The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sperry Marine, Inc.; Aydin Radar & E.W. Division

File: B-227106, B-227106.2

Date: September 14, 1987

DIGEST

1. Protests alleging that the awardee's proposal was technically unacceptable to the RFP's mandatory performance requirements are timely when filed within 10 days after the award, when the basis for the protests was known.

2. Where the awardee's proposal is technically acceptable only if certain formulas contained in the RFP's mandatory performance requirements are revised as proposed in the awardee's proposal, the agency's award and simultaneous contract modification changing those mandatory performance specifications were improper and amounted to a relaxation of the RFP's specifications. The General Accounting Office recommends that the competition be reopened by issuing an amendment notifying all offerors of the relaxation of the performance requirements, and then allowing all offerors to submit revised best and final offers.

DECISION

Sperry Marine, Inc. and Aydin Radar & E.W. Division, a division of Aydin Corp., protest award of a contract to Norden Systems, Inc., by the Department of the Navy pursuant to request for proposals (RFP) No. N00024-86-R-5664(Q). The protesters allege that the award to Norden was improper because Norden's proposal was technically unacceptable. The protesters also allege that the Navy modified mandatory performance specifications set forth in the RFP in order to make award to Norden, but the Navy improperly did not amend the solicitation and give other offerors an opportunity to revise their proposals on the basis of the relaxed specifications.

We sustain the protests.

Background

The solicitation, issued on November 4, 1986, requested proposals for a contract to design, develop, fabricate, test and evaluate the AN/BPS-( ) radar system for use on submarines. The RFP contemplated award of a contract for a base period with options to provide radar systems and related contract items over an additional 5-year period.

The AN/BPS-( ) radar system consists of three components: the inboard electronics, a mast, and an antenna. The inboard electronics component of the radar system is made up of the receiver/transmitter unit, a video signal processor unit, and a radar set control. The transmitter and related specifications are at the core of the present protests.

The RFP provided that the proposed radar systems must be in accord with the Naval Sea Systems Command Contract Specification WS-26308 (the Specification) which was included in the RFP and which contained the basic performance, design, construction and testing specifications for the AN/BPS-( ) radar system. The RFP also provided that the radar system must be able to meet specified performance requirements in the rain and other adverse weather conditions, as well as in other environmental conditions set forth in an appendix to the Specification.

The Specification stated at paragraph 3.4.4.11 that, "The Contractor shall specify whether the transmitter shall be either a linear beam tube or a magnetron oscillator tube type design." The Specification further stated that, whichever type transmitter (linear beam tube or magnetron tube) was offered, the tube must be selected from among "available" tubes and must meet the electrical performance requirements of Specification paragraph 3.2.1.2 and the system reliability requirements of Specification paragraph 3.2.3.1.2.

The solicitation provided that the resultant contract would be a combination of a fixed-price incentive contract (for the full scale development phase during fiscal years 1987 through 1989) and a firm, fixed-price contract (for the production phase during fiscal years 1990 through 1992). According to the Navy, this combination of contract types was chosen because there may be some technical risk during the development phase which is expected to diminish during the production phase.

The Navy received five proposals by the January 15, 1987, closing date for receipt of initial proposals.1/ Initial proposals were evaluated by the Technical Evaluation and Review Panel (TERP) and discussions were held with all offerors. Best and final proposals were submitted by the March 30 closing date. After best and final proposals were reviewed by the TERP and the Contract Award Review Panel (CARP), the Navy determined Norden's proposal to be the most advantageous to the government, price and other factors considered, and awarded the contract to Norden on April 29. Sperry and Aydin filed their protests in our Office on May 7 and 8, respectively.

Protest Issues

The substantive issue for resolution is whether Norden's proposal met the performance criteria set forth in paragraph 3.2.1.2 of Specification WS-26308 regarding "frequency stepping" and "system bandwidth" or whether the Navy relaxed those criteria in order to accept Norden's offer. Frequency stepping and system bandwidth are critical to the performance requirement of decorrelation of rain clutter (the ability of the radar to filter out interference caused by heavy rain).

Protesters' Arguments

Sperry states that it investigated the possibility of using a magnetron tube design for the receiver-transmitter component of its proposal, because a magnetron tube design is significantly cheaper than a linear beam tube design. Both protesters contend that, even though the Specification stated that offerors could propose either a linear beam tube or magnetron oscillator tube transmitter, no known magnetron tube could meet the requirements set forth in other parts of the Specification. Specifically, paragraph 3.4.4.11.3 mandated that the proposed magnetron tube be an "available tube." Furthermore, the Specification stated that an offered magnetron tube must meet the performance requirements of paragraph 3.2.1.2, including certain formulas set forth in that paragraph under the headings "frequency stepping" and "system bandwidth." Sperry states that, in response to its inquiries, magnetron tube manufacturers informed it that there is no available magnetron tube that would meet the performance criteria in the environmental conditions set forth in the RFP. Thus, both Sperry and Aydin based their proposals upon the use of an available

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1/ In addition to the protesters and Norden, the other firms submitting proposals were Motorola, Inc., and Raytheon Co.

linear beam tube which they believed met all performance criteria of the Specification.

The protesters point out that, of the five firms responding to this solicitation, only Norden proposed to use a magnetron tube. They contend that it is unreasonable to believe that there is a satisfactory tube which every offeror except Norden failed to locate. Sperry argues that in order to meet all of the performance requirements with an available tube, it was forced to offer the more expensive linear beam tube technology to its prejudice since Norden was awarded the contract in part because of its lower price.

At a bid protest conference in our Office on these protests, Sperry presented contract modification P00001 as evidence that Norden's proposal did not meet the frequency stepping and system bandwidth requirements of the Specification as originally set forth in the RFP. Modification P00001 was issued by the Navy simultaneously with the contract award to Norden. Therefore, no offerors other than Norden had an opportunity to see certain changes made to the formulas for the frequency stepping and system bandwidth performance criteria. Sperry and Aydin argue that the formulas had to be changed so that Norden's proposed magnetron tube transmitter could meet them. Sperry has introduced the analyses of experts from Georgia Tech Research Institute and from United States General Dynamics Corp. in support of its conclusions that: (1) the formulas contained in modification P00001 significantly changed and relaxed the mandatory frequency stepping and system bandwidth criteria; and (2) an off-the-shelf magnetron tube would be unable to meet the original frequency stepping and system bandwidth criteria without the changes made to the formulas by modification P00001.

Timeliness

Since the RFP's specifications stated that an offeror could propose either a linear beam tube or a magnetron oscillator tube transmitter, the Navy and Norden argue that the protests are really protests against apparent solicitation improprieties which should have been filed before submission of initial proposals in accord with our Bid Protest Regulations. 4 C.F.R. § 21.1(a)(1) (1987). The Navy and Norden also argue that Sperry's introduction of contract modification P00001 is untimely, because Sperry was given a copy of that document on May 7, 1987, but waited until the June 22 conference to raise this issue. Accordingly, the Navy and Norden contend that the alleged impropriety of contract modification P00001 was known to Sperry more than 10 days before Sperry protested on that basis and, under section 21.2(a)(2) of our Regulations, which governs protests of

other than apparent solicitation improprieties, the issue should be dismissed. 4 C.F.R. § 21.2(a)(2).

We find the protests to be timely. Sperry and Aydin are not challenging the propriety of the RFP's specifications, but rather are protesting that Norden's proposal did not meet the mandatory performance requirements. Sperry and Aydin raised this issue in their initial protests filed on May 7 and May 8, respectively. As both protests were filed within 10 days of the April 29 award to Norden, they are timely under section 21.2(a)(2) of our Bid Protest Regulations and will be considered on their merits. 4 C.F.R. § 21.1(a)(2). Moreover, as Sperry specifically challenged Norden's compliance with Specification paragraph 3.2.1.2 in the areas of frequency stepping and system bandwidth in its initial protest letter, we consider contract modification P00001--which was incorporated into the Specification in the contract provided to us by the Navy--to be part of the record to be considered in resolution of timely filed issues.

Analysis

The "Evaluation Factors for Award" section of the RFP stated that proposals would be evaluated based upon technical, management, and cost factors. The RFP further indicated that the technical factor was the most important factor and was considered more important than the management and cost factors combined, while the cost factor was considered more important than the management factor. Under the heading "Technical Factor," the RFP listed nine subfactors in descending order of importance. The first and most important technical evaluation subfactor was "Inboard Design." The evaluation of this subfactor area would include the transmitter-receiver since it is one of the three major components of the inboard electronics. In evaluating inboard electronics, the RFP stated that consideration would be given to, among other things:

> " - The extent to which the proposed design of the in-board electronic units meet the functional baseline requirements (WS-26308) . . .
>
> " - The proposed design to perform each of the functional characteristics specified in WS-26308 for the in-board electronic units . . .
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> " - The proposed design regarding system frequency accuracy and stability."

The Navy contends that, in the judgment of its technical evaluators, Norden proposed to provide a magnetron tube

transmitter which met all the performance requirements of the Specification. The Navy reports that, since Norden's proposal indicates no intention to deviate from the performance requirements of the RFP, the evaluators properly determined the proposal to be acceptable. The Navy also asserts that should Norden's magnetron tube design fail to meet the performance requirements of the Specification, Norden will be obligated to produce a radar system which meets all performance requirements at the fixed-price incentive amount proposed.

We have examined all of the evaluation materials provided to this Office by the Navy. Our review included the TERP report on Norden's best and final proposal, as well as reports (category reports) made by smaller groups of evaluation team members and consultants on individual technical subfactors. The evaluation reports are replete with statements that show the evaluators' concerns that Norden's magnetron tube design posed considerable risk that its radar system might not meet all of the specifications. The evaluators were specifically concerned that the magnetron approach would not adequately decorrelate rain clutter; they also questioned the magnetron design's ability to tune reliably and to manage the frequency stepping mode. Most notably, the TERP report contains the direct statement that "The offeror has taken exception to the Navy's requirement for channel separation to decorrelate rain clutter. . . ."

In this regard, it appears to be significant that nowhere does the Navy contend that Norden's proposal met the frequency stepping or system bandwidth requirements as stated in the original formulas. To the contrary, the Navy, instead of requiring Norden to conform to the Specification formulas, allowed Norden to propose its own formulas, and through modification P00001 the Navy incorporated Norden's formulas into the contract awarded to Norden.

Moreover, it is clear from our review of the evaluation reports and the RFP itself that the Specification formulas for frequency stepping and system bandwidth were critical to ensuring that the proposed radar system would decorrelate rain clutter adequately. The RFP stated only generally that the system is to operate in 12mm/hr. of rain, while the formulas indicated specifically how the proposed system would do so.

Concerning the modification, the Navy has provided its own engineer's explanation of why the contract formulas were modified. The Navy engineer states that, at the outset, the Navy believed that either linear beam tube or magnetron tube design could meet the decorrelation of rain clutter

requirement. However, the Navy engineer points out that the two approaches use very different methods to decorrelate rain clutter. A linear beam tube transmitter decorrelates rain clutter on the basis of its frequency accuracy while a magnetron tube transmitter decorrelates rain clutter using its stability/repeatability capability. The Navy engineer admits that, at the time the RFP was written, the Navy had enough information from vendors to develop frequency stepping and system bandwidth formulas that measure a transmitter's ability to decorrelate rain clutter solely on the basis of frequency accuracy (the linear beam tube approach). The Navy did not, however, develop sufficient information about a magnetron tube transmitter's stability/repeatability capability to prepare frequency stepping and system bandwidth formulas to measure a transmitter's ability to decorrelate rain clutter on the basis of stability/repeatability (the magnetron tube approach). It was only after the Navy examined Norden's proposal and the formulas Norden had developed, that the Navy concluded that alternative standards would be acceptable, leading to the Navy's decision to incorporate Norden's formulas into the contract.

The problem with the Navy's position is that the formulas included in the Specification apply irrespective of the type of technology proposed. Offerors could and did assume quite reasonably that proposed transmitters were to meet the formulas, a circumstance that led the protesters and perhaps others to conclude that only the linear beam tube design (which could meet the formulas) would fully satisfy the Navy's stated requirements. The Navy's position and actions persuade us that the point Sperry and Aydin argue is correct: an offer of the magnetron tube design would not and could not be considered acceptable under the published criteria, and the Navy, when it learned from Norden that formulas specifically applicable to magnetron tube transmitters could be developed and substantiated, had a duty to inform all other offerors that they did not have to use the RFP formulas. See Federal Acquisition Regulation, 48 C.F.R. §§ 15.606(a) and (c) (1986). Generally, where a technical proposal represents a basic change in the government's essential requirements, it can be accepted only if the agency informs the other offerors of the change and affords them an opportunity to submit revised proposals. E.C. Campbell, Inc., B-205533, July 8, 1982, 82-2 C.P.D. ¶ 34. This reflects the fundamental federal procurement principle that all offerors must be treated fairly and equally so as to promote full and open competition. Id.; RCA Corp.; Norman R. Selinger & Associates, Inc., 57 Comp. Gen. 809 (1978), 78-2 C.P.D. ¶ 213.

Conclusion and Recommendation

We find that the Navy's action amounted to a relaxation of the RFP's mandatory frequency stepping and system bandwidth performance requirements. See Motorola, Inc., B-222181, July 11, 1986, 86-2 C.P.D. ¶ 59. Accordingly, we conclude that the award was invalid, and we sustain the protests.

Since it is clear that the Navy's actual requirements may be fulfilled by using a magnetron tube transmitter and revising the frequency stepping and system bandwidth formulas, by letter of today to the Secretary of the Navy we are recommending that the Navy reopen the competition by issuing an amendment to the RFP informing all offerors of its actual needs in accord with the above discussion, and then allow offerors to revise their proposals in another round of best and final offers. If Norden loses the reopened competition, the Navy should terminate Norden's contract and award a new one; if Norden wins, its contract should be amended pursuant to any revisions in the firm's best and final offer.

The protests are sustained.

for Harry R. Van Cleve
Comptroller General
of the United States