

DECISION

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

*Szefermet
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FILE: B-216441 **DATE:** May 10, 1985
MATTER OF: Digital Radio Corporation

DIGEST:

1. An agency's determination of whether a proposal is in the competitive range is a matter of agency discretion which will not be disturbed absent a clear showing that the determination lacked a reasonable basis. Moreover, a protester's mere disagreement with the agency's judgment does not meet its burden of proving that the evaluation of proposals and competitive range determination were unreasonable.
2. Review of record shows that agency technical evaluation was fair, reasonable and consistent with major evaluation criteria set forth in the request for proposals (RFP). Although agency gave greater emphasis to one subfactor than provided for by the evaluation scheme in the RFP, record indicates that the change in the relative importance of the subfactor was not prejudicial to protester.
3. Allegation that agency should have provided offerors with greater detail concerning the expected manner of compliance with the request for proposals' requirements for a research development effort is denied since there is no requirement that the agency precisely specify the manner in which offerors are to perform and the RFP clearly set forth the capabilities and characteristics of the product to be developed.
4. Protest alleging that agency conducted procurement in bad faith is denied where agency actions which form the basis of the

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protester's complaint--such as not conducting the procurement under the section 8(a) program--are not found improper.

Digital Radio Corporation (DIRAD) protests its exclusion from the competitive range under request for proposals (RFP) No. N62269-84-R-0032 issued by the Department of the Navy. The RFP was for a cost-plus-fixed fee research and development contract for the design and development of a digital sonobuoy receiver for use in Naval aircraft engaged in anti-submarine warfare. DIRAD contends that the Navy's technical evaluation of DIRAD's proposal was unreasonable and that the Navy failed to adhere to the evaluation scheme set forth in the RFP. DIRAD argues that the Navy's action in excluding it from the competitive range was arbitrary and in bad faith and contends that it is entitled to recover its proposal preparation expenses.

We deny the protest and the claim.

The RFP was issued on February 7, 1984 and specified a closing date of March 23, 1984. Four proposals were received. The technical proposals were evaluated by a team of seven engineers which comprised the source selection board (SSB). The scores assigned to the technical proposals and the proposed costs were as follows:

	<u>Technical Score</u>	<u>Total Estimated Cost</u>
Hazeltine	86.12	\$ 836,657
Rockwell Collins	85.86	545,741
DIRAD	68.41	489,070
Resdel	63.53	1,225,943

The SSB determined that the proposals submitted by DIRAD and Resdel should be declared technically unacceptable since a complete rewriting of their proposals was necessary to render them competitive. In mid-July, Resdel was eliminated because of its high cost and low technical standing. However, since DIRAD apparently met the RFP's minimum technical requirements and also offered the lowest price, it was decided not to eliminate the firm from the competition at that time.

Subsequently, the SSB again reviewed the proposals and determined that DIRAD had no reasonable chance of being selected for award. The Navy states that from a technical standpoint, DIRAD's proposal was considerably weaker than the two other proposals and it did not appear possible that DIRAD could appreciably improve its technical score. By letter dated September 7, 1984, the Navy advised DIRAD that it was eliminated from the competitive range. The Navy conducted discussions with Rockwell Collins and Hazeltine and on September 12, 1984, awarded a contract to Rockwell Collins in the amount of \$450,000.

The Navy indicates that the sonobuoy receiver being developed under the contract is used to receive and demodulate radio signals transmitted by sonobuoy (buoys deployed at sea which utilize an acoustic sensor to help detect the presence of underwater targets) and then interfaces with the acoustic signal processor in the aircraft to help determine the identity and location of enemy submarines. The Navy states that this receiver will differ from existing sonobuoy receivers in two key respects. First, the statement of work (SOW) requires an all digital receiver capable of digital processing and second, a significant increase in channel capacity. In addition, the Navy indicates that the RFP required that very high speed integrated circuits technology (VHSIC) be considered and although not explicitly set forth in the RFP, the Navy states that it did not believe that the above two requirements could be achieved without employing this technology.

The RFP provided that proposals will be evaluated on the basis of "(1) Technical Approach, (2) Experience, (3) Management and (4) Cost, with major emphasis being placed on the offeror's technical approach." The specific criteria to be used in the evaluation, in decreasing order of importance, were listed as follows:

1. Technical Approach
 - A. Soundness of approach
 - B. Compliance with requirements
 - C. Understanding the problem

2. Experience

- A. Experience in similar/related fields
- B. Personnel assigned

3. Management

- A. Resources allocated

4. Cost

The Navy indicates that the actual evaluation plan employed by the SSB did not precisely mirror the scheme set forth in the RFP. The Navy states that the emphasis on the four major evaluation factors was in accordance with the RFP's evaluation plan. However, the subfactors under Technical Approach were not in the proper sequence. The Navy indicates that "Understanding the problem" should have been listed first, rather than last, with the remaining subfactors each dropping down a position. The Navy argues that this deviation was inadvertent, was not prejudicial and was not so material as to require notification to offerors in an RFP amendment.

