Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Voith Hydro, Inc.

File: B-277051

Date: August 22, 1997

Michael Fischer, Esq., Timothy J. Saviano, Esq., Foley & Lardner, for the protester.
Sherry K. Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, although offeror indicated its intent to manufacture required items in a new plant, which the agency considered would give rise to unacceptable risk and therefore constituted the primary weakness in the firm's proposal, the agency failed to raise in discussions its concerns about use of that plant.

DECISION

Voith Hydro, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 1425-96-SP-10-13640, issued by the Department of the Interior for 18 hydraulic-turbine runners for the Grand Coulee Dam Powerplant.

We sustain the protest based on our conclusion that Interior failed to conduct meaningful discussions.

As amended, the RFP required that each offeror's technical proposal be submitted as a separate volume of the proposal and include "detailed information of the proposed manufacturing method and facilities to be used during the runner replacement and turbine rehabilitation work. . . ." The technical volume of Voith's initial proposal did not state the manufacturing facility the firm would use.

After receipt and evaluation of initial proposals, the agency created a competitive range including Voith's proposal. By letter of February 12, the contracting officer informed Voith that its proposal was in the competitive range and provided the firm with questions and comments concerning the proposal, including: "Where will the runners be manufactured? Please provide information on the manufacturing

capabilities of that location. This is a deficiency, and--as such--will render your proposal unacceptable unless you provide the requested information." (Emphasis omitted.)

The February 12 letter also scheduled an oral presentation/question and answer session with Voith and asked the firm to respond to the written questions and comments before the meeting.

In response to the above question, in a February 28 letter Voith stated:

> Voith Hydro companies have six (6) major hydro-turbine manufacturing facilities throughout the world capable and experienced in manufacturing and supplying runners to the hydropower generation market. Voith would therefore recommend for a long term project such as Grand Coulee, that our commitment be that the runners will **all** be manufactured at a Voith manufacturing facility. This would allow best management of schedules and risks. However, if this is not acceptable, Voith will commit, as indicated in the proposal, that nine (9) runners would be manufactured in China, which more specifically would be our SHEC (Shanghai Hydro-Power Equipment Company, Ltd.) facility in Shanghai, China. The remaining nine (9) runners would be manufactured at our Voith Hydro facility in York, Pennsylvania. [Emphasis in original.]

Voith then made an oral presentation and participated in a question and answer session. An agency memorandum dated March 5, under the heading "Manufacturing methods and facilities," describes the two options for manufacturing the runners which Voith proposed in its February 28 letter. The memorandum then states "the proposed [SHEC] fabrication facility was the primary weakness in the offeror's proposal." According to the memorandum, this was because SHEC is a start-up facility and will have a long learning curve before a high quality product can be produced consistently. The memorandum also states that due to the critical need for high efficiency and uncompromised reliability from the Grand Coulee runners, the agency cannot afford the risk of an unproven facility with an inexperienced work force. In addition, the memorandum states:

> The [contracting officer] informed the offeror that the [evaluators] can only evaluate what is proposed and that given several options they will have to assume the least favorable and thus the proposal will be evaluated accordingly. There was an indication that Voith will commit to one of the two options. Regardless of the option selected it appears to the [evaluators] that Voith has committed to a new plant in China and that the runners will be manufactured in this new plant that does not have a proven record. This is a deep concern to the [evaluators] . . . .

Nonetheless, the agency left Voith's proposal in the competitive range and requested a best and final offer (BAFO) from Voith along with the other competitive range offerors. The BAFO request letter to Voith included no questions or additional comments concerning the firm's proposal.

Voith's BAFO stated that the firm would supply nine runners manufactured at the SHEC plant. Based on their review of Voith's BAFO, agency evaluators recommended that Voith's proposal be removed from the competitive range "due to the proposed use of an unproven manufacturing facility and an inexperienced workforce for nine of the runners." In a letter excluding Voith's proposal from the revised competitive range, the contracting officer explained that the SHEC facility "was the primary weakness in [the firm's] proposal, and the cause of your removal from the competitive range."

Voith argues that Interior failed to conduct meaningful discussions because the agency failed to advise the firm that the SHEC facility was the major weakness in the firm's proposal, even though Voith's representatives specifically asked the contracting officer during discussions whether the agency had concerns about that facility. Voith notes that during discussions, instead of informing Voith of the agency's concerns about the SHEC plant, the contracting officer simply requested a firm commitment as to the facilities where Voith would manufacture the runners and Voith argues that it cured this deficiency. Finally, Voith states, had the agency identified the SHEC facility as a major weakness in Voith's proposal, the firm would have proposed to manufacture the runners at one of its other five plants.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are included in the competitive range. Federal Acquisition Regulation (FAR) § 15.610. Although 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. Serv-Air, Inc.; Kay and Assocs., Inc., B-258243 et al., Dec. 28, 1994, 96-1 CPD ¶ 267 at 6. In this regard, the agency is required to point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result in technical transfusion or leveling. FAR §§ 15.610(c), (d) and (e); Innovative Training Sys., B-251225.3, Oct. 19, 1993, 93-2 CPD ¶ 232 at 3. Discussions are not meaningful where the agency does not inform an offeror of the central deficiency in its proposal. E.L. Hamm & Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156 at 3-5. In short, discussions cannot be meaningful unless they lead an offeror into those aspects of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award. Global Indus., Inc., B-270592.2 et al., Mar. 29, 1996, 96-2 CPD ¶ 85 at 4-5. Under this standard, Interior should have advised Voith of the agency's concerns with the SHEC facility so that Voith would have an opportunity to decide whether to continue to propose that facility.

Interior does not argue that it raised this matter in discussions or that it otherwise placed Voith on notice of the agency's concerns regarding the SHEC plant. On the contrary, the agency specifically states that it did not raise this issue during discussions because Voith's initial technical proposal did not commit the firm to manufacture runners at the SHEC facility, so agency officials were not aware of this possible deficiency in order to raise it in discussions. Thus, Interior argues that due to Voith's failure to provide the requested information in its initial proposal, Voith's proposal did not have the weakness until after it submitted its BAFO. According to the agency, by seeking to keep its options open and by not providing the information required by the RFP--and specifically requested by the contracting officer--Voith effectively hid the weakness until it was forced to commit to a specific manufacturing facility, which it finally did in its BAFO.

While we agree that Interior could reasonably conclude that Voith's initial proposal did not contain a contractually binding commitment to manufacture runners at the SHEC facility, during discussions and before BAFOs were requested, the agency had sufficient understanding that Voith planned to use the SHEC facility to raise the matter in discussions.[1] Voith's February 28 letter clearly indicated Voith's commitment to production of nine of the runners at the SHEC facility. As explained above, although Voith recommended in that letter that it be permitted the option of manufacturing the runners at any Voith manufacturing facility, the letter also stated "if this is not acceptable, Voith will commit, as indicated in the proposal, that nine (9) runners would be manufactured in China, which more specifically would be our SHEC . . . facility in Shanghai, China." Since the lack of a commitment to specific facilities in fact was not acceptable to the agency, we think a reasonable reading of that letter should have led (and, in fact, did lead) agency officials to understand that Voith planned to produce runners at the SHEC facility. Accordingly, the agency was required to raise that major weakness in discussions with Voith.

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[1]Voith argues that two references in Voith's initial proposal reasonably should have placed agency officials on notice that the firm planned to manufacture some of the runners at that facility. First, under the heading "Listing of Possible Sub-Contractors," the proposal, in a volume other than the technical volume, listed the SHEC facility in Shanghai, China for "Runner Fabrication." Second, also not in the technical volume, Voith's proposal included the standard "Buy American Act--Trade Agreements--Balance of Payments Program Certificate" filled out to indicate that Voith would supply items manufactured in China to meet the requirements of line item number five of the RFP. That line item is for designing and furnishing nine of the runners required under the contract. As we explain below, we conclude that Voith's February 28 letter should have led the agency to raise in discussions its concerns about the SHEC facility. Consequently, we need not decide whether the references in Voith's initial proposal should have led the agency to raise this matter in discussions.

