Cunningham

3909

DECISION

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

FILE: B-217067 DATE: April 5, 1985

MATTER OF: CD Systems, Inc.

DIGEST:

GAO cannot question Army's decision to exclude protester's best and final proposal from the competitive range of a procurement for an effective insect repellent formulation given the Army's concerns about the protester's description of two chemicals in its proposal; consequently, facts that protester's initial technical proposal was in competitive range and that protester proposed lower cost (compared with other awardees) to do work were not significant.

CD System, Inc. (CDS), protests its failure to receive a research contract award under request for proposals (RFP) No. DAMD17-84-R-0056 issued by the Department of the Army for a "Controlled-Release Personal Use Arthropod Repellent Formulation."

We deny the protest.

The RFP described three phases of work effort referred to as: Phase I (development of "Prototype repellent effective for 12 hours or more"); Phase II (those contractors submitting the best prototypes in Phase I were to provide proposals for developing advanced prototypes); and Phase III (Phase II advanced prototype to be scheduled for full scale development). CDS claims that its price for the work was significantly lower than at least one of the successful offerors and that CDS's proposal, which CDS alleges was of acceptable technical merit, should, therefore, have been accepted.

Following receipt of initial proposals in June 1984, the Army states that a Source Selection Board (SSB) "reviewed, analyzed, and scored" all the eight proposals received. In July 1984, the SSB determined that seven of the eight proposals (including the one submitted by CDS) "should be included in the competitive range" for the procurement.

031697

The Army states that discussions were then conducted with CDS and the other competitive-range offerors. Following discussions, best and final offers were received from these offerors. Final offers were then evaluated, and the SSB reconvened and recommended awards to all offerors except CDS and another concern. As to the reason why CDS's proposal was not accepted for award, the Army states that CDS's best and final proposal was "determined to be technically unacceptable."

CDS has raised several issues about the propriety of the technical evaluation. Before considering those issues, we observe that it is not the function of our Office to evaluate technical proposals; consequently, the determination of the relative merits of a proposal, particularly with respect to technical consideration, is primarily a matter of procuring agency discretion, and the exercise of that discretion will not be disturbed unless it is shown by the protester to be arbitrary or in violation of the procurement laws or regulations. General Management Systems, Inc., B-214246, Sept. 25, 1984, 84-2 C.P.D. ¶ 351.

Technical Evaluation

CDS criticizes the Army's technical evaluation. Specifically, CDS argues that: (1) the Army misinterpreted CDS's proposal concerning "continuous repellent release," the use of a certain chemical and the use of "mineral spirits"; and (2) the Army improperly criticized CDS's prior research efforts for the Army and CDS's "microencapsulation technology."

As to the parts of CDS's proposal involving disputed interpretations, CDS's proposal provided:

Repellent release:

"to release the aqueous solution from the 'dry particle' it is only necessary to apply sheer stress."

Chemical formulation:

"CDS agrees to delete the incorporation of [a proposed chemical] from its final candidate arthropod formulations produced under a subsequent contract."

Mineral spirits:

"CDS would insure that toxicity and/or flammability is not markedly increased."

The Army interpreted these provisions of CDS's proposal as follows:

Repellent release:

> "The proposed repellent formulation, in order to provide continuous repellent release, would require rubbing the treated skin areas throughout the 12-hour period -- this was judged to be impractical for use by military personnel."

Chemical formulation:

> "The Source Evaluation Board requested that the proposed formulation not include [the proposed chemical] yet the contractor responded that they would intend to use [that chemical] in Phase I but not in the final formulations."

Mineral spirits:

> "The proposed use of mineral spirits in the formulation was questioned because of its potential toxicity to humans and its increase to the flammability of the product."

CDS argues that the Army erroneously interpreted CDS's repellent release description and that an individual would not have to rub the treated skin areas throughout the 12-hour period to obtain protection. Nevertheless, we cannot conclude that the Army unreasonably interpreted this provision since CDS specifically stated that rubbing (sheer stress) was necessary to release the formulation and no time limit was placed on the release time.

Concerning the use of the proposed chemical, CDS argues that its use of the word "contract" in the phrase--"final candidate . . . formulations produced under subsequent contract"--could only mean the Phase I contract, not the Phase II contract as the Army suggests, and that CDS was clearly conforming to the Army's request not to use this substance in Phase I as the Army had requested. Nevertheless, given the ordinary meaning of the word "subsequent," which CDS acknowledges to be "following"--in other words, a contract following Phase I, namely: a Phase II or later contract, we cannot fault the Army for interpreting this part of CDS's proposal as it did.

Finally, as to mineral spirits, CDS argues that the Army should have accepted its assurances that CDS would ensure that toxicity and flammability would not be increased even though CDS did not commit itself to the elimination of this substance. Nevertheless, the protester has not shown that the Army's technical judgment concerning CDS's implicit reservation to continue use of mineral spirits is in error.

As to the Army's alleged improper criticism of CDS's "microencapsulation technology," we consider CDS's comments as evidencing a difference of technical opinion between CDS and the Army over the acceptability of that technology. This dispute does not mean, however, that the Army's position has been shown to be unreasonable by the protester under our review standard. Although CDS asserts that other offerors' proposed use of this technology was found acceptable, this assertion does not mean that CDS's own version of this technology should be considered acceptable. As to CDS's prior research efforts, the Army apparently intended its comments to be a statement of fact--that CDS had not developed an acceptable product--rather than a criticism of CDS's research efforts for, as CDS recognizes, no other firm has developed an acceptable product.

