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Decision

Matter of: Silynx Communications, Inc.

File: B-310667; B-310667.2

Date: January 23, 2008

David B. Dempsey, Esq., David S. Black, Esq., and Megan M. Mocho, Esq., Holland & Knight, LLP, for the protester.

Len Rawicz, Esq., Mitchell S. Ettinger, Esq., and Elizabeth C. Billhimer, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP, for Nacre, AS, an intervenor.

James L. Yohn, II, Esq., and Robert C. Peterson, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misevaluated technical proposals is denied where record shows that protester's product was reasonably determined technically unacceptable for failing to meet mandatory threshold specifications.
 2. Agency reasonably made award on basis of initial proposals, without holding discussions, where solicitation advised offerors of agency's intent to make award without discussions.
 3. Agency's price reasonableness determination was unobjectionable where it was based on historical information relating to cost of items being acquired; fact that protester offered a lower price for product determined to be technically unacceptable does not demonstrate that determination was unreasonable.
 4. Protest that agency technical evaluator was biased and could not objectively evaluate protester's product is denied where protester presents no evidence to credibly support its assertion.
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DECISION

Silynx Communications, Inc. protests the award of a contract to Nacre, AS under request for proposals (RFP) No. N65236-07-R-0139, issued by the Department of the Navy to acquire a quantity of combat radio headsets. Silynx maintains that the

agency miscalculated proposals, improperly failed to engage in discussions, and exhibited bias in favor of the awardee.

We deny the protest.

The agency issued the RFP as a commercial item acquisition seeking to award a fixed-price contract for the headsets, which provide individuals in combat settings both hearing protection and hearing enhancement, to allow them to hear ambient noises in a combat setting and to engage in radio communications among the members of combat squadrons. The RFP included 149 mandatory performance, test and acceptance specifications; all had to be met by the proposed headsets in order for a firm's product to be considered for award. Offerors were advised that the agency would make award to the firm whose offer best conformed to the RFP's requirements, price and other solicitation requirements considered.

The agency received proposals from Nacre and Silynx, both of which essentially listed, and indicated whether the proposed product met, the 149 specifications. Thereafter, the agency amended one of the specifications relating to the requirement for noise attenuation in blast environments, and also made a minor change to the solicitation's language relating to the basis for award. In response, Silynx submitted a proposal revision on September 24. Supplemental Agency Report (SAR), exh. 1. The agency reviewed the proposals and, rather than rely entirely on the offerors' representations, sought to verify that their proposed headsets in fact met all requirements. In this connection, the agency relied principally on a performance study prepared by the Department of the Air Force, dated August 2007, and a first article test report prepared by the U.S. Marine Corps, dated February 2007.¹

Based on its evaluation, the agency determined that Silynx's proposal failed to meet 5 of the 149 specifications. As relevant here, the agency found that Silynx's product did not meet specification [deleted], which required the proposed headsets to be [deleted], and did not meet specification [deleted], which required the headsets to provide [deleted]. Agency Report (AR), exh. 4, at 4-7. On the basis of these considerations, the agency concluded that Silynx's proposal was technically unacceptable, and therefore made award to Nacre at a price higher than the protester's. After learning of the award and receiving a debriefing, Silynx filed this protest.

¹ The Air Force's study evaluated both the Silynx and Nacre headsets, while the Corps's report considered only the Nacre headset. The Corps did not evaluate the Silynx product because, at the time of its study, only prototypes of its headsets were available, and there was no available safety test data that could form the basis for the issuance of a safety release by the Corps, which would be required for the Silynx product to be evaluated. SAR, exh. 6.

TECHNICAL EVALUATION

Silynx challenges each of the five findings regarding the technical unacceptability of its headset. In considering protests of an agency's evaluation of proposals, it is not our role to reevaluate the proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2007 CPD ¶__ at 3-4. We find the agency's evaluation conclusions with respect to specifications [deleted] and [deleted] reasonable and, therefore, that the agency reasonably found Silynx's proposal technically unacceptable.

