The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McManus Security Systems

File: B-231105

Date: July 21, 1988

DIGEST

1. Protest challenging rejection of protester's offer is timely despite contracting agency's contention that it sent letter to protester advising of rejection more that 10 days before the protest was filed where protester denies ever receiving the letter and protest was filed within 10 days after protester was orally notified that award was made to another offeror.

2. Contracting agency engages in discussions, not clarifications, where it asks offeror to provide information relating to essential functions of its proposed equipment and offeror's responses have a determinative effect on the agency's evaluation of the proposal.

3. Protester's proposal was properly rejected as technically unacceptable where protester fails to show that its proposal or other descriptive material submitted as a result of discussions demonstrated that the equipment it offered would include an essential feature required by the solicitation; protester's subsequent submission of detailed explanation with its protest does not satisfy protester's obligation to show through its proposal that its equipment meets the solicitation requirements.

4. Where proposal is included in the competitive range only because it is susceptible to being made acceptable and discussions later make clear that proposal should not have been included in the competitive range initially, proposal may be eliminated from the competitive range without an opportunity to submit a revised proposal.

DECISION

McManus Security Systems protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. N00014-87-R-HP29, issued by the Naval

Research Laboratory (NRL) for a video intrusion detection system. McManus principally contends that NRL failed to hold meaningful discussions or allow McManus to submit a best and final offer (BAFO) and improperly evaluated McManus' proposal as technically unacceptable. We deny the protest.

The RFP, issued on August 13, 1987, called for offerors to provide a video intrusion detection system for the perimeter of NRL's facility. As described in the RFP, the purpose of the system is to allow a guard located in a central alarm room to monitor activities around the perimeter of the NRL facility through the use of closed circuit television cameras mounted along the perimeter and linked to an intrusion detection signal analyzer. In the event that changes in the scenes being monitored indicate attempts at penetrating the facility, the detection system is to go into its alarm state and the scene is to be displayed on a video monitor to the dispatcher who can then deploy a response team. The performance requirements and specifications for the system are set out in Attachment J-1 of the RFP. Award was to be made to the lowest priced, technically acceptable offeror.

Initial proposals were submitted by 10 offerors. The technical proposals were forwarded to NRL's technical evaluator, who found that one offer was acceptable, one was unacceptable, and eight, including McManus', were unacceptable but susceptible to being made acceptable. NRL then sent a letter dated December 8 to McManus asking it to respond to five questions concerning its technical proposal. According to the contracting officer, similar letters were sent to the other seven offerors whose proposals were found unacceptable but susceptible to being made acceptable. McManus responded to NRL's inquiry by letter dated December 21. After submission of the letter, McManus states that oral discussions with the NRL technical evaluator continued. In response to one such conversation, in late January 1988 McManus submitted a preliminary translation from the original German of the specifications for one part of the system it offered, the video signal analyzer.

According to NRL, final evaluation of the proposals was delayed due to filing of an agency-level protest by the offeror found technically unacceptable. Accordingly, by letter dated January 26, NRL requested and later received extensions of their acceptance periods from McManus and the other offerors. NRL states that a final technical evaluation of the proposals subsequently was performed. Based on the offerors' responses to NRL's inquiries regarding their technical proposals, the NRL evaluator concluded that four of the eight offerors initially considered susceptible to

being made acceptable, including McManus, were technically unacceptable; a total of five offerors were considered technically acceptable. NRL then made award to the lowest priced of the five offerors, without calling for submission of BAFOs.

NRL states that it advised McManus by letter dated March 25 that it was no longer being considered for award. McManus denies receiving the letter and states that it first became aware that it had been eliminated from the competition on April 11, when it was orally advised by NRL that award had been made to another offeror. McManus then filed its protest with our Office on April 21.

