



Comptroller General
of the United States

5172311

Washington, D.C. 20548

Decision

Matter of: Presearch, Inc.

File: B-257889

Date: November 21, 1994

Jacob B. Pompan, Esq., and Neil H. Ruttenberg, Esq., Pompan, Ruffner & Werfel, for the protester.
Don L. Hill, for Hill Electronics, Inc., an interested party.
Patrick M. Burke, Esq., Department of Energy, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where both awardee's and protester's proposals were technically noncompliant for failure to satisfy the delivery terms of the solicitation and those terms were relaxed for both offerors, the protester was not prejudiced.

DECISION

Presearch, Inc. protests the award of a contract to Hill Electronics, Inc. (HEI) under request for proposals (RFP) No. G85747, issued by the University of California, Lawrence Livermore National Laboratory (LLNL), a management and operating (M&O) contractor for the Department of Energy (DOE).¹

We deny the protest.

LLNL issued the RFP on April 8, 1994, to acquire solid state video recorders and related items. The equipment is part of a closed-circuit surveillance system and will be used to capture, temporarily store, and replay video footage when an

¹Our Office reviews subcontract awards by prime M&O contractors under a "federal norm" standard, i.e., to determine whether the procurements and subsequent awards are consistent with the policy objectives set forth in statutes and regulations which apply directly to federal agency procurements. Elma Eng'g, 70 Comp. Gen. 81 (1990), 90-2 CPD ¶ 390.

alarm indicates a possible intrusion. The procurement is a total small business set-aside. The RFP stated that a firm, fixed-priced contract would be issued based on the proposal which was "most advantageous to [LLNL], price and other factors considered."

The RFP stated that the anticipated date of award was May 13. It included "required delivery" dates for each of the six basic line items (excluding options). As the RFP was initially issued, line item 3 was to be delivered by November 1, 1994; line items 4 through 6 were to be delivered by July 1, 1994.

Presearch and HEI were among the offerors submitting proposals by the May 6 time set for receipt of initial proposals.² On May 18, LLNL issued an amendment revising some aspects of the technical specifications and changing the required delivery dates; the amendment no longer included an anticipated date of award. Although delivery dates for line items 3 through 6 remained the same, the revised schedule noted:

"The desired delivery is for the unit to be delivered to LLNL by July 1, 1994. Although the need here is for LLNL to develop the software to interface to the [solid state recorder] controller. A software freeze date has been set for August 26, 1994. The vendor must supply a means whereby LLNL can develop the software interface and verify correct operation of that software interface on actual [solid state recorder] hardware by August 26, 1994.

"If you cannot meet the desired delivery of July 1, 1994, but can meet the delivery of August 26, 1994, please provide a description of the means that you can supply in order for LLNL to develop the software interface."

The May 18 notice to offerors called for best and final offers (BAFO) to be submitted by May 23. Both Presearch and HEI submitted timely BAFOs. LLNL's evaluators reviewed the proposals and determined that both satisfied the technical requirements of the RFP. On June 1, LLNL amended the RFP to correct an incorrect priority rating and requested a second round of BAFOs to be submitted later that day; the required delivery dates were not changed. Both Presearch and HEI

²Because the proposals of Presearch and HEI are the only ones relevant to this protest, no other firm's proposal is discussed here.

submitted second BAFOs on June 1 confirming that their first BAFO terms remained unchanged. On June 3, LLNL awarded a contract to HEI. This protest followed.

Presearch contends that LLNL improperly failed to obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA). In the protester's view, the equipment being procured is automated data processing equipment (ADPE) and LLNL lacked authority to conduct the procurement without a DPA. In addition, Presearch asserts that HEI's proposal should have been rejected as unacceptable, because it failed to satisfy the solicitation's required delivery dates.³

Concerning LLNL's failure to obtain a DPA, LLNL and the Department of Energy contend that a DPA was unnecessary because the equipment being procured is not ADPE and that, in any event, management and operating contractors are not required to obtain DPAs even when procuring ADPE for use under a federal contract. In response to our Office's inquiry, GSA has indicated that the video recorders being procured here are not ADPE (notwithstanding the incidental inclusion of computer components). Accordingly, in the view of GSA, which has responsibility for determining when to issue DPAs, see 40 U.S.C. § 759(b)(3) (1988); Pindar Donnelley Partnership, GSCBA No. 12667-P, Dec. 27, 1993, 94-2 BCA ¶ 26,673, 1994 BPD ¶ 4, no DPA was required in this procurement, regardless of whether management and operating contractors are generally required to obtain DPAs before procuring ADPE for use under a federal contract. In light of GSA's position, which we find reasonable, we deny this basis of protest. See Ebon Research Sys., B-253833.2; B-253833.3, Nov. 3, 1993, 93-2 CPD ¶ 270.

The next question is whether HEI's proposal satisfied the required delivery terms of the RFP. HEI's BAFO, dated May 20, proposed delivery dates that were different from those required in the RFP. Thus, HEI proposed to deliver line items 4, 5, and 6 "90 Days ARO," although, under the revised RFP, these items were to be delivered at the latest on August 26.⁴

³Although Presearch raised additional issues in its initial protest, in its comments it did not respond to the agency's rebuttal of those issues, and we therefore treat them as abandoned. See Hampton Rds. Leasing, Inc., 71 Comp. Gen. 90 (1991), 91-2 CPD ¶ 490.

⁴"ARO" refers to "after receipt of order," a term used because the RFP stated that award would be made in the form of a purchase order.

Presearch contends that HEI's proposed delivery dates rendered the proposal unacceptable, since they effectively extended the RFP delivery schedule. LLNL responds that, as of the date HEI submitted its BAFO, the proposed delivery schedule was consistent with the RFP schedule, and that, even if it was not, LLNL's acceptance of HEI's schedule did not prejudice Presearch.

Delivery requirements are among the terms in a solicitation that frequently have so significant an impact on offerors' prices as to define the competition. Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Accordingly, our Office has generally treated delivery requirements as material terms that may not be waived unless all offerors are given the opportunity to compete under the relaxed requirements. Id.

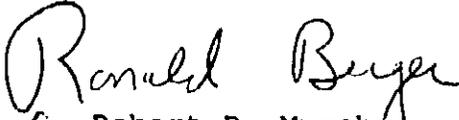
HEI's proposed delivery dates did not satisfy the RFP requirements. While the "90 days ARO" language might have met the requirements if award had been made on the May 20 date on which HEI submitted its first BAFO, by June 1, when the second BAFO was submitted, a proposal to provide line items 4, 5, and 6 within 90 days of award no longer complied with the requirement that those items be provided, at the latest, by August 26, since the 90th day from June 1 would be August 30. In fact, as noted above, award was made only on June 3, which would extend the delivery period under the terms of HEI's proposal to September 1.

LLNL contends that LLNL's relaxing of the RFP delivery schedule for HEI did not prejudice Presearch. "We agree, because Presearch benefited from equal treatment in this regard. Presearch's BAFO stated that Presearch's concurrence with the revised delivery schedule in the RFP was "contingent on LLNL awarding a [contract] by 1 June 1994."⁵ As a result of this language, Presearch appeared to reserve the right to deliver under a relaxed, but unspecified, schedule if LLNL failed to award a contract by June 1. Notwithstanding that reservation of rights, when award was not, in fact, made by June 1, LLNL continued to consider Presearch's proposal acceptable. In effect, LLNL permitted Presearch to assert the right in its BAFO to an undefined extension of time for delivery, which was similar to (and potentially more permissive than) the treatment afforded HEI. Because the protester was afforded the opportunity to compete under delivery requirements relaxed

⁵Presearch's initial proposal similarly conditioned agreement to the RFP delivery schedule on award being made by May 13.

at least as much as those proposed by the awardee, Presearch was not prejudiced by LLNL's acceptance of HEI's proposed delivery terms.

The protest is denied.


for Robert P. Murphy
Acting General Counsel