



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Team One USA, Inc.

File: B-272382

Date: October 2, 1996

James F. Nagle, Esq., and John Lukjanowicz, Esq., Oles Morrison & Rinker, for the protester.

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Col. Nicholas P. Retson and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as technically unacceptable a proposal for a special warfare rigid inflatable boat where the proposed boat did not satisfy the material minimum design requirements regarding the seating location and deck drainage.

DECISION

Team One USA, Inc. protests the rejection of its proposal under request for proposals (RFP) No. USZA22-96-R-0003, issued by the United States Special Operations Command, MacDill Air Force Base, Florida, for development and production of the Naval Special Warfare Rigid Inflatable Boat and trailer.

We deny the protest.

The RFP, issued on October 26, 1995, contemplated multiple awards and stated that the agency desired a modified nondevelopmental item based on existing rigid inflatable boats. The boat is intended for use in rugged, ship-to-shore transport of Special Operations Forces and their equipment in a low to medium threat combat environment.¹

¹The boat is classified as LPD-17 ship class with a maximum overall length of 36 feet.

The RFP statement of work (SOW) set forth both performance and design requirements. Of particular relevance are the requirements concerning location of passenger seating (i.e., bolsters) and water drainage from the deck area. For passenger seating the SOW stated:

"III-3.7 Console^[2]

"The console shall be located forward of the passenger bolsters. . . ."

"III-10.6 Bolsters

". . . Two/three bolsters shall be located aft of the console for the crew and eight/nine additional bolsters shall be provided for the passengers/passengers & engineer. Bolsters for the passengers shall be located to minimize the effects of vertical accelerations. . . ."³

For deck drainage, SOW I-4 stated that the boat "shall be . . . self-bailing" The SOW further provided:

"III-9.3 Bilge/Drainage System

"A minimum of two electric bilge pumps shall be installed to pump out all bilges with the craft at rest with payload. . . . A manual bilge pump(s), taking suction from the same area as the electric bilge pump(s), shall be installed. All compartments shall drain to the location of the bilge pump suction area(s).

"The deck shall be drained through the transom by two large capacity freeing ports sized so as to completely drain the entire deck in the minimum time practicable, and fitted with flapper type closures or elephant trunks. When craft is at idle or in the reverse mode no water shall be able to pass into the craft."

²The console is the structure containing the instrumentation and controls from which the crew operates the boat.

³Vertical acceleration refers to the up and down movements of the boat as it travels across the crests and troughs of waves. As the boat planes over the waves, part or all of the hull of boat is thrust upward away from the water, followed by the boat hull falling back down to hit the water surface. Vertical acceleration can be significant at high speeds on rough water, exposing passengers and crew to uncomfortable, physically fatiguing, and possibly hazardous gravitational stress on the body.

Prior to the submission of initial proposals, the agency issued several amendments to the RFP, including written responses to questions from prospective offerors. On December 20, 1995, amendment 0005 was issued and stated the following prospective offeror question (submitted by Team One) and the agency response:

"[Question]: The RFP requires at SOW III-3.7 for the console to be located forward of passenger bolsters, while SOW III-10.6 requires passenger bolsters to be located to minimize the effects of vertical accelerations. Are these requirements intended to force the design away from locating passenger bolsters forward of the console when the latter design may minimize vertical acceleration, as well as provide superior conformance to other requirements?

"[Response]: The Government recognizes that the locations of least vertical acceleration on planing craft vary, depending on longitudinal center of gravity (LCG), wetted area, speed, and sea state, and that placing all passengers aft of the console will not result in the least vertical accelerations for all passengers in all conditions. In our experience, however, a console forward of the passengers is the best combatant craft configuration, yielding best visibility for the crew and ensuring that passengers are not subject to unsustainable accelerations when it becomes necessary for the crew to operate the craft at speed in extreme conditions. Accordingly, Amendment 0005 changes this requirement. See paragraph 3.d. of this amendment."

Paragraph 3.d. of amendment 0005 deleted from SOW III-10.6 the sentence concerning minimization of vertical accelerations and revised the requirement as follows:

". . . Two/three bolsters shall be located aft of the console for the crew and eight/nine additional bolsters shall be provided for the passengers/passengers & engineer. Bolsters for the passengers should not be located forward of the console. . . ."

The requirement at SOW III-3.7 requiring that the console be located forward of the passenger bolsters was not changed. The RFP stated that any offeror proposing exceptions to any SOW requirements shall explain each exception and "[f]ull supporting rationale shall be provided for each."

