



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Matter of: ENMAX Corporation--Modification of Remedy

File: B-281965.2

Date: July 7, 1999

Blake S. Atkin, Esq., Atkin & Lilja, for the protester.
John E. Lariccia, Esq., Michael Mullin, Esq., and Capt. Rex D. Hockaday, Department of the Air Force, 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

Protester's request that General Accounting Office modify recommendation in earlier decision sustaining its protest by replacing recommendation that the agency reevaluate the awardee's technical proposal to determine whether it should have been considered acceptable with a directed award to the protester is denied where the record shows that the agency evaluators might have reasonably concluded, in accordance with the terms of the solicitation, that the awardee's proposal was acceptable, and where the circumstances of the procurement do not support a conclusion that the protester would necessarily receive the award even if the awardee's proposal were rejected.

DECISION

ENMAX Corporation requests that our Office modify the recommended remedy in our recent decision sustaining its protest of the award of a contract to Carlisle Research, Inc. by the Department of the Air Force for engineering services in support of software development activities at Hill Air Force Base, Utah. Our prior decision recommended reevaluation of Carlisle's technical proposal to determine whether it should have been considered acceptable given the proposal's failure to show experience in certain computing environments identified under one of the three technical evaluation factors. ENMAX requests that our Office instead recommend that the award be made to ENMAX.

We deny ENMAX's request.

In our earlier decision, we agreed with ENMAX's contention that Carlisle's proposal did not provide information demonstrating 2 or more years of experience in all

[deleted] of the enumerated computing environments identified under the third technical evaluation factor. As discussed further below, however, our agreement on this issue did not lead us to conclude that Carlisle's proposal was technically unacceptable, and had to be rejected. In addition, even if we had concluded that Carlisle's proposal could not be accepted as is, directed award to ENMAX is not the appropriate remedy under the circumstances here.

ENMAX's contention that Carlisle's proposal was technically unacceptable was ultimately premised on an internal evaluation plan prepared by the Air Force, rather than on the terms of the RFP. As discussed in our earlier decision, the Air Force evaluated proposals by converting the many requirements under each of the RFP's three evaluation factors into separate checklist items, which were graded on a pass/fail basis. ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD ¶ ____ at 2, 5. With regard to ENMAX's contentions about the meaning of this checklist, our decision stated unambiguously that evaluation plans are internal agency instructions and as such do not provide outside parties with any rights. Further, regardless of the terms of any evaluation plan it may devise, an agency is required to follow the evaluation scheme set forth in the RFP. Mandex, Inc.; Tero Tek Int'l, Inc., B-241759 et al., Mar. 5, 1991, 91-1 CPD ¶ 244 at 7. Our analysis then turned to the language of the RFP, not the evaluation checklist items.

The RFP required offerors to "receive a 'pass' evaluation on all three [evaluation] factors . . . [to] be eligible for award." RFP amend. 0002, § M.B.2. While the RFP did not specify that failure to meet any one of the technical areas under an evaluation factor would result in a finding of technical unacceptability under the factor overall, it did require offerors to "ensure that each and every area of each factor has been addressed." Id. Since there was no evidence in the record that the evaluators considered whether Carlisle's failure to demonstrate all of the specified experience made its proposal technically unacceptable under the third evaluation factor, we sustained ENMAX's protest, and recommended that the agency reevaluate the proposal and consider this issue.

In its request that we modify our recommended remedy, ENMAX argues that the Air Force cannot award the contract to Carlisle without changing its evaluation plan, and contends that only one result is possible under that plan--that Carlisle must be found technically unacceptable. According to ENMAX, the checklist is evidence of what the agency intended by its RFP, and evidence of what the evaluators would have concluded had they expressly considered Carlisle's failure to show experience with all **[deleted]** of the computing environments identified under the third evaluation factor. As in its initial protest, ENMAX continues to rely upon the Air Force's internal evaluation plan to support its argument; as before, ENMAX is wrong about the meaning of such plans.

As a preliminary matter, we became aware during the course of our earlier review that the internal checklist used by the Air Force evaluators appears to change the meaning of this solicitation in subtle but significant ways. For example, the

evaluation factor at issue here stated, among many other things, that “[t]he Government will evaluate experience of offeror (2 plus years) in client/server development in ORACLE, UNIX, NT, and Powerbuilder environments. . . .” RFP amend. 0002, § M.B.2. However, in the internal checklist used by the evaluators, this requirement was set forth separately--rather than as part of a list of requirements, as in the RFP--graded on a pass/fail basis, and restated as follows:

Demonstrated experience (2 plus years) in client/server development in ORACLE, UNIX, NT, and Powerbuilder environments.

Evaluation Plan for Engineering Services Support, Oct. 15, 1998, attach. 1. Evaluating such experience, along with several other requirements under the RFP’s evaluation factor, is very different from grading on a pass/fail basis an offeror’s “demonstrated” experience in A, B, C, and D, as under the internal checklist.

Nonetheless, even assuming that the evaluation plan reflected the evaluators’ intended approach, their intent cannot override the terms of the solicitation. Solicitations provide all potential offerors with a uniform roadmap to the agency’s needs, and uniform directions about the best method for preparing a successful offer to meet those needs. Allowing agency intentions or internal evaluation plans to alter the terms of solicitations is unfair to potential offerors who seek an opportunity to do business with the government.¹ In short, solicitations are, and must be, the touchstone for whether offerors have been treated fairly in an evaluation--not internal documents, or agency intentions. In this case, since the RFP itself--regardless of the terms of the evaluation plan--did not specify that failure to meet any one of the technical areas under an evaluation factor would result in a finding of technical unacceptability under the factor overall, there was no basis to conclude

¹ Our earlier decision assumed that the principle that internal evaluation documents do not provide parties with any rights was sufficiently well established to not require further discussion. In its request for modification, ENMAX attempts to distinguish one of the cases we cited, Mandex, Inc.; Tero Tek Int’l, Inc., supra, from the situation here by suggesting that the outcome in the Mandex decision was influenced by the fact that our Office “determined that the deviation from the evaluation plan, that occurred before any protest, would not have resulted in a different outcome.” ENMAX Request for Modification of Remedy, May 21, 1999, at 1 (citing Mandex, supra, at 8 and n.3). In fact, the portion of the Mandex decision ENMAX highlights focuses on a deviation from the RFP--i.e., the failure of the agency to use a team of evaluators to review best and final offers, and instead using only the evaluation chairman to conduct the final review. It was as to this deviation from the RFP--not from the evaluation plan--that our Office concluded that the protester was not harmed by the agency’s action. Mandex, supra, at 8. Thus, there is no basis to distinguish the instant protest from the principle stated in Mandex that deviations from evaluation plans alone do not provide a basis for protest.

that Carlisle's proposal necessarily would have been found technically unacceptable due to Carlisle's failure to demonstrate all of the experience called for under the third evaluation factor.

As a final matter, we note that ENMAX is not correct in its belief that it would be in line for award if the Carlisle proposal were deemed technically unacceptable. The RFP's evaluation scheme advised that award would be made using a performance/price tradeoff which "permits tradeoffs between price/cost and the past performance evaluation for technically acceptable proposals." RFP amend. 0002, § M.A.8. Our review of the record shows that there were other technically acceptable offerors, with past performance risk ratings of **[deleted]**, and with prices **[deleted]**. Memo for Record, Feb. 10, 1999, at 1-2. Thus, even if Carlisle's proposal is rejected, the agency will have to perform a performance/price tradeoff, as anticipated by the RFP, before it may properly select an awardee, whether ENMAX or another firm. In addition, we have no basis to assume that the agency might not have elected to conduct discussions with all offerors, and thus provide Carlisle a second opportunity to furnish information about its experience in the questioned areas. Had the agency adopted this course of action, there is no reason to assume that ENMAX would have prevailed at the conclusion of the competition. See Ogden Gov't Servs.--Protest and Request for Modification of Remedy; Tate Facilities Servs., Inc.--Protest, B-253350 et al., Apr. 4, 1994, 94-1 CPD ¶ 226 at 4. Accordingly, we reject ENMAX's assertion that it should automatically receive award.

The request for modification of remedy is denied.

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