



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Loral Terracom; Marconi Italiana
File: B-224908; B-224908.2
Date: February 18, 1987

DIGEST

1. It is a fundamental rule of federal procurement that an agency must treat all offerors equally and must provide a common basis for the preparation and submission of competitive proposals.
2. Although an agency in a negotiated procurement was not necessarily required to reject a proposal which offered an approach deemed to be superior to that originally conceived by the agency, but which was technically nonconforming to the literal requirements of the solicitation, the agency, upon its determination that alternative means existed to satisfy its acquisition needs, should have issued a written solicitation amendment to that effect or taken other steps to advise all competitive range offerors that its requirements were significantly changed from those stated in the solicitation.

DECISION

Loral Terracom (Loral) and Marconi Italiana (Marconi) protest the award of a contract to the Aydin Corporation (Aydin) under request for proposals (RFP) No. DAAB07-86-R-J006, issued by the Department of the Army. The procurement was for the acquisition of variable function radio sets having the capability to be converted from wide-band to narrow-band configurations.

Loral protests the rejection of its proposal as technically unacceptable on the ground that the Army failed to conduct meaningful discussions with the firm by not pointing out perceived areas of weakness or deficiency in its proposal. The firm also complains that the Army improperly determined that the firm was not a responsible prospective contractor.

Marconi similarly asserts that the Army failed to conduct meaningful discussions, but expands its protest to urge that the Army's award to Aydin was legally objectionable because

Aydin's proposal did not conform to an essential requirement of the solicitation concerning the method by which the particular radio sets were to be converted. Marconi complains that its proposal in fact was improperly downgraded during the Army's technical evaluation for offering the very conversion approach called for in the solicitation. Marconi contends that if the Army had determined upon its evaluation of proposals that more than one acceptable means existed to accomplish the configuration conversion, the agency should have issued an amendment to that effect to give all offerors within the competitive range an opportunity to submit revised proposals.

We sustain Marconi's protest. We need not address the issues raised by Loral because our action in sustaining the Marconi protest will effectively afford Loral another opportunity to obtain the award.

BACKGROUND

The Army sought to acquire the variable function radio set AN/GRC-222(v) to replace its current wide-band radio set and its narrow-band, high-capacity radio set. The Army contemplated that the AN/GRC-222(v), a non-developmental item utilizing existing radio componentry, would be furnished in two specific equipment configurations, the AN/GRC-222(v)1 (hereinafter "(v)1 configuration"), which would replace the existing wide-band set, and the AN/GRC-222(v)2 (hereinafter "(v)2 configuration"), which would replace the existing narrow-band, high capacity radio set. Of critical importance to the acquisition was the requirement that the (v)1 configuration be readily convertible by user personnel to perform functionally as a complete (v)2 configuration.

In this regard, the Army had prepared an Operational Requirements Document (ORD) which set forth the Army's acquisition objectives and the specific requirements of the new variable function radio set. At principal issue in this case, the ORD made numerous references to a (v)2 "Conversion Kit" to effect the reconfiguration of the radio set from the (v)1 to the (v)2 mode.

A draft of the Army's ORD was released to industry for comment on November 15, 1985. On April 16, 1986, the Army conducted a presolicitation conference with prospective offerors and presented a draft of the proposed solicitation. The RFP itself was issued on May 15 to 45 firms for a total quantity range of 296 to 345 (v)1 and (v)2 configurations each, including conversion kits and related items, plus options. The RFP's statement of work provided that the radio

set requirements were set forth in the Army's ORD, which was being furnished as an attachment to the RFP and would form part of the resulting contract.

Five firms submitted proposals by the June 30 closing date. As provided in the solicitation, proposals were evaluated under the major criteria of Operational Suitability, Cost/Price, Logistics, and Management, listed in descending order of importance. The RFP stated that award would be made to the offeror whose proposal, conforming to the terms of the RFP, represented the "best value" to the government. The Army did not point-score the proposals, but rather utilized an adjectival rating system ranging from "Superior" to "Unacceptable." No less than an "Acceptable" rating had to be achieved under each of the four major criteria for a proposal to be considered for award.

