



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mech El Inc.

File: B-233092

Date: February 21, 1989

DIGEST

1. In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the solicitation specifies that cost is determinative.
2. Where a proposal is considered to be acceptable and in the competitive range, an agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible score. That a third of an agency's technical questions in its best and final offers request letter merely asked for "clarification and elaboration" of certain areas (while the other questions were more detailed) does not mean that the discussions were not meaningful; the questions were sufficient to point the protester to the areas of its proposal which could have used strengthening.
3. Value engineering change proposals (VECP) are proposals made to change existing contracts, not proposals made before a contract is awarded. There is no duty to consider a VECP prior to award.
4. Protest that protester had less time to prepare its proposal because best and final offers (BAFO) request arrived late is untimely as protest was not filed prior to date for receipt of BAFOs.
5. Protest that best and final offers (BAFO) request should not have been contained in same letter transmitting technical and management questions is untimely since it was filed after closing date for BAFOs. In any event, the Federal Acquisition Regulations do not preclude this practice.

044680/1380m4

DECISION

Mech El Inc., protests the award of a contract to Roberts Construction Co. under request for proposals (RFP) No. DACA45-88-R-0020, issued by the Corps of Engineers, Omaha District, for the installation of a fire alarm system.

The protest is dismissed in part and denied in part.

Mech El alleges that it can provide the items at the most advantageous price to the government and nothing in the record shows that Roberts provided the best overall value to the government to justify the additional cost. Mech El also contends that the Corps failed to hold meaningful discussions with it because the Corps never advised Mech El of any deficiencies focused upon the evaluation criteria. Mech El contends that the Corp's request for best and final offers (BAFO) does not constitute discussions where a proposal contains technical uncertainties.

The Corps has responded that the solicitation made clear that award was to be made to the offeror submitting the proposal most advantageous to the government considering all the evaluation factors and there was no requirement that the low cost offeror receive the award. The Corps also states that meaningful discussions were held with Mech El as the Corps submitted 59 questions tailored to areas of weaknesses or ambiguities in Mech El's proposal. Finally, the Corps states that Mech El has not shown that the Corp's evaluation was improperly conducted or how its proposal is technically superior to Roberts' proposal.

The RFP set out the following evaluation criteria and weights:

<u>Factor</u>	<u>Weight</u>
Technical	50%
Price	40%
Construction Management Plan & Experience	10%

After receipt of initial proposals and their evaluation, the Corps sent letters to the offerors in the competitive range, including Mech El, setting out the offerors' proposals' weaknesses or ambiguities and requesting BAFOs.

After technical evaluation of the BAFOs and applying the appropriate weights for the evaluation factors, Roberts received 797 total points (price \$728,225) and Mech El 783 total points (price \$649,891). The breakdown of the scores shows that although Mech El, because of its lower price, received the maximum number of points for price, Roberts received higher technical and construction management/experience scores. Award was made to Roberts based on the determination that its proposal provided the greatest value to the government.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the RFP specifies that cost will be the determinative factor. University of Dayton Research Institute, B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Here, the solicitation made plain that an award would be made to that offeror who received the highest score in accordance with the above-stated weights for technical, price and construction management plan and experience. Roberts overall score was higher than Mech El's. Since price was taken into account under the scoring system used here, award to Roberts was proper. Fort Wainwright Developers, Inc.; Sadco Enterprises; Fairbanks Assocs., 65 Comp. Gen. 572 (1986), 86-1 CPD ¶ 459.

With respect to Mech El's contention that the Corps did not hold meaningful discussions with it, because of the Corps use of the term "clarify and elaborate," we note that the Corps' BAFO request letter included a request for a sufficiently detailed written response to 59 clarification requests relating to various paragraphs and areas of the specifications. Roughly a third of the Corps' queries with respect to specific specifications were for Mech El to "clarify and elaborate" on aspects of its proposal. A significant number of the Corps' questions went further and asked for specific details as to certain aspects of the specifications.

The governing provision of the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (Supp. IV 1986), as reflected in Federal Acquisition Regulation (FAR) § 15.610(b) (FAC 84-16), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Price Waterhouse, 65 Comp. Gen. 205 (1986) 86-1 CPD ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. However, while agencies generally must conduct discussions with all offerors in the competitive range, advising them of deficiencies in their proposals and offering them the opportunity to submit revised proposals, this does not mean

that offerors are entitled to all-encompassing discussions. Agencies are only required to lead offerors into areas of their proposals considered deficient. Moreover, where a proposal is considered to be acceptable and in the competitive range, an agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible score. Varian Associates, Inc., B-228545, Feb. 16, 1988, 88-1 CPD ¶ 153.

We think that the Corps satisfied its obligation to conduct meaningful discussions with Mech El. We note that Mech El was not rated unacceptable and, as stated above, agencies are not obligated to discuss every element of a technically acceptable proposal which has not received the maximum possible rating. The Earth Technology Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113. The Corps request, which consisted of copies of the solicitation's pages dealing with the specific sections of the specifications and noting which areas needed clarification, elaboration, sample plans, or verifications was sufficient to advise Mech El of the areas of its proposal which needed strengthening.

Mech El's contention that Roberts' proposal is not technically superior and does not provide the best overall value to the government is not supported by the record. In reviewing a protest of the propriety of a technical evaluation, we will not evaluate the proposals anew and make our own determination of their acceptability or relative merits, since the evaluation of proposals is the function of the contracting agency. Tampa Shipyards, Inc., B-231802, Sept. 30, 1988, 88-2 CPD ¶ 304. We will, however, examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. T.H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252. The protester has the burden of showing that the evaluation was unreasonable or inconsistent with the evaluation scheme; mere disagreement with the agency's evaluation does not meet this burden. Tampa Shipyards, Inc., B-231802, supra.

We have reviewed the Corps' evaluations of both Mech El's and Roberts' proposals and find the evaluations to have been consistent and in accordance with the evaluation scheme set out in the RFP and the Corps' evaluation plan. Although Mech El's price proposal was lower than Roberts', Roberts' received higher scores on technical and substantially higher scores on construction management plan and experience to offset Mech El's higher point score for price.

Mech El, in its comments on the agency report, complains that it did not receive the evaluation documents for Roberts' and its proposals. We note that Mech El never

requested these documents under our regulations governing document production requests (4 C.F.R § 21.3(c) (1988)), but chose to file a Freedom of Information Act request with the agency. The record shows that some of the documents requested by Mech El were nonexistent, others, such as the awardee's proposal and agency's evaluation thereof, properly were not released. Mech El was provided the total evaluated score for each offeror and the fact that it received the maximum score of 400 for price. In any event, we have reviewed all of the relevant documents, in camera, and we find no basis for Mech El's contention that the evaluation was improperly conducted. In assessing the relative desirability of proposals and determining which offer should be accepted for award, contracting agencies enjoy a reasonable range of discretion and our Office will not question such a determination unless there is a showing of unreasonableness, abuse of discretion or a violation of the procurement statutes or regulations. Fort Wainwright Developers, Inc., et al., 65 Comp. Gen., supra. In view of Roberts higher total point score, which was the basis for award, we cannot find the Corps' award to Roberts was unreasonable. Id.

Also, in its comments, Mech El states that the Corps failed to consider Mech El's proposed savings of \$119,920.29, through the value engineering change proposal (VECP) it submitted with its offer. The solicitation contained the VECP clause in FAR § 52.248-3, by which the contractor is encouraged to submit VECP's and, if accepted, share in the contract savings realized from the VECP.

VECP's are change proposals made to existing contracts, not proposals made before a contract is awarded. Compudyne Corp., 44 Comp. Gen. 784 (1965); Dan-D, Inc., et al., B-225404 et al., Feb. 17, 1987, 87-1 CPD ¶ 174. Value engineering incentive clauses are included in contracts to provide authority for permissive, approved deviations from specifications, etc., after contract award to an offeror which was otherwise responsive to the requirements of the solicitation. Id. It would be improper to consider a VECP altering the RFP requirement in the evaluation of a response to an RFP without giving all competitively qualified offerors a chance to submit proposals which would alter the requirements of the RFP. Id. In view of the above, the Corps was under no duty to consider Mech El's VECP prior to award.

Mech El also raises several other issues in its comments on the Corps' report. Mech El contends that Roberts' proposed equipment does not meet specification 5.1.2.'s requirement for a removable hard disk. However, under paragraph 8, Instructions to Proposers, offerors were allowed, as Roberts

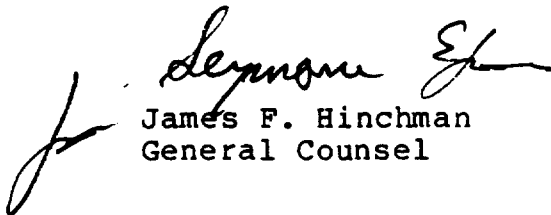
did here, to propose alternates and the RFP Compliance Summary Checklist provided a column where alternates offered would be noted and evaluated. Roberts proposal of an alternate, therefore, did not make its proposal technically unacceptable under this RFP.

Mech El asserts it received few if any points under specification 5.7 as the Corps' BAFO request asked if Mech El's system was capable of supporting addressable detectors when, in fact, Mech El's equipment has such a capability. Our review shows that the Corps increased Mech El's score on this factor after BAFO's were considered.

Mech El also protests that it had less time to prepare its BAFO than other offerors because the BAFO request letter to Mech El arrived late. BAFO request letters were sent to offerors on September 1, 1988, advising offerors that BAFOs were due on September 9. Mech El contacted the Corps on September 9 and stated it never received the September 1 letter. The Corps then telefaxed a copy of the September 1 letter and gave Mech El until September 16, to submit its BAFO. Mech El was required to protest prior to the closing date for BAFOs if it felt there was insufficient time to respond. 4 C.F.R. § 21.2(a)(1).

Finally, Mech El protests that by calling for BAFOs in the same letter which transmitted the technical and management questions the Corps erred because the FAR contemplates that conducting meaningful discussions and requesting BAFOs are meant to be two separate activities, the former always preceding the latter. This basis for protest is also untimely as Mech El knew prior to closing that the Corps was asking for BAFOs in the same letter in which it transmitted questions to Mech El, but Mech El did not protest until after closing. 4 C.F.R. § 21.2(a)(1). In any event, we do not read FAR § 15.611(a) (FAC 84-16) as precluding the transmittal of technical questions in the same letter in which BAFOs are requested.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel