



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Chant Engineering Company, Inc.

File: B-281521

Date: February 22, 1999

Philip Chant for the protester.

Susan Spiegelman-Boyd, Esq., Department of the Navy, for the agency.

Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency reasonably determined that protester's proposal was unacceptable and excluded it from the competitive range in a solicitation for a commercial item where the protester was not offering "commercial off the shelf equipment," as required, but was merely offering to fabricate, for the first time after award, equipment that met the specification.

DECISION

Chant Engineering Company, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N00164-98-R-0064, issued by the Department of the Navy, Naval Surface Warfare Center, Crane (Indiana) Division, for a manual electro-hydraulic servo valve test station for the Corpus Christi Army Depot.

We deny the protest.

The RFP was issued on May 5, 1998, under the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) part 12. RFP at 1. The RFP required the test station (also referred to as a stand) to "be commercial off the shelf equipment designed to assemble, troubleshoot and test aircraft proportional nozzle type and jet pipe type Electro-hydraulic Servovalves with various configurations." Id. at 17. The RFP included the full text of FAR § 52.212-4, Contract Terms and Conditions--Commercial Items, which incorporates by reference the FAR § 52.202-1 definition of "commercial item."¹ Id. at 6.

¹Under FAR § 52.202-1(c), a "commercial item" is defined, in relevant part, as:

- (1) Any item . . . that is of a type customarily used for nongovernmental purposes and that--

(continued...)

Besides requiring the contractor to deliver, install, and test/check-out the test station, the RFP requires the contractor to provide the full coverage of any standard commercial warranty normally offered in a similar commercial sale (and to submit a copy of its standard commercial warranty with its offer), to provide commercial off-the-shelf operating and maintenance manuals (that "contain operation, maintenance, parts lists, and other instructions applicable to equipment designed and manufactured for commercial use"), and to train government personnel in the operation and maintenance of the test station. Id. at 2, 3, 8, 14, 16-17, Contract Data Requirements List exhibit (e).

The RFP contemplated the award of a fixed-priced contract to the responsible offeror whose conforming proposal would be most advantageous to the government, price, technical capability and past performance considered. Id. at 24. The RFP established that, for evaluation purposes, technical capability was significantly more important than past performance and price. Id. For technical capability, the RFP stated that proposals would be evaluated to ensure that the proposed test station, warranty, and training comply with the requirements specified in the RFP's performance specification and statement of work. Id.

The RFP informed offerors that their test stations would be examined for compliance with the requirements of the performance specification and statement of work and that "[a]ny redesign or modification of the contractor's standard product to comply with [the] specified requirements . . . shall receive particular attention for adequacy and suitability." Id. at 21.

The RFP instructed offerors that their proposals must include a technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation, which may include product literature, or

¹(...continued)

- (i) Has been sold, leased, or licensed to the general public; or
- (ii) Has been offered for sale, lease, or license to the general public;
- (2) Any item that evolved from an item described in paragraph (c)(1) of this clause through advances in technology or performance and that is not yet available in the commercial marketplace . . . in time to satisfy the delivery requirements under a Government solicitation;
- (3) Any item that would satisfy a criterion expressed in paragraphs (c)(1) or (c)(2) of this clause, but for--
 - (i) Modifications of a type customarily available in the commercial marketplace; or
 - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements
- (4) Any combination of [the above] of a type customarily combined and sold in combination to the general public

other documents, if necessary. Id. at 24. The RFP stated that "each technical proposal shall enable Government evaluating personnel to make a thorough evaluation and arrive at a sound determination as to whether or not the proposal will meet the requirements of the government." Id.

The Navy received Chant's proposal, among others, by the June 23 due date. In its proposal, Chant listed the technical requirements in the RFP and stated that it would comply with each. The proposal included two drawings of the proposed equipment, and pictures and descriptions of other types of equipment that Chant has produced. Following the technical evaluation, the agency determined that Chant's proposal was unacceptable as submitted because it was not accompanied by literature "that provides the information necessary to make a determination as to meeting any of the requirements" of the RFP. Agency Technical Comments, Aug. 1998. The agency also considered Chant's failure to supply warranty information as a deficiency. Id. The agency viewed correction of these deficiencies as requiring Chant to submit what would amount to an entirely new proposal.

Based on Chant's unacceptable technical proposal, the agency determined that Chant did not have a reasonable chance of being selected for award and excluded its proposal from the competitive range. On October 29, the contracting officer sent Chant a letter stating that its proposal had been excluded from the competitive range and listing the 47 RFP specification requirements (as well as the warranty requirement) for which Chant's proposal provided insufficient information "for a thorough evaluation." The next day, Chant requested a debriefing, which was provided by telephone on November 4. Chant's protest followed.

