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

FILE: B-215624; B-215624.2 **DATE:** October 23, 1984

MATTER OF: Anchor Conveyors, Inc.; The Austin Company

DIGEST:

1. In reviewing protests against allegedly improper evaluations, GAO will not substitute its judgment for that of the contracting agency's evaluators, who have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations.

2. An offeror clearly bears the burden to furnish satisfactory responses to concerns raised by the agency when given the opportunity to revise a deficient technical proposal.

3. Meaningful discussions have been held where the agency has identified those areas in a proposal which are deficient, and has afforded the offeror an opportunity to correct those deficiencies in a revised proposal.

4. If a revised proposal still remains unacceptable, there is no legal obligation that compels an agency to reopen discussions to allow another opportunity for revision of the proposal.

5. In order to prevail in its allegation that a bid is unbalanced and therefore nonresponsive, the protester must show that there is a reasonable doubt that the bid will not result in the lowest ultimate cost to the government.

Anchor Conveyors, Inc. and The Austin Company protest the proposed award of a contract to SPS Technologies under invitation for bids (IFB) No. DTFA-02-84-B-00550, the second step of a formally advertised two-step procurement issued by the Federal Aviation Administration (FAA), Department of Transportation. The procurement is for an automated warehouse material handling and storage system at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma. Anchor complains that the FAA acted improperly in rejecting its step one technical proposal as unacceptable, thereby excluding the firm from further competition under step two. Austin alleges that SPS's step two bid is unbalanced. We deny the protests.

Background

Two-step formal advertising is a hybrid method of procurement, combining the benefits of formal advertising with the flexibility of negotiation. The step one procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with formal advertising procedures, with the exception that the competition is limited to those firms that submitted acceptable technical proposals under step one. See, e.g., Essex Electro Engineers, Inc., B-213892, Apr. 17, 1984, 84-1 CPD ¶ 434.

The solicitation in issue represents the FAA's second attempt to purchase the desired system. The agency initially issued a step one request for technical proposals (RFTP) in mid-1983, to which three firms, including the protester, responded. All three proposals were evaluated as being technically unacceptable, and each offeror was then requested to submit revised proposals. The FAA's evaluation team determined, however, that all the proposals remained technically unacceptable, and the original RFTP was therefore canceled.

The FAA issued a second RFTP on January 10, 1984, and received responses from Anchor, Austin, Harnischfeger Corporation and SPS. The evaluation team concluded that before it could proceed with the evaluations, clarifications were needed from all firms to address major deficiencies in the proposals; revised submissions therefore were requested. At Anchor's request, the FAA met with the firm before the revised offer was due to address the cited deficiencies in its proposal. According to the FAA, Anchor was advised that its proposal did not demonstrate an offer to furnish an integrated system, and that deficiencies still existed in the major areas of the proposed specialized storage racks, Mini-Automated Storage and Retrieval System (Mini-AS/RS), and conveyor sub-systems. The FAA states that Anchor acknowledged these deficiencies and assured that corrections would be made immediately, even if a major rewrite were required.

The FAA subsequently determined that only the revised proposals of Austin and SPS were technically acceptable. The evaluators stated that Anchor was still not in compliance in the major areas of the specialized storage racks, Mini-AS/RS, and conveyor sub-systems, and that the deficiencies were of such a material nature that a system redesign would be required to bring the firm's proposal into compliance. The evaluators also objected to Anchor's proposed contract performance schedule. Anchor was informed of this determination, the communication from the FAA specifying 30 major deficient items.

Anchor then appealed the finding of unacceptability to the contracting officer, responding to each of the 30 allegedly deficient items. The contracting officer concluded that a reevaluation of the firm's proposal was necessary, but instructed the evaluation team that any new information contained in the appeal letter could not be considered because the date for submitting revised proposals had since expired. Upon reevaluation, the FAA again determined that Anchor's proposal was technically unacceptable and that the firm therefore could not compete under step two. The evaluators had withdrawn their objections to some 7 items in the proposal, but had concluded that more than 20 items still did not comply with the specifications. Anchor protested the FAA's action to this Office after being advised of the results of the reevaluation.

Step two was issued to Austin and SPS, and SPS submitted the low bid at $13,417,013, with Austin bidding $13,870,974. Austin then protested to this Office, alleging that SPS's bid is unbalanced and therefore should be rejected as nonresponsive.

