Matter of: Infrared Technologies Corporation--
Reconsideration

File: B-255709.2

Date: September 14, 1995

Carlos Ghigliotti for the protester.
Deidre A. Lee, National Aeronautics and Space Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where record shows awardee's offer was technically unacceptable and did not affirmatively represent that firm would meet the required delivery schedule.

DECISION

Infrared Technologies Corporation requests reconsideration of our decision, Infrared Technologies Corp., B-255709, Mar. 23, 1994, 94-1 CPD ¶ 212, in which we denied its protest against the award of a contract to Inframetrics, Inc. under invitation for bids (IFB) No. 3-523916, issued by the National Aeronautics and Space Administration (NASA) for four infrared thermal imagers. Infrared contends that our earlier decision was erroneous.

We have reexamined the record and our conclusions. For the reasons stated below, we reverse our earlier decision and sustain Infrared's protest.

The solicitation was originally issued as a brand name or equal IFB and requested fixed-price bids to furnish one commercial and three "ruggedized" versions of the Mitsubishi Model IR-M300 infrared thermal imager, or equal. The commercial version of the imager is to be used for ground testing while the ruggedized imagers are to be used on board the space shuttle to conduct various experiments. The IFB contained a list of salient characteristics and a descriptive literature clause which required firms offering equal products, rather than the brand name product, to provide detailed technical information to demonstrate that their offered product met or exceeded the salient

characteristics. Among other things, all of the offered imagers including the commercial model were required to have an internal six-filter wheel and a remote interface. The ruggedized versions of the imagers were additionally required to meet detailed vibration requirements, that is, the imager had to operate properly under specified external vibration conditions.

In response to the IFB, NASA received four bids. After reviewing the bids, NASA concluded that all were nonresponsive. Infrared's bid, which offered the name brand product, was determined nonresponsive because it stated that the vibration requirements for the ruggedized versions of the imager would not be met. Inframetrics's bid was found nonresponsive because the firm failed to sign the bid and did not submit a certificate of procurement integrity. The other two bids were found nonresponsive for failing to meet one or more of the salient characteristics. Because no responsive bids had been submitted, NASA converted the acquisition from sealed bidding to negotiation in accordance with Federal Acquisition Regulation §§ 14.404-1(e)(1) and 15.103. All four firms were notified of the agency's action and the reasons why their bids were found nonresponsive.

In response to the agency's letter, Infrared submitted a list of questions to NASA relating to the vibration specification. The agency provided a response to Infrared's questions. Thereafter, the firm submitted another letter which stated that Infrared could meet the vibration requirement. (Infrared's second letter also contained additional questions to which the agency never responded.) After receiving Infrared's response, NASA found the firm's offer unacceptable; although Infrared had offered to comply with the vibration specification, NASA was not satisfied with what it viewed as a blanket offer of compliance to meet this requirement with no supporting data.

As for Inframetrics--which offered an equal product rather than a name brand product--NASA obtained the firm's signature on its bid and also a properly executed certificate of procurement integrity. (The other two proposals in the competitive range were found technically unacceptable for various reasons.) Based on these results, NASA made award to Inframetrics, even though the firm had submitted the highest price ($439,500 compared to Infrared's price of $293,436) among the competing offerors. In making its award, NASA found that Inframetrics's offered equal product met all of the solicitation's salient characteristics.

In its protest, Infrared argued that NASA had improperly rejected its offer because it had in fact proposed to meet the vibration requirements. Infrared also contended that

Inframetrics's offer was technically unacceptable for a number of reasons, including that the firm's standard unit would not meet various salient characteristics within the required delivery period. In its reconsideration request, Infrared continues to maintain that Inframetrics's offer was inadequate to demonstrate that its equal product met all of the salient characteristics. NASA, on the other hand, agrees with the conclusion in our previous decision that Inframetrics's offer was adequate to show that its product met the salient characteristics.

In a brand name or equal acquisition, firms offering to provide products equal to the name brand product must demonstrate through materials submitted with their bids or offers that their product meets or exceeds the solicitation's material requirements, including any listed salient characteristics. AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308.

Our original decision held that Infrared's offer was properly found technically unacceptable for failing to demonstrate compliance with the vibration requirement. As noted, Infrared maintains that this finding was improper, and that its offer in fact met this requirement; Infrared maintains that it can support the assertion in its offer with test data. We think the firm should have submitted its test data with its best and final offer (BAFO), or at least indicated to the agency that such data were available. (Infrared has not provided our Office with the test data.) On the record before us, we have no basis to question our earlier finding that Infrared's imager did not meet the vibration specification. It thus remains our conclusion that Infrared's offer did not adequately demonstrate compliance with the solicitation.

At the same time, we find that Inframetrics's offer also was unacceptable because it failed to adequately demonstrate that the firm's standard, commercial model (the first camera to be furnished under the contract) would meet the salient characteristics, or that if it ultimately did, it would do so within the prescribed delivery schedule. Inframetrics's BAFO stated that:

> "Inframetrics proposes to supply for the first deliverable, the standard version of the camera without the filter wheel and remote interface, operating in the 3.0 to 5.0 microns waveband. This camera will later be upgraded to include the filter wheel and remote interface to support ground based testing. A complete radiometric analysis will be supplied when the exact imaging requirements are determined. This analysis shall be used in conjunction with input from

> NASA['s] . . . technical representatives to define the optimum camera configuration. . . ."

This aspect of Inframetrics's offer was technically unacceptable. First, the quoted language clearly indicated that the first deliverable would not include two of the salient characteristics--a filter wheel and a remote interface. The proposal therefore was noncompliant with the RFP on its face. See IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378. Second, the quoted language also clearly indicated that Inframetrics would need input from NASA's technical representatives before defining the optimum camera configuration. This requirement for post-award input from the agency made it uncertain whether Inframetrics was offering a conforming, acceptable imager.

Further, Inframetrics's offer was silent with respect to precisely when the imager would be upgraded. The offer therefore was unacceptable because it did not commit Inframetrics to supply conforming units within the agency's delivery schedule. Where a firm's offer fails to affirmatively demonstrate compliance with the solicitation's delivery schedule (which is a material term of any solicitation), the offer should be rejected as unacceptable. VR Envtl. Servs., 71 Comp. Gen. 354 (1992), 92-1 CPD ¶ 370. We note in this connection that Inframetrics in fact did not meet the required delivery schedule. Specifically, the record shows that although award was made to the firm on October 14, 1993 (and our Office issued its first decision in connection with this protest on March 23, 1994), Inframetrics did not deliver the first unit until June 27, 256 days after award, notwithstanding the solicitation requirement for delivery of this unit within 60 days after award.

In our view, NASA failed to treat the two firms equally. It is a fundamental principal of government procurement law that an agency must treat all offerors equally and evaluate their offers consistently against the solicitation's requirements. CXR Telecom, B-249610.5, Apr. 9, 1993, 93-1 CPD ¶ 308. As discussed, both firms submitted technically unacceptable offers; Infrared offered inadequate information to show that it would meet the vibration specification, while Inframetrics offered to supply a nonconforming first deliverable, and indicated that it would require NASA's input before ultimately defining the optimum camera configuration.[1] NASA ignored the defects in Inframetrics's

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[1]Infrared continues to maintain in its reconsideration that Inframetrics was technically unacceptable for reasons beyond the defects discussed above. We need not resolve these

(continued...)

offer, while finding the protester's offer technically unacceptable. This disparate treatment of the firms was inconsistent with the requirement that all firms be treated equally, and thus was improper. Id. The proper course of action for the agency would have been either to cancel the acquisition, or engage in further discussions with both firms (after amending the solicitation, if necessary) in an effort to obtain a technically acceptable offer.

We are advised by NASA that Inframetrics has delivered three of the four imagers to the agency. In view of this substantial performance, it is not practicable for us to make a recommendation for corrective action. We therefore find Infrared entitled to the costs of preparing its proposal. 4 C.F.R. § 21.6(d)(2) (1995). We also find Infrared entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), Infrared should submit its certified claim for these costs, detailing the time expended and the costs incurred, to the agency within 60 days of its receipt of our decision.

Our prior decision is reversed; the protest is sustained.

\s\ James F. Hinchman
for Comptroller General
of the United States

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[1](...continued)
issues, since we find that NASA improperly accepted Inframetrics's offer for the reasons discussed.