Specification [deleted]

The agency's technical evaluator found that the Silynx product did not meet the [deleted] requirement because the [deleted] utilized to form [deleted] was made from a [deleted] material that potentially could [deleted]. The evaluator based her conclusion on the informal feedback provided by members of operational forces who had used the Silynx product, and the opinion of a Department of the Army audiologist familiar with the Silynx product, who advised that this was a [deleted]. AR, exh. 4, at 4.

Silynx challenges the agency's conclusion. Silynx maintains that the agency unreasonably failed to physically inspect or test either its originally proposed foam earpiece, or a new foam earpiece proposed in its September 24 revised proposal (in response to the amendment), and also unreasonably declined its offer to demonstrate its product. The protester asserts that it was unreasonable for the agency to base its conclusion on an informal inquiry of operational forces, and on the audiologist's opinion, which, Silynx asserts, is essentially unsubstantiated in the record.

We find that the agency's determination was reasonable. First, nothing in the solicitation contemplated or required the agency to conduct product inspection or testing, or to permit product demonstrations; in fact, the RFP's instructions called for submission of product samples only where such samples were otherwise required under the terms of the solicitation, and there was no such requirement for product samples in the RFP. RFP at 27. Rather, the RFP contemplated that offerors would include product literature or other information—for example, test data or feedback from prior or current users of their product—to demonstrate compliance with the RFP's requirements,² id., and that, after award, the contractor would

² In this respect, Silynx's proposal represents that its product has been fielded with all branches of the armed forces, AR, exh. 10, at 6, 20, 21, but does not provide any
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conduct first article testing and field user evaluation demonstrations to verify compliance of its product with the performance characteristics proposed in the firm's offer. RFP at 19-25. Thus, there was nothing improper in the agency's declining to conduct an inspection or to perform testing of the Silynx product, or to permit demonstrations as part of the evaluation process.³

Second, we find no basis to object to the agency's reliance on the informal inquiry of operational force members and the audiologist's opinion. While the inquiry of the operational forces was informal in nature, there is no indication in the record that it did not accurately reflect the users' opinions. Silynx has submitted no information--for example, its own user feedback information or test data for either of its proposed earpieces--showing different results from the information obtained by the agency. We thus see no reason why the agency could not use the information to assist it in making a judgment as to the [deleted]. As for the audiologist, the record shows that she is a consultant to the Army's Surgeon General for hearing conservation and audiology. SAR, exh. 4, at 2. The protester has presented no evidence or information bringing into question this individual's qualifications to render an opinion on the safety of Silynx's product, and has not shown that her opinion is unreasonable. We conclude that the agency reasonably determined that the Silynx earpieces were [deleted].⁴

(...continued)

information from previous or current users relating to any of the performance aspects of its product or any test data, despite the RFP's call for such information.

³ Silynx also maintains that the agency improperly declined to test the foam ear tips proposed in its September 24 revised proposal for compliance with specification [deleted] which required the device to provide [deleted]. However, the revised proposal presented only a passing reference to the new ear tips, and that reference showed that the ear tips were, at best, in a prototype development stage. SAR, exh. 1, at 9. Silynx's revised proposal did not contain any documentation or technical information to establish the performance capabilities of its new ear tips, or to show that they would meet the requirement of specification [deleted]; indeed, it did not even make an affirmative claim that the new ear tips met this requirement. Silynx's revised proposal did not provide pricing for the new ear tips (it provided prices for only the three previously-offered ear tip sizes), despite the fact that it included changes in other aspects of the original pricing. *Id.* at 8. As discussed in more detail below, we conclude that the agency reasonably relied on its evaluation of the firm's originally-proposed ear tips, for which there was both a claim of compliance in Silynx's proposal, and test data from the Air Force report that was less than a month old.

⁴ Silynx asserts that Nacre's earpieces should not have been evaluated as acceptable for [deleted]. The basis of this assertion is the Corps's first article test report, which,
(continued...)

Specification [deleted]

Specification [deleted] required the proposed headset to provide [deleted]. The protester principally asserts that the agency improperly relied on averaged data to evaluate compliance with this requirement; in the protester's view, the specification required the agency to measure the device's compliance on a "per frequency" basis, as measured on the scale of [deleted] specified in the solicitation. Assessing compliance in this manner, according to Silynx, would show that, while its own product did not meet the [deleted] requirement, neither did the awardee's.

The evaluation in this area was unobjectionable. First, there was nothing in the language of specification [deleted] that required devices to meet the requirement for every frequency on the scale. Rather, as noted, the specification only required proposed devices to provide [deleted]." We find no basis for questioning the agency's determination that averaging the data for each device was a valid approach to obtaining a measure of the degree to which the devices met the desired [deleted] threshold. This approach appears to be consistent with the way the data were presented in the Air Force's report, which consistently presented the average [deleted] of the devices. AR, exh. 11, at 10-12. Similarly, the results of testing performed on Silynx's device by the Institut franco-allemand de recherches de Saint-Lois (ILS) are expressed in terms of averaged data. Protester's Comments, Nov. 26, 2007, exh. B.

The Air Force report relied upon by the agency shows that the Nacre device met the as close to [deleted] standard, while Silynx's did not. The report shows that the Nacre product had average [deleted] measurements of [deleted] with the device turned off, and [deleted] with the device turned on. In comparison, the measurements for the Silynx device were [deleted], and [deleted], respectively. AR, exh. 11, at 10. While both products had data points above and below the [deleted] threshold, the averaged results show that, for the Nacre product, the overwhelming number of data points occurred at or above the [deleted] threshold, while for the Silynx product the overwhelming number of data points occurred below the [deleted] threshold. We conclude that the agency reasonably relied upon this information in finding that Nacre's device met this requirement, while Silynx's did not.

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the protester maintains, shows that the earpiece was [deleted]. However, this report in fact shows that the Nacre product was rated as acceptable for [deleted] by the end users participating in the study. SAR, exh. 3, at 12.

We conclude that the agency reasonably determined that Silynx's product was technically unacceptable for failure to meet specifications [deleted] and [deleted], which were mandatory.⁵

COMPLIANCE OF NACRE PRODUCT

Silynx asserts that the agency did not have information in the Nacre proposal with which to confirm that firm's compliance with 47 of the RFP's 149 requirements. This argument is without merit. The record shows that the agency's technical evaluator also serves as the project engineer and receiving agent for another acquisition where the Nacre product is being purchased. On the basis of her knowledge of Nacre's product through this other acquisition, she was able to confirm Nacre's compliance with a large number of the 47 requirements in question. SAR, exh. 4. Of the remaining requirements, the evaluator confirmed Nacre's compliance with most of them with individuals who had been responsible for conducting the Corps's first article test, and by reference to another evaluation of Nacre's product by individuals she considered to be subject matter experts. *Id.* We find nothing objectionable in the evaluator's methodology or conclusions; the protester has not shown that they were unreasonable.

Silynx complains that the evaluator did not take similar steps to determine whether its product met these additional requirements. However, the evaluator did not rate Silynx's proposal technically unacceptable based on any of these requirements--she merely noted that she was unable to obtain information showing compliance--and Silynx's proposal was not rejected as unacceptable based on any of these requirements. Since we have already found that the agency properly rejected Silynx's proposal for failure to meet specifications [deleted] and [deleted], it is not apparent how Silynx was prejudiced by the agency's actions in this regard. We therefore have no basis to object to this aspect of the evaluation.

DISCUSSIONS

Silynx asserts that the agency unreasonably failed to conduct discussions. The protester maintains that, because the agency's initial technical evaluation was flawed, it had no reasonable basis to distinguish between the proposals for purposes of making a best value determination. Silynx claims that our decision in The Jonathan Corp; Metro Mach. Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174 at 13-15, aff'd, Moon Eng'g Co.--Recon., B-251698.6, Oct. 19, 1993,

⁵ Silynx also asserts that the agency improperly found that its product did not comply with three other specifications. We need not address these arguments given our conclusion that the agency reasonably determined that its product did not meet specifications [deleted] and [deleted].