Chant contends that its proposal was improperly evaluated, resulting in the agency's determination that the proposal was technically unacceptable. Chant complains that other than stating that Chant did not supply enough information, the agency has failed to provide specifics as to what the deficiencies in its technical proposal were. According to Chant, during the debriefing, the agency's technical evaluator could not elaborate on the reasons he found Chant's proposal unacceptable and merely reiterated several times that Chant, unlike other offerors, had failed to supply "color brochures" with its proposal. Chant views the RFP's requirements as being so specific and detailed that there was nothing left for Chant to add to its proposal other than to reiterate the RFP requirements and state that it "will provide" the required features.

The evaluation of proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency, since it is responsible for defining its needs and determining the best method of accommodating them. Laboratory Sys. Servs., Inc., B-256323, June 10, 1994, 94-1 CPD ¶ 359 at 2. 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. Riveer Co., B-279723, July 14, 1998, 98-2 CPD ¶ 19 at 4. In reviewing challenges to an agency's competitive range determination, our Office does not independently reevaluate proposals; rather, we examine the evaluation to determine whether it is reasonable. Tri-Services, Inc., B-253608, Sept. 7, 1993, 93-2 CPD ¶ 131 at 2.

Here, based on our review of the record, we conclude that the Navy's evaluation of Chant's proposal, and the contracting officer's determination not to include the proposal in the competitive range, are unobjectionable because the statements in Chant's technical proposal that Chant's proposed test station will meet the RFP's performance requirements, without more, are not sufficient to satisfy the RFP's commercial item requirement. Chant's proposal provides no evidence that its proposed test station has at least been offered for sale, lease, or license to the general public or that it otherwise complies with the FAR § 52.202-1(c) definition of "commercial item." Instead of offering "commercial off the shelf equipment," Chant is merely offering to fabricate, for the first time after award, a customized test station in compliance with the specification (but using commercial off-the-shelf components "to the fullest extent possible"). Chant Technical Proposal, at 1. Thus, it is apparent from Chant's proposal that its proposed test station is not based on any existing, commercially available model.²

Although Chant's proposal showed that Chant had designed and fabricated several other types of test stations/stands for the government, there is no indication in the proposal that these items were ever commercially available and that the test station proposed here has evolved from any of those items through advances in technology or performance and would be available in the commercial marketplace in time to satisfy the delivery requirements of this RFP. See FAR § 52.202-1(c)(2). One of the purposes of a solicitation requirement for a commercial product is to avoid the design and engineering risks associated with new equipment by procuring a commercially proven item. See AUL Instruments, Inc., B-186319, Sept. 1, 1976, 76-2 CPD ¶ 212 at 6. New equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial off-the-shelf (existing) equipment. See Aydin Corp., B-224185, Nov. 28, 1986, 86-2 CPD ¶ 625 at 3, aff'd, B-224185.2, Feb. 10, 1987, 87-1 CPD ¶ 141, recon. denied, B-224185.3, Aug. 25, 1989, 89-2 CPD ¶ 176; AUL Instruments, Inc., supra.

Finally, Chant alleges that the agency's evaluator may have been biased against it as reflected in his comments at the debriefing that other offerors had supplied "color brochures" of their products, which he preferred, whereas Chant had supplied only

²Other indicia that Chant's proposed test station is not commercially available are Chant's failure to provide a copy of a standard commercial warranty and the commercial off-the-shelf operating and maintenance manuals required by the RFP.

black and white drawings showing the general layout of the equipment it was proposing.³ The point the evaluator apparently was making was not that "color brochures"--or "company brochures" as he claims to have stated--were specifically required, but that Chant did not submit any product literature showing that the test station it was proposing was based on any commercially available model (with or without modifications) that conforms to the RFP's requirements. The protester has presented absolutely no evidence of bias against it, however; it merely infers bias based on the exclusion of its proposal from the competitive range. We will not attribute bias in the evaluation of proposals on the basis of inference or supposition. Tri-Services, Inc., supra, at 6.

The protest is denied.

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³During the debriefing, the protester pointed out to the evaluator that other offerors may have to customize their products shown in their brochures in order to meet the RFP's requirements. However, the FAR definition of "commercial item" allows for modifications of a type customarily available in the commercial marketplace or minor modifications of a type not customarily available in the commercial marketplace made to meet government requirements. FAR § 52.202-1(c)(3)(i), (ii).