Non-Technical Issues

CDS has raised other issues relating to the Army's evaluation of CDS's proposals in the areas of subcontracting, facilities, and cost. Also, CDS alleges that the Army failed to meaningfully discuss some of the criticisms of CDS's proposal.

Subcontracting

The Army noted that "many key elements [of CDS's proposal] . . . will not be done by CDS but will be subcontracted elsewhere." As to facilities, the Army noted that "CDS's proposed facilities are quite small." In reply, CDS argues that the Army's findings constituted, in effect, a finding of nonresponsibility which should have been referred to the Small Business Administration (SBA) for decision. CDS also argues that its subcontractor--now its parent company after a recent corporate acquisition by the subcontractor--has adequate facilities.

A procuring agency may properly make use of responsibility-related considerations as proposal evaluation criteria. This does not mean, however, that proposal

ratings in these areas constitute findings involving responsibility which, in the case of small business, may be for referral to the SBA in appropriate circumstances. Numax Electronics Inc., B-210266, May 3, 1983, 83-1 C.P.D. ¶ 470.

Nevertheless, to the extent that the Army lessened CDS's rating merely because of CDS's proposal to use a subcontractor and did not consider the subcontractor's proposed facilities, we think this was improper since it is well-established that needed resources may be obtained through subcontracting. See, for example, Federal Acquisition Regulation, 48 C.F.R. § 9.104-1(f) (1984).

But, given the Army's above criticisms of CDS's technical approach, which involved "methodology"--the most important technical factor--we cannot conclude that CDS has shown that its proposal should have been considered eligible for award even if it should have received a higher rating under the "Facilities" evaluation factor of the RFP. Although CDS notes that its initial technical proposal was considered to be "acceptable"--that is, in the competitive range for the procurement--the Army insists that it subsequently determined CDS's proposal to be technically unacceptable because of the above technical criticisms. CDS argues that the Army's position is inconsistent with its initial finding concerning CDS's proposal. We disagree.

A procuring agency may revise its competitive range decision, eliminating from the range a proposal formerly considered to be within, if discussions reveal that the proposal no longer has a reasonable chance of acceptance; in this event, the offeror submitting the proposal need not be provided with an opportunity to submit a revised proposal. Pettibone Texas Corp., B-209910, June 13, 1983, 83-1 C.P.D. ¶ 649.

Regardless of the adjectives the Army used in describing CDS's proposal, it is clear from the SSB narrative concerning the evaluation of best and final proposals that the Army evaluators regarded CDS's final proposal as being technically unacceptable as of that time.

CDS notes that the concerns found in the Army's final evaluation of CDS's proposal are also found in the initial evaluation of CDS's proposal. We do not find this inconsistent with the view that CDS's final technical proposal was unacceptable. The Army apparently expected that in discussions with CDS that CDS's proposal deficiencies would be remedied; however, in the Army's view, CDS did not

correct its deficiencies through discussions and its final offer was therefore found to be unacceptable because of these continuing concerns.

We have already concluded that the Army's conclusions about, or interpretation of, CDS's proposal regarding the use of the proposed chemical and the use of mineral spirits are not legally objectionable. Moreover, both these concerns were specifically discussed with CDS. Although it appears that the "repellent release" concern (and possibly other proposal concerns) were not discussed with CDS, we cannot question the Army's ultimate decision to exclude CDS's proposal from the competitive range given its reasonable concerns about CDS's discussion of the proposed chemical and mineral spirits since these were substantive concerns obviously affecting the acceptability of CDS's proposed formulation. Consequently, the Army's apparent failure to have meaningful discussions concerning other perceived deficiencies in CDS's proposal was not significant.

Given the proper exclusion of CDS's proposal based on technical reasons, CDS's lower proposed cost simply is not relevant. As we said in 52 Comp. Gen. 382 (1973) at page 388:

> "We do not believe that 10 U.S.C. 2304(g) requires that price must be considered in all instances in determining what proposals are in a competitive range. To accord such an interpretation to the law would place procurement officials in the unreasonable position of having to consider the price proposals of all offerors, no matter how deficient or unacceptable the accompanying technical proposals might be. We do not believe that Congress intended such a result. Rather, it seems to us that Congress wanted to insure that the prices proposed by . . . offerors who submit acceptable proposals would be considered prior to the making of awards to higher priced offerors on the basis of technical considerations alone."

CDS also alleges that another successful offeror's "business activities are completely foreign to the technical requisites of the contract" according to "Dun and Bradstreet data" and that the Army considered the resources of that offeror's proposed subcontractors (contrary to the

Army's approach in evaluating CDS's proposed subcontractor) in determining that the offeror's proposal had sufficient merit for award. However, as noted above, an agency may properly consider a subcontractor's resources described in a proposal in assessing the merit of that proposal.

Finally, CDS argues that the Army's decision not to disclose its "scoring and ranking methods . . . degrades the quality and credibility of the evaluation process." Nevertheless, it is our view that the Army disclosed sufficient information about the evaluation of CDS's proposal so that the reasons why the Army excluded CDS's proposal from the competitive range are evident and sufficient to support that exclusion.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel