

DECISION



18557

Martin, P.L.

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

B-200822

FILE:

DATE: June 22, 1981

MATTER OF: Motorola Inc., Communications Group

DIGEST:

Protest is sustained where agency accepted proposal which did not conform with solicitation requirements in several significant respects without amending solicitation to provide competitors opportunity to respond to changed requirements since all offerors must be treated equally and given common basis for preparation of proposals.

Motorola Inc., Communications Group, protests a U.S. Forest Service award for microwave transmission systems to GTE Lenkurt Incorporated under request for proposals (RFP) No. R5-80-60. Motorola contends Lenkurt's proposal was nonresponsive in that it did not comply with many of the requirements in the solicitation and that Lenkurt received preferential treatment from the agency. The Forest Service states award was made to Lenkurt because of the three offerors, its technical proposal received the highest score and its price was the lowest. The agency concedes it would have preferred that some of the discrepancies in Lenkurt's proposal had been corrected before award but it states that the lack of these corrections is not of sufficient import to warrant disturbing the award under which performance is well underway. For the reasons discussed below, the protest is sustained.

Motorola's initial grounds of protest were contained in a telefax message and a letter filed respectively on October 14 and 15. In these communications the protester contended that it was treated unfairly in that it was required to submit extensive and detailed information during discussions while Lenkurt's "nonresponsive" proposal which included little in-depth information was

[Protest Alleging That Awardee's Proposal Was Nonresponsive]

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accepted. In this regard, the protester noted ten areas where the Lenkurt proposal was not in compliance with RFP requirements.

The protester filed a supplemental letter on October 27, listing eight additional nonconforming aspects of the Lenkurt proposal. The contentions raised in the supplemental letter are untimely under our Bid Protest Procedures as they were filed more than ten days after the date (October 9) the protester indicated it received all the data relating to the Lenkurt proposal from the Forest Service. See 4 C.F.R. § 20.2(b)(2) (1980).

As Motorola contends Lenkurt's proposal was "nonresponsive" in a number of respects, it should be noted at the outset that the rigid rules of bid responsiveness in formally advertised procurements are not directly applicable to negotiated procurements. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. One of the basic purposes of a negotiated procurement is to determine whether deficient proposals are reasonably susceptible to being made acceptable through discussions. DFF Incorporated, E-180292, June 5, 1974, 74-1 CPD 303. Thus, while a proposal must ultimately conform to the requirements of the solicitation, the fact that it may not be fully in accord with the RFP is not a sufficient reason to reject a proposal if its deficiencies are reasonably subject to correction through discussions. NCR Corporation, B-194633.2, September 4, 1979, 79-2 CPD 174.

The purpose of discussions, however, is not to conform the RFP requirements to the proposals but to insure that proposals conform to the requirements. It is a fundamental principle of Federal procurement that offerors must be treated equally and be provided a common basis for the preparation of their proposals. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346. In negotiated procurements such as this, any proposal which ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis of an award. See Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358. If an agency wishes to accept such a proposal it owes a duty to the other offerors to place them on notice of the specification changes through the issuance of an amendment and to provide an opportunity for all offerors to compete under the new requirements. See Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134.

It is our view that the Lenkurt proposal does not meet RFP requirements for servicing and testing the equipment and contains disclaimers which improperly shift risks to the agency. In addition, it appears that the equipment offered by Lenkurt fails to meet the RFP technical requirements for operation under humid conditions and carrier leakage.

The RFP specifications call for repair or replacement servicing of defective equipment within five days after receipt of notice by the contractor in cases of emergency and within 21 days in non-emergency cases. The Lenkurt proposal makes no firm time commitments with respect to either emergency or non-emergency cases. It states that emergency cases "may be handled by a temporary replacement unit * * *" and refers the reader to an attached brochure which states that there is a handling charge of ten percent of the cost of the unit for use of the replacement unit. With respect to non-emergency cases, the proposal states that "Normally, defective equipment is repaired and shipped within 14 to 21 calendar days after receipt." The brochure makes it clear that in some instances, the repair cycle may be longer because the units may require aging or because of the unavailability of components and other materials.

The agency contends that because in emergency cases a replacement will be shipped immediately upon receipt of a telephone call and that phone services are always available, the response time will be limited only by the shipping time and will therefore be faster than the required five days. The agency further contends the Lenkurt proposal, in stating that response time in non-emergency cases is normally "14 to 21" days, deviates only slightly from the required 20 days.

Under Lenkurt's proposal, its commitment with respect to both emergency and non-emergency repairs and replacements differs from that required by the solicitation. Under the solicitation, the contractor must maintain sufficient inventory and capability to meet definite deadlines while the Lenkurt proposal at best promises only a good faith effort to repair or replace defective equipment expeditiously. While it might be inferred from the statement that "normally" defective equipment will be repaired or replaced within 14 to 21 days that all cases will be handled in a similar fashion, that is not a commitment to which Lenkurt could be held by the agency even with respect to normal situations and again is a deviation from the RFP requirements which should not have been accepted without amending those requirements.

Motorola further contends Lenkurt's proposal contained a number of disclaimers shifting to the agency some of the risks which the solicitation required the offerors to bear. The disclaimers include the statement that the price and completion dates will be adjusted should delay or additional expenses be incurred for reasons over which the agency has no control; that the installation and other specified services will be performed by nonunion employees of Lenkurt, its regular vendors or subcontractors; that all installation and service work will be performed during normal working hours; that the agency will locate any potential sources of electromagnetic interference in areas adjacent to the installation sites and inform Lenkurt before its project engineering has been completed; that system performance depends upon equipment and engineering information supplied by the Government; that suitable weather conditions will prevail during construction; and that equipment can be installed without the use of a helicopter or crane.

Each of the stated assumptions implies that if stated contingencies occur or fail to occur, the agency will make adjustments in price, delivery or both. While some of these items such as the accuracy of Government supplied information or delays caused by the Government merely reflect circumstances under which Lenkurt may be entitled to adjustments under the solicitation others, such as whether Lenkurt has union problems, are matters which under the solicitation are clearly the responsibility of the contractor. Relief from such risks is a benefit which could affect price and improve an offeror's competitive position. As such, they should have been offered to all offerors when the agency determined that their acceptance from Lenkurt was in the best interest of the Government.

Motorola further contends Lenkurt rewrote the factory test requirements of the RFP by stating in its proposal such tests would be performed to ensure the equipment meets Lenkurt's standards rather than those contained in the RFP. Motorola claims the Government specifications are more stringent and costly to meet than commercial specifications and that this relaxation should have been offered to all competitors. Moreover, Motorola points out the purpose of factory testing is to ensure compliance with the RFP requirements. In addition, Motorola contends the agency was in error in accepting Lenkurt's proposal which stated Lenkurt would meet the system test requirements in a more cost effective and practical manner and promised to furnish a test plan which would prove system performance "in lieu of those specified."

The Forest Service argues that the promise to conduct system testing in a more cost effective and advantageous manner indicated an intent to comply with the required specifications and that the negotiation process permits offerors to submit proposals with variances from the RFP which may result in acceptable proposals differing from the original RFP. However, we agree with Motorola that such changes were significant and should not have been accepted without giving the other offerors a chance to respond to the changed requirements. See Union Carbide Corporation, supra.

The agency does not dispute Motorola's contentions that Lenkurt's proposal offered equipment which does not comply with the specification requirements that the equipment perform under conditions of 90 percent humidity at 40° C and exhibit carrier leak of less than -50dBm0 at an "on hook idle condition", but maintains that the Lenkurt equipment "complies with the intent" of the specifications and will operate satisfactorily in the hot, dry climate of Southern California where it will be used. While the technical significance of these deviations is not clear from the record, if the agency found that its specifications in this regard exceeded its actual needs it was required to amend the solicitation so that other offerors could have responded to the relaxed requirements.

Motorola presents several other deficiencies which it perceives in the Lenkurt proposal. In these instances, however, either the deficiency was minor or nonexistent or of no prejudice to Motorola. Some of these alleged deficiencies are set out below.

In the first of these, Motorola objects to the agency's acceptance of Lenkurt's proposal to the extent that it shifts from the contractor to the agency the expense and responsibility of obtaining any necessary licenses and permits. The Forest Service concedes this shift of responsibility but contends it had no effect because no permits are required under the contract. We agree with the Forest Service that there was no prejudice to Motorola here.

Motorola next contends that as Lenkurt has never sold or put into operation the equipment it proposed, it could not and did not include the required general description of contract work of a similar nature and that the list of customers provided by Lenkurt were not of those using the

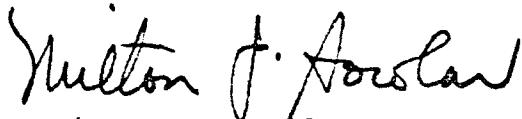
equipment proposed by Lenkurt. The agency points out that work of a similar nature does not require that the work be identical and notes that Lenkurt did list customers who used its similar equipment along with the name of a customer for whom identical equipment was being installed. In addition, although the agency notes that Lenkurt's description of the systems could have been more comprehensive, it was in its view sufficient. We believe the purpose of the requirement was met by Lenkurt and the agency acted reasonably in accepting this portion of Lenkurt's proposal.

Motorola also argues that Lenkurt's proposal was nonresponsive because the literature and detailed specification sheets which it was required to submit actually described equipment designed to operate in a 2110 to 2200 MHz frequency band and that Lenkurt would have to extensively redesign this equipment to meet the required frequency band of 1710 to 1850MHz. The agency concedes the manual submitted by Lenkurt showed equipment operating outside the required frequency band. It points out, however, the Lenkurt proposal offered equipment meeting the required frequency range and that the necessary design changes, which the agency does not consider to be extensive, had already been performed by Lenkurt for another customer. We agree with the agency.

Motorola states the Lenkurt proposal was also deficient because it did not supply the required photographs, physical dimensions and weights of each rack completely assembled with all units. The solicitation stated this information would enable the agency to prepare adequate space, floor strength, ventilation and clearance for cable runs and maintenance. The agency contends that pictures of the equipment were included in the proposal and that the physical dimensions and weights of the major units were contained in the technical literature submitted. It states the weights of the components which were not furnished were not heavy enough to be of any consequence with respect to assuring sufficient floor strength and that, therefore, Lenkurt substantially complied with the intent of the requirement. We have no basis to conclude that the agency acted unreasonably in accepting this portion of Lenkurt's proposal.

Motorola contends Lenkurt avoided system responsibility by its refusal to accept responsibility for radio interference which may result from adherence to the required frequency plan. The Forest Service points out Lenkurt's initial proposal erroneously referred to the frequencies listed in Exhibit 4 when it denied responsibility for adherence to the frequency plan. Lenkurt later corrected its proposal to deny responsibility for any radio interference resulting from adherence to the frequencies listed in Exhibit 10. The Forest Service contends the Lenkurt equipment clearly will work internally within the system in accordance with the frequency plan in Exhibit 10 and that external interference from "co-channel/ near-channel" users is not the responsibility of the contractor. We have no basis to disagree with the agency on this matter.

Because as shown above the agency accepted Lenkurt's proposal despite the fact that it was not in accordance with the RFP requirements in several significant respects, the protest is sustained. While we are bringing these matters to the attention of the Secretary of Agriculture, since contract performance is substantially complete no remedial action is practical at this time.



Acting Comptroller General
of the United States