Anchor's Protest and GAO Analysis

Anchor complains that the evaluators (1) overlooked or misunderstood Anchor's acceptable responses in its revised proposal to certain expressed areas of concern; (2) set forth new requirements not previously stated in the RFTP or its incorporated amendments; (3) raised concerns not previously noted without giving Anchor a proper opportunity to respond; and (4) should have considered any clarifying information in Anchor's appeal letter which would have gone toward making its proposal acceptable. Anchor further alleges that the FAA's evaluation of its proposal was arbitrary and unfair, and that the FAA did not make a reasonable effort to assist offerors in becoming acceptable, given the magnitude and complexity of the procurement.

(1) Evaluation of Anchor's revised proposal:

In reviewing protests against allegedly improper evaluations, this Office will not substitute its judgment for that of the contracting agency's evaluators, who have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 CPD ¶ 396.

As an example of an area where Anchor's allegedly acceptable responses to expressed areas of concern were overlooked or misunderstood by the evaluators, Anchor points to the RFTP requirement that the Mini-AS/RS be able to manage a minimum inventory of 132,000 National Stock Numbers (NSNs), using unique NSNs of at least 14 digits in length. The evaluators determined that Anchor's proposed

use of only the last 4 digits of the NSNs was unacceptable, and asked the firm to explain if the 14-digit requirement adversely affected its proposed system. In its revised proposal, Anchor responded only that the system operator would be able to verify that the stored material in a particular bin was the same as the material to be stored, by electronically scanning the bar code label of the material in the storage bin. The evaluators considered this to be an unacceptable response to the objection raised. In its appeal letter, Anchor stated that the required use of a unique 14-digit NSN did not adversely affect its system in any way, in that the data field was variable and could be set to any number of characters. Upon reevaluation, the evaluators acknowledged that the response contained in Anchor's appeal letter regarding this item of concern would have been acceptable if it had been contained in the revised proposal; as it was "new information," the evaluators stated that they could not consider it. Anchor believes that this serves to illustrate that the evaluators are continuing to overlook or misunderstand other responses to the FAA's concerns as addressed in the firm's revised proposal. We do not agree.

The burden is on the offeror to submit sufficient information with its initial proposal so that the agency can make an intelligent evaluation, see Marvin Engineering Co., Inc., B-214889, July 3, 1984, 84-2 CPD ¶ 15, a burden which necessarily extends to furnishing satisfactory responses to concerns raised by the agency when given the opportunity to revise a deficient proposal. See Control Data Corp., B-209166.2, Dec. 27, 1983, 84-1 CPD ¶ 21. We see nothing unreasonable in the evaluators' conclusion that Anchor's response to the issue of 14-digit NSNs as contained in its revised proposal was inadequate. As noted above, Anchor was on notice that the FAA objected to its proposed use of only the last four digits of the NSNs and was specifically asked to explain if the 14-digit requirement would adversely affect its proposed system. Our own reading of the firm's reply reveals nothing that addressed this specific concern; the statement that the system operator would scan a bar code label on stored material simply does not relate to the concern raised. Therefore, we believe that it is specious for Anchor to argue that the

FAA is at fault for any misunderstanding on this issue. Nor, for that matter, as we discuss more specifically below, was there an obligation on the evaluators' part to consider information in Anchor's appeal letter, finally responding to their expressed concern, and which was not provided earlier, in the firm's revised proposal.

(2) Alleged new requirements:

Anchor alleges that the evaluators set forth new requirements relative to the contract performance schedule, an area in which Anchor was found deficient, that were not previously stated in the RFTP or its incorporated amendments. Anchor points out that the solicitation permitted offerors to submit a proposed contract performance schedule somewhat different from the FAA's desired schedule, as long as all project work was completed within 600 calendar days from receipt of a written notice of award. Anchor admits that its proposed schedule for the installation of various system components in fact differed from the desired schedules but that it clearly demonstrated full completion within 600 days. The firm accordingly asserts that it is arbitrary for the FAA now to require adherence to the desired schedule for all project components, and therefore to reject its proposal as unacceptable on this ground. We cannot conclude, however, that the FAA imposed a new requirement upon Anchor.

The FAA informed Anchor upon evaluation of its initial proposal that its proposed schedule:

> "is such that there are radical deviations which could impact FAA operations and make the completion of the final project extremely sensitive to variations of scheduling in the individual component projects. Also [Anchor's proposed schedule] does not appear to be well coordinated."

Anchor responded in its revised proposal that its schedule had been designed to comply with the FAA's requirement that all work be completed within 600 days. The firm noted that its proposed contract milestones had been kept quite broad intentionally, but would be narrowed when the FAA determined its final delivery requirements.

It is obvious that, from the outset, the evaluators were dissatisfied with Anchor's proposed delivery schedule because it deviated sharply from the FAA's desired schedule for completion of various project components; for example, Anchor proposed to complete the Mini-AS/RS component by day 240 instead of by day 120 as anticipated. Therefore, although the firm may have complied with the requirement for full completion within 600 days, it was on notice at the initial stage of evaluation that the FAA perceived major deficiencies in its scheduling of particular systems. The FAA states that the desired performance schedule as to the phasing of the various project components was explained in detail to Anchor at the preproposal conference as well as during later discussions. The FAA also points out that the RFTP provided that an offeror's proposed delivery schedule would be an evaluation criterion, so that any deviations from the desired phasing of project components would necessitate a full justification and rationale. Since all of this was known to Anchor well before the submission of its revised proposal, we see no merit in Anchor's argument that it was unreasonable for the FAA to reject the firm's proposed delivery schedule as unacceptable. Clearly, although given the opportunity to address the FAA's concerns on this issue so as to correct perceived scheduling deficiencies, the firm failed to meet its burden of furnishing an adequate response. See Control Data Corp., supra.

(3) Opportunity to respond to allegedly new concerns:

Upon evaluation of Anchor's initial proposal, the FAA's evaluators noted that the firm had provided product literature on moving beam scanners to read bar code labels, but had not mentioned their proposed use in any detail. Accordingly, Anchor was asked to clarify how and where they were to be positioned, how the bar code data would be placed on the particular item being scanned, and to address any positioning or operating features or problems the scanners might have. In its revised proposal, Anchor referred the evaluators to a particular blueprint showing the scanners' location, clarified the positioning, and stated that operational features were detailed in the product literature and that no operational problems were

anticipated. The evaluators acknowledged the clarification but still considered the proposal to be unacceptable for this item. They noted that Anchor was only providing three scanners, all concentrated in the mechanical packing and the Mini-AS/RS area, and noted the apparent lack of any scanners on the pallet conveyor. It was their view that Anchor had not furnished sufficient information to demonstrate the tracking ability of the conveyor throughout the entire system. In its appeal letter, Anchor complained that the evaluators had only asked for information relating to the moving beam scanners and not for information on overall tracking capability. The firm then explained that the conveyor control had an integral tracking capability so that material on the pallet conveyor could be tracked at all times. Anchor believes this situation clearly demonstrates that the evaluators raised a concern not previously noted, and therefore unfairly precluded Anchor from an opportunity to furnish an adequate response.

The FAA states that Anchor's response in the revised proposal was unacceptable because it only addressed a part of the question (regarding moving beam scanners) asked by the evaluators, and therefore was inadequate to permit a complete evaluation of the item. According to the FAA, the evaluators' comments on the revised proposal do not constitute a new concern, but merely serve to express the basis for the unacceptability determination on this item.

We tend to agree with Anchor that the original concerns raised by the evaluators only expressly related to the positioning and operational characteristics of the moving beam scanners, not the tracking capability of the conveyor system as a whole. However, it is apparent that Anchor did not fully address the critical overall tracking capability issue at all until it provided the information in its appeal letter. Since the offeror bears the burden of submitting an adequately written proposal, it is our view that it was incumbent upon the firm to have included information on such an obviously critical element in the initial proposal, see Marvin Engineering Co., Inc., supra, not at a much later time.

(4) Failure to consider information furnished in appeal letter:

Anchor asserts that the FAA should have considered any new information contained in its appeal letter which would have gone toward making its proposal acceptable. We do not agree. As we have already noted, the closing date for revised proposals had expired well before Anchor filed its appeal with the contracting officer. An agency has no legal duty to reopen a competition to permit a single offeror another chance to demonstrate the merits of its approach. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, Dec. 23, 1982, 82-2 CPD ¶ 571. In this respect, if the evaluators had considered Anchor's information, an action which essentially would have constituted a reopening of discussions with Anchor, the FAA would have been obligated to reopen discussions with the other offerors and accept further revisions of their proposals as well, since it is clearly improper to afford such an opportunity for further revision only to one offeror whose revised proposal remains deficient. See Community Economic Development Corp., B-211170, Aug. 23, 1983, 83-2 CPD ¶ 235. Accordingly, we have no legal basis to object to the FAA's action.

(5) Extent of discussions:

Anchor essentially alleges that the FAA did not make a reasonable effort to assist offerors in becoming acceptable in light of the complexity of the procurement. The record simply does not support such an allegation. We have already noted that the FAA on numerous occasions pointed out to the firm the perceived deficiencies in its proposal, under the first RFTP which was subsequently canceled as well as during the evaluation process at issue. In this regard, meaningful discussions have been held where the contracting agency has identified those areas in an offeror's proposal that are considered to be deficient and has afforded the offeror the opportunity to correct those deficiencies in a revised proposal. Logistical Support, Inc., et al., B-208722, et al., Aug. 12, 1983, 83-2 CPD ¶ 202. As the FAA points out, Anchor was on notice that there were 83 major deficiencies in its initial proposal, and the firm was able to correct a large number of them in its revised proposal. Although it failed to correct the remainder, Anchor was clearly given the opportunity to do so, and there is no legal obligation that compels an agency

to continue with successive rounds of discussions in such a situation to lead a technically unacceptable offeror to technical acceptability. Control Data Corp., supra.

For that matter, discussions need be held with those firms whose initial proposals are determined to be either acceptable or reasonably susceptible of being made acceptable. See Gould Defense Systems, Inc., et al., B-199392.3, et al., Aug. 8, 1983, 83-2 CPD ¶ 174. Here, Anchor's revised offer was in response to the evaluators' determination that they could not even properly evaluate initial proposals without the offerors first addressing various material deficiencies in the proposals. Thus, the FAA's evaluators never determined that Anchor's technical proposal was reasonably susceptible of becoming acceptable, so that the general requirement for meaningful discussions was inapplicable. In any case, we believe that the FAA nonetheless gave Anchor sufficient opportunity to revise its proposal so that there is no merit to the firm's position that a reasonable effort was not made to assist it in becoming acceptable.

The Austin Company's Protest and GAO Analysis

The Austin Company alleges that the low bid of SPS Technologies under step two of the procurement is unbalanced and therefore should be rejected as nonresponsive. Since it is clear that there is no legal merit to the allegation, we have not obtained an administrative report from the FAA on the matter before reaching our decision.

As indicated previously, SPS's bid was low at $13,417,013, with Austin bidding $13,870,974. Austin argues that SPS bid much too low for the Mini-AS/RS component of the procurement with a price of $2,876,429, whereas Austin priced the component at $4,511,143 which, Austin asserts, reflects the true market cost. Additionally, Austin believes that SPS has overstated the cost for one storage unit for supplies at $19,843, whereas Austin priced the item at only $259.

Unbalanced bidding is the practice of bidding high on some items and low on others. We have recognized two aspects to unbalanced bidding, both of which must exist before a bid must be rejected. First, the bid must be mathematically unbalanced, which involves a determination as to whether each bid item carries its share of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. Second, the bid must be materially unbalanced, that is, there must be a determination that a reasonable doubt exists that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the government. Everett Dykes Grassing Co., et al., B-210223.4, et al., Feb. 13, 1984, 84-1 CPD ¶ 176.

Here, we cannot conclude that SPS's bid is mathematically unbalanced. Apart from Austin's allegation, we see no evidence that SPS's price for the Mini-AS/RS is so unreasonably low as to represent only a nominal price for that item. Although the price for the storage unit may be overstated, the amount involved is negligible in relation to the total price for the project. In any event, even if we were to find that SPS's bid is mathematically unbalanced, Austin, which has the burden to do so, has not shown that there is a reasonable doubt that award to SPS will not result in the lowest ultimate cost to the government. All prospective offerors for this procurement were advised that the resulting contract would be a firm fixed-price one, and there are no estimated quantities or other pricing variables involved through which SPS could recoup any losses occasioned by underbidding the Mini-AS/RS component. Therefore, we see no possibility that SPS's offer will ultimately prove to be more costly than Austin's, since the FAA is purchasing a complete system at a firm fixed-price.

The protests are denied.

Milton J. Socolar

Acting Comptroller General
of the United States