



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Motorola, Inc.

File: B-277862

Date: December 3, 1997

David B. Apatoff, Esq., Hadrian R. Katz, Esq., and Rosemary Maxwell, Esq., Arnold & Porter, for the protester.

Gerard F. Doyle, Esq., Ron R. Hutchinson, Esq., and Michael F. Mason, Esq., Doyle & Bachman, for Savi Technology, the intervenor.

Craig E. Hodge, Esq., and Capt. Brian J. Godard, Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that the agency waived a material solicitation requirement for the awardee is dismissed as untimely where the contention is based on an ambiguous requirement in the statement of work that was apparent on the face of the solicitation documents and thus constituted a patent ambiguity that had to be protested prior to the closing date for submission of initial proposals.
2. Protester was not prejudiced by an agency decision to ignore a requirement in the statement of work requiring compliance with a transmission duty cycle imposed by Federal Communications Commission regulations where the record shows that the awardee's offered equipment operated with or without the duty cycle, and also shows that even with the imposition of the duty cycle requirement the offered equipment nonetheless transmitted data at a rate compliant with the solicitation's requirements for transmission speed.
3. Contention that the agency conducted an unreasonable price evaluation of one of the awardee's optional items is denied where the record shows that the agency's approach was reasonable, and in compliance with the instructions set forth in the solicitation.

DECISION

Motorola, Inc. protests the award of a contract to Savi Technology pursuant to request for proposals (RFP) No. DAAB07-97-R-V002, issued by the Department of the Army for Radio Frequency Identification (RFID) equipment. Motorola disputes

the Army's interpretation of the solicitation in two areas, and in both, claims that the agency waived a material RFP requirement for Savi. Motorola also argues that the Army conducted an unreasonable evaluation of Savi's price proposal.

We dismiss the protest in part, and deny it in part.

BACKGROUND

The Army issued the RFP on April 15, 1997, to procure RFID equipment, software, and support services for the Department of Defense and the U.S. Coast Guard. The RFID equipment at issue here uses radio frequency (RF) as the identification medium in shipping and receiving material, including tracking and monitoring assets within large military warehouse environments, open-air storage areas, office and laboratory environments, combat areas, and military transportation facilities. Specifically, the RFP sought to purchase an integrated system of personal computers, transponders, interrogators and software to permit electronic identification of assets.¹ The RFP contained a 36-month ordering period for hardware, software, and documentation, and a 60-month ordering period for training and technical engineering services.

The RFP anticipated award of a fixed-price, indefinite delivery/indefinite quantity (ID/IQ) contract to the offeror whose proposal presented the best value to the government based on consideration of the evaluation factors of technical, cost, management, and past performance. The RFP set forth the relative weight of these factors as follows: the technical factor was significantly more important than any other factor; the past performance and cost factors were approximately equal, and each was more important than the management factor; and the technical, past performance, and management factors combined were significantly more important than cost.² RFP, amend. No. 0002, part E-2, para. 3.1. Under the evaluation scheme, each proposal was to receive an adjectival and color rating under the technical, management, and past performance evaluation factors; no score was to be assigned for the cost factor.³

¹A transponder is attached to an asset and stores information about that asset. It operates as an electronic tag. An interrogator sends out a radio signal that reads or communicates with the transponder. Once the interrogator receives information from a transponder, it transfers the information to a computer.

²Although the RFP here includes an evaluation factor for cost, the solicitation anticipated award of a fixed-price ID/IQ contract. Hence, any estimated costs discussed in this decision are actually estimated prices.

³The Army used separate color schemes for each of the three rated evaluation
(continued...)

By the closing date set forth in the RFP, the Army received proposals from two offerors, Motorola and Savi. The Army scheduled oral presentations, conducted discussions, and permitted each offeror an opportunity to demonstrate its proposed system. Although the results of the demonstration were not separately scored, the RFP advised offerors that information from the demonstration could be reflected in the evaluations. RFP, amend. No. 0002, part E-1, para. 16.2.e. During the demonstration, Motorola experienced numerous significant problems with its equipment; Savi's equipment experienced few problems during the demonstration.

Upon receipt of best and final offers (BAFO) on July 30, 1997, the Army's source selection evaluation board (SSEB) concluded its review. The ratings under each of the evaluation factors, and the total evaluated prices, are shown below:

OFFEROR	TECHNICAL	PRICE/COST	PAST PERFORM.	MGMT.
SAVI	Blue	\$100 million	Blue	Blue
MOTOROLA	Yellow	[deleted]	Blue	Blue

On August 6, after reviewing the SSEB report and other evaluation materials, the Source Selection Authority selected Savi for award, which was made on August 8. After receiving a debriefing on August 14, Motorola filed its protest with our Office on August 25.

DISCUSSION

Motorola raises three challenges to this procurement. First, it claims it was misled by the RFP into proposing a graphical user interface (GUI) for the hand-held interrogators (HHI) required by this solicitation. Because providing GUI capability for the HHI portion of this system was technologically difficult, and because the Army did not impose the same requirement for Savi's proposed HHI, Motorola contends that its system was necessarily more expensive and experienced more technical problems during its demonstration than the less complex device offered by Savi. Second, Motorola claims that the Army waived Savi's noncompliance with a material requirement of the RFP regarding the radio frequency operating parameters of this system. Third, Motorola contends that the Army improperly used

³(...continued)

factors; however, since the technical evaluation is the only issue in dispute in this protest, we will set forth only that scheme. The technical proposals were rated as: blue/outstanding; green/good; yellow/acceptable; pink/susceptible to being made acceptable; or red/unacceptable.

an arbitrary and unfair method of computing the evaluated price for one of the optional items proposed by Savi.

The GUI Requirement

As explained above, the RFP here anticipated that offerors would propose an integrated system of transponders and interrogators which, together with a computer (the PC), would permit the user to locate (as well as organize and inventory) various assets. The requirements for the system were set forth in the Specification and Statement of Work. RFP, amend. No. 0002, part D, sec. 4. Specifically, subsection 4.10 identified the hardware and software requirements for each of the system's components.

As shown below, the general software requirements in the RFP mandated contractor-provided software for a minimum of two components--the PC and the HHI--and established two standards applicable to such contractor-provided software. The RFP stated:

The Government requires software to operate from, at a minimum, AT-compatible PCs and the Contractor-provided Hand-held Interrogators. The Contractor shall provide as a minimum, Operating Software for PC, Operating Software for HHI, and Application Development Software. All Contractor-provided software shall provide a Graphical User Interface and be, as a minimum, compatible with MS-DOS, Windows 95, and Windows NT operating systems.

RFP, amend. No. 0002, part D, para. 4.10.8. In the protester's view, this provision contains a clear mandate that contractors must provide software for the HHI, and that such contractor-provided software must include a GUI. There is no dispute in the record that Motorola's HHI included a GUI and Savi's HHI did not. Hearing Transcript (Tr.) at 119-121.

The Army disagrees with Motorola's interpretation of paragraph 4.10.8, stating that it interpreted "no requirement for the HHI to have a graphical display or to run Windows 95 or Windows NT as the native operating system." Department of the Army Letter to Motorola, August 25, 1997, enclosure at second unnumbered page. Rather, in the Army's view, the requirement for a GUI in paragraph 4.10.8 applied only to the PC, and not to the HHI.

The Army also argued that Motorola's interpretation of paragraph 4.10.8 is inconsistent with the RFP's hardware requirements for the "active" version of the HHI.⁴ These requirements are as follows:

The Active Hand-held Interrogator (HHI) shall have an internal memory capacity of at least 512 Kbytes; however, the Government desires a larger memory capacity. . . . The Active HHI shall use an operating system that is compatible with MS-DOS®, and shall have a manual data input interface as well as user-programmable functions. . . . The Active HHI shall have a user-selectable, night-readable display, capable of displaying at least 80 characters without scrolling; however, the capability to display more than 80 characters without scrolling is desired.

RFP, amend. No. 0002, part D, para. 4.10.3.4.1. In the Army's view, two of the requirements in this provision--internal memory of at least 512 kbytes, and a display of at least 80 characters without scrolling--foreclose the possibility that an HHI was required to have a GUI, because GUI capability for the HHI would require significantly more memory and display capability than the minimums imposed by the hardware requirements.

When faced with a dispute over the terms of a solicitation, we first attempt to read the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Dr. Carole J. Barry, B-271248, June 28, 1996, 96-1 CPD ¶ 292 at 4. Applying this rule, we find unpersuasive the Army's view that the requirement for a GUI in paragraph 4.10.8 applied only to the PC.

The GUI requirement in the RFP is located within a paragraph (4.10.8) describing the general software requirements for the solicitation. This general provision requires software for, at a minimum, the PCs and the HHIs, and requires that "[a]ll [c]ontractor-provided software shall provide a [GUI] and be, as a minimum, compatible with MS-DOS, Windows 95, and Windows NT operating systems." RFP, amend. No. 0002, part D, para. 4.10.8. In our view, the Army's interpretation of this clause--that the GUI requirement applies to the PC and not the HHI--is not

⁴The RFP set forth requirements for both active and passive HHI devices. Generally, devices described as active were required to have an omnidirectional read and write capability for each active transponder at a minimum unobstructed distance of up to 300 feet. RFP, amend. No. 0002, part D, para. 4.10.3.1. Passive devices were required to have a read and write capability of a minimum of 1.5 feet for writing, and 5 feet for reading. Id. at para. 4.10.4.1. In addition, the RFP provisions cited above identified faster transmission rates for active equipment than for their passive counterparts.

supported by the plain language of the clause, and renders meaningless the statement that software must be provided for the PC and the HHI.

On the other hand, Motorola's interpretation of paragraphs 4.10.8 and 4.10.3.4.1 requires the addition of words and terms not found in the clauses, and ultimately highlights a patent ambiguity in the solicitation. As an initial matter, all of Motorola's arguments regarding the GUI requirement in paragraph 4.10.8, relate to the RFP's requirement for active HHIs. However, the 4.10.8 requirement is driven by the mandate to provide software. While the RFP did not require either memory or software for the passive HHI (RFP, amend. 0002, part D, paras. 4.10.8, 4.10.4.4.1; Tr. at 112), the record shows that Motorola offered software with its passive HHI. Tr. at 80-81. Given that paragraph 4.10.8 required all contractor-provided software to have GUI capability, and given that the software provided with Motorola's passive HHI did not offer GUI capability, Tr. at 81, Motorola's own actions appear inconsistent with its urged interpretation of the RFP. Alternatively, Motorola's interpretation requires that the application of the clause be limited to the active HHI--a limitation clearly not found in paragraph 4.10.8--to preserve the meaning Motorola now urges.

As discussed below, Motorola's contention that paragraph 4.10.8 requires GUI capability for the HHI ultimately highlights an ambiguity in the solicitation that was discernable on its face, and should have been challenged prior to the submission of proposals.

Motorola's response to the Army's contention that the requirement for a GUI on the HHI is inconsistent with paragraph 4.10.3.4.1 is that the restricted memory and display capabilities stated for the active HHI in paragraph 4.10.3.4.1 are only bare minimums; Motorola points out that the RFP sought more capability than the minimum amount stated in both areas.⁵ Since the RFP expressed a preference for greater capabilities than the stated minimums, Motorola argues that the provisions can be read together and are not inconsistent.

While Motorola is correct about the RFP's stated desire for products that exceed minimum capabilities, we conclude that equipment meeting the minimum hardware requirements of paragraph 4.10.3.4.1 will not have the capability to operate software that includes a GUI. In this regard, our Office convened a hearing to learn, in part, if it is possible to meet the software requirements for a GUI with hardware that is minimally compliant with the requirements in paragraph 4.10.3.4.1. On at least two

⁵Specifically, paragraph 4.10.3.4.1. stated that the active HHI should have a memory "of at least 512 Kbytes; however, the Government desires a larger memory capacity" and that the active HHI must be "capable of displaying at least 80 characters without scrolling; however, the capability to display more than 80 characters without scrolling is desired." (Emphasis added.)

occasions, the protester's witness admitted that an active HHI offering minimum compliance with the hardware requirements of this solicitation would not operate a GUI. Tr. at 148, 150. Later the protester attempted to counter that evidence by explaining that it could conceive of a very elementary GUI--Windows 1.0, for example--that might operate within the hardware constraints of paragraph 4.10.3.4.1. Tr. at 217-222. Upon reviewing the testimony as a whole, however, we find that no reasonable offeror could have concluded that an active HHI with the minimally required memory and display capability stated within paragraph 4.10.3.4.1 would be able to operate a GUI sufficient for this requirement.⁶

Since equipment that complies, however minimally, with the hardware requirement for the HHI could not reasonably be viewed as capable of operating a GUI sufficient for this system, the solicitation documents contained a patent ambiguity. In such situations an offeror may not simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the RFP and then expect relief when the agency does not act in the manner assumed. Rather, the offeror must challenge the alleged ambiguity prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1997); American Connecting Source d/b/a Connections, B-276889, July 1, 1997, 97-2 CPD ¶ 1 at 3; Christie Constructors, Inc., B-271759, B-271759.2, July 23, 1996, 96-2 CPD ¶ 87 at 6. The purpose of our timeliness rule with respect to solicitation improprieties is to afford parties a fair opportunity to bring such matters to the attention of the agency prior to the submission of offers, so that the matter can be remedied before offerors have relied on the terms of the solicitation in formulating their proposals. Gordon R. A. Fishman, B-257634, Oct. 11, 1994, 94-2 CPD ¶ 133 at 3. Since we conclude that this ambiguity could have been raised in advance, this basis of Motorola's challenge is untimely and must be dismissed.

The Requirement for Non-Licensed Communication

Motorola argues that the Army waived Savi's noncompliance with the requirements in paragraph 4.5 of the statement of work regarding non-licensed radio frequency (RF) communication. For the reasons set forth below, we agree with Motorola that the provisions of paragraph 4.5 were effectively waived by the Army, but we conclude that Motorola was not prejudiced by the Army's actions because Savi's offered equipment could also be operated in accordance with the requirement.

⁶The record shows that Motorola's error was that it ignored the RFP's minimum requirements and focused instead on the RFP's stated desire to procure equipment that exceeded these minimums, if possible. During the hearing, Motorola's explanations suggested that the company viewed the RFP's minimum requirements as anachronistic remnants of earlier specifications that had been overlooked in the desire to upgrade the Army's system. See Tr. at 135.

Paragraph 4.5 of the statement of work required the following:

The RFID configuration shall support non-licensed communication in compliance with . . . Federal Communications Commission Code of Federal Regulations, Title 47, Part 15, Radio Frequency Devices, or equivalent regulations. RFID devices shall be capable of operating at a frequency and radiated output power that does not require special operational licensing by the Government or host nation.

RFP, amend. 0002, part D, para. 4.5.

The Federal Communications Commission (FCC) regulations set forth in 47 C.F.R. Part 15, describe the operational characteristics of RF equipment permitted to operate without an FCC license. 47 C.F.R. § 15.1 (1996). Of particular interest here is the "duty cycle" requirement applicable to certain frequencies that limits the duration and frequency of non-licensed transmissions. Specifically, the duty cycle applicable to the 433 MHz frequency selected by Savi requires that devices have a means of automatically limiting their operation "so that the duration of each transmission shall not be greater than one second and the silent period between transmissions shall be at least 30 times the duration of the transmission but in no case less than 10 seconds." 47 C.F.R. § 15.231(e). This duty cycle requirement--for example, 1 second "on" followed by 30 seconds "off"--was a technological barrier to the offerors in designing a system that would transmit information at the speed required by the RFP. Tr. at 239-241, 243-247.

During the course of the procurement, Savi, through its attorney, approached the FCC about its compliance with the requirements of 47 C.F.R. Part 15, and was advised, in writing, that the requirements are inapplicable to devices intended for use by the government, pursuant to guidance set forth at 47 C.F.R. § 2.807(d). FCC Letter to Wiley, Rein & Fielding, May 19, 1997. When Savi provided this letter to the Army, the Army evaluated Savi's proposed RF solution without regard to the duty cycle requirement. Motorola, on the other hand, proposed equipment that operated at a different frequency, in part at least, to avoid the duty cycle requirement applicable to 433 MHz. Motorola explains that the 433 MHz frequency might have permitted a more straightforward technical solution than the one it used, and states that it might have selected this frequency had it known that there would be no duty cycle requirement.

The Army responds that it did not "waive" the requirement in paragraph 4.5 of the statement of work because the requirement did not apply in any event. Alternatively, the Army argues that Motorola was not prejudiced in this area because Savi's equipment can also operate in compliance with the FCC requirements.

As an initial matter, we disagree with the Army's contention that since the requirements of part 15 of the FCC's regulations are inapplicable to government equipment, the Army was not required to advise Motorola that compliance with the regulations was unnecessary. Although there appears to be no independent FCC requirement for compliance with these regulations, the Army expressly required compliance with their terms in paragraph 4.5 of the RFP. Unless or until the Army indicated otherwise, an offeror failed to meet this requirement at its own risk. Accordingly, to the extent that the Army evaluated Savi's equipment without regard to the duty cycle requirement, it effectively waived the requirement.

Despite our conclusion that the Army waived the requirement in paragraph 4.5, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, the record shows that Savi's equipment met the requirements of the RFP regardless of whether it operated with or without compliance with the duty cycle. Tr. at 264-265, 271-272, 276-277.

The Army admits that Savi's equipment would operate at a substantially slower speed if forced to meet the duty cycle requirement, but explains that the equipment operates either way and would nonetheless meet the minimum transmission requirements set forth elsewhere in the RFP. Tr. at 278-279. In fact, during the hearing, the Army explained that with the imposition of the duty cycle--and the resulting slower transmission of data--Savi's hardware rating [deleted].⁷ Tr. at 279.

While Motorola does not challenge the Army's reassessment of Savi, it argues that it was prejudiced because it was unfairly induced to compete. Specifically, Motorola explains that it

was familiar with the duty cycle restrictions that applied to Savi's existing equipment and the slow data transfer rates resulting from the duty cycle restriction; [deleted].

⁷While we are generally skeptical of reevaluations prepared in the heat of the adversarial process, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, the Army's explanation of the impact on the evaluation of imposing the duty cycle requirement on Savi's equipment--i.e., that Savi's rating [deleted]--seems reasonable in light of the fact that the equipment would continue to meet the transmission speed requirements in the RFP. In addition, Motorola has not argued that the Army's assessment of this impact was unreasonable.

Motorola's Post-Hearing Comments, Nov. 4, 1997, at 16-17. We fail to see how Motorola is in any different position now than it claims it was in prior to submitting its bid. By reassessing Savi's technical score to impose the duty cycle requirement, Savi is in precisely the position that Motorola anticipated. Motorola could have chosen to compete by offering the same solution--which would have met the minimal requirements of the RFP, but would not have involved much technical innovation--or it could have opted to outshine Savi with a more complex solution--which the record shows it tried to do. Given that Savi would still have a higher-rated, lower-priced proposal using an RF that Motorola could have chosen as well, Motorola was not prejudiced by this chain of events.

Evaluation of Savi's Docking Station Prices

Motorola's third argument involves the Army's treatment of Savi's proposed prices for its optional transponder docking stations. In essence, a docking station is a device into which a transponder can be loaded to permit the ability to transmit data via a hardwired connection. This device provides a faster interface than the RF transmission. Tr. at 321-322. Although the item was offered as an option by Savi, Motorola complains that the unit price for the item should have been multiplied by the RFP's stated evaluation quantity for interrogators--i.e., 12,945--because the docking station operates as a hard-wired interrogator. Instead, the Army contacted Savi for information regarding its previous sales of transponder docking stations [deleted] and used those figures to evaluate Savi's price. Tr. at 325-326. Specifically, based on the [deleted] experience, the Army used an estimate of 33 transponder docking stations in calculating Savi's proposed price.

At this juncture, the short answer to Motorola's contention is that even if the Army was required to make the adjustment Motorola claims, Savi's total costs would have risen by [deleted] between Motorola's and Savi's price.⁸ Thus, Savi would still have the higher-rated, lower-priced proposal--even considering the adjustment to Savi's technical rating for operation of its equipment within the duty cycle confines of the FCC regulations. In any event, our review of the record on this issue leads us to conclude that the Army acted reasonably. Although the price evaluation scheme here anticipated the use of fixed evaluation quantities for the line items required in the RFP, the Army explained that its evaluation of prices for optional items would "be determined on the basis of the solution proposed." Question and Answer No. 52, appended to RFP. In fact, when Motorola's representative was asked during the hearing if the company was suggesting that the Army might actually purchase 12,900 docking stations, he replied "[a]bsolutely not." Tr. at 331. We think the

⁸Motorola acknowledges that Savi's evaluated price "would have been approximately [deleted] with this adjustment. Motorola's Post-Hearing Comments, November 4, 1997, at 20.

Army reasonably evaluated this item using Savi's previous sales under an earlier contract.

The protest is dismissed in part and denied in part.

Comptroller General
of the United States