



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TM Systems, Inc.
File: B-228220
Date: December 10, 1987

DIGEST

1. Where agency specifically rebuts issues raised in the initial protest and the protester fails to address the agency's rebuttal in its comments on the agency report, the issues are deemed abandoned.
2. Protest against amendment of solicitation is untimely where the protest is filed after the next closing date for receipt of proposals.
3. Agency's failure to inform protester of all deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of meaningful discussions. The protester, however, was not prejudiced since its technical proposal was substantially inferior to that of the awardee and even if there had been meaningful discussions the protester could not have supplanted the awardee's substantially superior proposal.

DECISION

TM Systems, Inc. protests the award of a contract to Atlantic Research Corporation under request for proposals (RFP) No. N66001-87-R-0132, issued by the Naval Ocean Systems Center, Department of the Navy for a digital patching switchboard. TM asserts that the Navy improperly changed the evaluation criteria, failed to conduct meaningful discussions and unreasonably found TM to be technically unacceptable.

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

The RFP, issued December 24, 1986, contemplated the award of a firm, fixed-price contract for the design, fabrication and testing of a 50-connector digital patching switchboard. The RFP provided that award would be made to "the responsible offeror proposing the lowest price for supplies or services

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meeting the requirements of the solicitation." The Navy intended to conduct a technical evaluation on a "pass-fail" basis.

The RFP was twice amended to answer technical questions of TM and other offerors. By the closing date for receipt of proposals, the Navy had received six proposals and, after the initial technical evaluation, determined that only Atlantic's proposal was technically acceptable. The Navy, however, decided to include all six offerors in the competitive range.

By letter of May 29, 1987, the Navy informed TM that it's proposed end-item did not meet the solicitation specifications because TM had not proposed a correct number of normal and non-normal-thru modules. TM was given the opportunity to revise its technical and cost proposals and to submit a best and final offer.

After evaluation of best and final offers, the Navy determined that TM's proposal was technically unacceptable because TM had failed to demonstrate how the end-item would meet the RFP specification requirements. Specifically, the Navy concluded that details provided in TM's proposal were too general to allow evaluation.

On June 18, 1987, the Navy amended the RFP and changed the evaluation criteria. The Navy concluded that the technical evaluation should be conducted on a "grading" type of evaluation rather than on a "pass-fail" basis. The following evaluation criteria were listed in descending order of relative importance:

- (1) Technical
 - (a) Soundness of technical approach
 - (b) Compliance with specifications and requirements
 - (c) Understanding of the problem
 - (d) Identification of problem areas
- (2) Management
 - (a) Demonstrated performance
 - (b) Acceptable delivery schedule
 - (c) Availability of facilities and equipment
 - (d) Availability of service and supplies
- (3) Price

The Navy informed offerors by telephone and letter of the changed evaluation criteria and of their right to revise their proposals. Offerors were warned that their technical

proposals must give clear, detailed information sufficient to enable evaluation. In addition, the amendment stated that award could be made without further discussion.

TM submitted additional information in response to the RFP amendment. After evaluation of the second best and final offers, the Navy determined that TM's proposal was not technically acceptable because TM had restated the RFP specifications without explaining how it intended to comply. The Navy concluded that TM was no longer in the competitive range. On September 4, 1987, the Navy awarded a \$1,211,930 contract to Atlantic.

Initially, we note that TM has abandoned the improper evaluation issue it raised in its original protest letter. TM alleged that the Navy had improperly evaluated its proposal. In the report on TM's protest, the Navy responded in detail concerning TM's allegation, and TM, in commenting on the report, did not attempt to rebut the Navy's response. Where an agency specifically addresses an issue raised by the protester in the initial protest and the protester fails to rebut the agency's responses, we consider the issues to have been abandoned by the protester. Pacord, Inc., B-224249, Jan. 5, 1987, 87-1 C.P.D. ¶ 7.

TM also protests that it was improper for the Navy to amend the RFP to change the evaluation criteria after the receipt of initial best and final offers. TM contends that the Navy changed the evaluation criteria in order to exclude TM from further negotiations under this RFP. TM's challenge to the new evaluation criteria included in the final amendment to the RFP concerns an alleged impropriety incorporated into the RFP. Our Bid Protest Regulations require that protests of this nature shall be filed before the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1987). Since TM did not raise this objection until well after the closing date for the second round of best and final offers, this objection is untimely and will not be considered.

TM also protests that the Navy failed to conduct meaningful discussions so as to afford the firm the opportunity to submit an improved technical proposal.

