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

FILE: B-201568 **DATE:** September 29, 1982

MATTER OF: ConDiesel Mobile Equipment Division

DIGEST:

1. GAO will not object to a contracting agency's technical judgment that a specification is not impossible to meet absent clear and convincing evidence of impossibility, since the responsibility for drafting proper specifications is the contracting agency's.

2. By signing and submitting an offer to meet the solicitation's specifications, a firm is legally obligated to do so if the offer is accepted. Questions posed to the firm by procuring officials during a preaward survey with respect to its actual ability to fulfill that legal obligation do not constitute the improper reopening of negotiations if the firm is not given the opportunity to modify its proposal.

3. GAO will not review a contracting officer's judgment that a prospective contractor is responsible except in limited circumstances. The contracting officer, with first-hand knowledge of the firm's resources and capabilities, is in the best position to assess responsibility, and has significant incentive in that respect, since he is the one that must bear the consequences of any difficulties experienced by reason of the contractor's inability to perform in the time and manner required.

4. Where an offer was determined most advantageous to the Government under the solicitation's award criteria, and the offeror was found capable of meeting its legal obligation if awarded the contract, GAO has no basis to object to the contractor's post-award decision to change the way it will meet its obligation at the contract price, since the award itself was proper and no offeror that competed for the contract is prejudiced.

5. Where no technical proposals are solicited in a negotiated procurement, so that award is based on price, an agency's use of a competitor's unsolicited opinion about the acceptability of the prospective contractor's product in examining the product during a preaward survey does not constitute improper technical "transfusion"; the term "transfusion" connotes the obviously unfair disclosure to a competitor of a portion of another offeror's technical proposal that shows an innovative or ingenious solution to a problem.

This is our second decision on protests by ConDiesel Mobile Equipment Division under Air Force request for proposals (RFP) F09603-80-R-1344 for aircraft refueling trucks. No technical proposals were involved in this negotiated procurement; that is, the competition was based solely on price. ConDiesel protested that solicitation specifications regarding noise level limits were impossible to meet; that the specified minimum defueling rate could not be met at certain temperatures; and that the Air Force engaged in improper negotiations with the awardee, Kovatch Corporation, after the submission of best and final offers.

We resolved the timeliness of the protests in our first decision, ConDiesel Mobile Equipment Division, B-201568, July 30, 1981, 81-2 CPD 67. As to the noise specification, we noted that ConDiesel was obliged to meet the same specification in another contract with the Air Force. We stated that we would not consider

the protest because any contention that the noise level requirements were impossible to meet therefore should be brought under that contract's Disputes clause. We also held that the protest against the defueling requirement was untimely because it was not filed before the closing date for the receipt of initial proposals. Finally, we held that ConDiesel's objections to the award procedures were timely because they were raised within ten working days after the basis for protest arose.

This decision (1) responds to a request by ConDiesel that we reconsider our position on the noise specification issue; (2) responds to Kovatch's request that we reconsider our finding on the timeliness of the protest against the award procedures; and (3) finally resolves all protest matters. We have decided to review the protest against the noise specification, but we find it to be without merit. We affirm our finding that ConDiesel's protest against the award to Kovatch was timely; however, we deny the protest on the merits.

The noise level requirement

ConDiesel maintained that the solicitation's noise level limits were impossible to meet. ConDiesel asserted that it first became aware of the problem when, after failing a first article test relating to identical noise level limits in another contract, it conducted its own tests which established that the noise level requirement could not be met.

In our initial dismissal of this issue, we stated:

> "ConDiesel is currently under an obligation to meet the noise level specifications in question by virtue of its current contract. As a contractor, it is free to challenge the noise level requirements under the Disputes clause of the current contract. In fact, ConDiesel is required to submit all such claims with the contracting officer by virtue of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III 1979).

> "We do not think our Office should provide ConDiesel with what is essentially another forum to decide the same issue. If ConDiesel wants to argue that the noise level requirements are impossible to meet, it should make its arguments under the Disputes clause of its present contract and not before our Office in a proceeding designed to force a change in the specification requirements. Our consideration of ConDiesel's objections would permit the contractor to circumvent the claim resolving process of its current contract through the bid protest process.

ConDiesel requests that we reconsider our holding that it would not be appropriate to consider the protest against the noise level specification. ConDiesel points out that the contracting officer in effect waived the noise level requirement under ConDiesel's contract by agreeing that ConDiesel could furnish earmuffs with each refueler and affix to the vehicle a notice warning about the noise and the necessity for the earmuffs. Thus, ConDiesel had no practical reason to challenge the noise level requirement under that contract's Disputes clause. ConDiesel also complains that "a protester should not be penalized because performance of an on-going contract happens to coincide with issuance of a solicitation for an identical end-item."

As to the merits of the protest, ConDiesel concedes the specification may appear possible when considered in the abstract, that is, separate from the other refueler specifications. ConDiesel argues, however, that the specification's impossibility would become evident when the entire refueler is tested.

Even accepting ConDiesel's argument that we should consider the issue on the merits, we cannot conclude that the noise requirement was impossible to

meet.[1] The esponsibility for drafting proper specifications that reflect the Government's needs is the contracting agency's. Our Office therefore will not substitute its judqment for the agency's in a situation such as this unless there is clear and convincing evidence that the specifications are impossible to meet. American Electric Construction Co., Inc., B-189532, November 8, 1977, 77-2 CPD 350.

The Air Force technical experts have judged the noise level requirement entirely attainable, and the Air Force points out that of the seven offerors that responded to the RFP, only ConDiesel complained about the specification--four offerors expressly stated that they could meet it. Also, even ConDiesel concedes that the noise specification is a relatively unimportant one, and that the Air Force in effect waived the firm's failure to comply with the same requirement in connection with ConDiesel's other contract. Finally, the Air Force reports that Kovatch met the noise and the other specifications during first article testing. The protester has the burden to prove its case, and under these circumstances the burden is not met here.

The allegedly improper negotiations

Notwithstanding that no technical proposals were involved in this procurement, ConDiesel alleged that the contracting officer improperly encouraged Kovatch to switch from an International Harvester chassis to a Mack chassis. ConDiesel contended that Kovatch's switch to a Mack chassis resulted from concerns that

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[1]The parties also dispute the timeliness of the protest on this issue, since it was not filed before initial proposals were due. See 4 C.F.R. § 21.2(b)(1) (1982). That filing requirement, however, applies to allegations of improprieties in an RFP that are apparent from the solicitation as issued. We consider this situation to be the type where a specification may appear appropriate on its face but events during the competition indicate to a firm that the specification is impossible. A protest against such a latent solicitation defect must be filed within ten working days after the defect is discovered. 4 C.F.R. § 21.2 (b)(2).

the contracting officer expressed to Kovatch after best and final offers were submitted regarding the International Harvester chassis proposed, and from the contracting officer's relay to Kovatch of technical information on the two chassis furnished to the Air Force by the protester. ConDiesel contends that the contracting officer's expression of concern constituted an improper reopening of negotiations with only one offeror, and that the relay to Kovatch of the ConDiesel's information represented improper technical "transfusion."

(1) Preliminary Issue--awardee's request for reconsideration of original timeliness finding

Kovatch contended that ConDiesel's protest on this issue was untimely because it was not filed within ten working days after February 12, 1981, which was the date that Kovatch believed ConDiesel should have known the basis for protest. See 4 C.F.R. § 21.2(b)(2). It was on that date that ConDiesel wrote to Kovatch warning it against the use of any proprietary information and technology developed by ConDiesel. Kovatch further contended that even if ConDiesel did not know on February 12, 1981 that Kovatch originally intended to use an International Harvester chassis and that award based on a Mack chassis thus reflected a change in Kovatch's initial offer, ConDiesel did not diligently pursue the information that would establish the basis for protest and that the protest was untimely for that reason.

We rejected both of Kovatch's arguments. We pointed out that ConDiesel's objections were not based on Kovatch's use of a Mack chassis per se, but rather on Kovatch's switch to a Mack chassis from an International Harvester one, and to the contacts between Kovatch and the Air Force after best and final offers. We could not conclude that ConDiesel's February 21, 1981 letter indicated that ConDiesel knew or should have known that basis for protest. We also described ConDiesel's efforts to secure information bearing on the award to Kovatch, and found that ConDiesel indeed diligently pursued the basis for its objections to the award.

In the reconsideration request, Kovatch reiterates its assertion that ConDiesel knew or should have

known the basis for its protest against the procedures used by the Air Force in awarding the contract to Kovatch by February 12, 1981. Kovatch also reiterates its view that ConDiesel did not diligently pursue the basis for protest in any event.

We thoroughly considered, in connection with our previous decision, the timing of ConDiesel's protest in the context of the events that preceded it, and we concluded that the protest was filed in a timely manner. Kovatch now merely restates facts and arguments already considered. While the firm may disagree with the conclusion that we reached based on these same facts, it has not shown that our decision was based on an error of fact or law. See 4 C.F.R. § 21.9. We therefore will not reconsider the matter.

(2) The merits

(a) The facts:

The Air Force issued the RFP on June 19, 1980. Initial proposals were received on September 22, discussions held with all offerors, and best and final offers received on October 31. Kovatch submitted the low evaluated offer which, under the RFP's evaluation scheme, placed the firm in line for award.

In early November, ConDiesel, which offered a Mack chassis, telephoned the contracting officer to advise that in its view an International Harvester chassis would not meet the RFP's specifications. ConDiesel followed this conversation with a letter of November 14 detailing why in its own search for a chassis it rejected the International Harvester chassis. ConDiesel listed six "major deficiencies" in the International Harvester chassis: chassis rails, front axle, tire size, power train incompatibility, length and height dimensions, and delivery schedule. ConDiesel enclosed with the letter its own charts and drawings illustrating these alleged deficiencies. ConDiesel stated:

> "It is difficult to comprehend how any truck manufacturer can supply a quote for this critical application without a clear understanding of the technical

specification. As a successful supplier of Air Force Refuelers over many years, ConDiesel has found it necessary to spend several months working with chassis manufacturers to review technical data, to finalize design and to insure compatibility between the tank, pumping system and the truck chassis. International Harvester chose not to participate in this activity, dismissing it by stating that they were supplying a chassis, and that was the limit of their responsibility. Under such circumstances, we did not consider International Harvester as an acceptable supplier for the R-9 Refueler on the subject proposal."

On December 18, 1980, while a preaward survey of Kovatch was being conducted, the contracting officer sent Kovatch a letter expressing concern about the International Harvester chassis.[2] The contracting officer stated that based on a review of the chassis data supplied during the preaward survey, he was concerned that the International Harvester chassis would suffer excessive flexing that might result in serious cracking problems in the tank and pumping compartment. The contracting officer advised Kovatch that the particular reason for his concern was the decrease in the "section modulus" from that in the previous contract, and that ConDiesel was so concerned about possible cracking that the firm offered a greater section modulus than in the previously acquired refuelers. He also pointed out that certain diagrams that Kovatch furnished during the preaward survey did not correctly describe the vehicle that would be furnished. The contracting offer requested that Kovatch comment on the matters, providing specific information as to how the Air Force could be assured that there would be no cracking problems, and that Kovatch concur with the Air Force's plan to perform a strain gauge test, which measures chassis rigidity.

Kovatch responded on December 24 that it agreed to a strain gauge test during first article testing, and that it would forward specific comments on the

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[2]This letter never has been released to ConDiesel.

Government's position as soon as possible. Kovatch also extended its offer to January 16, 1981.

On January 12, before it furnished the promised comments, Kovatch advised that it could not extend its offer past January 16. The contract was awarded to the firm on January 16. Shortly after award Kovatch advised the contracting officer that it would use a Mack chassis instead of an International Harvester chassis.

(b) The protest:

ConDiesel complains about the contracting officer's December 18, 1980 letter to Kovatch, and Kovatch's post-award switch to a Mack chassis. ConDiesel contends that the letter represented an improper initiation of negotiations after best and final offers had been submitted in that the Air Force gave Kovatch the opportunity to change its proposal, or at least to convince the Government that its doubts about the International Harvester chassis were misplaced, and as a result Kovatch switched to a Mack chassis. Because of Kovatch's subsequent refusal to extend its offer, ConDiesel argues, the Air Force was constrained to award the firm a contract for a refueler that did not meet the specifications and permit Kovatch to substitute the acceptable chassis after the award.

In response, the Air Force points out that offerors were not required to specify the type of chassis they would use, nor were they required to submit technical data on the chassis with their offers. The Air Force states:

> "* * * Kovatch's proposal had already been determined fully responsive to the solicitation in that Kovatch agreed to provide a vehicle which met the specifications as stated in the RFP. * * * Proof of the satisfactory operation of the particular component configuration an offeror proposed would be made during first article testing. Since the successful offeror would then have contracted to meet a particular performance specification,

> it would have to provide a vehicle configuration which would meet this requirement.
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> "In addition, there was no requirement in the solicitation that a chassis meet a certain rigidity standard. Thus, whether or not Kovatch or any other offeror agreed to strain gauge testing, there was no provision under which the contracting officer could have accepted or rejected a proposal on this basis. * * *
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> "* * * since Kovatch was not given an opportunity to modify its proposal in any way [the test of whether discussions have occurred], having not been required to specify which chassis it would provide * * * and Kovatch's response had no basis whatsoever in determining the acceptability of its proposal, the letter did not constitute discussions. The letter was a well-intentioned effort on the contracting officer's part to allay any fears the engineers may have had upon hearing that Kovatch might use an International Harvester chassis, while attempting not to affect any decision on Kovatch's part as to which chassis manufacturer it would use. Had the letter simply been held until after a formal award had been made there would be no question at this time about its propriety. * * * it had no effect on the selection of the successful offeror nor did it prejudice ConDiesel in any manner."

(c) Analysis

If the contracting officer's December 18 letter represented a reopening of negotiations with Kovatch, it indeed was improper to award the firm the contract without also reopening negotiations with ConDiesel. See PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11. We cannot agree with ConDiesel, however, that the Air Force improperly

reopened discussions with Kovatch. In this respect, discussions have been conducted if the offeror has been afforded the opportunity to change or modify its proposal. 51 Comp. Gen. 479 (1972).

The contacts complained of occurred after Kovatch had been selected for the award, following competition with ConDiesel, based on the intention reflected in its proposal to comply with the RFP specifications and thus to meet the Air Force's needs. By signing and submitting the proposal, Kovatch legally obligated itself to meet the contract specifications if the offer was accepted. See Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404. It certainly is not unusual that questions about a firm's actual ability to fulfill its stated intention will arise during a preaward survey; indeed, the precise purpose of a preaward survey is to evaluate the prospective contractor's capability to perform under the proposed contract. Defense Acquisition Regulation (DAR) § 1-905.4 (1976 ed.). Moreover, the regulations expressly permit an agency to contact the prospective contractor to resolve questions about his capability. DAR § 1-905.3(ii).

Of course, the mere fact that a firm already has been selected for award by the time certain communications take place is not dispositive of whether these contacts constitute improper negotiations. For example, in Group Hospital Service, Inc. (Blue Cross of Texas), B-190401, February 6, 1979, 79-1 CPD 245, we stated that preaward survey communications with the prospective contractor are improper if they are "for the purpose of further exploring offeror understanding of requirements and ferreting out possible weaknesses, all with a view toward providing a meaningful discriminator for selection of a contractor." In the same decision, we stated that it would be improper for an agency, during a preaward survey, to accept the prospective contractor's offer of an even more attractive proposal than that on which offers were based--for example, by offering to begin performance two months earlier than the start date indicated in the solicitation--without reopening negotiations with the other competitors.

We find neither situatic.. here, however. According to the Air Force, its own review of the chassis information supplied during the preaward survey caused the contracting officer to be concerned about Kovatch's ability to meet the agency's needs, and he simply asked Kovatch to allay these concerns. Further, despite ConDiesel's gratuitous November 1980 advice to the contracting officer, and the contracting officer's stated concerns, the contracting officer found Kovatch responsible. That is, he in effect judged that Kovatch could meet the Air Force's needs based on the firm's response to the RFP. This is precisely the type of judgment that we consistently have held is not appropriate for our review except in circumstances not involved here. The reason that we do not generally review affirmative determinations of responsibility is that the determination as to whether a prospective contractor can perform as promised essentially involves a matter of business judgment. Patterson Pump Company, B-204694, March 24, 1982, 82-1 CPD 279. Clearly, the contracting officer, with his first-hand knowledge of the firm's resources and capabilities, is in the best position to assess responsibility, and has significant incentive in that respect, since he is the one that must bear the consequences of any difficulties experienced by reason of the contractor's inability to perform in the time and manner required. See Edw. Kocharian & Company, Inc. - Request for Modification, 58 Comp. Gen. 516 (1979), 79-1 CPD 326; Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

