



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Digital Equipment Corporation
File: B-235665
Date: September 21, 1989

DIGEST

1. Protester's proposal was properly rejected as technically unacceptable where protester's best and final offer did not comply with material, mandatory requirements under the request for proposals. An offeror should not expect to be granted an additional opportunity to clarify or revise its proposal after submission of best and final offers.
2. Agency conducted meaningful discussions where it directed protester to areas in which its proposal was deficient or noncompliant with mandatory solicitation requirements. Procuring agency is not required to provide an offeror with exact proposal language which will establish compliance.
3. Protester's status as large corporation which has the capability to satisfy mandatory solicitation requirements does not establish that it will satisfy those requirements where its proposal indicates otherwise. Compliance with solicitation specifications must be determined on the basis of an offeror's proposal, not on the basis of the offeror's alleged intentions, corporate capability, or reputation.

DECISION

Digital Equipment Corporation protests the award of a contract for a central scientific timesharing system to Convex Computer Corp., under request for proposals (RFP) No. 263-88-P(89)-0025, issued by the National Institutes of Health (NIH). Digital asserts that it submitted a lower priced proposal which was improperly rejected as technically noncompliant by NIH.

We deny the protest.

The RFP was issued on March 19, 1988, and NIH received six initial proposals by the June 27 closing date. The RFP

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provided that in order to be acceptable and eligible for evaluation, a proposal must meet all of the mandatory requirements set forth under section C of the RFP. Award was to be made to the offeror whose proposal offered the greatest value to the government, with technical quality stated to be more important than price. Offerors were required to execute a capacity benchmark test, with results to be submitted with their proposal, and offerors included in the competitive range were also required to perform a live test demonstration. In addition to the mandatory requirements, section C of the RFP also listed a number of optional features which offerors could include and which would be evaluated, if included, but which offerors did not have to provide in order to satisfy the RFP requirements.

Based on its evaluation of initial technical proposals, the Technical Evaluation Committee (TEC) determined that all six offerors failed to meet one or more mandatory RFP requirement, and all offerors were given until August 15 to correct these deficiencies. On August 19 the TEC performed a technical evaluation of the proposals, taking into consideration the offerors' proposed corrections, and determined that only the proposals submitted by Convex and Digital should be included in the competitive range. The other four proposals were eliminated either because of failure to comply with the mandatory requirements, or because of other major technical deficiencies. Live test demonstrations were performed by Digital and Convex, and NIH personnel examined both offerors' cost proposals for the purpose of conducting a cost analysis. Based on this analysis of Digital's cost proposal, NIH determined that there were numerous discrepancies between Digital's technical proposal and its cost proposal, which raised questions as to what equipment, supplies and services Digital was offering to provide. Discussions were held with both offerors in the competitive range. Discussions with Digital occurred on November 28, at which time NIH provided Digital with a list of 34 deficiencies, to which Digital responded in writing on November 30 with responses which indicated that Digital would comply with the mandatory requirements in its best and final offer (BAFO).

BAFOs were received on December 21. In evaluating Digital's BAFO, the TEC determined that Digital had satisfactorily resolved 27 of the 34 deficiencies which had been raised during discussions, but that the remaining 7 were either unresolved, or Digital's resolutions had resulted in further deficiencies. The TEC also determined that 12 additional deficiencies were raised by new material in Digital's BAFO. Convex's BAFO was fully compliant with the RFP requirements. The NIH project director determined

that, in order to enhance competition, he would request a second round of BAFOs to give Digital an additional opportunity to rectify its proposal deficiencies. On February 28, 1989, Digital was notified by letter of the deficiencies in its BAFO and was requested to submit a second BAFO by March 7. Digital was advised in this letter that its BAFO "did not meet certain mandatory requirements," and that "this shall be the only opportunity given to meet the requirements of the solicitation." This letter identified 14 areas in which Digital's BAFO failed to comply with mandatory RFP requirements. In addition, it referenced certain other technical and cost areas which required clarification. NIH addressed the following deficiencies, among others, in which it indicated that Digital's BAFO was noncompliant:

"7. Resolve the apparent conflict between the technical proposal and the cost proposal regarding the duration of the principal period of maintenance for the VAX 8810 main system during year one of the contract's life (Sections C.2.10.1 and C.8.4)."

"9. Verify that Software Support Services (QT-OJQAA-L9) proposed for the VAX 88x0 provides the right to use the MDDS (QT-OJQAA-EM) in years two through five of the contract's life (Sections C.2.3.2 and C.11)."

"10. Explain which proposed products provide software support on the VAX 6210 test system throughout the life of the contract (Sections C.2.3.2 and C.2.10.2)."

"13. Provide the unit and total price for the annual updates and replacements of documentation throughout the life of the contract (Sections C.2.11 and C.10.2.)."

The TEC evaluated Digital's second BAFO and determined that Digital's proposal remained noncompliant with respect to four mandatory requirements under the RFP. The TEC concluded that Digital's proposal failed to comply with the requirement at section C.8.4 to provide a 16-hour per day principal period of maintenance (PPM) for on-call service, with a 2 hour response time, for the 8810 main system during the first year of the contract. Digital's second BAFO had clearly specified a 9-hour per day PPM in both the cost and technical sections. A 9 hour PPM had been referenced in the RFP as an on-site service option, but was not indicated as an acceptable PPM for the mandatory on-call

service. Digital's BAFO also failed to provide certain software support required for the VAX 6210 X-Window system. In addition, Digital's BAFO failed to provide support for its f77 fortran compiler and failed to provide for certain required replacement and update documentation.

The contracting officer determined that Digital's proposal was still noncompliant and Digital was eliminated from the competition as technically unacceptable. Digital was notified of this determination on May 15, 1989, and on the same date award was made to Convex. Thereupon, after NIH provided Digital with a debriefing, Digital filed this protest with our Office on May 25. Contract performance was initially suspended, however, NIH subsequently made a determination under Federal Acquisition Regulation § 33.104(c)(2)(i) (FAC 84-9), that continued performance was in the best interest of the government.

The underlying rationale behind Digital's protest is that Digital should not have been eliminated for failure to comply with the mandatory requirements because Digital is an established corporate entity which is known to have the technical capability to fulfill the RFP requirements. Digital contends that notwithstanding any discrepancies in its BAFO, it clearly intended to satisfy the mandatory requirements. Digital also argues that NIH failed to engage in meaningful discussions because NIH should either have provided Digital with more specific questions or directions, or afforded it an additional opportunity to clarify its proposal. Thus, while Digital concedes that there were certain technical problems in its BAFO, it characterizes these problems as either the result of "miscommunication between Digital and NIH," or as clerical errors.

More specifically, with respect to Digital's failure to offer the required 16 hour PPM service, Digital argues that it is technically capable of providing this service and always intended to do so, and Digital questions how its proposal could have gone from being initially technically acceptable to technically unacceptable if NIH had conducted meaningful discussions. In particular, Digital contends that NIH's questions in this respect should have been more specific. Digital also contends that it should have been given an additional opportunity to clarify and comply after the second round of BAFOs.

Digital agrees that the RFP contains a mandatory requirement for 16 hour on-call PPM service and that its second BAFO only provides for a 9 hour on-call PPM. In its initial technical proposal, Digital had indicated that it would comply with the 16 hour requirement. It was on the basis of

this indication in the technical narrative that NIH determined that Digital's proposal was technically compliant. However, in its BAFO, Digital made substantial changes in its hardware maintenance charges under its cost proposal, replacing many such charges with first-year warranty coverage. This warranty coverage indicated that during the first year, the PPM for the 8810 system was only 9 hours per day. When NIH evaluated Digital's cost proposal, the TEC became aware that Digital's cost proposal provided for a 9 hour PPM and became concerned that Digital did not intend to provide the required 16 hour PPM. As a result, NIH asked Digital to resolve the discrepancy between its technical and cost proposal in this regard in item 7 quoted above. When Digital clearly stated in its second BAFO that it was providing a 9 hour PPM during the first-year warranty period, NIH concluded that Digital's proposal was technically noncompliant.

We note that an agency properly may reject as technically unacceptable a proposal which it initially finds technically acceptable if, as here, the BAFO is noncompliant with a material term or condition of the RFP. See Montgomery Furniture Co., B-229678, Mar. 1, 1988, 88-1 CPD ¶ 212. Thus, the fact that Digital's initial proposal was considered compliant does not establish that its BAFO was technically acceptable. While NIH could have asked Digital specifically whether it intended to supply the required 16 hour PPM, an agency is only required to lead an offeror into areas of its proposal which require correction. Hill's Capitol Sec., Inc., B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274. Agencies are not required to afford offerors all-encompassing discussions, and the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved. Addsco Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. An agency is only required to express its concerns in a manner which reasonably communicates the nature and gravity of these concerns. Mark Dunning Indus., Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364. In our view, NIH's reference in item 7, which specifically pointed out that there was a conflict in Digital's proposal with respect to the duration of PPM service, was sufficient to put Digital on notice that its proposal was noncompliant with the mandatory RFP requirement for a 16 hour PPM for on-call service.

Digital characterizes item 7 as merely providing it with a 50 percent chance to answer correctly, and characterizes its answer indicating that it intended to provide a 9 hour PPM as a clerical error. Digital reasons that in response it simply mistakenly changed its BAFO to reflect a 9 hour PPM which was included in the RFP in a different section

relating to optional on-site service. In our view, this argument ignores the content of the RFP, which clearly contains a mandatory requirement for a 16 hour PPM for on-call service. In the face of item 7, which raised an issue concerning Digital's compliance with a mandatory RFP requirement, Digital was not free to merely guess at which of two different PPM time periods it actually intended to propose. Nor does such an incorrect guess constitute a clerical error. Rather, it was incumbent on Digital to rectify its noncompliance with a mandatory requirement which was clear under the RFP, and to change its offer to indicate compliance with the 16 hour PPM, if that was, in fact, Digital's intention. See Eagan McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405.

Digital also argues that even if NIH concluded that Digital's BAFO deliberately offered a 9 hour PPM, NIH could have established the cost of a 16 hour PPM from table B-6 which was included in Digital's proposal to provide additional costs for various extended optional PPM's. However, that table relates only to optional later-year service coverage and provides no information with respect to PPM service during the first year of warranty maintenance, which is the period for which Digital's proposed PPM service was found noncompliant.

Having provided an ambiguous PPM in its initial BAFO, and having provided a clearly noncompliant PPM in its second BAFO, Digital was not entitled to another opportunity to clarify its proposal through additional discussions and another round of BAFOs. As a general matter, an offeror may not contemplate a further opportunity to revise its proposal after submission of a BAFO. Violet Dock Port, Inc., B-231857.2, Mar. 27, 1989, 89-1 CPD ¶ 292. Moreover, agencies are not required to notify offerors of deficiencies remaining in their proposals, or first appearing in their BAFOs, or to conduct successive rounds of discussions until such deficiencies are corrected. Id.; Mark Dunning Indus., Inc., B-230058, supra. Accordingly, we find NIH's conduct of discussions both sufficient and reasonable.