In evaluating DIRAD's technical proposal, the SSB specifically identified eight major deficiencies. The Navy determined that the front end design proposed by DIRAD was costly, power consuming and risky. The Navy states that DIRAD's response to VHSIC design and application and its response to the RFP's requirement for a reliability and maintainability program was weak. Also, the Navy indicates that DIRAD's proposed design provides for only 20 of the 99 output channels which were required by the RFP. Further, the Navy concluded that DIRAD's determination to conduct a computer simulation rather than validate performance through the use of a partial prototype was unsatisfactory. Additional deficiencies were also noted and the Navy states that, under the circumstances, DIRAD had no reasonable chance of being selected for award and was therefore properly excluded from the competitive range.

DIRAD disagrees with the Navy's technical evaluation. DIRAD contends that its front end design was not fatally flawed and that the 99 channel capability could be obtained by a simple adjustment which would not require a major redesign effort. Although DIRAD acknowledges that it did not deal with VHSIC technology in its proposal,

DIRAD argues that the RFP did not require that this technology be employed and that the Navy should have stated in the RFP its belief that a contractor which did not employ this technology could not satisfactorily perform. Also, DIRAD complains that the Navy's rejection of digital computer simulation was improper since this method is widely accepted. Again, DIRAD argues that if the Navy expected a partial prototype to be developed, this should have been stated in the RFP. Additionally, DIRAD argues that in various other areas the Navy did not clearly review its proposed design and downgraded its proposal for not complying with requirements that were not clearly set forth in the RFP. DIRAD contends that the delay between the Navy's initial evaluation and the final decision to exclude DIRAD demonstrates that the proposal was acceptable and evidences the Navy's bad faith in excluding the firm from the competitive range.

DIRAD also argues that the Navy's use of an evaluation scheme which differed from that set forth in the RFP was prejudicial. DIRAD contends that the emphasis in its proposal was intended to demonstrate the "soundness of its approach" and had the relative weighting of the technical subfactors been presented in the order which the Navy ultimately used, DIRAD's proposal would have had a vastly different emphasis.

Finally, DIRAD raises several issues, which, in its view, demonstrate that the Navy conducted this procurement in bad faith. DIRAD contends that the Navy's denial of its request to have this procurement conducted under the Small Business Administration's 8(a) program demonstrates that the Navy intended to exclude DIRAD. DIRAD argues that there was disparity in the point scores of the technical evaluators and alleges that the discrepancies are evidence of bias. Also, DIRAD complains that the Navy improperly delayed notifying DIRAD of its exclusion from the competitive range and thereby precluded an effective protest by DIRAD.

Our decisions have clearly established that contracting officials enjoy a reasonable degree of discretion in the evaluation of proposals for acceptability, and this Office will not substitute its judgment for that of a procuring agency by making an independent determination unless the agency's action is shown to be arbitrary or in violation of procurement statutes or regulations. Laser Photonics, Inc., B-214356, Oct. 29, 1984, 84-2 CPD ¶ 470. Thus, we will not disturb an agency's initial determination of whether a proposal is in the competitive range

absent clear evidence that the determination lacked a reasonable basis. Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 CPD ¶ 299. In this regard, a protester's mere disagreement with the agency's judgment does not meet its burden of proving that the evaluation of proposals and competitive range determination were unreasonable. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121.

Generally, proposals that are to be considered within the competitive range are those which are technically acceptable or reasonably susceptible of being made acceptable--that is proposals which have a reasonable chance of being selected for award. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 CPD ¶ 396. Even a proposal which is technically acceptable may be excluded from the competitive range if, relative to all proposals received, it does not stand a real chance for award. Hittman Associates, Inc., 60 Comp. Gen. 120 (1980), 80-2 CPD ¶ 437.

Initially, we point out that we find DIRAD's allegations concerning the adequacy and clarity of the RFP requirements to be without merit. DIRAD, in effect, is arguing that its proposal would have been different if the Navy had more precisely defined how it expected offerors to comply with the RFP's requirements. In this regard, DIRAD argues, for example, that the Navy's expectations regarding the application of VHSIC technology and the use of a partial prototype rather than a computer simulation should have been explicitly stated in the RFP.

Our decisions recognize, however, that where, as here, the contract is a research and development project and the RFP's requirements are performance oriented, the government is inviting innovative and independent approaches to the performance requested. Memorex Corp., B-212660, Feb. 7, 1984, 84-1 CPD ¶ 153. Although DIRAD may have preferred that the Navy provide additional information and added detail prior to submitting its proposal, there is no requirement that the Navy precisely specify the manner in which offerors are to fulfill the required tasks. In our view, the RFP clearly set forth the capabilities and characteristics that the Navy sought to achieve in the digital sonobuoy receiver which is being developed. The fact that DIRAD's response in some areas differed from what the Navy expected to receive does not render the RFP's requirements vague or ambiguous.