The governing provision of the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4) (Supp. III 1985), as implemented in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(b) (1986), requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. Price Waterhouse, 65 Comp. Gen. 205, 86-1 C.P.D. ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 C.P.D. ¶ 333. This fundamental requirement includes advising offerors of

deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of a revised proposal. FAR, §§ 15.610(c)(2) and (5); Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 C.P.D. ¶ 400. Thus, it is well settled that for competitive range discussions to be meaningful, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in technical transfusion or technical leveling. Advanced Technology Systems, B-221068, Mar. 17, 1986, 86-1 C.P.D. ¶ 260; Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 C.P.D. ¶ 439.

Although agencies are not obligated to afford offerors all-encompassing discussions, Training and Management Resources, Inc., B-220965, Mar. 12, 1986, 86-1 C.P.D. ¶ 244, or to discuss every element of a technically acceptable competitive range proposal that has received less than the maximum possible score, Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 C.P.D. ¶ 380, they still generally must lead offerors into the areas of their proposals which require amplification. Furuno U.S.A., Inc., B-221814, *supra*; Technical Services Corp., B-216408.2, June 5, 1985, 85-1 C.P.D. ¶ 640. In short, discussions should be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. Tracor Marine, Inc., B-207285, June 6, 1983, 83-1 C.P.D. ¶ 604.

In this case, we agree with TM that the Navy failed to conduct meaningful competitive range discussions. We have carefully reviewed the Navy's May 29 letter and the subsequent solicitation amendment changing the evaluation criteria but cannot conclude that these discussions sufficiently advised TM of the areas of deficiency in its proposal so that TM had an opportunity to satisfy the government's requirements.

The Navy, in its evaluation of TM's second best and final offer, determined under soundness of technical approach that TM had parroted the RFP specifications without defining the connectors and patch cord they intended to use, or indicating the type of connection and switch they intended to use for the normal-thru configuration or what mechanism they intended to use to break this connection upon insertion of a patch cord into the patch module housing. The Navy also found that TM had failed to demonstrate experience in building patch panels. Each of these deficiencies had been noted by the Navy in their evaluation of TM's initial technical proposal. In its May 29 letter to TM, the Navy, however, only identified to TM its failure to propose a full complement of normal-thru and non-normal-thru modules in accordance with specifications. The Navy did not identify

any of the other deficiencies it had noted in TM's initial proposal.

The amendment of the RFP evaluation criteria also did not sufficiently advise TM of the areas of deficiency in its proposal.^{1/} While the new criteria informed offerors of detailed technical information that the Navy would evaluate, the instructions to the RFP had also informed offerors of the requirement to provide sufficient detail to indicate the offerors' proposed means of complying with the specifications. The Navy's failure to inform TM of its failure to indicate how it would accomplish the contract work left TM with the impression that the only problem area in its technical proposal was the identified specification error. Once discussions were opened, the agency must point out all deficiencies in the offeror's proposal and not merely selected areas. Checchi & Co., 56 Comp. Gen. 473, 77-1 C.P.D. ¶ 232 (1977).

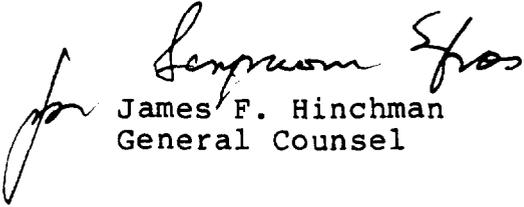
Despite our conclusions, we will sustain a protest alleging that the government failed to hold meaningful discussions with a firm only if the protester demonstrates that it was prejudiced by the government's actions. B.K. Dynamics, Inc., B-228090, Nov. 2, 1987, 87-2 C.P.D. ¶ _____; Science and Management Resources, Inc., et al., B-212628, et al., Jan. 20, 1984, 84-1 C.P.D. ¶ 88. The record does not show that TM was prejudiced here. First, TM does not state that if there had been meaningful discussions it could have raised its technical proposal to the level of Atlantic's. In addition, our review of the Navy's technical evaluation leads us to conclude that even if there had been meaningful discussions TM could not have improved its proposal to the level of Atlantic's proposal.

Atlantic's second best and final proposal was substantially superior to TM's proposal. Atlantic's technical proposal was awarded 93.75 percent of the available technical points, while TM's proposal received only 50.94 percent of the available technical points. Under the soundness of technical approach, the most important technical factor, the difference between Atlantic's and TM's proposal was 62.50 percent. Even if TM were given all the points that Atlantic received under this category, TM's proposal would still be 11.60 percent lower than Atlantic's proposal. Thus, TM could not have supplanted Atlantic's substantially superior proposal even if there had been meaningful discussions.

^{1/} The Navy's amendment of the evaluation criteria and notification to offerors that they could revise their proposals constituted discussions. See Price Waterhouse, 65 Comp. Gen. at 209, supra.

Thus, TM has not demonstrated that it was prejudiced by the Navy's failure to hold meaningful discussions with TM.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel