



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Conrac Corporation, SCD Division

File: B-225646

Date: May 11, 1987

DIGEST

1. In procurements requesting competitive proposals, alleged improprieties which are subsequently incorporated into the solicitation must be protested no later than the next closing date for receipt of proposals following the incorporation.
2. Protester's proposal was properly rejected as unacceptable where the firm took exception in its revised best and final offer to certain standard provisions of the solicitation deemed to be material. An offeror should not anticipate a further opportunity to revise its proposal after it makes its "best and final" submission.
3. Allegation that the awardee's proposal was technically nonconforming will not be considered because the protester, whose offer was properly rejected for taking express exception to certain standard provisions of the solicitation, is not eligible for an award and, hence, is not an "interested party" under the General Accounting Office's bid protest procedures.

DECISION

Conrac Corporation, SCD Division, protests the award of a contract to Hartman Systems under request for proposals (RFP) No. N00163-86-R-1109, issued by the Department of the Navy. The procurement is for the acquisition of color video monitors for use in naval aircraft in support of an airborne electronic warfare system. Conrac complains that the Navy rejected its offer on the improper ground that the firm had not complied with the solicitation's requirement that the government be furnished rights in the contractor's proprietary technical data. Conrac also alleges that Hartman's proposal was technically nonconforming to the terms of the solicitation.

We deny the protest in part and dismiss it in part.

The RFP was issued on May 14, 1986, contemplating the award of a firm-fixed-price contract for 35 video monitors with an

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units. The RFP also called for, among other things, first article and burn-in tests, ten sets of spares, and unlimited rights by the government in the contractor's technical data, including Level 3 (production) drawings.

Prior to the June 17 date established in the RFP for receipt of initial proposals, Conrac contacted the Navy's Competition Advocate General's Office to complain that the requirement that the government be provided with unlimited rights in technical data was unreasonable and would irreparably damage Conrac's ability to protect its commercial market. The Competition Advocate General's Office then suggested to the contracting activity that, because of Congressional concern in this area, the activity consider some alternative to the requirement for unlimited rights, such as a license granted by the contractor to the government to use its technical data for military procurement purposes only.

Accordingly, the Navy issued amendment No. 0001 which deleted the requirement for unlimited data rights and incorporated the following additional clause, H.2, into the RFP as a "Special Contract Requirement":

"LICENSE FOR DOD PROCUREMENT AND VALIDATION

The Contractor hereby grants to the Government a non-exclusive, paid up license to utilize technical data supplied with Limited Rights . . . for the purposes of procurement, by any agency of the Department of Defense, either directly or through a prime contract issued by such agency, of Video Monitor, P/N 78E6N7050, Revision F, and any subsequent revision thereto, and of spare parts thereof. The aforesaid technical data may also be utilized by any agency of the Department of Defense for in-house technical data package validation of the aforesaid equipment, including procurement in support thereof. Nothing in this clause shall be construed as granting to the Government any rights with respect to commercial sales or commercial application of the aforesaid Limited Rights Technical Data."

Four firms, including Conrac and Hartman, submitted proposals by the June 26 closing date, as extended by amendment No. 0001. The Navy determined that none of the offers were technically conforming, in principal part because no firm complied with the particular requirements of the soldering and workmanship specification set forth in the RFP. Conrac's proposal was also found to be noncompliant with the first article and other test requirements, and,

significant to this case, Conrac appeared to take exception to the limited data rights requirement of clause H.2.

Three more amendments to the RFP were issued, and written discussions took place concerning the various noncompliant aspects of the proposals. Hartman, Conrac, and one other firm remained in the competition by the October 9 due date for receipt of best and final offers as requested by the Navy. The Navy determined that the firms' best and final offers were technically compliant with the RFP's requirements. However, with regard to the data rights licensing requirement at clause H.2, Conrac's best and final offer proposed as follows:

"Conrac proposes to provide Level 3 drawings . . . with unlimited rights. These drawings will be held in an escrow account by a disinterested third party. The exact terms of the escrow account will be determined at the time of contract negotiation"

Conrac also requested in its best and final offer that the first article requirement be modified to allow the contracting officer, prior to first article approval, to authorize the contractor to acquire any necessary materials and components or to begin production in order to meet the delivery schedule.

The Navy acceded to Conrac's request to modify the first article provisions and determined, in the interests of time, to forego the issuance of a formal amendment and to advise the three offerors of this change by telex message to allow for the submission of revised best and final offers on that basis. However, the Navy also determined to advise Conrac in this message that its proposed escrow account approach to satisfy the limited data rights requirement was unacceptable.

The escrow account proposal was not acceptable to the Navy because Conrac had not provided any firm date for the delivery of the Level 3 drawings, whereas the solicitation had required that they be delivered to the government within 90 days after contract award. The firm was also cautioned that the Navy would not consider any terms or conditions in the firm's best and final offer "left to 'further negotiations' acceptable."

A second round of best and final offers from the three firms were received by the October 28 deadline specified in the telex messages. The Navy concluded that each offer conformed to the technical specifications of the RFP. Nevertheless, the Navy also concluded that Conrac's offer

continued to take exception to the clause H.2 requirement. Among other things, Conrac now proposed that:

(1) the Level 3 drawings would be placed in an escrow account 90 days after the last item under the contract (whether base or option) was shipped to the Navy, with the cost for the drawings payable upon their placement in escrow (the account to be maintained at Conrac's expense);

(2) the drawings would remain in escrow for five years, at which point the government would acquire rights in them for specified military procurement purposes only; and

(3) the government would be free to use the drawings to establish other sources of supply should Conrac be permanently unable to perform due to "bankruptcy, natural disasters, or . . . withdrawal from the video display business."

The Navy deemed the escrow account proposal, especially given the five-year waiting period before possession, to be inconsistent with the clause H.2 requirement and the specific provision that the Level 3 drawings would be delivered to the government 90 days after award. Moreover, the Navy also noted that Conrac's revised best and final offer took express exception to certain standard provisions of the solicitation as well, including those concerning stop-work orders, risk of loss, and warranty of supplies.

Accordingly, Conrac's proposal, which was not lowest in price, was rejected as being materially conditioned and, therefore, unacceptable. Award was then made to Hartman on December 17 as the lowest price offeror whose proposal was conforming. In this regard, Hartman offered the government unlimited rights in its data at no cost. Conrac's protest to this Office follows the Navy's denial of Conrac's earlier agency-level protest.

PROTEST POSITION

Conrac principally urges that the Navy improperly rejected its offer for failure to comply with the data rights licensing requirement of clause H.2. Conrac contends that, as a matter of law, a firm's refusal to provide the government with unlimited rights in its technical data pertaining to an item developed wholly at the firm's own expense cannot serve as a basis to deny the firm the award of a contract. Conrac indicates that it proposed the escrow concept in place of the clause H.2 licensing agreement because it feared that its Level 3 drawings might ultimately be

acquired by the firm's commercial competitors to its great harm, even if it were contemplated that those drawings would be utilized by the government for military procurement purposes only.

Similarly, Conrac contends that the procurement was flawed because its position on the data rights issue was employed as a "hidden evaluation factor" by the Navy to deny it the award. The firm urges that the RFP set forth no evaluation factors other than cost and, hence, that the Navy could not reject Conrac's offer of rights in data somewhat more prescribed than those called for by the clause H.2 licensing requirement, or, on the other hand, impermissibly favor Hartman's offer of greater rights than sought by the government.

Additionally, Conrac contends that the exceptions it took in its revised best and final offer to certain standard provisions of the RFP were minor in nature only and merely "clarified the standard language or offered completely reasonable and negotiable, alternatives."

Finally, Conrac contends that Hartman's proposal was materially nonconforming to various required technical specifications of the color video monitor.

ANALYSIS

The Navy argues that Conrac's protest with respect to the data rights issue should be dismissed as untimely because the firm was aware of the clause H.2 licensing requirement, as incorporated into the RFP by amendment No. 0001, several months before it filed its January 20, 1987, protest with this Office.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), specifically provide that, in procurements where proposals are requested, alleged improprieties which are subsequently incorporated into the solicitation must be protested no later than the next closing date for receipt of proposals following the incorporation.

Here, clause H.2 was incorporated into the RFP in response to Conrac's earlier challenge to the unlimited data rights requirement existing in the RFP as originally issued. If Conrac objected in turn to the more limited provisions of clause H.2, we agree with the Navy that the firm was required by our Regulations to protest the matter no later than the extended June 26 closing date for receipt of initial proposals. See Cosmos Engineering, Inc., B-217430, Jan. 18, 1985, 85-1 CPD ¶ 62.

Our Regulations provide that this Office may consider any protest which is not timely filed where it raises issues significant to the procurement system, 4 C.F.R. § 21.2(c), an exception to our filing procedures which Conrac requests that we utilize here so that we may consider the data rights issue, which Conrac concedes was untimely raised. This "significant issue" exception will be invoked where we believe that the subject matter of the protest is of widespread interest or importance to the procurement community and involves a matter that has not been considered by this Office in a previous decision. Radiation Systems, Inc.--Request for Reconsideration, B-222585.6, Sept. 11, 1986, 86-2 CPD ¶ 285.

However, we decline to invoke the exception to address the matter on the merits because Conrac's proposal was otherwise unacceptable. In this regard, it is clear that Conrac was not entitled to an award under this solicitation in any circumstance because the firm took explicit exception in its revised best and final offer to certain standard terms and conditions of the RFP. Hence, any ruling of the data rights question would be academic at best.

Among other things, the RFP provided for a 90-day stop-work period, FAR, 48 C.F.R. § 52.212-13(a); specified that the risk of loss of or damage to supplies remained with the contractor until either acceptance by the government or delivery to the government, whichever was later, FAR 48 C.F.R. § 52.246-16(b)(2); and provided that any corrected or replacement supplies or parts would have a warranty of equal duration as that for supplies initially delivered, with the warranty period to run from the date of delivery to the government of the corrected or replacement supplies. FAR, 48 C.F.R. ¶ 52.246-17(b)(3). In our view, these provisions are material to the acceptability of an offer because they affect the government's rights under the resulting contract.

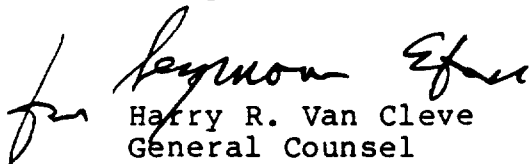
In its revised best and final offer, Conrac took exception to these provisions by calling for only a 30-day stop-work period, by proposing that the risk of loss of supplies would pass to the government immediately upon delivery, and, although providing a 12-month coverage period for items initially delivered under the contract, limited the warranty period for repaired equipment to the unused term of the warranty upon return of the equipment to the government.

We do not accept Conrac's argument that these exceptions were minor in nature and properly the subject for negotiation, and, therefore, we see nothing legally objectionable in the Navy's rejection of Conrac's offer as unacceptable because of the exceptions taken to these material provisions. See Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175.

An offeror should know that its action in taking exception to a solicitation requirement likely may have a decided impact upon the acceptability of its proposal. Computer-vision Corp., B-224198, Nov. 28, 1986, 86-2 CPD ¶ 617. This is especially the case where the exceptions are present in a best and final offer, since an offeror should not anticipate a further opportunity to revise its proposal after it makes its "best and final" submission. See Weinschel Eng. Co., Inc., 64 Comp. Gen. 524 (1985), 85-1 CPD ¶ 574; Mount Pleasant Hospital, B-222364, June 13, 1986, 86-1 CPD ¶ 549. Contrary to Conrac's position, the Navy was under no obligation to discuss the various exceptions taken to the RFP's standard provisions, and the firm was properly excluded from the procurement. Computervision Corp., B-224198, supra, 86-2 CPD ¶ 617 at 6.

For that reason, Conrac is not an "interested party" under our Regulations, 4 C.F.R. § 21.0, to assert that Hartman's offer was technically nonconforming to the terms of the RFP. This is the case because, even if we were to agree ultimately with Conrac on this issue, the firm is not eligible for an award. Therefore, we will not consider the matter. See Engine & Generator Rebuilders, 65 Comp. Gen. 191 (1986), 86-1 CPD ¶ 27.

The protest is denied in part and dismissed in part.


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