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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Foster-Miller, Inc.

File: B-296194.4; B-296194.5

Date: August 31, 2005

Matthew D. Schwartz, Esq., Timothy Sullivan, Esq., and Katherine S. Nucci, Esq., Thompson Coburn LLP, for the protester.
Capt. Victor G. Vogel, John J. Reynolds, Esq., and Lea E. Duerinck, Esq., U.S. Army Materiel Command, for the agency.
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DIGEST

1. Under procurement calling for two stages of testing of equipment (chamber testing and field testing), contracting agency properly barred protester from using a programming load for its equipment during the field test different from the programming load that the protester had used during the chamber test; agency's decision was based on a reasonable interpretation of language in the chamber and field test plans as prohibiting changes to the programming load after the chamber test.

2. Protest is denied where protester fails to demonstrate that agency's evaluation of proposal as unacceptable under critical evaluation subfactor and agency's exclusion of proposal from competitive range on that basis were unreasonable.

DECISION

Foster-Miller, Inc. (FMI) protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W15P7T-05-S502, issued by the U.S. Army Communications-Electronics Life Cycle Management Command, Fort Monmouth, New Jersey, for a Counter Remote Control Improvised Explosive Device (RCIED) Electronic Warfare (CREW) System.

We deny the protest.

BACKGROUND

The solicitation seeks to acquire a next-generation CREW system, to be used to prevent and defeat improvised explosive device ambushes [deleted]. That is, the solicitation seeks improved technology for jamming radio-controlled roadside bombs. The goal is to improve on the capabilities of the currently-fielded CREW system by providing for simultaneous coverage against all RCIED threats at increased ranges, broader frequency coverage extendable to higher frequencies, ease of programmability, reduced size, weight, and power, and built-in capacity for future growth.

The RFP, which was issued on February 4, 2005, contemplated the award of one or more 4-year, fixed-price, indefinite-delivery/indefinite-quantity and time-and-materials contracts to the offerors whose proposals were determined most beneficial to the government. The solicitation provided for the evaluation of proposals on the basis of the following four factors, listed in descending order of importance: technical performance, price, performance risk, and small business participation. The technical performance factor included the following subfactors, listed in descending order of importance: technical approach, schedule and production capacity, and supportability. The solicitation advised offerors that to receive consideration for award, proposals had to be rated no less than acceptable under the technical performance factor, each of its three subfactors, and the small business participation factor.

The RFP's Statement of Objectives identified Band A (required) and Band B (desired) capabilities of the systems to be procured. One of the Band A requirements pertained to frequency spectrum; another pertained to effective range. The RFP advised that the government would evaluate the offeror's ability to meet the Band A requirements, as well as any offered capabilities from Band B. The RFP further advised that failure to meet any Band A requirement would render a proposal unacceptable. Offerors were cautioned that "[u]nsupported promises to comply with contractual requirements will not be sufficient," and that "[p]roposals must contain supporting rationale for any statements relating to proposed performance." RFP § M-3(C)(1). Similarly, offerors were advised that one of the criteria that would be considered in evaluating their proposals under the technical performance factor and its subfactors was completeness/adequacy of response and that "[m]ere statements of compliance or repetition of the technical requirements without a complete discussion and analysis [are] unsatisfactory." Id.

The solicitation required the submission of at least two hardware system samples for testing in a laboratory anechoic chamber at Fort Monmouth and in the field at Yuma Proving Ground in Arizona, with results of the testing to be considered in the evaluation of proposals under the technical approach subfactor. The solicitation provided that the test results would be used to verify the content of the offeror's written proposal and to help the government assess the risk in the offeror's ability to

meet solicitation requirements. The RFP further provided that an offeror's failure to submit at least two system samples for laboratory anechoic chamber and Yuma Proving Ground testing at the time of proposal submission would render the offeror's proposal ineligible for award.

The RFP included both a Chamber Test Plan and a Field Test Plan. RFP Attachs. 5 and 6. Of relevance to this protest, the Chamber Test Plan instructed offerors as follows:

> The offeror may bring any test equipment, to be used for installation, verification, operation, and diagnostics of TEST ARTICLE(s), into Building 600. This equipment will need to be included in the shipment of TEST ARTICLE(s). Equipment that is not shipped with the TEST ARTICLE(s) will be prohibited from entering the 12WD facility.

RFP Attach. 5, at 5. The Field Test Plan, in contrast, did not place restrictions on the test equipment that offerors were permitted to bring to the test site.

The Chamber Test Plan also advised offerors that as part of the testing, they would be provided with a list of test threats and their tuning ranges to be used to "set up, or program their TEST ARTICLES." Id. at 8. The plan further advised offerors that, after an initial or "dry" run, they would be allowed to "reprogram the test article with a new programming load,"[1] and then have their test articles retested for the record against the same list of threats. Id. at 5. The plan instructed that at the conclusion of the chamber testing, the government would ship the test equipment and test articles to Yuma for the field test, and that "[n]o software changes to the TEST ARTICLES [would] be permitted between the chamber tests and field tests." Id. The Field Test Plan provided that as part of the field test, offerors would be provided with the same list of test threats and their tuning ranges as used in the chamber test, and that they would be allowed to "input the TEST ARTICLE programming load once prior to the Field Tests." RFP Attach. 6, at 6. Offerors were cautioned that they

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[1] The term "programming load" is used to describe the data input into a test article by an offeror during the testing. Specifically, FMI describes "programming load" as

> data (selective, targeted frequencies with start and stop frequencies and other variables such as step size in kilohertz, step time and dwell time) entered into [an offeror's] system via the [graphic user interface] software, much like data is entered by a user on a computer spreadsheet via Excel applications software. The system's software then uses the data to tell the system where to direct power and energy levels to jam likely threats.

Comments, July 8, 2005, at 9-10.

would "NOT be permitted to reprogram [their] TEST ARTICLES at any time during the Field Testing." Id.

Eight proposals were received by the March 21 closing date. FMI furnished hardware samples with its proposal, but failed to include with the proposal a laptop computer, which it needed to run the interface software which it planned to use to input the programming load into its test article.[2] When the FMI team arrived at Fort Monmouth for chamber testing of the protester's test articles on March 30, it brought with it a laptop computer that it intended to use to run the interface software and enter the programming load. Agency officials refused to allow the FMI team to bring the laptop computer into the test facility, however, since, as noted above, any test equipment was required to have been shipped with the test articles. Agency officials also refused to allow the protester's team access to an agency laptop. FMI was given the option of proceeding without loading the software or not proceeding at all. According to the protester, its test article [deleted]; while the agency's refusal to permit it to use the laptop would prevent FMI from adjusting the program load to maximize its system's performance, [deleted] the test article would allow some demonstration of the equipment's capabilities. As a result, FMI initially opted to proceed with testing. After the agency test facility director advised the FMI team that FMI also would not be permitted to use the laptop prior to the second round of testing at Yuma, meaning that it would also be precluded from demonstrating its system's full capabilities during the field testing, FMI elected not to proceed with testing of the system and its team left the test facility. The contracting officer subsequently notified FMI via telephone call that FMI's proposal had been disqualified from further consideration.

On April 8, FMI protested its disqualification to our Office, arguing that it had elected not to proceed with testing of its samples because the test facility director had incorrectly advised it that it would not be permitted to use its laptop prior to field testing at Yuma. The protester maintained that the field test plan, unlike the chamber test plan, permitted offerors to bring equipment to the test site for use in installing its test articles, and thus it should be permitted to bring a laptop computer to the Yuma test site. The protester requested that it be reinstated in the competition and provided a reasonable opportunity to demonstrate its product at the chamber and field tests. In response to the protest, the agency agreed to reinstate FMI in the competitive range and to allow it to return to the anechoic chamber for testing. Upon receipt of notification from the agency that it was taking this corrective action, we dismissed FMI's protest as academic.

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[2] FMI did furnish a copy of the interface software with its hardware samples but, without a laptop computer, it could not use the software to enter a programming load.

FMI completed the chamber testing, and on May 5, received notice from the contracting officer that its proposal had been included in the competitive range. The contracting officer's letter further informed the protester that items for negotiations (IFN) would be furnished to it the following day, and that failure to resolve the deficiencies identified in the IFNs to the government's satisfaction would preclude it from receiving an award. A second letter dated May 5 notified the protester that its field test dates would be May 23-25.

At the completion of the chamber test, the agency had loaded the programming load from FMI's test article onto a government laptop, which it then shipped to Yuma. When the protester arrived at the Yuma test site, it was furnished with the laptop and the list of test threats and frequency tuning ranges. Using the laptop, FMI then sought to enter into the test article a programming load different from the programming load that had been used during the chamber test. Agency officials barred FMI from doing so on the ground that entering a new programming load would constitute reprogramming of the test article, which was prohibited by the test plans.

FMI protested the agency's actions to our Office on May 31, asserting that the Field Test Plan expressly authorized it to enter a programming load into its test article prior to commencement of the field testing. ("The offeror will be allowed to input the TEST ARTICLE programming load once prior to the Field Testing." RFP Attach. 6, at 6.) The protester argued that the agency's refusal to allow it to proceed in the manner authorized by the test plan had placed it at a significant disadvantage because its inability to enter the programming load had prevented it from demonstrating its system's full capabilities. As a consequence, the protester argued, "its system was significantly handicapped and could not react to as many threats or react as effectively as it would have had FMI been permitted to input the programming load as permitted by the Test Plan." Protest, May 31, 2005, at 6-7.

On June 17, the agency notified FMI that its proposal had been excluded from the competitive range and thereby eliminated from the competition. The letter directed the protester's attention to § M-3 of the RFP, which placed offerors on notice that to receive consideration for award, a proposal had to be rated no less than acceptable under the technical performance factor and each of its three subfactors. The letter also cited the solicitation language providing that offerors who failed to meet any Band A requirements would be rated unacceptable. The letter informed the protester that after extensive evaluation, its proposal had been rated as follows:

TECHNICAL PERFORMANCE	UNACCEPTABLE
Technical approach	Unacceptable
Schedule/Production Capacity	Acceptable
Supportability	Acceptable
PERFORMANCE RISK	Low
SMALL BUSINESS PARTICIPATION	Good

The letter explained that the rating of unacceptable under the technical approach subfactor was attributable to the protester's failure to demonstrate that its system complied with the RFP's frequency bandwidth and effective range requirements.

Upon receipt of the contracting officer's letter, the protester sought and obtained an agency debriefing. On June 28, FMI filed a supplemental protest with our Office objecting to its exclusion from the competitive range. On the same day, the agency notified our Office that it was proceeding with award of a contract notwithstanding FMI's protest.

ANALYSIS

The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, and in reviewing an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the documented evaluation was fair and reasonable and consistent with the evaluation criteria, as well as procurement statutes and regulations. Safety-Kleen (Pecatonica), Inc., B-290838, Sept. 24, 2002, 2002 CPD ¶ 176 at 5-6. An agency is not required to retain in the competitive range a proposal that is not among the most highly rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. Federal Acquisition Regulation § 13.306(c)(1); SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5.

FMI argues that the exclusion of its proposal from the competitive range was based on a substantially flawed and unreasonable evaluation of its written proposal and IFN responses and on the agency's refusal to adhere to the requirements of the Field Test Plan, which prevented FMI from demonstrating the full capabilities of its system. According to the protester, the agency's deviation from the Field Test Plan prevented it from demonstrating that its system could meet the requirements of the RFP.

As discussed in detail below, the agency argues in response that it properly did not permit the protester to load a different programming load into its test article before the field test. The agency further argues that FMI's performance on the field test was not the basis for its elimination from the competitive range in any event; rather, the agency asserts, the proposal was eliminated because it contained an unresolved deficiency pertaining to FMI's approach to satisfying the Band A requirements pertaining to frequency bandwidth and effective range.

Field Testing

With regard to the conduct of the field testing, FMI argues that the agency improperly barred it from entering a programming load different from the one used during the chamber testing. The agency disagrees, arguing that it acted properly given that the test plans made clear that "there would be no *change* allowable to any software or programming load from the time the chamber test ended through the initiation of and the full conduct of the Yuma Field Test." Source Selection Evaluation Board (SSEB) Chairman's Statement, June 13, 2005, at 1. The agency cites as support for its position the statement in the Chamber Test Plan that "[n]o software changes to the TEST ARTICLES will be permitted between the chamber tests and field tests," id. at 2; according to the agency, "software" and "programming load" are synonymous terms. The Army asserts that the bar on changing the programming load reflects its intent to ensure that upon completion of the chamber test, the same programming load would then be used in the field test.

