one manufacturer, Finnigan MAT Corporation. Contrary to Fisons's allegation that the agency was biased against it, the record shows that Fisons subsequently withdrew the protest, thanking the contracting officer for considering its concerns and for making changes to the technical requirements "that enable a more competitive and fairer" procurement process and that "opened up the options for all manufacturers of ICP/MS equipment." We note that to the extent Fisons continues in this protest to challenge the requirements, its protest is untimely since protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to the time set for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993).

²Prior to being amended, the RFP required a "dual detector system" with both a Faraday detector to measure isotopes with higher count rates and an electron multiplier to measure isotopes with lower count rates.

³Prior to being amended, the RFP required a flat, as opposed to a curved, signal response.

per trillion for a 1 part per billion equimolar solution" of various elements). The RFP also outlined a series of performance tests, corresponding to the various technical requirements, including those just described, which the successful offeror would be required to satisfy upon award of the contract and prior to the agency's final acceptance of the system.

The RFP advised that proposals would be evaluated to determine an offeror's understanding and approach concerning the work to be performed, the likelihood that an offeror could complete the work as specified in the RFP, and the reasonableness of an offeror's price. The RFP instructed offerors to address each of the RFP's technical requirements "in sufficient detail to demonstrate that the offeror understands the requirements and to describe clearly what the offeror is proposing in order to meet the specifications." The RFP invited offerors to submit "descriptive printed matter," for example, product brochures, scientific papers, etc., in addressing the technical requirements. The RFP stated that technical factors were substantially more important than price. Of the 18 technical requirements, which also functioned as the technical evaluation factors, 5 of these requirements, including sensitivity, linear dynamic range, signal response, and detection limit, were evaluated at 2 points each, while the other 13 requirements were evaluated at 1 point each, for a possible total of 23 technical points. The RFP stated that the award would be made to the responsible offeror whose offer, conforming to the RFP, was determined to be most advantageous to the government, technical evaluation factors and price considered.

On June 16, by the closing time for receipt of initial proposals, three firms, including Fisons and Finnigan, submitted initial proposals with accompanying descriptive materials. The agency's technical evaluation committee (TEC) evaluated each proposal. Prior to making the competitive range determination, the chairperson of the TEC requested from all offerors additional documentation to substantiate various performance claims.

Fisons's proposal, which reflected the second-lowest price, received 14 out of 23 technical points from the TEC. Fisons's proposal was downgraded for its detector system component and for the technical requirements involving sensitivity, linear dynamic range, signal response, and detection limits. Finnigan's proposal, which was one-half percent higher priced than Fisons's proposal, received 23 points from the TEC.

Based on the TEC's evaluation of all proposals, the contracting officer determined that only Finnigan's proposal

would be included in the competitive range. By letter dated August 30, the contracting officer notified Fisons that its proposal was not included in the competitive range since it was deficient, *i.e.*, technically unacceptable. Specifically, Fisons was advised that its ICP/MS system did not satisfy the detector system component requirement and the technical requirements for sensitivity, linear dynamic range, signal response, and detection limits. The contracting officer advised that a revision of Fisons's proposal would not be accepted. On September 7, Fisons filed this protest. Following the filing of the agency report and comments on the agency report, this Office held an informal conference with all parties to clarify various technical matters. All parties filed post-conference comments.

Fisons essentially argues that the agency improperly and unfairly evaluated its proposal for each of the requirements for which it was downgraded.

The evaluation of proposals and the resulting determination as to whether an offer is in the competitive range are matters within the discretion of the procuring agency, since that agency is responsible for defining its needs and deciding on the best methods of accommodating them. EnviroSearch Int'l, B-252550, July 6, 1993, 93-2 CPD ¶ 6. We will question the agency's technical evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the RFP. JEM ASSOCS., B-245060.2, Mar. 6, 1992, 92-1 CPD ¶ 263. The fact that the protester disagrees with the agency does not itself render the evaluation unreasonable. Id. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, the agency is not required to include the proposal in the competitive range. DBA Sys., Inc., B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36.

Here, based on our review of the entire record, we conclude that the TEC's evaluation of Fisons's proposal and the contracting officer's determination not to include the proposal in the competitive range were reasonable and consistent with the terms of the RFP. In this regard, the RFP instructed offerors to address each of the RFP's technical requirements in sufficient detail in order to demonstrate that the offeror understood the requirements and to clearly describe how the offeror's system would meet the requirements. The RFP specifically invited offerors to submit descriptive materials, such as product brochures and scientific papers, to demonstrate that its particular system met the stated requirements. Fisons stated in its proposal narrative that its standard, basic ICP/MS system and its enhanced performance package option, both commercially

available items,⁴ met or exceeded all technical requirements and that it took no exception to these requirements. However, with respect to the requirements at issue in this protest, the record shows that Fisons either submitted no descriptive materials to substantiate its narrative claims or its descriptive materials clearly contradicted its claims. In contrast, Finnigan, in support of the statement in its proposal that its system "meets all specifications," submitted descriptive materials--product brochures and scientific papers--which demonstrated that its system did, in fact, meet the requirements.

For example, regarding the sensitivity requirement, one of five more heavily weighted technical evaluation factors, the RFP required that an offeror's ICP/MS system be able to measure very low, trace concentrations of environmental elements at a particular numerical count rate. While Fisons stated in its proposal narrative that it is "offering a system with sensitivity beyond that required," the record shows that Fisons submitted no product brochures or scientific papers to substantiate its narrative claim. Finnigan, on the other hand, submitted a product brochure that established that its system would not only meet, but could exceed, the sensitivity requirement.

Regarding the signal response requirement, the RFP, as amended, required a signal response that best addressed the ICP/MS system's need for high sensitivity. Fisons's system would produce a curved response, as opposed to a flat response. Acknowledging the agency's preference for a flat response, Fisons stated that it could "tune" its system to achieve a flat response if this was what the agency

⁴Fisons also submitted a price for an ultra-high performance package option which we believe the TEC reasonably did not evaluate because Fisons failed to establish the commercial availability of this option. The record shows that in response to the TEC's request that Fisons provide information establishing the commercial availability of the option, Fisons merely provided the name of a professor at a university in the United Kingdom, and the name of a university in Japan and the name of a Japanese company, without any points of contact. Fisons stated that it could "give [the agency] the phone numbers, with the users['] permission, if [the agency] require[d] them." While Fisons "assume[d] that [it] established commercial availability" of the option based on furnishing the above information, it is our position that the information provided was of limited value in establishing the commercial availability of the option, particularly without any other documentation, for example, reports on how the listed users utilized the option in the scientific and business communities.

required. Nevertheless, since Fisons had not substantiated its narrative claim that its system could satisfy the basic sensitivity requirement with a curved response, absent any evidence in the record to the contrary, the TEC believed that if Fisons tuned its system to achieve a flat response, there would be a corresponding decrease in the sensitivity which its system could measure. Finnigan's system, on the other hand, would produce a flat response and Finnigan submitted an in-house scientific paper which explained that its system could achieve a flat response without any corresponding decrease in sensitivity. Finnigan also explained the benefits associated with a flat response, namely easier calibration and quantification of a straight line.

As for the linear dynamic range requirement, the RFP required that the system be able to measure total concentrations and isotopic ratios for environmental samples, without reoptimizing or reprogramming the system for each sample variation run, at a range meeting or exceeding 10 orders of magnitude. While Fisons states in its proposal narrative that its system "offers 6 orders of range on the ion counting system and 4 orders on the analog detector range for a total of 10 orders," a product brochure and a scientific paper submitted by Fisons clearly contradict its claim. Specifically, the product brochure states that "a full eight orders of concentration range" is available and the scientific paper states that "with the use of a combined pulse-counting and analogue detection system . . . a linear dynamic range of at least eight orders of magnitude is possible."⁵ In contrast, Finnigan submitted a product brochure which established that its system could achieve "8 orders of magnitude with [a] Faraday [detector] [and] 10 orders of magnitude with an [electron] multiplier," items included as part of Finnigan's system.

⁵We note that by letter dated May 19, Fisons requested that the contracting officer change the linear dynamic range requirement to require only "at least seven orders of magnitude." We believe this the request suggests that Fisons knew that its system could not meet the RFP's technical requirement for 10 orders of magnitude.

⁶With respect to the detector system component requirement, the TEC determined that Fisons's system was less advantageous than Finnigan's system because, unlike Finnigan's system, which included a Faraday detector and an electron multiplier for the simultaneous assessment of higher and lower isotopic count rates, Fisons's system lacked this capability without diluting and rerunning a sample. The need for an extra dilution step concerned the

(continued...)

From this record, we conclude that Fisons failed to affirmatively demonstrate that its ICP/MS system would in fact comply with the RFP's requirements and led the agency to reasonably believe that to become technically acceptable, Fisons would have to make major design changes to achieve a flat signal response without a corresponding decrease in sensitivity and to achieve a linear dynamic range of 10 orders of magnitude.⁶ Under these circumstances, exclusion of Fisons's proposal from the competitive range is not legally objectionable.

Accordingly, the protest is denied.

Robert P. Murphy
Acting General Counsel

⁶ (...continued)

TEC because samples are often so small that not enough of the sample would be available to rerun after dilution. The scientific paper submitted with Fisons's proposal (which Fisons now maintains is not applicable to the agency's requirements here) states that "serial dilution of [a] sample is [an] effective [approach, but] can result in increased analysis time, and there may be errors associated with dilution."

⁷We need not address the reasonableness of the TEC's evaluation of Fisons's proposal with respect to the detection limit requirement for which there is some controversy over whether a weight or equimolar definition for detection limits was required. Even if Fisons was unreasonably downgraded for this requirement, it has not been prejudiced because, as discussed, Fisons was reasonably downgraded and determined technically unacceptable for four other technical requirements. Also, contrary to Fisons's assertion, it appears from a scientific paper presented at an annual conference and submitted by Finnigan with its proposal that Finnigan's system could satisfy the detection limit requirement.