In any event, the record shows that agency officials understood, before receipt of Voith's BAFO, that the firm was proposing to manufacture some of the runners at the SHEC facility. As explained above, the agency's March 5 memorandum (written before BAFO's were received) stated that, given the options offered by Voith, the agency would "assume the least favorable" one. The memorandum also stated "[r]egardless of the option selected it appears to the [evaluators] that Voith has committed to a new plant in China and that the runners will be manufactured in this new plant that does not have a proven record." Finally the memorandum stated that the SHEC facility "was the primary weakness in the offeror's proposal." Thus, although Interior now argues that at the time of discussions, Voith's proposal did not include the weakness at issue here, the contemporaneous record shows that, based on the February 28 letter, the agency's evaluators did understand during discussions that Voith's proposal included the plan to manufacture the runners at the SHEC facility.[2]

In addition to arguing that it was not aware of the weakness in Voith's proposal, Interior argues that it was not permitted to discuss with Voith the firm's plan to use the SHEC facility. According to the agency, the contracting officer concluded that determining which facility to propose was a business decision properly left to Voith and that, had he discussed how the evaluators would rate the SHEC facility before Voith "committed" to using that facility, he would have engaged in "impermissible coaching," or technical leveling. In this respect, the agency argues that it was each offeror's responsibility to decide where it would manufacture the runners and it would have been improper to seek to improve Voith's technically acceptable proposal through repeated rounds of discussions which coached the firm concerning the agency's view that Voith's particular proposed "approach" was not the desired way of meeting the agency's needs.

There is no merit to this argument, which would, in effect, foreclose the government from obtaining the best offers for needed goods and services. Technical leveling--which is often referred to as improper coaching--occurs when an agency, through successive rounds of discussions, helps to bring a proposal up to the level of another proposal by pointing out weaknesses that remain in the proposal due to an offeror's lack of diligence, competence, or inventiveness, after having been given an opportunity to correct them. FAR § 15.610(d); CBIS Fed. Inc., 71 Comp. Gen. 319, 324-328 (1992), 92-1 CPD ¶ 308 at 7-9. As we concluded above, the weakness remained in Voith's proposal simply because agency officials never

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[2]Interior is correct that the RFP called for offerors to provide detailed information on the proposed manufacturing facilities and Voith's initial proposal failed to provide that information. Nonetheless, this does not excuse Interior from its obligation under the FAR to conduct meaningful discussions once the agency included Voith's proposal in the competitive range, received Voith's February 28 letter, and proceeded to conduct a face-to-face session with Voith in early March.

pointed out that they considered the SHEC facility to be a weakness, not because of a lack of diligence, competence, or inventiveness on Voith's part.[3]

Finally, Voith challenges Interior's evaluation that the firm's proposed use of the SHEC facility entailed unacceptable risk. We will question an agency's evaluation of proposals only if the record demonstrates that it was unreasonable or inconsistent with the RFP's evaluation criteria. Microwave Solutions, Inc., B-245963, Feb. 10, 1992, 92-1 CPD ¶ 169 at 2. Here, there has been no such showing. Voith has not argued that the evaluation was inconsistent with the evaluation criteria and we have no basis to challenge the evaluators' concern that, due to the critical need for efficiency and reliability from the runners, the agency cannot afford the risk of an unproven facility. Nonetheless, as we explain above, had the agency identified the SHEC facility as a major weakness in Voith's proposal, it appears likely that the firm would have proposed one of its other five facilities for manufacturing the runners.

We recommend that the agency provide Voith the opportunity to amend its proposal to substitute another plant for the SHEC facility. If Voith does so, we recommend that the agency then reassess whether the revised proposal should be included in the competitive range and considered for award. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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[3]Interior also appears to believe that it would have constituted technical transfusion to have discussed with Voith "the desirability of using a proven manufacturing facility as its competitors had proposed." Disclosure of one offeror's approach to another is unfair and is prohibited as technical transfusion. See FAR § 15.610(e); CBIS Fed. Inc., supra, at 8. Here, however, to have advised Voith that the agency had serious concerns about the SHEC facility would have told Voith nothing about its competitors' proposals and therefore would not have constituted technical transfusion.