Regarding the fact that Kovatch changed to a Mack chassis shortly after award, we generally will not object to a change in contract terms that is within the scope of the contract, since it involves contract administration, which is a matter within the contracting agency's authority. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. We will object, however, where the contracting personnel made an award based on material performance conditions that they knew would be changed afterward. The reason is that such a situation undermines the integrity of the competitive procurement system in that it deprives the Government of the full benefit of competition, for example a lower price or better terms that it might have obtained. Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145.

Here, however, Kovatch offered to furnish refuelers that met the solicitation's specifications, and that offer was deemed most advantageous to the Government of those received based on the solicitation's award criterion: lowest evaluated price. Kovatch then was judged capable of meeting the Air Force's needs at the offered price, and the award to Kovatch legally bound the firm to do so. We do not see how the firm's post-award decision to change the way it would perform can be considered a change in the contract terms, nor do we see how this decision tainted the award or prejudiced a higher-priced competitor such as ConDiesel that offered the same chassis that ultimately would be used. Under the circumstances, we find no reopening of negotiations.

ConDiesel also complains that the information relayed to Kovatch in the December 18 letter represented improper technical "transfusion." The term "transfusion" connotes the obviously unfair disclosure to a competitor of a portion of a technical proposal that shows an offeror's innovative or ingenious solution to a problem. Logistics Systems Incorporated, 59 Comp. Gen. 548, 553 (1980), 80-1 CPD 442.[3]

We find no transfusion here. There were no technical proposals involved in this solicitation and offerors were bound to perform in accordance with the specifications. According to the Air Force, and as the contracting officer expressed in the December 18 letter, the expressed concerns were prompted by the agency's review of the chassis data that Kovatch

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[3]Similarly unfair and prohibited is technical "leveling," which refers to helping one offeror, by pointing out weaknesses or deficiencies in its inadequate original proposal, to bring its proposal up to the level of other adequate proposals where the weaknesses or deficiencies resulted from the firm's own lack of diligence, competence, or inventiveness in preparing the offer. Logistics Systems Incorporated, supra; 52 Comp. Gen. 870 (1973).

furnished during the preaward survey, not by ConDiesel's unsolicited analysis of the inadequacies of the International Harvester chassis. Moreover, even if the matters raised in ConDiesel's unsolicited letter--chassis rails, front axle, tire size, power train, length and height, and delivery--triggered concerns by Air Force personnel that caused them to look with particular care at the chassis Kovatch proposed during the preaward survey, we see nothing wrong with an agency using one firm's unsolicited opinion about the acceptability of another's product in examining that product. We believe that it would be naive to presume that ConDiesel did not intend its letter (which we note did not contain any proprietary legends) to have precisely that effect, i.e., raise doubts in the Air Force contracting personnel's minds about any chassis other than that ConDiesel was offering.

The prohibition against transfusion reflects an inherent limitation on the scope of the statutorily mandated written or oral discussions in negotiated procurements, see 10 U.S.C. § 2304(g)(1976), to insure that a firm is appropriately rewarded for its innovative approach. As such, the prohibition in effect is confined to the selection process for purposes of determining whether an award is tainted. Here, Kovatch already had been selected for the award on the basis of price. The December 18 letter was written and sent during the preaward survey and, as stated above, the Air Force was willing to, and did, accept Kovatch's offer. Under the circumstances, we do not view the Air Force's action as improper technical transfusion.

Conclusion

We find ConDiesel's protest against the noise specification to be without merit. We affirm our finding that ConDiesel's protest against the award procedures was timely, but we deny the protest on that issue.

Harry R. Van Cleve
for Comptroller General
of the United States