Concerning the Navy's evaluation of proposals, DIRAD, in our view, has not established that the Navy's technical conclusions were unreasonable. The Navy indicates that DIRAD's proposal was technically deficient in several areas and stood no real chance of being selected for award. The Navy found that DIRAD's proposed design was deficient and although DIRAD argues that the design could have been improved, an agency's technical evaluation is dependent upon the information furnished in the proposal and the burden is upon the offeror to submit an initial proposal that is adequately written. Marvin Engineering Co., B-214889, July 3, 1984, 84-2 CPD ¶ 15. Although a basic goal of negotiation is to point out deficiencies so that offerors in the competitive range may revise their proposals, there is no obligation on the Navy's part to conduct discussions with an offeror whose initial proposal is so deficient that it is excluded from the competitive range. Informatics, Inc., B-194926, July 2, 1980, 80-2 CPD ¶ 8.

Here, we conclude that the Navy's technical criticisms of DIRAD's proposal are valid and despite DIRAD's assertions to the contrary, these deficiencies could not have been easily rectified. There is no question that the proposal was downgraded for deviations and material omissions as to what the agency required. Therefore, we agree that the Navy could reasonably determine that DIRAD's proposal stood no real chance of being selected for award. Based on the record, we are unable to conclude that the Navy's determination to exclude DIRAD from further consideration was improper.

In addition, our review of the record shows that the Navy's technical evaluation was consistent with the evaluation factors set forth in the RFP. The RFP indicated that an offeror's technical approach would be given the most weight and the Navy did follow this evaluation scheme. While we recognize that the Navy emphasized "Understanding the problem" as the most important subfactor under technical approach and that the RFP indicated it would be the least important of the three subfactors that were listed, we do not believe DIRAD was materially prejudiced by this error. See ORI, Inc., B-215775, Mar. 4, 1985, 85-1 CPD ¶ 266.

The record indicates that the Navy rescored the proposals assigning the weights in a manner which more accurately reflects the RFP's stated evaluation scheme. The rescoring of the proposals shows that DIRAD's overall

score does not appreciably increase when compared to the scores for proposals submitted by Hazeltine and Rockwell Collins. Also, the deficiencies noted by the Navy, such as DIRAD's admitted failure to consider VHSIC technology and a proposed design which would not provide for the 99 channel capability required by the RFP, are based on the evaluation of information DIRAD provided with its proposal. Although DIRAD argues that it would have changed its approach, there is no indication that its affirmative response in these areas would have differed had DIRAD been advised of the change in the relative importance of the subfactor. Accordingly, we do not believe that the Navy's misapplication of the subfactors under technical approach was prejudicial and we see no reason to disturb the Navy's determination to exclude DIRAD from the competitive range.

The remaining issues raised by DIRAD do not substantiate DIRAD's claim that the Navy conducted this procurement in bad faith. Although DIRAD alleges that the Navy's failure to conduct this procurement under section 8(a) of the Small Business Act demonstrates that the Navy intended to exclude DIRAD from the competition, a contracting official is authorized to let contracts under section 8(a) "in his discretion" and a decision not to set aside a particular procurement does not, by itself, constitute evidence of bad faith. Ebonex, Inc., B-213023, May 2, 1984, 84-1 CPD ¶ 495.

Furthermore, we see no evidence in the Navy's scoring of proposals which reflects bias or bad faith on the part of the evaluation panel. Relatively low scoring by one member of an evaluation panel does not establish that the member was biased. Martin-Miser Associates, B-208147, Apr. 8, 1983, 83-1 CPD ¶ 373. In addition, we have long recognized that it is not unusual for individual evaluators to reach disparate conclusions when judging competing proposals since both objective and subjective judgments are involved. See Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD 427, affirmed, B-187645, Aug. 17, 1977, 77-2 CPD ¶ 124; Western Engineering and Sales, Co., B-205464, Sept. 27, 1982, 82-2 CPD ¶ 277. There is no evidence in the record which indicates that the scoring by the technical evaluation panel reflects anything other than their reasonable judgment as to the merits of DIRAD's proposal.

Finally, we do not agree with DIRAD that the Navy did not promptly notify DIRAD of its exclusion from the

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competitive range. The record indicates that there was a disagreement among Navy personnel over whether DIRAD's proposal should be excluded at the outset. Although DIRAD's proposal was considered weak, the Navy continued to consider the proposal due to its low cost. However, following audits conducted to establish the agency's pre-negotiation cost position, it became apparent that the price differences between the offers would decrease and it was under these circumstances that the Navy concluded that DIRAD would have no reasonable chance for award. We see nothing improper in the Navy's continued consideration of DIRAD's proposal nor do we find that the Navy's actions in this regard in any way undermine the Navy's determination to exclude DIRAD from further consideration. The record shows that DIRAD was promptly notified of the Navy's determination and we see no evidence that the Navy's actions were an attempt to preclude DIRAD from filing a protest before the Navy awarded the contract. In any event, we regard the failure to give notice to an offeror that its proposal was excluded from the competitive range a procedural irregularity which does not affect the legality of an agency's actions unless it prejudices the offeror. CSR, Inc., B-213058, Mar. 28, 1984, 84-1 CPD ¶ 364. Since DIRAD's proposal was properly excluded, no prejudice was present.

In view of our decision denying the protest, DIRAD's claim for proposal preparation costs is denied.

for Seymour Egan
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General Counsel