



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: American Training Aids, Inc.
File: B-232291
Date: December 19, 1988

DIGEST

1. Protest that offeror was improperly excluded from the competitive range is denied where agency reasonably concluded that the offeror's proposal was technically unacceptable and could not be made acceptable through discussions.
2. Protest of alleged solicitation defects, apparent on the face of the solicitation, is untimely when filed after receipt of initial proposals.

DECISION

American Training Aids, Inc., protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. DABT60-88-R-0044, issued by the Department of the Army. We deny the protest in part and dismiss it in part.

The RFP contemplated the award of a cost-plus-incentive-fee contract for an instrumentation system to be used for the testing of prototype weapons at the Advanced Combat Rifle (ACR) Range at Fort Benning, Georgia, with the contractor to design, develop, test, evaluate and install a computer controlled test system consisting of sensors and instrumented fixed and moving target mechanisms for the ACR field test.

Offerors were required to submit separate technical, management and cost proposals. The RFP advised offerors that proposals would be evaluated and scored on the basis of technical, managerial and cost factors, in that order of importance. Costs were to be evaluated on the basis of cost realism. Offerors were further advised that their "technical" proposals would be evaluated under the following factors listed in descending order of importance:

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- a. Requirements Assessment
- b. Software Development Methodology
- c. Design Integration Methodology
- d. Reliability/Maintainability Methodology
- e. Fabrication and Installation Methodology
- f. Training Methodology

The RFP stated that factors a and b were of equal weight, and factors c, d and e were of equal weight.

The Army received proposals from three firms, including ATA, by the May 31, 1988, closing date. The Technical Evaluation Board (TEB) concluded that ATA's proposal was unacceptable and could not be made acceptable through discussions without a complete revision because it failed to adequately address the solicitation requirements. ATA's proposal subsequently was determined to be outside the competitive range, and on July 28, the contracting officer notified ATA that its proposal would not be considered further. Subsequent to the agency debriefing concerning the technical evaluation of its proposal, ATA filed this protest.

ATA contends that it should have been given an opportunity to improve its proposal through discussions. The protester argues that its capabilities are superior to its competitors' and it disagrees with the Army's conclusion that its proposal was unacceptable and not for inclusion in the competitive range. It asserts it was hampered in its efforts to prepare its proposal by the Army's refusal to address certain preproposal questions ATA asked of it and alleges that at least one, if not both, of its competitors had the advantage of a preproposal site visit denied ATA. Finally, the protester argues that the Army improperly used in the solicitation ideas and concepts proprietary to ATA.

Whether a proposal is technically acceptable is within the discretion of the contracting agency and we will not disturb an agency's decision to exclude an offeror from the competitive range unless that determination is unreasonable or in violation of procurement statutes or regulations. See HSQ Technology, B-227935, Oct. 2, 1987, 87-2 CPD ¶ 329. Generally, offers that are unacceptable as submitted and would require major revisions to become acceptable are not for inclusion in the competitive range. Moreover, the protester bears the burden of proving that the agency's evaluation is unreasonable, and this burden is not met by

the protester's mere disagreement with the evaluation or its good faith belief that its proposal should have received a higher rating. See Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94. We have reviewed the proposal submitted by ATA and all the evaluation documents and, as discussed below, we cannot conclude that the Army's determination that ATA's proposal was unacceptable was unreasonable.

The narrative accompanying the TEB's scoring indicates that the TEB lacked confidence that the protester's instrumentation system could in fact meet the performance specifications of the solicitation. The TEB criticized ATA's proposal as consisting primarily of a repetition of specific RFP requirements; as containing too many generalities; as not providing any significant details or specific information to support its general statement that its system met the specifications; and in some instances, as explicitly stating that certain specification requirements could not be met. Although the TEB identified numerous deficiencies in ATA's proposal in both evaluation areas--technical and management--the most significant deficiencies in ATA's proposal were in the technical area. For example, with regard to factor a, requirements assessment, subfactor b, target hit sensor, the TEB noted that ATA disagreed with the specification requirements and stated in its proposal that it was unable to meet the requirements as written.

The TEB also had reservations about subfactor e, lane control and data acquisition subsystem (LCDAS). The TEB was of the opinion that ATA's proposal did not provide sufficient information on specific data acquisition, the type of computer, or programming limitations. Further there was no indication in the proposal that there was any individual lane control. The TEB therefore rated ATA's proposed LCDAS technically unacceptable. Similar concerns were expressed in relation to subfactor f, the scenario description subsystem (SDS), because there was inadequate information on the SDS data file, its method of recording, storage or retrieval of data. As for factor b, software development methodology, the TEB downgraded ATA's proposal under subfactor a, design concept, because a "definable" design concept could not be determined.