The agency received 11 technical proposals by the due date of January 8, 1996.⁴ Team One's proposal stated that it took exception to the requirement for location of

⁴Cost proposals were submitted separately on January 22.

passenger seating; it proposed seating in front of the console, citing its experience in testing the proposed forward seating location during 1,000 hours of testing its parent craft (on which the design of the proposed boat is based). The proposal did not include any test data or calculations to support its rationale as to why this exception should be accepted. The proposal also provided a description of the proposed bilge pumping system; however, it did not describe deck drainage.

Based on its evaluation of the proposals, the agency determined that seven proposals, including Team One's, were in the competitive range. In evaluating Team One's proposal, the agency determined that, since Team One had not provided any test data from the parent craft or any calculations for the proposed craft concerning the proposed location of passenger seating, the proposal did not provide adequate support to justify deviation from the stated requirement. The agency also noted that, although the proposal did not address deck drainage, the proposed design of the boat showed the forward deck would be below the waterline, and thus determined that the deck could not drain overboard as contemplated by the SOW.

The agency conducted written discussions with the competitive range offerors. By letter dated March 12, the agency advised Team One of the evaluated weaknesses and deficiencies in its proposal. The letter stated that Team One's proposal was technically unacceptable, though susceptible of being made acceptable. With regard to the requirement regarding passenger seating, the agency advised Team One:

"The Offeror took exception to the requirement to place the passengers aft of the console. This is considered unacceptable since it fails to meet a critical requirement, and the Offeror did not provide strong evidence for reconsideration of this critical requirement. . . . Please provide an arrangement which meets the requirement."

As for the deck drainage requirement, the agency advised Team One:

"The proposal does not adequately describe the auxiliary systems of the craft. Information provided in the Offeror's proposal is often inconsistent or incorrect: (I) The drainage system is not discussed. The forward deck is about 11 [inches] below the designed waterline, which fails to meet the requirement of [SOW] III-9.3 that the deck areas drain overboard. This is unacceptable. The bilge pumps are not large enough to drain water from this deck effectively. [Informational deficiencies concerning other requirements, including the bilge system, were stated.] . . . Please provide the information requested and correct the noted deficiencies."

The discussion letter to Team One also stated:

"A CONSIDERABLE AMOUNT OF EFFORT WILL BE REQUIRED IN ORDER TO RESPOND TO THE GOVERNMENT'S CONCERNS AND HAVE A REASONABLE CHANCE OF RECEIVING AN AWARD. Therefore, YOU ARE ADVISED TO CONSIDER CAREFULLY WHETHER TO EXPEND FURTHER EFFORT AND EXPENSE IN IMPROVING YOUR PROPOSAL. . . .

". . . You are cautioned that this will be your only opportunity to provide clarification to resolve these concerns. Failure to fully satisfy these concerns could result in the non-selection of your proposal for award."

Proposal revisions were due by April 16. Although Team One submitted some proposal revisions, its proposal continued to take exception to the passenger seating requirement. Team One further explained this exception by specifically identifying the Department of Defense (DOD) organizations that participated in the testing of Team One's parent craft, claiming that every person who rode in the parent craft was pleased with the comfort of the ride. Team One did not provide any statements from the DOD personnel who rode in the parent craft, nor did it provide any test data or calculations to support the claims about ride comfort. In response to the deck drainage requirement, Team One described in detail its bilge pump system, which included dedicated and emergency backup pumps for removing water from the forward deck, and stated that water from the forward deck would be pumped overboard through this bilge system.

The agency requested and received best and final offers (BAFO) from all of the competitive range offerors by April 30.⁵ Team One's BAFO did not propose any further revision to the passenger seating location or the deck drainage in its proposed design. Although the agency otherwise evaluated Team One's BAFO as "marginally acceptable," it rejected Team's One's proposal from consideration for award because the agency considered the proposal technically unacceptable based on Team One's boat's failure to meet the "critical" passenger seating location and deck drainage requirements.

On June 14, the agency awarded contracts to United States Marine, Inc., Willard Marine, Inc., and Intermarine, USA. Team One requested a debriefing, which the agency conducted on June 20; this protest followed.

Although Team One acknowledges that its proposal did not meet the precise terms of the specifications concerning passenger seating location and deck drainage for the forward deck, it alleges that these specifications were not minimum

⁵One offeror withdrew from the competition.

requirements, but rather only "design preferences." Team One alleges that its proposal cannot reasonably be found technically unacceptable for failing to satisfy such preferences.

To be reasonable, an interpretation of solicitation language must be consistent with the solicitation when read as a whole and in a reasonable manner. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379; Datacomm Management Sciences, Inc., B-261089, Aug. 8, 1995, 95-2 CPD ¶ 259. We find that the protester's interpretation of these solicitation terms as design preferences, rather than minimum requirements, is unreasonable.

The RFP language addressing the location of passenger seating states that the console "shall be located forward" of the passenger seating (SOW III-3.7), and that the passenger seating "should not be located forward of the console" (SOW III-10.6 as revised by amendment 0005). In amending the latter specification provision, the agency essentially acknowledged that the original language of this section, which stated that the location of passenger seating shall "minimize the effects of vertical accelerations," could possibly be interpreted to mean that seating in front of the console could be acceptable depending on the applicable vertical acceleration. The agency stated in the amendment why it did not want passenger seating in front of the console, deleted the language concerning minimizing vertical accelerations, and replaced it with a clear statement that passenger seating "should" not be located forward of the console. Also, the amendment referenced SOW III-3.7, which clearly requires passenger seating behind the console, and this provision was not amended. Thus, although this amended language in SOW III-10.6 used the terminology "should be," which, as the protester indicates, in some contexts depicts a desired or preferred characteristic rather than a mandatory requirement, compare All Star Maintenance, Inc., B-244143, Sept. 26, 1991, 91-2 CPD ¶ 294 ("should" considered mandatory term in context of solicitation) with Steelcase Inc., B-260781, July 21, 1995, 95-2 CPD ¶ 41 ("should" not considered mandatory term in context of solicitation), when all of the solicitation specifications for location of passenger and crew seating are considered together, the RFP clearly requires that passenger seating be located behind the console. To conclude otherwise would read SOW III-3.7 completely out of the solicitation. See ASAP Servs., a div. of ACM, Inc., B-260803, July 18, 1995, 95-2 CPD ¶ 36.

With regard to the other specification in question, the SOW generally requires the boat to be "self-bailing." The specific language addressing deck drainage (SOW paragraph III-9.3) provides specifications for the "bilge/drainage system" in two separate paragraphs. The first paragraph addresses bilge pumps and the drainage of water from compartments to the bilge pump suction area. The second paragraph separately addresses deck drainage, stating that the deck "shall be drained through the transom by two large capacity freeing ports." It is apparent that this second

paragraph describes a requirement for self-bailing of the decks, whereby the decks can drain directly overboard.

Although the protester acknowledges that its boat's forward deck is not self-bailing, Team One alleges that it may address deck drainage through its proposed bilge pump system. SOW III-9.3 clearly and specifically distinguishes drainage of water on the deck, which must drain through ports in the transom (i.e., must drain overboard), from the drainage of water in other compartments, which must drain to the bilge suction area(s) for removal by bilge pumps. The SOW does not provide for an alternative method of deck drainage through the bilge pump system, nor does the SOW language suggest that the specified method of deck drainage is only a preference. Thus, the RFP language that the deck "shall" drain in this manner states a mandatory, rather than discretionary, requirement for self-bailing decks.

Team One additionally alleges that the RFP provides that mandatory requirements will be denoted only by use of the word "threshold," and therefore, since the requirements in question are not stated as "threshold" requirements, they cannot be mandatory requirements. We disagree. SOW III-1 "System Performance" states in pertinent part:

"General Note: Throughout this document, 'threshold' refers to maximum or minimum parameters that are absolute requirements, 'objective' refers to maximum or minimum parameters that are desired, but not required."

The protester's allegation that requirements stated without using the term "threshold" cannot be mandatory requirements is based on a selective and incomplete analysis of the terms of the solicitation. When considered as whole, the solicitation does not use the terms "threshold" or "objective" exclusively to identify required or preferred characteristics. In fact, outside of those performance specifications for which the agency has both a minimum need and a desire for performance in excess of that actual minimum need,⁶ the SOW does not generally

⁶For example, in specifying speed and range requirements, the SOW states both preferred and minimum required parameters:

"The objective top speed is 40 knots, the threshold top speed is 34 knots." (SOW III-1.1)

"The objective cruise speed is 32 knots, the threshold cruise speed is 27 knots." (SOW III-1.2)

(continued...)

use the threshold/objective language. If, as the protester asserts, a specification without the term "threshold" cannot be an "absolute requirement," then a specification without the term "objective" cannot be a "desired, but not required" characteristic. However, since the majority of the specifications stated in the SOW do not use either of these terms, the absence of the threshold/objective language under this reasoning would render the majority of the specifications as neither required nor desired, and thus meaningless; such reasoning does not give effect to all of the terms of the RFP and is thus unreasonable.⁷ See ASAP Servs., a div. of ACM, Inc., supra.

Team One alternatively claims that the requirements in question are not material terms of the RFP, for which its proposal could be rejected for its failure to meet them.

In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Satellite Transmission Sys., Inc., 70 Comp. Gen. 624 (1991), 91-2 CPD ¶ 60. Technical requirements that are stated in clear and unambiguous terms are presumed to be material to the needs of the government. Id.

Here, not only were the pertinent technical requirements stated in clear and unambiguous terms, their importance to mission capability were obvious. Amendment 0005 specifically stated the agency's needs for the specified location of passenger seating under the combat mission conditions in which the boat will perform and why it was important, and, during discussions, the agency advised Team One that this was a "critical requirement." As for deck drainage, the agency persuasively states that self-bailing decks are a critical design characteristic because a boat with decks that do not automatically drain overboard presents an unacceptable safety risk to personnel in the event the boat is disabled in high sea states where waves would routinely wash water onto the decks. It is thus apparent

⁶(...continued)

"The objective range is 175 NM [nautical miles], the threshold range is 150 NM." (SOW III-1.3).

⁷In any event, the agency specifically stated to Team One during discussions that both the passenger seating location and the deck drainage specifications were minimum requirements, that Team One's proposal failed to satisfy these requirements, and that its proposal was unacceptable because of this failure. Thus, even if Team One was not aware of these requirements from the face of RFP, the agency's discussion letter clearly stated the agency's actual mandatory requirements and that the agency considered Team One's proposal unacceptable for failing to meet these requirements.

that these requirements are material terms of the RFP. Since the protester's proposal did not satisfy these material technical requirements, the agency properly determined that Team One's proposal could not reasonably form the basis for award and rejected the proposal from further consideration.⁸ See id.

Team One nevertheless alleges that the agency must accept Team One's proposal because the RFP contemplated the possible waiver of mandatory requirements. It is true that the terms of the RFP contemplate offerors proposing exceptions to the requirements, so long as the proposal clearly states the exception and provides full supporting rationale for the exception. However, the RFP did not indicate that the mere act of proposing exceptions would necessarily result in waiver or revision of the stated requirements.

Here, Team One noted only one exception—the location of passenger seating. During discussions, the agency stated that Team One's passenger seating exception was unacceptable and requested revision of the proposed seating location so that it "meets the requirement." Also, although Team One's proposal did not identify its approach to deck drainage as an exception to the requirements, the agency stated that the proposal failed to meet the stated requirement and was unacceptable, and requested correction of this deficiency. Therefore, since the agency clearly stated during discussions that the proposed deviations from the requirements were unacceptable, Team One could not reasonably believe at that point that the agency would consider its proposal for award without revision to satisfy the identified requirements.

Alternatively, Team One alleges that, since the agency considered its proposal unacceptable, the agency improperly included the proposal in the competitive range. While it may be that Team One's proposal could have been rejected without discussions, the record reflects that the agency thought that there was some possibility that Team One could modify its boat to satisfy the agency's requirements. Federal Acquisition Regulation § 15.609 states that when there is doubt as to whether a proposal is in the competitive range, the proposal should be included. Moreover, the agency's discussion letter specifically advised Team One that its proposal was unacceptable, identified the requirements which it would have to satisfy in order to be considered acceptable, and commented that "a considerable amount of effort will be required" to respond to the agency's concerns sufficiently and that Team One should "consider carefully whether to expend further effort and expense in improving [its] proposal." Team One, however, neither withdrew from

⁸Team One also protests the agency's evaluation of other elements of its proposal. Since the protester's proposal is technically unacceptable under the two requirements discussed in this decision, these other protest bases are academic and will not be considered.

the competition nor revised its proposal as indicated. Under the circumstances, we find no basis to provide Team One any relief for the inclusion of its proposal in the competitive range. See Deskin Research Group, Inc., B-254487.2, Feb. 22, 1994, 94-1 CPD ¶ 134.

The protest is denied.

Comptroller General
of the United States