



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Oxford Medical, Inc.--Request for Reconsideration

File: B-224256.2

Date: February 24, 1987

### DIGEST

1. Protest which was dismissed as untimely, for failure to be filed with the agency within 10 working days after basis of protest was known to protester, will be considered on the merits since protester provides evidence, in its request for reconsideration, which establishes that its agency-level protest was filed within the 10-day deadline.
2. Technical requirements, stated in clear and unambiguous terms, are presumed to be material and essential to the needs of the government. Acceptance of a proposal which does not conform to such a material solicitation requirement, without first amending the solicitation to provide an opportunity for all offerors to compete on an equal basis, is improper.

### DECISION

Oxford Medical, Inc. requests reconsideration of our decision, Oxford Medical Inc., B-224256, Oct. 8, 1986, 86-2 C.P.D. ¶ 409, in which we dismissed Oxford's protest of a contract award to Del Mar Avionics under request for proposals (RFP) No. DADA09-86-R-0044, issued by the Department of the Army for medical monitoring equipment at the William Beaumont Army Medical Center, El Paso, Texas. In our original decision, we found that Oxford's protest was not for consideration on the merits because we determined that the protest was untimely in that it had not been filed with the agency within 10 working days after the basis of the protest was known to Oxford. We based our finding of untimeliness on an assumption of fact, absent contrary evidence, that Oxford's protest, dated 1 day before the 10-day time period was to expire, did not reach the agency until after the 10-day deadline.

038118-132265

In its request for reconsideration, Oxford has provided us with a copy of a Federal Express delivery record, signed by the contracting officer, which shows that she received Oxford's protest at 10:40 a.m. on August 28, 1986. The Army has not disputed the timeliness of Oxford's protest to it. In light of this new factual evidence establishing that its protest did reach the agency within the 10-day deadline, we find Oxford's agency-level protest to be timely and its subsequent protest to our Office for consideration on the merits.

The RFP solicited offers for an ambulatory physiological monitoring scanner system to analyze electroencephalographic telemetry (the electric activity of the brain). Such a scanner system is used to analyze data initially recorded by electroencephalographic recording devices. Section C of the RFP, its specifications, contained 13 "minimum essential requirements," including one that the system "shall be compatible with Medilog 424 EEGI, 2, 3, 4 and Oxford XC-3" recording devices. This requirement was included in the specifications because the Army already owned the listed recording devices and wanted to assure that any scanner purchased would be compatible with those recorders.

Two offers were received, one from Del Mar and one from Oxford. Oxford offered to provide one scanner system at a price of \$29,450. Oxford's scanner met all of the minimum essential requirements listed in the RFP, including the compatibility requirement. Del Mar offered one scanner system and four recording devices with accessories for a price of \$29,000. Del Mar's scanner system met all of the RFP's minimum essential requirements except for the compatibility requirement, a deficiency which Del Mar sought to overcome by including the additional recording devices in its offer.

The Army awarded the contract to Del Mar stating that Del Mar's offer was most advantageous to the government since it offered recorders along with its scanner system, all at a lower price than Oxford proposed for its scanner system without recorders. The Army also stated that accepting Del Mar's offer would allow it to use its existing recorders in other capacities. Oxford protests that the Army's award to Del Mar was improper because the scanner system Del Mar offered does not meet the RFP's minimum essential requirement of compatibility with the listed recording devices.

We sustain the protest.

Technical requirements, stated in clear and unambiguous terms in a solicitation, which set forth particular features of the

product to be purchased are presumed to be material and essential to the needs of the government. See Squibb-Vitatek, Inc., B-205306, July 27, 1982, 82-2 C.P.D. ¶ 81. Consequently, offerors have a right to assume that such requirements will be enforced and, on the basis of them, to anticipate the scope of competition for award. Squibb-Vitatek, Inc., B-205306, supra, 82-2 C.P.D. ¶ 81 at 4. Therefore, when a contracting agency determines that a proposal, which involves a material departure from specified requirements, would nonetheless be acceptable, amendment of the RFP is required so that all offerors are afforded an opportunity to compete on an equal basis. Parkson Corporation, B-187101, Feb. 11, 1977, 77-1 C.P.D. ¶ 103.

The Army admits that Del Mar's scanner system did not meet the compatibility requirement of the RFP but argues that the award was proper since Del Mar's offer met the government's needs at the lowest price by offering to provide recorders along with its scanner.

Section M of the RFP, "Evaluation Factors for Award," advised offerors that award would be made based on the following order of precedence: (1) "Section C, ability to meet minimum essential technical requirements"; (2) capability of prospective contractor to meet required delivery date; and (3) price. One of the "minimum essential requirements," as we indicated above, was that the scanner system be compatible with certain existing government-owned equipment. It is difficult to imagine a more unambiguous statement that the satisfaction of the agency's technical requirements was of primary importance, outweighing even time of delivery and price. It is equally clear that Del Mar's offer did not meet one of the agency's "minimum essential requirements." Even the Army admits in its report to our Office that it "questions" whether the medical center's actions could be "legally supported," however well motivated, and that it:

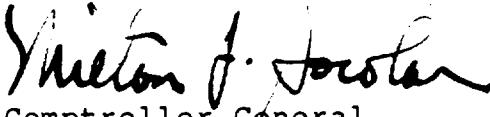
" . . . would have been better practice if the contracting officer had revised the solicitation to remove the compatibility requirement, or resolicited . . . without the requirement, after receiving the Del Mar proposal incorporating its own recorders."

We agree. Since the Army did not amend the RFP to delete the compatibility requirement, we find that the award to Del Mar was improper. The protest is, therefore, sustained.

The record shows that this contract was substantially, if not wholly, performed prior to our October 2, 1986, receipt of Oxford's initial protest. The Army states that Del Mar

shipped the equipment on August 27--the day before Oxford's agency-level protest was received by the Army--and that the equipment was received at the medical center on September 4, weeks before the Army's denial of Oxford's protest to it and, obviously, even longer before that firm's subsequent filing of a protest with our Office. In addition, the Army advises that the necessary ambulatory monitoring was suspended pending receipt of a scanner system. Removal of Del Mar's equipment, which is now in satisfactory operation, would thus cause an unnecessary disruption in the medical center's current monitoring operations. In light of the above circumstances, we find that disturbance of the award is not appropriate.

We do allow a protester to recover its proposal preparation costs where the protester had a substantial chance of receiving the award, but was unreasonably excluded from the procurement, and where we did not recommend one of the remedies delineated in 4 C.F.R. § 21.6(a)(2-5) (1986). Our regulations also permit recovery of the costs of filing and pursuing a protest in situations where the protester was unreasonably excluded from the procurement. 4 C.F.R. § 21.6(e). Since the Army awarded this contract in contravention of the evaluation criteria contained in its solicitation, which Oxford--the only other offeror--met, Oxford was unreasonably excluded from the procurement. We therefore recommend the award to it of proposal preparation costs and the costs of pursuing the protest. In addition, we are recommending to the Secretary of the Army that appropriate action be taken to insure that the deficiency noted in this procurement does not recur.

*ja*   
Comptroller General  
of the United States