The Army determined that all initial proposals were within the competitive range. The proposals of Raytheon Company (Raytheon) and Fairchild Communications & Electronics Company (Fairchild) were deemed to be acceptable as submitted, whereas the proposals of Aydin, Marconi, and Loral were judged to be susceptible to being made acceptable through negotiation. Discussions, both written and oral, were then conducted, and the Army requested the submission of best and final offers (BAFOs). Upon its evaluation of the BAFOs, the Army determined that Loral's proposal, although lowest in price, was "Unacceptable" overall technically because of the unreasonably high risk associated with Loral's approach, which called for a mast-mounted circuitry configuration. In addition, the firm was determined to be a nonresponsible prospective contractor based on a negative preaward survey which found that Loral had failed to demonstrate the existence of a quality control program reflecting the requirements of the MIL-O-9858A quality assurance standard.

The proposals of Fairchild and Aydin received overall technical ratings of "Good," whereas Marconi's overall technical rating was "Acceptable." The Army concluded that Fairchild and Aydin were essentially equal technically under the Operational Suitability criterion, the most important, but the Army also concluded that Aydin's lower proposed price--12 percent lower than Fairchild's--and Aydin's higher rating for Life Cycle Costs (a subcriterion of Operational Suitability) outweighed Fairchild's higher rating for Logistics.

Although Raytheon's technical proposal was ranked the highest, receiving an overall rating of "Superior," the Army determined that the firm's proposed price, by far the highest

among the five firms, was unjustified since the acquisition called for a non-developmental item. Hence, the Army concluded that acceptance of Raytheon's proposal, despite its technical superiority, would not prove advantageous to the government under the "best value" standard. Although the Army noted that Marconi's "Acceptable" proposal met the requirements of the RFP, the agency believed there was a certain degree of risk associated with the firm's approach, and further noted that Marconi's proposed price was somewhat higher than Aydin's. Accordingly, the Army awarded the contract to Aydin as the firm whose proposal represented the "best value" to the government.

The contract was awarded on September 25. As a result of Marconi's subsequent debriefing by the Army as an unsuccessful offeror, and the firm's receipt of certain contract documents under the Freedom of Information Act, Marconi asserted, and the Army ultimately agreed, that a mathematical error had been made in evaluating Marconi's BAFO price. However, even though the Army now determined that Marconi's actual proposed price was some 1.2 percent lower than Aydin's, the agency affirmed its selection of Aydin for the award under the "best value" standard. Upon learning of the Army's determination to stand by its original selection decision, Marconi filed this protest with our Office.

PROTEST POSITIONS

The gravamen of Marconi's protest is the contention that the RFP, without exception, required that the conversion of the radio set from the (v)1 to the (v)2 configuration be effected by means of a separate conversion kit. Marconi states that it attended the presolicitation conference during which the Army circulated the draft RFP as well as a briefing paper setting forth the general requirements of the variable function radio set being acquired. Marconi states that the Army's technical personnel indicated at that time that a separate conversion kit might not be necessary to accomplish the reconfiguration requirement, and that the briefing paper utilized the term "Conversion Kit (if required)" in its description of the conversion kit. However, Marconi avers that the contracting officer for the procurement proceeded to caution all prospective offerors at the conference that the statements of the technical personnel and the documents being circulated were not to be relied upon unless incorporated into the final version of the RFP. Marconi draws attention to the fact that the RFP as issued contained no qualifying language, in contrast to that employed in the briefing paper,

to indicate that a two-configuration radio set employing a separate conversion kit was other than a mandatory solicitation requirement.

Marconi asserts that at no time during the negotiation process did the Army give the firm any indication that its technical approach in using a separate conversion kit to accomplish the (v)1/(v)2 reconfiguration constituted a weakness or undesirable aspect of the proposal. However, in this regard, Marconi has obtained a copy of the Army's technical evaluation report concerning the firm's proposal, and the firm points to numerous instances in which the Army's evaluators felt that the firm's utilization of the separate conversion kit approach was not a proposal strength. For example, Marconi specifically notes that under the evaluation subcriteria concerning the soundness of human and system safety engineering, the evaluators concluded that:

"The offeror's approach requires a conversion kit (two modules and a filter assembly) to convert from the [(v)1] to the [(v)2]. This represents an undesirable (though acceptable) approach from a human factors viewpoint."

Marconi asserts that such language is a clear indication that the Army improperly evaluated its proposal by downgrading it for offering exactly what was called for in the RFP. It is Marconi's contention that the Army, during its evaluation of the competing proposals, became biased in favor of the reconfiguration concept proposed by Aydin, which, as Marconi has learned, did not utilize a two-configuration approach and a separate conversion kit, but rather a single multi-function configuration which could be converted from the (v)1 to the (v)2 mode by means of an internal switch.

Thus, Marconi argues that Aydin's proposal was nonconforming to an essential requirement of the RFP and should have been rejected because the firm was not proposing both (v)1 and (v)2 configurations convertible through the replacement of separate components. On the other hand, Marconi urges that the procurement was fatally flawed because the Army, if it actually determined that Aydin's single-configuration approach was more desirable to meet its acquisition needs, neither issued an RFP amendment to that effect nor gave any indication to Marconi during negotiations that its requirements had changed. The firm asserts that it could have proposed a radio set providing for (v)1/(v)2 reconfiguration without the need for a separate conversion kit had it been informed that this was the favored approach. Marconi

contends that it is entitled to the award as the offeror submitting the lowest price offer fully conforming to the material requirements of the solicitation.

Contrary to Marconi's position, the Army contends that the requirements of the solicitation were essentially functional in nature, and, hence, that the RFP:

". . . did not preclude . . . solutions to the variable function requirement by the use of a single radio configuration approach, thereby obviating the need for a conversion kit. In fact, other offerors [besides Aydin] selected this approach."

The Army indicates that it did not downgrade Marconi's proposal for utilizing a separate conversion kit, since this was an acceptable approach meeting the governing variable function requirement, but rather for the degree of risk associated with Marconi's particular implementation of that approach. For example, in terms of the Operational Suitability evaluation factor, the Army notes that access to Marconi's radio for conversion purposes was from the rear of the equipment, which would be installed within a shelter and presumably placed against the walls of the shelter. In the evaluators view, this would impose additional burdens upon user personnel as the conversion process already entailed the removal and replacement of three components. Moreover, the Army viewed as a weakness the fact that these components, in certain instances, could not be removed or emplaced without the need for hand tools.

In essence, the Army's position is that Marconi's proposal was properly evaluated consistent with the evaluation criteria set forth in the solicitation. The Army contends that it was not required to conduct discussions with Marconi regarding every area of its proposal that received less than the highest rating, since discussions to that extent would have led to impermissible technical transfusion or technical leveling. The Army urges that Marconi was made aware during discussions of those aspects of its proposal which required improvement, and the Army contends that Marconi was given ample opportunity to address the agency's concerns in its BAFO. Thus, the Army asserts that it "went as far as possible" to alert Marconi to perceived weaknesses or deficiencies in its proposal without telling Marconi how to propose or leading it "to methods or approaches submitted by other offerors." To the extent Marconi urges that it is entitled to the award because its price ultimately was found to be slightly lower than Aydin's, the Army responds that

although due consideration was given to this fact, the award to Aydin was justified under the "best value" selection standard because the firm's proposal was significantly superior to Marconi's in terms of technical merit.

ANALYSIS

We agree with Marconi that the procurement was improperly conducted. We have closely scrutinized the terms of the RFP, including the attached ORD, and we reach the same conclusion as Marconi that the Army's expressed requirement was for a radio set in two separate configurations convertible from the (v)1 to the (v)2 mode through the use of a separate conversion kit. As indicated earlier, the ORD made repeated references to a "(v)2 Conversion Kit" or "Conversion Kit," which was to be furnished as an item separate from the radio set in both its (v)1 and (v)2 configurations. For example, among other references, the ORD expressly stated that the contractor "is required to provide a kit that includes those variable function equipment items of [the (v)2 configuration] required to enable the operator to reconfigure and convert [the (v)1 configuration to the (v)2 configuration]." The ORD further indicated that the (v)2 conversion kit was to be comprised of specific equipment items, such as "units, assemblies, subassemblies, parts, or combinations, thereof, as applicable. . . ." The ORD required a "Conversion Kit Compliance Verification Test" to demonstrate that the (v)2 configuration, "after conversion from a [(v)1] configuration by application of the [(v)2] Conversion Kit, shall meet all operational, functional . . . and interchangeability requirements. . . ." (Emphasis supplied.) The acquisition intent represented by the ORD is clearly borne out by the specific provisions of the RFP, which also repeatedly reference a (v)2 conversion kit, such as section 3.15.1 of the Statement of Work, which provides that: ". . . the U.S. Army will deploy the two types of . . . radio sets and the . . . (v)2 Conversion Kit delivered on the contract" (Emphasis supplied.)

