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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Dynamic Instruments, Inc.

File: B-291071

Date: October 10, 2002

Paul F. Whitten, Sr., for the protester.
B. J. Braun, Esq., United States Coast Guard, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that request for proposals that gives offerors the option of upgrading existing equipment or furnishing new equipment fails to provide for full and open competition is denied since, even though only manufacturer of existing equipment has sufficient information regarding its characteristics to furnish the upgrade, offerors that cannot offer upgraded equipment are not precluded from competing because they have the alternative of offering new equipment.

DECISION

Dynamic Instruments, Inc. protests the terms of request for proposals (RFP) No. DTCG38-02-R-J00007, issued by the United States Coast Guard for multi-aircraft tracking, balancing, and vibration analyzer systems. The protester contends that because the RFP gives offerors the option of upgrading existing systems or furnishing new ones, but does not furnish sufficient information regarding the existing systems to permit their upgrade by other than the original manufacturer, the solicitation does not provide for full and open competition.

We deny the protest.

BACKGROUND

On June 4, 2002, approximately 2 months prior to issuing the solicitation at issue here, the Coast Guard published in FedBizOpps solicitation No. DTCG38-02-Q-S00058, a combined solicitation/synopsis for upgrade of the agency's existing vibration analyzer systems. The notice advised that the Coast Guard intended to negotiate with the original equipment manufacturer, Helitune International, for the

upgraded equipment. By letter dated June 26, Dynamic protested the agency's intent to negotiate with Helitune on a sole-source basis, arguing that it was capable of furnishing equipment that would satisfy the agency's needs. On July 8, the Coast Guard issued an amendment canceling the solicitation. The amendment stated that "[t]his effort will be re-issued as a 'Full and Open' Competition," and "[a]ll offerors will be given the opportunity to submit new proposals when a resolicitation occurs." Upon receipt of this amendment, Dynamic withdrew its protest.

On July 31, the Coast Guard issued RFP No. DTCG38-02-R-J00002, requesting offers for "an upgrade to, or replacement of, [the agency's] existing Helitune Rotortuner Dash 5 vibration analyzer systems." RFP at 15. The RFP enumerated the minimum characteristics required of the new or upgraded systems and provided for award to the offeror whose proposal represented the best value to the government, considering price and price-related factors, technical factors, and past performance. The RFP further provided that in determining best value, price and price-related factors would be approximately equal in weight to the combination of technical factors and past performance. By amendment dated August 5, the agency changed the number of the solicitation from DTCG38-02-R-J00002 to DTCG38-02-R-J00007.

Dynamic protests the terms of the new solicitation, contending that by providing for either upgrade or replacement of the existing Helitune systems, but failing to furnish sufficient information regarding the existing systems to permit offerors other than Helitune to propose upgrades, the solicitation gives Helitune an unfair advantage in the competition. The protester maintains that when either an upgrade or new equipment would be acceptable to the requiring activity, "all parties must be afforded equal ability to propose and compete for [the] upgrade option." Protest at 3. The protester requests either that the agency revise the RFP to provide sufficient information regarding the necessary interface format and functional characteristics of the existing Helitune Rotortuner systems to permit other offerors to compete for the upgrade, or that it remove the upgrade option and require all competitors to offer new systems.

Regarding the protester's request that additional information regarding the existing Rotortuner systems be furnished to all prospective offerors, the Coast Guard states that "Helitune considers its entire Rotortuner Dash 5 system, including the cabling between components, as well as the upgraded version Dash 5JS+, to be proprietary," and that it "does not own or have a license right to share Helitune's proprietary data with other contractors." Contracting Officer's Statement at 5. Accordingly, it is not feasible for the agency to comply with the protester's first request. Regarding the protester's alternative request that the upgrade option be eliminated and all offerors be required to offer new systems, the protester essentially is asking that the field of competition be restricted to its benefit. Our role in resolving bid protests, however, is to ensure that the statutory requirement for full and open competition is met, not to protect any interest a protester may have in more restrictive solicitation terms. Fidelity and Cas. Co. of New York, B-281281, Jan. 21, 1999, 99-1 CPD ¶ 16 at 4; NavCom Def. Elec., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 2 n.1.

In any event, the determination of the agency's needs and the best method of fulfilling those needs is primarily the responsibility of the contracting agency, and we will not question the agency's determination unless it is shown to be unreasonable. T-L-C Sys., B-233136, Sept. 15, 1986, 86-2 CPD ¶ 298 at 2. Here, the agency determined that either an upgraded version of its existing system or a new system would meet its needs, and the protester has not demonstrated that this determination was unreasonable. Moreover, the fact that Helitune, which manufactured the existing systems, may be uniquely capable of offering to upgrade them does not mean that it should be precluded from competing on that basis. The government has no obligation to equalize a competitive advantage that a potential offeror may enjoy as a result of a prior government contract unless the advantage resulted from unfair motives or actions by the contracting agency. Bironas, Inc., B-249428, Nov. 23, 1992, 92-2 CPD ¶ 365 at 3; T-L-C Sys., supra, at 3.

The protester further argues that even assuming that the agency's actions are consistent with the requirements of the Federal Acquisition Regulation (FAR), they are inconsistent with promises made to the protester at the time it withdrew its initial protest. In this connection, the protester maintains that it was assured by the Coast Guard that the reissued solicitation would provide for full and open competition and "negat[e] any unfair advantage to the incumbent vendor." Protester's Comments at 1. The protester contends that it withdrew its initial protest "based upon the [agency's] assurances that the new solicitation would be structured to provide equal footing to all interested parties." Id.

As previously noted, while Helitune, as manufacturer of the existing equipment, may have a competitive advantage over other offerors in responding to the upgrade option, it is not the result of any unfairness on the part of the agency; accordingly, the protester's argument that the agency has failed to negate any unfair advantage accruing to the incumbent contractor is without basis. Further, to the extent that Dynamic is suggesting that it would not have withdrawn its original protest had it recognized that the agency intended to provide for an upgrade alternative in the resolicitation, the protester was not prejudiced by its decision to withdraw because had it not done so, we would have dismissed the protest on the grounds that the agency had cancelled the underlying solicitation. In this regard, we routinely dismiss protests where the agency has canceled the underlying solicitation because cancellation of the solicitation renders the protest academic, and we do not consider academic protests, because to do so would serve no useful public policy purpose. Morey Mach., Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102 at 1.

Dynamic also alleged in its initial protest that the language of the RFP concerning evaluation is "ambiguous, highly subjective, and without sufficient structure to support fair and equal evaluation of all proposed offers." Protest at 2. The contracting officer responded to this allegation in his statement, noting that the agency had complied with the requirements of FAR § 15.101-1 by identifying in the RFP the factors and significant subfactors that would affect contract award and their

relative importance. Contracting Officer's Statement at 5. The agency further noted that the solicitation's evaluation scheme reduced the incumbent contractor's competitive advantage by permitting the selection of a more expensive, but technically superior replacement product. In responding to the agency report, the protester has neither taken issue with nor attempted to rebut the positions taken by the agency. Accordingly, we consider it to have abandoned these grounds of protest. O. Ames Co., B-283943, Jan. 27, 2000, 2000 CPD ¶ 20 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel