

7239

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20348

C. Fogarty
P.L.#

FILE: B-191206

DATE: August 7, 1978

MATTER OF: Numax Electronics, Inc.

DIGEST:

1. Protest concerning alleged improprieties in first-step solicitation of two-step formally advertised procurement, filed after receipt of technical proposals, is untimely since alleged improprieties were apparent prior to step-one closing date.
2. Where request for technical proposals in first-step of two-step formally advertised procurement required offerors to submit proposed technical approach for major component of item being procured, including critical component and design considerations, rejection of technical proposal which simply indicated that offeror intended to sub-contract for the component, was proper.
3. Consideration of capacity and credit during step-one evaluation of technical proposals in two-step formally advertised procurements is improper. However, offeror who failed to submit acceptable technical proposal was not prejudiced by limited consideration of capacity that may have entered into step-one evaluation of its technical proposal.

On July 27, 1977, the Naval Regional Procurement Office, Long Beach, California, issued request for technical proposals (RFTP) No. N00123-77-R-1278 for AN/DKT-38 telemetry sets as the first-step of a two-step formally advertised procurement. The technical proposal submitted by Numax Electronics, Inc. (Numax), in response to the RFTP was found to be technically unacceptable by the Navy. Numax has protested this determination to our Office.

The telemetry sets were required to be furnished in accordance with the detailed performance specifications and drawings contained in the RFTP. These sets, for airborne use to replace the warhead in missiles during Navy fleet training exercises, consist of three major electronic components: antenna, circuit board assembly, and transmitter. Specification Control Drawing 106AS903, Transmitter, Radio, T-1235/DKT-38, set forth the RFTP requirements for the transmitter. The second page of the drawing listed Microcom Corporation as a suggested source of supply. The notes to the drawing, however, also stated that "procurement of the [transmitter] depicted shall be made in accordance with the requirements stated in this drawing and not solely by vendor item identification."

The RFTP included the following evaluation criterion for the technical proposals:

" 2. A description of the offeror's understanding of the scope of the work as shown by the scientific or technical approach proposed for the transmitter. This shall include:

- * * * * *
- b. Technical approach.
 - c. Critical and peculiar hardware.
 - d. Design plan for critical hardware.
- * * * * *
- h. Final System design considerations.
 - i. Reliability and maintenance design considerations.
- * * * * *

"The unpriced technical proposals must fully and clearly demonstrate that the offeror has a

thorough understanding of the requirements of the purchase description. Statements that the offeror 'understands' or 'can' or 'will' comply with the purchase description are considered inadequate. The technical proposals must also include sufficient details and information to allow a reasonable evaluation of each proposal. Items to be specifically addressed include those points identified heretofore as 'evaluation criteria'."

Numax submitted its technical proposal to the Navy. With respect to the transmitter, Numax's technical proposal stated, in relevant part, as follows:

"All contract end items to be delivered to the Government will be in strict conformance with the technical data and any approved changes authorized by Engineering Change Proposals (ECPs).

"The Numax Production Engineering staff has reviewed the data package for the Transmitting Set, Telemetric Data AN/DKT-38 and Numax will perform this contract in the following way.

1. Hardware items that are defined and described by source and specification control drawings will be purchased.

* * * * *

3. MAJOR COMPONENT DESIGN CONSIDERATIONS

Two major hardware items defined by specification control drawings fall into Category 1. [To be purchased.]

a. Transmitter, Radio T-1235/DKT-38,
106AS903

* * * * *

"If the selected vendors are not those suggested on the specification control drawing, the vendor will be requested to provide a qualification test report showing compliance with all of the requirements of the specification control drawing. Numax will then submit this report to the customer to obtain approval of the vendor before proceeding with part procurement.

The following are potential suppliers of the major specification control drawing hardware items:

(1) Transmitter

[Seven potential suppliers, including Microcom Corporation, were then listed.]

The remaining technical discussion in the proposal concerning the transmitter was largely a recitation of specification requirements.

Numax's technical proposal, along with the others received, was forwarded to the Technical Evaluation Board (TEB) for evaluation. The TEB reported the results of its evaluation to the contracting officer. Concerning Numax's proposal, the TEB report stated as follows:

"The NUMAX proposal is unacceptable as it exists, but could be made acceptable with the addition of adequate discussion of the following:

1. Technical design approach for the transmitter to demonstrate compliance to drawing 106AS903.
2. Technical design approach for the voltage control oscillator to demonstrate compliance to drawing 106AS905.
3. Technical approach to supplying an antenna to the requirements of drawing 106AS926.

4. The statement on transistors in the last paragraph of page C-3 requires correction.

COMMENTS:

This proposal contains an excellent management plan and a very good quality assurance plan. The bidder does not have a technical background in telemetry but has assembled and tested similar types of equipment into systems. The bidder apparently has not contacted any vendors for the critical telemetry subsystems. This may cause some delays or technical problems later which could lead to cost overruns. More technical information is required to enable a complete evaluation of this proposal."

The Navy advised Numax by letter that additional information was required to make an adequate judgment concerning the technical acceptability of its proposal. The letter specifically listed, word for word, the four areas cited by the TEB as requiring additional discussion by Numax. Numax responded by submitting a supplement clarifying its proposal. In this supplement, on pp. 4-7, Numax discussed its "Technical Design Approach for Transmitter." The discussion states that "[t]he transmitter * * * can be designed in several ways * * * requir[ing] sound engineering and manufacturing techniques to insure a reliable product that will meet all of the performance requirements over the environmental extremes." There followed three one-paragraph summaries of design approaches, or "concepts." The discussion then stated that "[s]uccessful * * * transmitters have been constructed by vendors incorporating each of the design concepts presented above. The latest developments in integrated circuits and R. F. transistors have been incorporated in their designs but the designs remain standard and within the state of the art." The remaining technical discussion was again largely a recitation of specification requirements for the transmitter as set forth in the solicitation.

The amended technical proposal was then forwarded to the TEB for evaluation. The TEB's conclusions were as follows:

"The response by NUMAX to the questions of clarification only partially satisfies the concern of the TEB that NUMAX cannot meet the requirements of the subject RFTP. NUMAX provided only a brief (one page) technical discussion of three possible transmitter designs that would be considered for use in the AN/DKT-38 should NUMAX be the successful bidder. Of the three possible transmitter designs, the first involves an approach that has no chance of meeting stability requirements. The brevity of the transmitter discussions does not provide sufficient information for the TEB to evaluate the other transmitter design approaches. The NUMAX proposal update included an additional two pages of transmitter specifications that are merely a restatement of RFTP specifications. Overall, the weakness of the NUMAX proposal in the critical area of the transmitter design approach leads the TEB to assume a lack of understanding on NUMAX's part of the complexity of the RFTP requirements with the attendant unacceptably high risk that NUMAX cannot meet delivery requirements, and that NUMAX cannot estimate reasonable costs for the proposed program."

As a result, the contracting officer advised NUMAX that its proposal was technically unacceptable. This protest was then filed.

The bases of Numax's protest are as follows:
(1) the first step RFTP was defective in that no criteria were presented for evaluating the technical proposals as required by Armed Services Procurement Regulation (ASPR) § 2-503.1(a)(iv) (1976 ed.); (2) the

RFTP did not contain a statement concerning the acceptability or nonacceptability of multiple proposals as required by ASPR § 2-503.1(a)(x); (3) the procurement should not have been conducted by two-step formal advertising since adequate specifications were available; (4) no rational basis existed for the Navy to determine that Numax's technical proposal was unacceptable because of transmitter design considerations, since the technical solution proposed by Numax made a submission concerning technical design unnecessary and superfluous; and (5) rejection of its proposal was improper, because the step-one technical evaluation also included a consideration of Numax's capacity, whereas ASPR §§ 2-501(i) and 2-503.1(e) provide that capacity and credit are not to be evaluated in the first-step of a two-step procurement.

With regard to the protester's first three contentions, Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), provides that protests based upon alleged solicitation improprieties must be filed prior to bid opening or the closing date for receipt of proposals. In addition we have held in connection with two-step procurements that solicitation improprieties must be protested prior to the step-one closing date. 53 Comp. Gen. 357 (1973); Norris Industries, B-182921, July 11, 1975, 75-2 CPD 31. Since the alleged lack of evaluation criteria in the RFTP, the lack of a statement concerning multiple proposals and the alleged improper use of the two-step method of procurement were improprieties apparent prior to the step-one closing date, and since Numax did not complain of the alleged improprieties until after its technical proposal was rejected, these portions of Numax's protest are untimely and will not be considered. However, Numax's complaints about the actual evaluation of its technical proposal are timely and will be considered.

Numax argues as follows:

"[T]he RFTP did not require offerors to submit a transmitter design * * * [and] [e]ven if the RFTP could be construed to require offerors to submit a transmitter design, the technical solution proposed by Numax makes such submission unnecessary and superfluous and is a nonessential deviation. * * * Specification Control Drawing 106AS903, Transmitter, Radio, T-1235/DKT-38 sets forth the requirements for the transmitter. The second page of the drawing lists Microcom as a suggested source of supply for the transmitter. Numax is not a radio transmitter manufacturer. Accordingly, their technical approach was to purchase the radio transmitter from Microcom and/or other potential suppliers of the radio transmitter. This technical approach was clearly stated in their initial technical proposal. In conjunction with this technical solution Numax submitted comprehensive data on the procedures they would use to insure that the purchased transmitter would satisfy the specifications. Nowhere in the letter RFTP, the technical specifications, or otherwise is there a requirement for offerors to submit a radio transmitter design. Nor is such a design critical to a determination regarding the acceptability or unacceptability of an offeror's technical proposal. This procurement is not for a radio transmitter, it is for a telemetry set. Also, a number of suppliers within the electronics industry specialize in the manufacture of radio transmitters for telemetry sets and similar application. The commercial availability of suitable radio transmitters to prospective offerors was recognized by the United States Navy. As previously noted, the specification control drawing lists Microcom Corporation as a suggested source of supply. Microcom Corporation is not a required source of supply. All of the above factors support the proposition that an offeror can submit an acceptable technical proposal which

specified that the transmitter will be purchased from a radio transmitter supplier such as Microcom."

