**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Southern Technologies, Inc.

**File:** B-278030; B-278030.2

**Date:** December 19, 1997

James V. Etscorn, Esq., Baker & Hostetler, for the protester.
Charles G. Lill for Frank Lill & Son, Inc., an intervenor.
Ann Giddings, Esq., and Lis B. Young, Esq., Naval Facilities Engineering Command, for the agency.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protester's objection to corrective action proposed by contracting agency in response to protest--i.e., paying protester's proposal preparation costs--is without merit where, although agency acknowledges that the solicitation specifications were misleading, agency demonstrates that, due to urgency of the requirement, alternate corrective action requested by protester--recompeting with revised specifications--is not feasible.

**DECISION**

Southern Technologies, Inc. objects to the corrective action proposed by the Department of the Navy in response to Southern's protest of the rejection of its proposal under request for proposals (RFP) No. N62477-97-R-0041. The Navy decided not to reopen the competition, as requested by Southern, but instead to pay Southern its proposal preparation costs as compensation for the agency's improper actions in conducting the procurement. The protester contends that the agency should reopen the competition since reopening is a practicable, and more meaningful, remedy for the impropriety that occurred.

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

BACKGROUND

The RFP, which was issued on May 28, 1997, solicited proposals for power plant improvements at the Goddard Power Plant in Indian Head, Maryland. The purpose of the improvements is to bring the plant, which is a major emitter of nitrogen oxides (NOx), into compliance with emission standards set by the state of Maryland. Work to be performed includes the installation of low NOx coal/oil fired

burners with combustion controls on each of the plant's three boilers, plant controls, a burner management system, and incidental related work.

The bid schedule divided the work among a base item and two options. The base item encompassed the entire project, with the exception of the work described in the option items. Option 1 was for plant controls, and option 2 was for the work involving the second and third boilers.

The solicitation provided for the evaluation of proposals on the basis of price, technical/management factors, and past performance, with price carrying greater weight in the selection process than the latter two factors. Technical/management factors included relevant experience, technical methodology, project staffing, work plan, and subcontracting plan. Under the technical methodology subfactor, offerors were to describe the burners that they intended to install and to submit documentation demonstrating the burners' compliance with performance criteria identified in the RFP.

Six offerors, including Southern, submitted proposals by the July 25 closing date. The technical evaluation panel determined that the protester's proposal was technically unacceptable because Southern had proposed burners employing over-fire air (OFA) combustion, a technology that the panel considered to be unduly risky and thus unacceptable. Another proposal was rejected as technically unacceptable for proposing the same technology.[1] The four remaining proposals were included in the competitive range.

After a pre-award debriefing at which it was informed of the basis for the exclusion of its proposal from the competitive range, Southern protested to our Office, arguing that the OFA technology that it had proposed was consistent with the solicitation's requirements and that its proposal ought therefore not to have been excluded from further consideration.[2]

The Navy responded that its technical experts had considered and rejected OFA as an acceptable compliance technology prior to issuance of the RFP. The agency conceded that the RFP's specifications, as written, could have misled offerors

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[1]A third offeror proposing OFA technology was included in the competitive range because it also proposed a non-OFA alternative.

[2]The agency proceeded with the selection process notwithstanding the protest, and on September 30, awarded a contract for the base item and option 1 to Frank Lill and Son, Inc. (Option 2 was not awarded since the agency did not have sufficient funding available on the date of award. The agency notes that it has sought, and expects to receive, additional funding so that option 2 can be exercised.)

regarding the acceptability of OFA technology, however, and accordingly, proposed to take corrective action. The Navy maintained that the corrective action requested by the protester--i.e., inclusion of its proposal in the competitive range--was not appropriate, however, because Southern would have to rewrite its proposal using a different technical approach to make the proposal susceptible of award. The Navy therefore proposed instead to reimburse Southern for its proposal preparation expenses. The agency requested that we dismiss Southern's protest on the grounds that it was offering the protester appropriate corrective action.

We declined to dismiss on the basis of the agency's request since, as we informed the parties, we did not think that the Navy had demonstrated that payment of proposal preparation costs was the only appropriate corrective action available. We explained that although, as a general rule, a proposal should not be included in the competitive range if it would have to be substantially rewritten to become technically acceptable, that rule did not govern where the agency conceded that the specifications were misleading and required revision--and the reasons for the proposal's exclusion related directly to the misleading provisions that were to be rewritten. In such circumstances, we noted, unless precluded by the urgency of the requirement, the agency should amend the solicitation to reflect its needs accurately, and then reopen the competition and allow offerors to submit new or revised proposals on the basis of the revised requirements. See Federal Acquisition Regulation (FAR) § 15.606 (June 1997); Puerto Rico Marine Management, Inc., 72 Comp. Gen. 42, 48 (1992), 92-2 CPD ¶ 275 at 8.

The Navy responded with a supplemental submission arguing that the urgency of the requirement did indeed preclude a reopening of the competition for the base and optional items. The Navy explained that the Maryland permit under which the Goddard Power Plant operates requires the installation of low NOx burners on one of the plant's three boilers by March 1, 1998,[3] in time for the 1998 summer ozone season. The agency asserted that it will be unable to comply with this deadline if the base item is recompeted since it will take the contractor 4 to 6 months to procure the burners, which must be customized to meet the particular requirements of the Goddard plant, and 3 months to install them. The Navy argued that a recompetition of option 2 (i.e., the work on the second and third boilers) was impracticable[4] since a new solicitation could not be issued until July 1998, after installation and baseline testing of the first boiler had been completed; it would

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[3]The plant's three boilers run on a 3-year cycle. While one boiler is in operation, a second boiler is on emergency standby, and the third is undergoing major overhaul. The boiler on which the low NOx burners to be installed under the base item is due to come on line in June 1998.

[4]The Navy did not address the feasibility of recompeting option 1 in its submission.

then take a minimum of 120 days for the agency to conduct the reprocurement, 4-6 months for the contractor to secure the required parts, and 3 months for the contractor to install them, meaning that a second boiler with low NOx burners would not be available for operation until July 1999. As a result, the first boiler would have to remain in operation longer than the 1 year that the agency views as acceptable.[5]

Southern argues that, contrary to the agency's representation, a reopening of the competition for the solicitation in its entirety is both feasible and appropriate. The protester proposes, as alternative corrective action, that the agency leave the work on the burners in place with Lill, while recompeting all of the other work in a competition from which Lill would be excluded.

ANALYSIS

Where a protester objects to the corrective action proposed by an agency to remedy a procurement impropriety and argues that alternative corrective action should be taken, we will examine the record to determine which corrective action is appropriate under the circumstances of the case. See Henkels & McCoy, Inc., B-250875 et al., Feb. 24, 1993, 93-1 CPD ¶ 174 at 3; Power Dynatec Corp., B-236896, Dec. 6, 1989, 89-2 CPD ¶ 522, aff'd, B-236896.2, Apr. 20, 1990, 90-1 CPD ¶ 404. Here, as discussed below, we find that neither of the remedies requested by the protester is feasible; we thus conclude that the corrective action proposed by the agency--i.e., payment of the protester's proposal preparation costs--is appropriate.[6]

The Navy has demonstrated that a recompetition of the solicitation in its entirety is impracticable since delay in the award of the base item would mean that the plant would not have a boiler with a low NOx burner available for operation during the peak ozone months of 1998, in violation of the terms of the plant's operating

[5]The agency explains that a boiler can only be run for 1 year as the primary boiler because the burner nozzles wear out in that period of time.

[6]The agency represented at one point in the proceedings that it was prepared to offer, as corrective action, a recompetition of the work encompassed in option 2. It subsequently retracted that offer, however, arguing that a recompetition of the option 2 work would be impracticable for a variety of reasons. The protester agrees that a recompeting the option 2 work would not be a meaningful remedy, although for reasons different from the agency's. Since neither party appears interested in a recompetition of the option 2 work, we need not address the appropriateness of this as a remedy.

permit.[7] Further, carving out a portion of the work for Lill and recompeting the rest in a competition from which Lill would be excluded is not, in our view, an appropriate remedy since the agency has a legitimate interest in retaining the possibility of overall control of the project remaining in the hands of a single contractor. In addition, it would be inconsistent with the statutory mandate for full and open competition for us to recommend that Lill be excluded from a recompetition. See 10 U.S.C. § 2305(a)(1)(A) (1994).

We therefore agree with the agency that there is no meaningful remedial action that it can take here and that the agency's decision to award the protester its proposal preparation costs constitutes appropriate corrective action in response to the protest. See IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378 at 7. Because the agency is taking appropriate corrective action, Southern's underlying protest objecting to the exclusion of its proposal from the competitive range is dismissed as academic.[8] Henkels & McCoy, Inc., supra, at 4.

The protest is denied in part and dismissed in part.

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[7]We recognize that the protester has argued that the plant could reduce its NOx emissions to an acceptable level during the 1998 ozone season without the installation of any low NOx burners by reducing its reliance upon coal as a fuel. It is not within the scope of our authority to question the agency's pollution abatement strategy, however.

[8]The protester also complained in a supplemental protest that Lill's offer should have been rejected because it was front-loaded. The agency responded with an agency report, in which it argued, citing our decision in MCI Constructors, Inc., B-274347; B-274347.2, Dec. 3, 1996, 96-2 CPD ¶ 210 at 5, that an offer that is mathematically unbalanced due to the pricing of base and option items need not be rejected where the agency reasonably expects to exercise the options. The protester has not responded to the agency report, and we therefore view it as having abandoned this issue. Arjay Electronics Corp., B-243080, July 1, 1991, 91-2 CPD ¶ 3 at 1.