Digital's entire argument is founded on the false premise that a firm is entitled to credit for its corporate stature, in lieu of having to satisfy RFP requirements in its proposal. On the contrary, neither Digital's corporate capability and stature, nor its current claim that it always intended to comply with the RFP requirements may serve to establish compliance. An offeror is not entitled to a favorable presumption in this regard because of its reputation, prior performance, or presumed intention; rather, compliance must be based on what the offeror

actually submitted in its proposal. Laser Power Technologies, Inc., B-233369, Mar. 13, 1989, 89-1 CPD ¶ 267; Ingersoll-Rand Co., Trilectron Indus., Inc., B-232739 et al., Feb. 7, 1989, 89-1 CPD ¶ 124; Electronet Information Sys., Inc., B-233102, Jan. 24, 1989, 89-1 CPD ¶ 68. Since NIH properly concluded that Digital's BAFO failed to comply with the 16 hour PPM service requirement, a material term of the RFP, this constituted a sufficient basis to reject Digital's proposal as unacceptable. In negotiated procurements, a proposal that fails to conform to a material term or condition of an RFP is unacceptable and may not properly form the basis for an award. Essex Electro Eng'rs, Inc., B-229491, Feb. 29, 1988, 88-1 CPD ¶ 215.

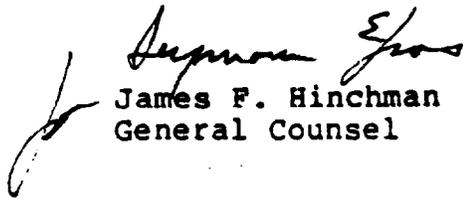
Since Digital's noncompliance with the 16 hour PPM service requirement provided a valid basis for rejecting Digital's proposal, the question of whether NIH properly determined that Digital's BAFO was noncompliant in the other three areas is academic. However, we note that two of the areas (failure to provide required f77 fortran compiler support and failure to supply required X-Window system software support) essentially involve Digital's disagreement with NIH's technical assessment of the manner in which Digital proposed to fulfill the RFP's requirements. As a general matter, the determination of the relative merits of a proposal and whether material provided by an offeror establishes the technical acceptability of its offer is primarily the responsibility of the procuring agency, which must bear the burden of any difficulties resulting from a defective evaluation. Pitney-Bowes, 68 Comp. Gen. 249 (1989), 89-1 CPD ¶ 157; Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235. Accordingly, in reviewing complaints about the evaluation of a technical proposal and the resulting determination of whether the proposal is technically acceptable, our Office will not reevaluate the proposal and independently determine its merits; we will only determine whether the agency evaluation had a reasonable basis. Stat-a-Matrix, Inc., et al., B-234141 et al., May 17, 1989, 89-1 CPD ¶ 472; Vikonics, Inc., B-234365, May 11, 1989, 89-1 CPD ¶ 443. In this regard, the protester's mere disagreement with the agency's judgment does not establish that it is unreasonable. Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441. We have reviewed the record and, notwithstanding Digital's disagreement, we find that NIH had a reasonable basis to conclude that Digital's proposal failed to satisfy NIH's technical requirements in these areas.

With respect to Digital's failure to provide in its BAFO for required replacement manuals, Digital argues that its BAFO implies that these manuals would be provided without

charge. However, while Digital indicates in its BAFO that it will provide updates at no cost, the BAFO does not state that Digital will provide required replacement manuals at no cost as well. The RFP specifies updates and replacements separately, as NIH also did during discussions, and Digital has not provided any convincing basis to establish that its offer to provide updates at no charge also encompasses replacements, as Digital argues it intended to mean. Digital also raises the same arguments with respect to this issue that were addressed above concerning Digital's corporate capacity and its intended compliance, and we reject these arguments for the same reasons.

Finally, Digital contends that NIH's determination to permit Convex to perform during the pendency of the protest was procedurally defective and therefore violated the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. IV 1986). We need not address this argument in view of our conclusion that Digital's proposal was properly rejected, since Convex's performance could not have prejudiced Digital. See Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422; VGS, Inc., B-233116, Jan. 25, 1989, 89-1 CPD ¶ 83.

The protest is denied.


James F. Hinchman
General Counsel