In reply, the Navy argues as follows:

"There is no requirement imposed either by the RFTP or the letter request for clarification, for a transmitter design. The requirement is for the offeror to address the technical aspects of the design approach to the transmitter and any consequences flowing from that approach. Where an offeror intends to design and fabricate the transmitter in house, it would necessarily be expected to provide more data than would be received from an offeror intending to subcontract the transmitter; in this assertion the protester and the contracting officer concur. However, it does not follow that the bald statement of subcontracting intention satisfies the requirement of the RFTP for a discussion of technical approach. It must be remembered that the transmitter will be incorporated into a system, by the contractor. The contractor will be responsible for assuring that the transmitter operates properly in conjunction with the rest of the system in the extremes of environmental stress which it will encounter in its role as a missile component. The transmitter operates at a frequency of greater than 2000 megahertz, or more than 2 billion cycles per second. Such frequencies require specialized circuit fabrication techniques, and are extremely sensitive to minute alterations in even such physical parameters as dimensions and distances. The contractor must be capable of assuring the system integrity. It is not sufficient to buy the parts and assemble them; the contractor must possess the engineering skill to ensure that the integrated whole will in fact function as intended. This skill, in turn, cannot be exercised without a

specifically detailed knowledge of the characteristics of the transmitter to be used. Consequently, the RFTP's focus, in the evaluation criteria, upon the design approach to the transmitter is an appropriate methodology for ascertaining whether the potential contractor will be capable of performing the required effort."

The technical evaluation criterion in the RFTP explicitly required each offeror to submit its scientific or technical approach proposed for the transmitter, including proposed critical and peculiar hardware, design plan for critical hardware, final system design considerations, and reliability and maintenance design considerations. As stated above, the TEB determined Numax's technical proposal to be unacceptable because of the proposal's weakness in the critical area of transmitter design approach. The appropriateness of this determination is at issue.

Consistent with the stated evaluation criterion, each offeror's proposed technical approach for the transmitter formed, in substantial part, the basis of the agency's evaluation of the acceptability of the offeror's technical proposal. Ultimately, upon completion of step-one, the supplies, that is, the telemetry sets, of which the transmitter is a major component, must be procured in step-two in accordance with the specifications and the bidder's own technical proposal as finally accepted. Since each offeror in its proposal is committing itself to fulfilling the Government's requirements by the specific technical approach it proposes, the agency, during its step-one evaluation, must determine substantive technical conformance to the stated criterion of each offeror's proposed technical approach. The Government is not in privity of contract with any potential subcontractor of a bidder. The Government must look to the offeror for performance in accordance with the terms of its proposal, that is, in accordance with the specific technical approach commitment contained therein. In short, it is the technical acceptability and conformance of

the offeror's proposed technical approach, its offered substantive technical undertaking, which is being evaluated, and not that of a subcontractor.

Thus, in view of the express requirement of the RFP for offerors to submit a scientific and technical approach for the transmitter, including critical component and design considerations, and in view of the notice in the RFP that statements such as the offeror "can" or "will" comply will be considered inadequate, we do not believe the agency to be unreasonable in its determination that a simple statement of subcontracting intention in Numax's proposal was unacceptable. Furthermore, concerning Numax's supplement to its proposal, containing three one-paragraph summaries of design approaches, or "concepts", we accept the considered judgment of the procuring agency's specialists that it too was unacceptable.

Numax also argues that rejection of its proposal was improper because the technical evaluation by the agency also included a consideration of Numax's capacity. Numax points to the expressed concern of the TEB, in its report to the contracting officer following evaluation of Numax's proposal, that a high risk existed that Numax could not meet delivery requirements or estimate reasonable costs for the proposed program. Numax also points to the Navy's statement, submitted with the agency report on the protest, which stresses the need for engineering skill, detailed knowledge and adequate capability of offerors to successfully perform the required effort. To the extent that this argument of Numax concerns the apparent focus of the evaluation criterion itself, it is untimely since Numax did not complain of the evaluation criterion until after its technical proposal was rejected. With respect to the actual evaluation of its proposal, we agree with Numax that consideration of an offeror's capacity or credit is improper during step-one evaluation of technical proposals. The record supports Numax's assertion that such consideration, at least to a certain extent, may have entered into the TEB's

evaluation of its technical proposal. However, as we have previously found, the agency's rejection of Numax's proposal as unacceptable was reasonable since Numax failed to submit an acceptable technical approach for the transmitter in substantive technical conformance to the stated criterion. Thus, since Numax's technical proposal was properly rejected under the stated evaluation criterion, Numax was not in any way prejudiced by the limited consideration of capacity that may have entered into the TEB's evaluation of its proposal.

The protest is denied.

Deputy


Comptroller General
of the United States