FMI argues that the language in the Chamber Test Plan on which the agency relies-- "no software changes to the TEST ARTICLES will be permitted between the chamber tests and the field tests"--does not impose a limitation on changing the programming load. According to FMI, the term "software" refers to "computer programs, which are sequences of instructions that are executed by hardware and define the basic characteristics and capabilities of a computer or computer-based equipment." Comments, July 8, 2005, at 7-8. In essence, FMI asserts, the limitation in the Chamber Test Plan applies only to any changes to the equipment's operating system or the interface software itself. Under FMI's interpretation, the programming load does not constitute software, and thus the prohibition on software changes does not bar loading a different programming load for use during the field test than was used during the chamber test.

We think that the agency's position regarding the restriction on changing the programming load reflects a reasonable interpretation of the test plans. Accordingly, we see no basis to object to the agency's decision to bar FMI from changing the programming load for purposes of the field testing.

First, even accepting the protester's definition of the term "software," we find reasonable the agency's position that the language in the Chamber Test Plan barring software changes extends to changes to the programming load. As the SSEB Chairman explains:

> FMI has further stated [that] the programming load . . . consists of data (selective, targeted frequencies with start and stop frequencies and other variables such as step size in kilohertz, step time and dwell time) . . . . In actuality, the [programming] load provides these values, which are identified by the operational software and incorporated into the instructions being given to the hardware. Changing these numeric

values changes the instruction. The FMI system observed in the
Chamber Test was in a "Default Factory Setting" that had default
values assigned to all of these parameters. Inputting the Threat
Program Load would have introduced new values for these settings
and would have changed the instructions to be executed by the
hardware as a result. It would be similar to giving a person the verbal
instruction "wait here for 10 seconds." This instruction is significantly
different from the verbal instruction "wait here for 30 minutes." Only
the number value has changed, but the instruction to the person and
the overall result of following the instruction is much different. . . .
Changing any of the parameters listed above would have had a direct
effect on the system's characteristics and capability.

SSEB Chairman's Statement, July 25, 2005, at 5. As the SSEB Chairman explains, the
programming load--like the equipment's operating system, which FMI asserts fits the
definition of "software"--provides instructions to be executed by the hardware and
defines the capabilities of the system. Id. Thus, to the extent that the programming
load constitutes software in the context of the test plan and the test articles involved
here, the prohibition on software changes in the Chamber Test Plan bars any
changes to the programming load.

Further, aside from the language prohibiting software changes, we think that, read as
a whole, the overall scheme set out in the test plans contemplated that offerors
would formulate a programming load that would be used for both the chamber and
field tests, and that no changes to the programming load were contemplated once it
had been used in the chamber test. In this regard, as explained above, after being
given a list of threats and their frequency ranges, an offeror was to enter an initial
programming load for chamber testing. After this initial test, or dry run, the offeror
was allowed to "reprogram the TEST ARTICLE with a new programming load," if it
so elected. RFP Attach. 5, at 5. The test article then would be retested against the
same list of threats using the new programming load. Id. Similarly, the Field Test
Plan provides as follows: "the offeror will be allowed to input the TEST ARTICLE
programming load once prior to the field tests. The offeror will NOT be permitted to
reprogram its TEST ARTICLES at any time during the Field Testing." RFP Attach. 6,
at 6.

It is clear that the term "reprogramming" is used throughout the test plans to refer to
the act of making changes to the programming load. Thus, to the extent that the
Field Test Plan states that no reprogramming will be permitted "at any time" during
the field test, it clearly is reasonable to interpret it to mean that no changes can be
made to the programming load. According to FMI, this language merely prohibits
changes to the programming load once it is loaded for use in the field test; it does not
prohibit changes to the programming load used in the chamber testing, before it is
loaded into the system for use during the field test. The agency explains in response
that no changes were intended to be made to the programming load used during the

chamber test, since it wanted offerors to use the same programming load to allow a valid comparison of a test article's performance in both settings, chamber and field. While the protester disagrees with the agency's premise, and argues that there are valid technical reasons for allowing different programming loads in the two settings, Comments, July 8, 2005, Declaration of Foster-Miller Technical Advisor, its assertions essentially constitute disagreement with the agency's technical judgment, and thus are not a sufficient basis to conclude that the agency's position is unreasonable. R&B Equip. Co., B-271194, May 22, 1996, 96-1 CPD ¶ 250 at 4-5.

In sum, we see no basis to find unreasonable either the agency's interpretation of the test plan language or its decision to bar FMI from changing its programming load before field testing began.

Proposal Evaluation

Turning then to the protester's argument that the agency's evaluation of its written proposal and IFN responses was unreasonable, we think that the record shows that the agency had a reasonable basis for concluding that FMI had not demonstrated that its system would be capable of complying with the Band A requirements pertaining to frequency spectrum and effective range concurrently, and on that basis rating it as unacceptable under the technical approach subfactor.[3]

In this regard, the agency found--and the protester does not dispute--that its written proposal did not contain adequate analysis or test data demonstrating compliance with these requirements, and while the protester's IFN responses did contain

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[3] We recognize that the contracting officer's letter to the protester notifying it of its exclusion from the competitive range cited additional bases for the determination of unacceptability under the technical approach subfactor, but we understand the protester's failure to demonstrate that its system would be capable of complying with the frequency spectrum and effective range requirements concurrently to have formed the underlying basis for the determination. In this regard, the Chairman of the SSEB observed in his technical statement that:

> despite two rounds of IFN requests and a detailed discussion of this issue during the one-on-one telephonic negotiation session, FMI failed to address the full requirement of simultaneously meeting the Band A threat frequency bandwidth coverage as set forth in Appendix A and the Band A effective range as specified in the Performance Based Specification. This was a minimum requirement of the RFP and therefore the failure to meet this requirement resulted in FMI being assigned a "deficiency" under the Technical Approach Subfactor.

SSEB Chairman's Statement, July 25, 2005, at 2.

analysis, the evaluators concluded that this analysis in fact demonstrated that FMI's system would not meet the solicitation's minimum requirements. Specifically, in summarizing this key deficiency in FMI's technical proposal, the SSEB Chairman states that FMI failed to address the full requirement of simultaneously meeting the Band A threat frequency bandwidth coverage and the required effective range, and that FMI's analysis and calculations focused only on the ability to cover the frequency bandwidth. This finding is consistent with the conclusions in the technical evaluation report, where the evaluators observed as follows with regard to FMI's technical proposal:

> [Deleted]

Technical Evaluation Report at 6.

We recognize that the protester, in a statement submitted by its business development manager, disputes the agency's conclusion that FMI's system's ECM spectral density will be too low to jam the threats to meet necessary Band A effective range requirements when programmed to the entire bandwidth of the system. Comments, Aug. 5, 2005, Fourth Declaration of Michael C. Hargett, at 4. Beyond his general contentions, however, FMI has not demonstrated--and thus we have no basis to conclude--that the agency's analysis is in error. Moreover, to the extent that FMI argues that "proper" testing would have established that FMI's system fully meets the RFP's effective range requirement, id., as noted above, we think that the agency's testing was consistent with the test plans. In any event, the implicit premise of the protester's position on this point--that the only way to demonstrate the capabilities of FMI's system is through actual testing--is flawed. It was clear from the terms of the solicitation that offerors were required to demonstrate compliance with the Band A requirements in their written proposals and that the test results would be used to verify that compliance, but were not a substitute for the proposal requirements. RFP § M-3(C)(1). Thus, contrary to FMI's apparent view of the role of testing here, we think that it was clear that the test results could not be used to cure deficiencies in a written proposal. TMC Design Corp., B-296194.3, Aug. 10, 2005, 2005 CPD ¶ ___.

In sum, the protester has not persuaded us that the agency's evaluation of its proposal as unacceptable under the technical approach subfactor and the agency's

exclusion of its proposal from the competitive range on that basis were unreasonable.

The protest is denied.

Anthony H. Gamboa
General Counsel