93-2 CPD ¶ 233 at 3-4, requires agencies to hold discussions where there is no reasonable basis to distinguish between proposals.

The agency was not required to conduct discussions here. The RFP incorporated Federal Acquisition Regulation (FAR) § 52.212-1, which expressly advised offerors of the agency's intent to make award without discussions. Further, the circumstances here are distinguishable from those in Jonathan. In that case, there was no clear basis to distinguish among the cost proposals due to the degree to which they varied from the government estimate, and our finding was that the agency had failed to conduct a reasonable cost evaluation; in effect, we found, the agency could not determine from the initial evaluation which proposal offered the lowest overall cost to the government. Here, in contrast, the agency had a clear basis for distinguishing between the proposals—the acceptability of Nacre's proposal and the unacceptability of Silyn's. Therefore, the Jonathan rationale is inapplicable here, and the agency's decision not to conduct discussions was legally unobjectionable in these circumstances.

PRICE REASONABLENESS

Silyn maintains that the agency unreasonably determined Nacre's price to be reasonable, since it was almost twice Silyn's price.

This argument is without merit. In evaluating price reasonableness, agencies may use a variety of techniques, including comparison of the proposed prices received in response to the solicitation, comparison of the proposed prices to prices previously paid for the item being acquired, comparison of the prices proposed with published commercial price lists and comparison of the prices received with an independent government estimate. FAR § 15.404-1(b)(2). The record shows that the agency based its price reasonableness determination on a comparison of Nacre's price to the government estimate and Nacre's commercial price list. AR, exh. 15, at 5-7. Silyn has not shown that Nacre's proposed price was unreasonably high compared to these proper benchmarks. The fact that Silyn's proposed prices were significantly lower than Nacre's does not establish that Nacre's price was unreasonable, given that Silyn's product was technically unacceptable, and thus did not meet the agency's requirements. See Idaho Norland Corp.--Recon., B-230598.2, Aug. 1, 1988, 88-2 CPD ¶ 103 at 2-3.

BIAS

Silyn asserts that the agency's technical evaluator was biased against its product, and in favor of Nacre's. Further, according to the protester, because the evaluator also functions as the program engineer responsible for helping to meet the Corps's requirement for these headsets, she could not objectively evaluate Silyn's product.

Government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶104 at 20-21. Where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but must also show that this bias translated into action that unfairly affected the protester's competitive position. Id. Silynx has not met this standard.

Silynx points to several actions by the agency that it believes evidence bias, including, for example, the following: the agency initially attempted to make award to Nacre on a sole-source basis; e-mails prepared by the technical evaluator, including one pointing out that there would be delays associated with award to Silynx because of a requirement to obtain a safety release for the firm's product; and the evaluator advocated making award to Nacre without discussions, rather than conducting discussions to remedy any deficiencies in Silynx's proposal.

Silynx's assertions do not establish bias. To the extent that the agency initially considered a sole-source award to Nacre, the record shows that the agency issued a competitive solicitation upon becoming aware of Silynx's product. As for the evaluator's e-mail noting that the Silynx product would require a safety release that would delay the acquisition (whereas award to Nacre would not), her observation was correct; Nacre's product already had received a safety release, while Silynx's had not. Regarding the agency's decision not to engage in discussions, as noted, the RFP advised offerors of its intent to award without discussions. As for the evaluator's alleged impaired objectivity, we fail to see—and the protester has not shown—how her involvement with the Corps's acquisition would have any improper effect on the manner in which she evaluated Silynx's product. Simply stated, the agency's evaluator had expertise relevant to this procurement, and her involvement was both understandable and appropriate.

In any case, as noted, the record shows that the Silynx product was found technically unacceptable based on objective, third-party technical findings relating to the [deleted] and its inability to [deleted]. Thus, there would be no basis for us to find that any bias or impaired objectivity translated into action that affected the protester's competitive position. TPL, Inc., supra.

The protest is denied.

Gary L. Kepplinger
General Counsel