

DECISION



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

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FILE: B-215557 **DATE:** February 13, 1985

MATTER OF: Xerox Special Information
Systems

DIGEST:

1. Offeror was not prohibited from substantially revising its proposal in its best and final offer, but it assumed the burden of establishing that the revised proposal was technically acceptable.
2. Disagreement with agency determination that an offeror's proposal is unacceptable is insufficient in itself to establish that the determination was unreasonable.
3. Protester has not proved its case when the only evidence on an issue of fact is conflicting statements of the agency and the protester.
4. Obtaining additional information essential to determine the acceptability of a proposal requires reopening negotiations, and agency did not abuse its discretion in failing to do so after receiving best and final offers.
5. Failure to notify offeror before award of the rejection of its proposal was a procedural deficiency which does not affect the validity of the award.

Xerox Special Information Systems protests the award of a contract to Integrated Automation Inc. under request for proposals (RFP) No. IRS 83-282 issued by the Internal Revenue Service (IRS), for a files archival image storage and retrieval system. Xerox contends that the IRS improperly determined that the Xerox proposal was unacceptable, and that the agency should have informed Xerox of alleged deficiencies so they could be remedied.

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We deny the protest.

The RFP sought proposals to provide a tax return storage and retrieval system based upon digital optical technology. The system is being procured in order to determine the feasibility of using digital optical technology to overcome problems in storing and retrieving paper tax returns. After proposals were received on July 18, 1983, the IRS conducted extensive discussions with five offerors, and received revised proposals. The IRS conducted demonstration tests on four of the proposed systems in March, and the four remaining offerors submitted best and final offers by April 17.

On April 23, the IRS technical evaluation team advised the contracting officer that, because of changes in major components introduced in the Xerox final offer, the Xerox proposal was no longer technically acceptable. On June 8, the IRS notified Xerox that a contract had been awarded to Integrated Automation, and that the Xerox best and final offer had been determined to be unacceptable primarily because it included components different from those used in the demonstration tests.

Xerox argues that it was not required to demonstrate the equipment proposed in its best and final offer and that the IRS had sufficient information to determine that the final offer was technically acceptable. On the other hand, the protester argues that, if its best and final offer was deficient in certain respects, the alleged deficiencies should have immediately been raised, and Xerox should have been asked to demonstrate the new components.

The RFP stated the requirement for a demonstration test as follows:

"Vendors shall be required to demonstrate, in a pre-contract award operation test, a 'total system' approach. Each operation - input, storage and retrieval shall be demonstrated in order to present a complete system. The vendor shall show a document being scanned, indexed, and available for quality control. The document image must then be stored on the proposed storage media and retrieved. At

this time, the demonstrated system need not be tailored to our final needs in areas of throughput and indexing. However, all basic system requirements must be demonstrated including the potential ability to increase storage capacity to the expanded volumes required in future configurations Vendor personnel shall be used for the demonstration. Test sample material shall be provided by IRS."

In a letter dated February 3, the IRS asked that all offerors submit "a final, complete equipment list that includes each item of equipment specified" in its current proposal. Offerors were cautioned that:

"IRS intends to complete technical evaluations based on information received as a result of this letter. Consequently, if the responses to IRS comments are inadequate and require additional discussions with the offeror, the proposal in question may be considered unacceptable and no longer be considered for contract award."

Enclosed with its letter were instructions for the demonstration test, stating that each vendor was required to present five major components of a basic operational system, including:

"Scanning

- . proposed scanning device
- . 200 x 200 resolution
- . ability to scan our sample document package (this package is similar to Appendix C, but will include various types of DLNs and documents with imperfections such as creases, folds, tears, and stray staples)
- . scan both sides of a document automatically

.

"Storage

- . proposed long-term automatic storage device
- . write demonstration image data onto at least three separate storage media

"Retrieval

- . proposed retrieval terminal
- . automatically retrieve demonstration document images from mass storage system device from each of the three media."

Xerox offers numerous arguments for its belief that it was not required to include demonstrated components in its final offer: the RFP requires demonstration of a "total system approach" rather than demonstration of tested components; some mandatory requirements of the system were not included in the demonstration and post-award tests were to be conducted to determine the system's ability to meet mandatory requirements; and a contracting official told Xerox that it could change models before best and final offers "as long as mandatories were met."

We agree with the protester that, under the terms of the RFP and other information provided to offerors, Xerox was not required to offer the identical equipment demonstrated to the IRS. The IRS contracting officer's technical representative for the procurement states that, in discussing one component of the system, she told a Xerox representative that it would have to deliver "virtually the same model" it demonstrated, although the item "could be modified for IRS needs and for minor technical developments." The RFP only required that basic system requirements be demonstrated. Minor modifications of demonstrated equipment were evidently anticipated by the IRS.

While Xerox could modify its earlier acceptable proposal in its best and final offer, the burden was upon Xerox to affirmatively establish the acceptability of its proposal. General Electric Company, 55 Comp. Gen. 1450

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(1976), 76-2 CPD ¶ 269; RCA Service Company, B-197752, June 11, 1980, 80-1 CPD ¶ 407. There is no obligation for an agency to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable technical proposal by a best and final offer. Centennial Systems, Inc., B-201853.2, Apr. 16, 1982, 82-1 CPD ¶ 350. Consequently, Xerox assumed the risk that changes in its final offer might raise questions about the demonstrated ability of the Xerox system to meet requirements of the solicitation, and result in rejection of its proposal. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, Dec. 23, 1982, 82-2 CPD ¶ 571.

The evaluation of proposals is the responsibility of the procuring agency, and we will not question an agency's technical evaluation unless the protester shows that the agency's judgment was unreasonable or in violation of the procurement statutes or regulations. SETAC, Inc., B-209485, July 25, 1983, 83-2 CPD ¶ 121. In this case, the protester has not shown that the IRS was unreasonable in concluding that the final Xerox offer could not be determined to be acceptable without additional negotiations.

In its best and final offer, Xerox stated the following with respect to optical scanners, major elements of the storage and retrieval system:

"Changes - The four . . . scanners are being replaced by two scanners which operate twice as fast, read red, contain data compression and have standard computer interfaces."

With respect to the optical disk drives, also major items in its offered system, Xerox stated that it planned to use a different manufacturer's optical disk drive and reduce the number used in its system. In response to the IRS report on the protest, Xerox emphasized the significance of the scanner included in its final proposal, which is made by a different manufacturer than the scanner originally proposed and demonstrated. Xerox states that the new scanner "allows for faster scanning, and enabled [Xerox]

to cut the number of scanners, scanner operators, and data compressors in half." It states that the new optical disk drive, "combined with a switch to double-sided disks, allowed [Xerox] to reduce the number of jukeboxes^{1/} from nine to four, the number of optical disk drives from eighteen to four, and the number of optical disks from 523 to 262. . . ."

The IRS and Xerox agree that no narrative technical description or manufacturer's technical literature was provided for either the new scanners or optical disk drives. Xerox also apparently agrees with the IRS that Xerox did not comply with the RFP requirement to provide a "detailed description of the technical characteristics for each component or subsystem of the proposed configuration." The agency states that, as a result, it was unable to determine the throughput rate of the system or to determine if the system met such requirements as 200 x 200 resolution, the ability to scan various size pages, or acceptance of documents with imperfections. These requirements were stated in the RFP and included in the requirements to be met during the demonstration tests. Moreover, the throughput rate of the system, which the IRS states that it could not determine from the Xerox final offer, was the major technical evaluation criterion stated in the RFP.

Xerox offers numerous arguments that the IRS had sufficient information to conclude that the final offer was acceptable. The protester states that because many mandatory requirements were not addressed in the demonstration tests, "every proposal to a great extent had to be taken on faith." The fact that the tests were not designed to establish compliance with all requirements does not relieve Xerox of the obligation to establish in its offer that its system would meet those requirements specifically reviewed in the test. Xerox contends that the IRS received some technical literature from another offeror about the disk drives which Xerox included in its final offer. The IRS responds and we agree that technical information about the

^{1/} A jukebox is an electro-mechanical device that stores optical disks.

disk drives does not fulfill the offeror's responsibility to establish how the disk drives operate in the particular system proposed. Xerox also contends that "the IRS knew perfectly well that the equipment changes made by [Xerox] involved changes only in manufacturers, not technology." In essence, Xerox is disagreeing with the technical judgment of the IRS evaluation panel that the changes were substantial and that they were not adequately explained. Unsupported assertions of disagreement with the agency's technical evaluation are insufficient in themselves to meet the protester's affirmative burden of establishing that the agency was unreasonable. Information Network Systems, B-208009, Mar. 17, 1983, 83-1 CPD ¶ 272. Xerox emphasizes that its proposed price is lower than the proposed price of Integrated Automation, but this factor is not controlling since Xerox's best and final offer was reasonably found unacceptable and thus could not be considered for award. See Management and Technical Service Company, a subsidiary of General Electric Company, B-209513, supra, 82-2 CPD ¶ 571 at 17.

Xerox asserts that the contracting officer's technical representative had been given and declined an opportunity to view an engineering demonstration of the scanners which Xerox eventually included in its final offer. No dates or details of this "opportunity" were provided. The contracting officer's technical representative states in an affidavit that in December 1983, a Xerox official mentioned to her the possibility of viewing some "state-of-the-art" scanners in Colorado during the Xerox demonstration, and that he never raised the subject again. She states that the IRS would have gladly sent representatives to such a demonstration. Where the only evidence on an issue of fact is the conflicting statements of the protester and the contracting official, the protester has not carried its burden of proving its case. BASIX Controls Systems Corporation, B-212668, July 2, 1984, 84-2 CPD ¶ 2.

In the alternative, Xerox maintains that any deficiencies could have been remedied without reopening negotiations, and the contracting officer abused his discretion by not reopening discussions regarding Xerox's best and final offer. Since the information needed from Xerox was essential for determining the acceptability of its proposals,

further negotiations would have been required to obtain the information, and the IRS would have been required to reopen negotiations with all offerors in the competitive range and request additional best and final offers. CompuServe Data Systems, Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374.

The contracting officer did not reopen negotiations because he believed that to do so would result in a 90 to 120 day delay in contract award. Because of tax return filing schedules, he believed that such a delay in award could result in a delay of a year or more in concluding the feasibility test, a test that the agency believes to be important because of the burdens it faces storing and retrieving paper tax returns. Xerox argues that only 1 week was provided for submission of best and final offers after a request was mailed. This schedule is not relevant to the new round of negotiations that Xerox advocates, since the best and final offers were expected only to encompass minor modifications of previously evaluated proposals. Xerox asserts that it offered to complete installation in sufficient time not to delay implementation. This offer, however, would only be available if Xerox was awarded the contract. Also, the protester contends that the IRS over-estimates the impact of a delay, and maintains that any delays were the fault of IRS in its conduct of the procurement process. It is up to the procuring agency to describe when the negotiation and offer stage of a procurement will conclude, Crown Point Coachworks and R&D Composite Structures; North American Racing Company, B-208694, B-208694.2, Sept. 29, 1983, 83-2 CPD ¶ 386, and we do not find that the IRS abused its discretion by failing to reopen negotiations.

Finally, the protester contends that it should have been immediately notified that its final offer was determined to be unacceptable. The Federal Acquisition Regulation, 48 C.F.R. § 15.1001(b), requires that contracting officers notify offerors whose proposals are determined to be unacceptable and to do so promptly before award when the contract is estimated at over \$10,000 and the evaluation period is expected to exceed 30 days. Xerox was not notified of the rejection of its offer until June 8, after award had been made on May 31. The IRS states that it

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believed that award would be made within 30 days after the determination regarding Xerox on April 23, and, because of the need for minor clarifications and administrative procedures, award was not made for 38 days. A procedural deficiency of this nature does not affect the validity of the award. See Leon Whitney, Certified Public Accountant, B-190792, Dec. 19, 1978, 78-2 CPD ¶ 420.

The protest is denied.

for Raymond E. Foss
Comptroller General
of the United States