McManus challenges NRL's determination that its proposal was technically unacceptable, arguing that the discussions held with McManus were not meaningful and, in any event, NRL improperly failed to give McManus an opportunity to submit a BAFO after discussions were concluded. McManus also contends that NRL failed to follow the evaluation scheme in the RFP since the system McManus offered was compared to the brand name equipment on which the specifications in the RFP were based rather than to the specifications themselves and since NRL did not allow McManus to present a live demonstration of its system. McManus also challenges NRL's failure to solicit BAFOs from other offerors in the competitive range after discussions were held with McManus.1/

As a preliminary matter, NRL contends that the protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988), protests such as this one must be filed within 10 working days after the protester is or should be aware of the basis of protest. Here, NRL states that it notified McManus by letter dated March 25 that its proposal had been eliminated from the competitive range. Since the protest was not filed until April 21, NRL argues that it is untimely. McManus, however, has submitted affidavits from its employees responsible for opening the firm's mail stating that the March letter was never received. According to McManus, it first became aware that its proposal was no longer being considered for award on April 11, when it was orally notified by NRL that award had been made to another offeror. Since the protest was filed less than 10 days later on April 21, McManus argues that it is timely.

1/ In its initial submission, McManus also contended that NRL had improperly disclosed the identities of the offerors and McManus' proposed price to the other offerors while the procurement was still ongoing. McManus subsequently abandoned this contention.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. Here, McManus states that it never received the March 25 letter from NRL; NRL has no basis upon which to dispute McManus' statement. As a result, we find that the protest is timely since it was filed within 10 days after April 11, when McManus states that it was first notified that it had not been selected for award.

As discussed in detail below, we agree that NRL engaged in discussions rather than mere clarifications with McManus regarding its technical proposal. In our view, however, NRL was not required to give McManus an opportunity to submit a revised proposal after discussions were completed since NRL reasonably found, based on McManus' response to NRL's inquiries, that McManus' proposal was technically unacceptable.

After an initial technical review of McManus' proposal, NRL in a letter dated December 8, 1987, posed five questions to McManus regarding its technical proposal. The letter asked McManus to furnish proposed camera angles and its system's specifications for minimum pixels and gray scales, as well as to explain how the system would meet the RFP requirements for evaluating targets in relation to size, speed and direction and for a trace feature relating to an intruder's path. NRL maintains that the December 8 letter merely requested clarification of McManus' proposal and did not rise to the level of discussions. We disagree.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601. In contrast, a request for clarifications is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. Here, the questions NRL posed in its December 8 letter related to essential functions of the detection system called for by the RFP. Further, McManus' responses to these questions had a determinative effect on NRL's evaluation of its proposal. After considering McManus' responses as well as other descriptive material later provided by McManus, the technical evaluator, who originally found McManus' proposal susceptible to being made acceptable, concluded that it was technically unacceptable. Under these circumstances, we find that NRL's contacts with McManus clearly constituted discussions, not clarifications. Id.

McManus contends that once discussions were opened, NRL was required to give McManus an opportunity to submit a revised proposal. In view of our conclusion, discussed below, that NRL properly concluded that McManus' proposal was technically unacceptable, we find this argument to be without merit.

NRL states that there were two principal reasons for its conclusion that McManus' proposal was technically unacceptable, first, that McManus failed to furnish adequate specifications on its system as called for by the RFP, and, second, that McManus failed to demonstrate that its system provided the tracking feature required by the RFP.2/ Since we find that NRL properly concluded that McManus' proposal was unacceptable for failure to demonstrate the required tracking feature, we need not address the alleged lack of specifications.

The performance requirements and specifications of the detection system were set out in Attachment J-1 of the RFP. Paragraph 2.f of Attachment J-1 requires the signal analyzer of the system to have a tracking feature which will cause the system to go to alarm condition only if the intruder makes a logical progression across the zone being monitored. The object of the requirement is to have the system disregard nuisance activity such as blowing vegetation. NRL maintains that even though the requirement was set out in the RFP and was raised in the December 8 letter, McManus failed to show that its system would provide the tracking feature. According to the NRL technical evaluator, the descriptive material submitted by McManus shows that its system will sound an alarm whenever any one of the sensitive cells in each camera is disturbed, rather than delaying the alarm until a "track" across the sensitive cells is made by the intruder. McManus contends that its system does provide the tracking feature and that the NRL evaluator was unable to accurately evaluate the system's capability because it functions differently than the brand name system on which the specifications were based and with which the evaluator is familiar.

In reviewing an agency's technical evaluation, our Office will not independently determine the relative merit of an

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2/ NRL also maintains that McManus' proposal lacked warranty and service information called for by the RFP. Unlike the alleged lack of specifications and failure to demonstrate the tracking feature, however, there is no indication that NRL's concerns about the warranty and service information were raised with McManus at any time before its proposal was eliminated from the competition.

offeror's technical proposal; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and the procurement laws and regulations. The protester bears the burden of establishing that an evaluation was unreasonable; mere disagreement with the agency's judgment does not meet this burden. Wellington Associates, Inc., B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. A clear showing of unreasonableness is particularly necessary where an agency is procuring sophisticated technical equipment. Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290. Moreover, in evaluating proposals an agency properly may eliminate a proposal from the competitive range based on informational deficiencies which are so material that major revisions or additions would be required to make the proposal acceptable. ASEA Inc., B-216886, Feb. 27, 1985, 85-1 CPD ¶ 247.

Here, McManus has not shown where in its proposal the tracking feature is discussed in any detail; on the contrary, the proposal merely repeats the language in the RFP. Such a blanket statement of full compliance with solicitation requirements is not sufficient to establish that the equipment meets those requirements. AZTEK, B-229525, Mar. 2, 1988, 88-1 CPD ¶ 218. Further, although McManus' compliance with paragraph 2.f was clearly raised in NRL's December 8 letter, McManus' brief reply in its December 21 letter did not directly address the tracking feature; rather, the letter focuses on the system's capability to analyze targets moving in all directions and to be preset to handle varying traffic movement conditions. In contrast to the discussions in its proposal and December 21 letter, McManus furnished detailed technical explanations with its protest submissions regarding how its system provides the tracking feature. McManus was required, however, to furnish sufficient detailed information showing that the system offered would meet the RFP requirements while its proposal was being considered, or risk rejection. See Johnston Communications, B-221346, Feb. 28, 1986, 86-1 CPD ¶ 211. In view of the limited discussion of the tracking feature provided with its proposal and in response to NRL's December 8 letter, McManus has not shown that the technical evaluator acted unreasonably based on the information before him in concluding that McManus' system did not offer the tracking feature required by the RFP.

Since McManus was properly found technically unacceptable, there was no requirement that it be given an opportunity to submit a revised proposal after discussions were concluded. If, as in this case, a proposal is included in the competitive range only because it is susceptible to being made acceptable, and discussions later make clear that the

proposal does not belong in the competitive range because it is technically unacceptable, the proposal may be eliminated from the competitive range without an opportunity to submit a revised proposal.3/ See FAR § 15.609(b); Operations Research, Inc., 53 Comp. Gen. 860 (1974), 74-1 CPD ¶ 252; RAM Enterprises, Inc., B-209455, June 13, 1983, 83-1 CPD ¶ 647.

Further, we see no merit to McManus' contentions that NRL's evaluation of its system was improperly based on a comparison with another company's system rather than the specifications in the RFP, or that NRL improperly denied McManus an opportunity to present a live demonstration of its system. While it appears that the specifications in the RFP were based on another company's system, there is no indication that McManus' system was improperly compared to that system rather than to the RFP requirements; on the contrary, as discussed above, NRL reasonably found that McManus failed to show that its system offered the tracking feature clearly set out in the RFP. Further, there was no requirement in the RFP for a live demonstration and even assuming, as McManus contends, that the technical evaluator was familiar with the actual operation of the other company's system, we see no reason why the evaluator was obligated to attend a demonstration of McManus' system. Rather, McManus bore the burden of demonstrating in its proposal that its system met the RFP requirements, and risked rejection if it failed to do so.

The protest is denied.

for James F. Hinchman
General Counsel

3/ McManus also challenged NRL's failure to solicit BAFOs from the other offerors in the competitive range after discussions were completed. McManus is not an interested party to raise this issue since it was properly eliminated from the competition as technically unacceptable and therefore would not be entitled to submit a BAFO even if its protest were sustained on this ground. See 4 C.F.R. § 21.0(a); Atrium Building Partnership, B-228958, Nov. 17, 1987, 67 Comp. Gen. ___, 87-2 CPD ¶ 491.