When a dispute exists, as here, regarding the actual meaning of a solicitation requirement, this Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356. We have done so here to find that Marconi's interpretation of the RFP (at least as originally conceived by the Army) as specifically requiring a separate conversion kit to effect the (v)1/(v)2 reconfiguration is the only reasonable reading given the repeated references to that exclusive approach in the solicitation documents. See Energy

Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. We have found no significant qualifying language to counter what we believe was the clear intent of the solicitation.^{1/}

Hence, we cannot accept the Army's view that the RFP's requirements as written were functional or performance-oriented in nature so that they did not preclude more than one technical approach. Although Aydin's single-configuration, switch-activated conversion concept may meet the overall (v)1/(v)2 reconfiguration requirement, this does not obviate the fact that the firm's proposal was technically nonconforming to the express terms of the solicitation. Cf. A.B. Dick Co., B-207194.2, Nov. 29, 1982, 82-2 CPD ¶ 478 (minimum mandatory requirements met by means of alternative approach to RFP's performance specifications).

That being said, however, we do not believe that the Army necessarily was required to reject Aydin's proposal because it did not offer a two-configuration, separate conversion kit methodology as did Marconi. We point out that the concept of responsiveness, i.e., a bidder's unconditional offer to comply with the terms of an invitation, generally does not apply to the give-and-take of negotiated procurements, although we have also recognized that certain RFP requirements may be sufficiently material such that a proposal which fails to include them is technically unacceptable. True Machine Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18. Notwithstanding Aydin's utilization of an approach which differed from that called for in the RFP--which we conclude allowed no latitude in that regard--it is obvious that the Army viewed the firm's concept as more desirable than Marconi's literally compliant approach. We have no basis to question the Army's technical judgment that the approach proposed by Aydin was ultimately preferable to that originally conceived by the agency itself. The real question, then, is not whether the procurement was flawed because the Army did not reject Aydin's proposal for offering a different way of meeting the (v)1/(v)2 reconfiguration requirement, but whether the Army properly could award Aydin the contract on that basis without making clear to the other competitive range offerors that an alternative methodology was also acceptable.

^{1/} We note that the cover letter to the Army's own administrative report identifies the procurement as the acquisition of "296 each to 345 each Radio Set [(v)1 and (v)2], Conversion Kits, Warranties, and related items." (Emphasis Supplied.)

It is a fundamental principle of federal procurement that a contracting agency must treat offerors equally, and that they must be furnished with identical statements of the agency's requirements in order to provide a common basis for the preparation and submission of competitive proposals. Computek Inc. et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD ¶ 384. When an agency's needs change so that a material discrepancy is created between the RFP's statement of the requirement and/or the ground rules under which the procurement will be conducted and the agency's actual needs, the RFP should be amended in writing, AT&T Communications, B-221463 et al., Mar. 12, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 247, and all offerors within the competitive range be given an opportunity through appropriate discussions to revise their proposals accordingly. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134; E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565. In the latter regard, we have held that, despite the agency's failure to issue a written amendment, an offeror is not prejudiced when the agency informs the firm during negotiations of any changed requirements, regardless of any resulting inconsistency with the requirements set forth in the solicitation. Ram Enterprises, Inc., B-221924, June 24, 1986, 86-1 CPD ¶ 581.

In the present matter, therefore, given our conclusion that the express language of the RFP allowed no other conversion methodology than that proposed by Marconi, the Army, upon its determination that the single multi-function configuration approach proposed by Aydin in fact was more desirable than the approach originally specified, was required to place the competition on a common basis by issuing the appropriate amendment or by taking other steps to provide clear notice to all offerors in the competitive range that the agency's requirements were not as rigid as indicated in the solicitation.

The Army issued no such amendment, and our examination of the source selection documents reveals nothing to indicate that the Army ever sought to advise Marconi and the other firms that it would consider an approach other than one utilizing a separate conversion kit to effect the (v)1/(v)2 reconfiguration.

The Federal Acquisition Regulation, 48 C.F.R. § 15.606(c) (1985), provides that, if the proposal considered to be most advantageous to the government involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements, as long as this can be done without revealing to the other offerors

the solution proposed in the original departure, that is, there can be no technical transfusion^{2/} or technical leveling.^{3/}

The Army's argument that impermissible technical transfusion or technical leveling might have arisen from extended discussions with Marconi would have merit if the RFP had allowed for alternative approaches to meet a functional requirement. In that case, it clearly would have been improper for the agency to convey Aydin's particular approach to Marconi (technical transfusion) or to seek to improve Marconi's proposal through repeated discussions which "coached" the firm with regard to the agency's view that the separate conversion kit approach was not the desired way of meeting the agency's needs (technical leveling). However, since the RFP as written did not provide for satisfaction of the (v)1/(v)2 reconfiguration requirement except through the approach utilized by Marconi, we think that, at a minimum, the burden was on the Army, when it determined that the requirement could be satisfied in other ways, to advise the competitive range offerors of this through appropriate discussions. See Brizard Co., B-215595, Oct. 11, 1984, 84-2 CPD ¶ 399. In our view, these discussions would have been legally sufficient and consistent with the provisions of the FAR, 48 C.F.R. § 15.606(c), supra, had the Army only indicated that the separate conversion kit methodology was not a mandatory requirement of the RFP, without conveying the specifics of any other concept.

It is clear that the procurement here has reached an incongruous result in which the proposal most conforming to the literal specifications set forth in the RFP was effectively downgraded by reason of that very conformity. Cf. Laser Photonics, Inc., B-214356, Oct. 29, 1984, 84-2 CPD ¶ 470 at 9 (protest sustained where proposal rejected as too

^{2/} "Technical transfusion" is the government disclosure of technical information pertaining to a proposal that results in the improvement of a competitive proposal. Federal Acquisition Regulation, 48 C.F.R. § 15.610(d)(2) (1985).

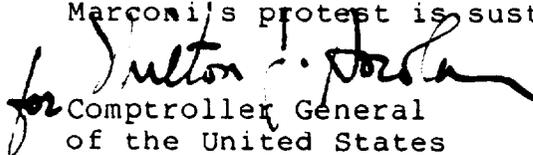
^{3/} "Technical leveling" involves helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out inherent weaknesses in the proposal stemming from the offeror's own lack of diligence, competence, or inventiveness in preparing its proposal. Federal Acquisition Regulation, 48 C.F.R. § 15.610(d)(1); see also Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD ¶ 61; E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192.

risky for incorporating advanced technological features even though the solicitation itself clearly indicated that state-of-the-art technology was being sought). Although the Army has urged that Marconi's proposal was downgraded because of the firm's particular implementation of the separate conversion kit approach (e.g., rear access to equipment), rather than because of its employment of the concept itself, our analysis of the record leads us to a contrary conclusion. Instead, we believe that the agency's evaluation report concerning Marconi's proposal fairly shows that Marconi's approach, although conforming, was no longer what the agency considered to be most feasible or desirable in meeting the (v)1/(v)2 reconfiguration requirement.

We find persuasive Marconi's argument that the approach proposed by Aydin was not necessarily innovative and would have been considered by Marconi had the firm been properly advised that a separate conversion kit was not a mandatory requirement. Since the Army has not reasonably justified its procurement action, we sustain the protest on the ground that the Army's failure to clarify its needs misled Marconi to its competitive prejudice. Laser Photonics, Inc., B-214356, supra, 84-2 CPD ¶ 470 at 10.

Accordingly, by separate letter of today, we are recommending to the Secretary of the Army that discussions be reopened with all competitive range offerors to allow for the submission of a new round of BAFOs under a formally amended solicitation which clearly states the Army's position concerning the need for a separate conversion kit to effect the (v)1/(v)2 reconfiguration requirement. We further recommend that Aydin's contract be terminated for the convenience of the government if it is not the successful offeror at the conclusion of these discussions.

Marconi's protest is sustained.^{4/}


for Comptroller General
of the United States

^{4/} The Army's required bid protest conference comments were not filed until some 3 weeks after the specified due date. See 4 C.F.R. § 21.5(c) (1986). The Army has not adequately justified the extreme lateness of this filing, which is compounded by the fact that Marconi, although not obligated to do so, furnished a draft copy of its own conference comments to the Army 2 days prior to the due date. Nevertheless, we have reviewed the Army's submission, but we do not find it material to our decision.