While the protester disputes the TEB's conclusions concerning the weaknesses of its technical and management proposals, ATA has offered no evidence, other than mere disagreement, to rebut the TEB's evaluation of its proposal. The protester contends that its proposal was unreasonably downgraded because neither the performance specifications nor the statement of work (SOW) required offerors to provide "detailed description of or what each electronic component

performance is capable of [providing]." In addition, ATA states that the contracting officer's refusal to respond to its preproposal questions hampered its ability to submit a "full and complete [t]echnical [p]roposal response."

Contrary to the protester's assertions, the RFP specifically instructed offerors to submit proposals that included a "narrative of plan, sketches, diagrams, calculations and any other data or material presented in sufficient detail to provide adequate basis for evaluation of the proposal." The instructions further provided that the offeror format its proposal to respond to each topical area in the SOW and, as a minimum, ensure that the technical evaluation factors are "thoroughly covered." Our review of ATA's proposal supports the Army's position that the firm failed to demonstrate in its proposal that its proposed instrumentation system met the agency's minimum needs, as for example, ATA's failure to provide any technical description of the LCDAS offered in its proposal, and its failure to describe in sufficient detail how its proposed SDS would interact with the user/operator. We simply see nothing in the protest record that convinces us that the Army's assessment of ATA's proposal was unreasonable. Since ATA has failed to show that the Army improperly or unreasonably evaluated its proposal, we will not question the agency's judgment in this regard; therefore, this ground of protest is denied.

As we indicated above, ATA also alleges that the agency's failure to respond to its preproposal questions hampered the preparation of its proposal and left the SOW "subject to the interpretation of the vendors."

In its report to our Office, the Army states that it did not address the protester's preproposal questions (we would assume through the issuance of a solicitation amendment to all offerors) because ATA was the only offeror to question the SOW and the Army did not consider an answer to those questions essential to the preparation of a technically acceptable proposal. This is demonstrated, the Army asserts, by a comparison of the technical evaluation with the questions earlier posed by the protester, which shows that answers to those questions would not have affected the technical acceptability of the protester's proposal. In any event, the Army argues, this basis of protest is untimely.

In its comments on the agency report, ATA requested that we decide its entire protest on the existing record except as to this issue, which the protester asserts was timely raised. The protester maintains that it did not know it had a basis for protest at the time it failed to receive answers to its preproposal questions, because it was

allegedly informed by the Army's buyer that "questions from vendors were too varied, that no site survey [was] permitted as time did not allow and that we were to submit our best proposal as no one would be disqualified at this point."

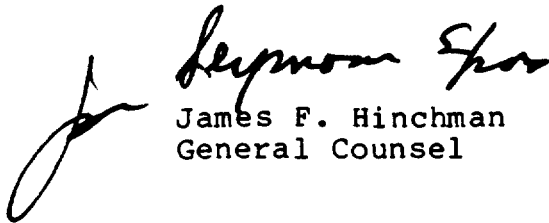
We find ATA's failure to raise this issue until after its proposal was rejected unreasonable. As the record indicates, ATA knew prior to the closing date for receipt of proposals that the Army was not going to answer its preproposal questions. If ATA thought there were ambiguities in the SOW which had to be resolved in order for it to prepare a proposal, it was incumbent upon the firm to file a protest prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2 (a)(1) (1988). We do not think ATA is excused from this obligation as a result of the alleged oral advice it was given, in view of the RFP's admonition that oral explanations or instructions given before the award of the contract would not be binding. See Inventive Packaging Corp., B-213439, Nov. 8, 1983, 83-2 CPD ¶ 544 (protest of solicitation specifications as unduly restrictive of competition, filed after rejection of protester's bid, dismissed as untimely despite alleged pre-bid opening advice by agency personnel that protester's product met the specifications.) Since ATA did not protest the solicitation as vague or ambiguous until after its offer had been rejected, this aspect of the protest will not be considered.

ATA also alleges that it was treated unfairly because the Army allowed one or more of its competitors to conduct a preproposal site survey while denying the firm a similar opportunity. There is no basis in the record for ATA's allegation. We find no evidence, and ATA points to none, that the Army improperly allowed either of the other two firms an opportunity to conduct a preproposal site visit. We therefore dismiss this aspect of the protest as unsubstantiated speculation. See Electra-Motion, Inc., B-229671, Dec. 10, 1987, 87-2 CPD ¶ 581.

Finally, ATA protests that the Army improperly used technical data on the patented ATA system as a basis for the solicitation's performance specifications. The Army not only denies this allegation but argues that ATA's protest on this issue also is untimely because it was not raised before

the date for receipt of proposals. We agree. Since ATA did not protest to our Office until August 15, well after the May 31 closing date, its protest on this issue is untimely.

The protest is denied in part and dismissed in part.

A handwritten signature in black ink, appearing to read "James F. Hinchman". The signature is stylized with a large, looping initial "J" and a long, sweeping underline.

James F. Hinchman
General Counsel