



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: National Medical Diagnostics, Inc.
File: B-232238
Date: December 2, 1988

DIGEST

1. Protester who proposed a newly configured model brain scanner and who admittedly could not provide operational data with respect to some request for proposal requirements has not shown that the agency acted unreasonably in excluding its proposal from the competitive range.
2. Protest concerning the scoring system set forth in the solicitation is untimely because it was filed after the date set for receipt of proposals.
3. Since protester was properly excluded from the competitive range, it is not an interested party to challenge the award.

DECISION

National Medical Diagnostics, Inc., protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. NIH-CL-88-04, issued by the National Institutes of Health (NIH) for the acquisition of a positron-emission tomograph (PET) brain scanner. The protester alleges that the technical evaluation and the competitive range determination were improperly conducted.

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

BACKGROUND

The RFP was issued on March 11, 1988, to acquire whole-body and brain PET scanners. Three offerors--National, Scanditronics, Inc., and Siemens Medical Systems, Inc.--submitted timely proposals by the April 25 closing date.

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National proposed a model SP3000C, whole-body scanner manufactured by PETT Electronics, Inc., and a PETT model SP3000CH brain scanner. In explaining why it could not provide performance information for the brain scanner as required, the protester's proposal stated that "no SP3000CH has been purchased from or constructed by PETT Electronics, Inc." ^{1/} An initial technical evaluation conducted on April 26 concluded that none of the offered whole-body scanners met all of the mandatory specifications contained in the RFP, and that only one of the brain scanners--not the protester's--met all of the mandatory specifications for that requirement. As a result, NIH on May 13, issued an amendment to the RFP eliminating the whole-body scanner requirement and relaxing some of the mandatory specifications for the brain scanner; offerors were invited to submit new or revised proposals based on the revised requirements.

The amended RFP informed offerors that NIH sought a "state-of-the-art" system; however, it specifically indicated that the agency was primarily interested in scanners which were in existence with features which were fully demonstrable on a working system. Although prototypes were not excluded from consideration, offerors were cautioned that points could be deducted during the technical evaluation for features which did not currently exist. Award was to be made on the basis of the proposal presenting the best advantage to the government considering technical merit, price and other factors. Technical considerations were listed as paramount but offerors were advised that they were not to be considered to the exclusion of price; the RFP further provided that price could become a paramount consideration if proposals were found to be essentially technically equal.

The solicitation contained two types of specifications--mandatory and non-mandatory (or "desirable"). Offerors were advised that a failure to meet any mandatory specification would result in the elimination of a proposal from further consideration. Points were not to be

^{1/} Certain other RFP requirements for the brain scanner were addressed by reference to technical data relating to the whole-body scanner; for other requirements, National stated that information was not available or that it would be provided at a later time.

awarded for merely meeting the mandatory requirements ^{2/}; rather, points were primarily to be awarded with respect to non-mandatory specifications which were listed in order of importance under each of the following major evaluation areas:

Performance Specifications	40 points
Physical Features	30 points
Software	20 points
Company Expertise	10 points

All three offerors again submitted proposals by the amended June 14 closing date. In addition to reproposing the SP3000CH brain scanner, National proposed another model designated as the SP3620H; however, like its first proposal, some of the required technical information was provided by reference to the SP3000C whole-body scanner or was stated to be presently unavailable. On June 30, the technical evaluation panel found National's proposal to be technically unacceptable; the other two proposals were found to be acceptable. The results of the panel's scoring were reported as follows:

	<u>Scanditronics</u>	<u>Siemens</u>	<u>National</u>
Point Totals	70	54	26

The narrative accompanying the evaluation of the protester's proposal indicated many problems including a concern over a lack of information presented in the proposal and a concern that the SP3620H model had never been built in the configuration contained in the proposal. It appears, however, that the evaluators did not find that National's proposal failed to meet at least the mandatory requirements of the RFP.

The scores, together with narrative findings and questions for further discussions, were forwarded to the contracting officer. On July 28, after considering the panel's findings, comparing the three proposals, and considering the prices submitted (the protester's price was approximately 20 percent higher than the others), the contracting officer determined that there was no real possibility that National's proposal could be improved to the point where it would receive the award. National was advised of this decision on the same day that the other offerors were

^{2/} Points could be awarded, however, for performance superior to the level stated in a mandatory requirement.

sent discussion questions and asked to submit revisions by August 4, when oral discussions were scheduled to commence.

We have been advised that, pursuant to 31 U.S.C. § 3553(c)(2) (Supp. IV 1986), a contract was awarded to Scanditronics on October 3 because of urgent and compelling circumstances.^{3/}

PROTEST

In its protest, National generally argues that neither the technical evaluation nor the competitive range determination properly took into account the state-of-the-art features of its proposed scanner. The protester also suggests that it was unfairly treated because other offerors were allegedly given an opportunity to clarify their proposals while National was not. Also, the protester alleges that the technical scoring was improperly conducted. For example, the protester complains that the panel should not have used the cumulative average method of scoring; that the panel did not actually read all of its proposal; and that the strengths and weaknesses listed in the panel's report do not directly relate back to specific RFP requirements. In this regard, the protester finally argues that it should have received some points for meeting the mandatory specifications.

As to the competitive range determination itself, National argues that it was both premature and improper. It was allegedly premature according to the protester because the panel made no independent competitive range recommendation based on technical considerations alone. National also argues that the determination was improper because the contracting officer considered the protester's price proposal and the relative standing of the offerors in comparison to one another before reaching his conclusion.

^{3/} The protester challenges NIH's factual basis for its determination to proceed with award, in essence, alleging that the urgent and compelling circumstances cited by the contracting officer constitute nothing more than the routine business of NIH. Since the agency has informed us of its written determination to go forward with the award it has complied with its statutory obligations. See Progressive Learning Systems, B-218483, July 23, 1985, 85-2 CPD ¶ 72.

The protester has submitted a great amount of technical information disputing specific findings of the panel.^{4/} In essence, National disputes the conclusion that the SP3620H scanner is a prototype, although it concedes, for example, that the lack of a prior identically configured scanner system is to be expected in any proposal containing state-of-the-art equipment. As to the lack of sufficient supporting technical information in its proposal, the protester disputes the panel's findings with respect to some of the data found wanting and argues, in essence, with respect to other data, that it could have been provided during discussions which were improperly foreclosed by the contracting officer's decision of July 28.

ANALYSIS

It is not the function of this Office to evaluate technical proposals de novo or to resolve disputes over their scoring. Rather, we will examine an agency's evaluation and competitive range determinations only to ensure that they were reasonable. The determination of the relative merits of proposals, particularly with respect to technical considerations, is primarily a matter of administrative discretion which we will not disturb unless it is shown to be arbitrary. Systems Processes Engineering Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ _____. We think that it is particularly incumbent upon the protester to make a clear showing that the agency technical judgment is flawed where, as here, the procurement involves highly technical scientific equipment. Litton Systems, Inc., et al., B-229921 et al., Mar. 10, 1988, 88-1 CPD ¶ 448. A protester's mere disagreement with the agency's judgment is not sufficient. Instruments & Controls Service, Co., B-230799, June 6, 1988, 88-1 CPD ¶ 531. Offers which are found to have no reasonable chance of being selected for award as submitted, and which would require major revisions to become acceptable, may be excluded from the competitive range. Twin City Construction Co., B-222455, July 25, 1986, 86-2 CPD ¶ 113. Where such a proposal is considered outside the competitive range, the agency has no duty to hold discussions with the offeror. Aydin Corp., B-224354, Sept. 8, 1986, 86-2 CPD ¶ 274.

For the reasons set forth below, we conclude that National has failed to clearly establish that NIH's technical

^{4/} Much of this information was contained in attachments to the offeror's final submission which were often not keyed to the specific evaluation findings and included a great deal of unexplained technical jargon.

judgment in excluding the protester's proposal from the competitive range was unreasonable, or that its method of determining the competitive range was improper.

At the outset, we note that the protester is incorrect in characterizing the RFP as seeking a state-of-the-art scanner without qualification and without regard to price considerations. While the general functional specifications call for a state-of-the-art device, the specific characteristics explicitly provide that all features, mandatory and non-mandatory alike, should be demonstrable on a fully functional machine at the time of proposal submission. Offerors were specifically advised that, while aspects of a system which were not demonstrable in this manner might be considered, points could be deducted for such items during the technical evaluation. With respect to price, while technical merit was stated as paramount, the RFP specifically noted that this preference was "not to the exclusion of price." Thus, we disagree with the protester's basic argument that the RFP sought a state-of-the-art scanner without any qualifications about whether it was found proven or not, and without regard to price considerations.

Similarly, we think that the protester's varied arguments against the scoring of the proposals are not supported by the record. Our review of the evaluation record discloses that the evaluation panel followed the RFP factors and subfactors. The relative weight to be accorded those factors was set forth in the RFP, including a provision which explained that mandatory characteristics would only be scored when the proposal was considered to offer features which exceeded the RFP requirements. In this regard, to the extent the protester objects to the RFP scoring scheme, the protest is untimely as the scoring method to be used was apparent from the face of the solicitation and, therefore, any objection to it should have been raised prior to the closing date for the receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Finally, while the RFP did not specifically provide that the scores assigned by individual evaluators would be cumulatively averaged, it did not preclude this method, and the protester has not shown that such a method is unreasonable, or that the results of the evaluation would have been appreciably changed if some other method of tallying final scores had been used.

Likewise, the protester's contention that the evaluation panel was required to make a competitive range recommendation prior to the contracting officer's competitive range determination is also incorrect. Federal Acquisition Regulation (FAR) § 15.609(a) specifically provides that

the contracting officer, not the technical evaluators, is to make the competitive range determination. In any event, the contracting officer's determination was made based in large part on the panel's technical report. Similarly, we find no support for the protester's argument that the contracting officer was precluded from considering the relative merits of the competing proposals and their prices in determining whether a proposal had a reasonable chance of being selected for award. In fact, the regulations specifically state price or cost is to be considered in the competitive range determination and that proposals without a reasonable chance for award--as compared to others--be eliminated from the competitive range. FAR § 15.609.

We also disagree with the protester's view that the agency should have conducted discussions with it because it did so with the other two offerors. Since National was not considered to be within the competitive range, there was no duty to conduct discussions with it. Aydin Corp., B-224354, supra. Further, the record shows that discussions were only conducted with the other two offerors after they were included within the competitive range. At that time, the discussions were proper. Id.

The protester's objections to the agency's technical judgment fall into two broad categories--that the evaluators acted unreasonably in regarding National's proposed scanner as a prototype, and that they acted unreasonably in downgrading the protester's proposal for failing to fully demonstrate the scanner's capabilities by supplying certain required data.

The record shows that the evaluators concluded that National's proposal was unacceptable based primarily on their finding that the brain scanner offered was a prototype system based on a whole-body scanner detector design. While the evaluators noted that the design offered several "interesting" features, they were concerned that those features added to the scanner's complexity and were largely unproven. Further, the evaluators were concerned about the fact that the unit's software had not been highly developed and that the computer had never been configured as proposed. Finally, the evaluators noted a number of informational deficiencies which made it difficult to determine system performance and the company's expertise.

We are unable to conclude from the technical material submitted in support of National's position, that the scanner configuration it proposed in response to the RFP was a proven commodity. By the protester's own admission,

the particular configuration is new. Consequently, we find no basis upon which to object to the agency's categorization of National's unit. With respect to providing technical support documentation concerning the system as proposed, we note that, even in its final comments, the protester continues to state that it cannot fully demonstrate some of the features of the SP3620H scanner. Our review of the protester's final proposal indicates numerous references to the firm's inability to provide support data. Even giving National the benefit of the doubt by assuming that some of the information contained in its final comments serves to clarify portions of its proposal, such a presentation is no substitute for the protester meeting its obligation to submit a timely and adequately written proposal. See, IMR Services Corp., B-230586, June 9, 1988, 88-1 CPD ¶ 548. We have carefully reviewed the agency evaluation record and all of the protester's technical submissions and it is our view that the protester has not clearly shown that the agency's technical judgment concerning this highly complex scientific equipment had no rational basis. Litton Systems, Inc., et al., B-229921 et al., supra.

The protester also questions whether Scanditronic's offer was properly accepted by the agency because the firm allegedly failed to disclose information concerning its ownership of another firm, and because of questions concerning the awardee's compliance with the Buy American Act. Since National was, in our view, properly determined to be outside of the competitive range, and a firm other than the awardee also was in the competitive range, the protester would not be in line for award even if we were to conclude that these allegations had merit. Hence, National is not an interested party to challenge the award to Scanditronics under our Regulations and we therefore will not consider this aspect of its protest. 4 C.F.R. § 21.0(a); DeCamp-Brown & Assocs., B-231397, June 10, 1988, 88-1 CPD ¶ 559.

The protest is denied in part and dismissed in part.

John F. Mitchell
for James F. Hinchman
General Counsel