VAN SCHAIK

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Mannesmann Tally Corporation

File: B-238790.4

Date: October 16, 1990

John C. Cooper for the protester.
David R. Hazelton, Esq., Latham & Watkins, for Federal Technology Corporation, an interested party.
Paul Grabelle, Esq., Office of the General Counsel, Department of Veterans Affairs, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. After protests to the General Services Administration Board of Contract Appeals (GSBCA) have been dismissed or denied, there is no impediment to assumption of jurisdiction by the General Accounting Office (GAO) of a timely protest, by a firm that was not a party before the GSBCA; of the same procurement when the issues raised in the GAO protest were never considered by the GSBCA.

2. Agency properly rejected protester's best and final offer which was ambiguous with regard to whether the contractor would pay for shipping of warranty repair items when solicitation warranty provision makes warranty shipment costs the contractor's responsibility.

3. Technically unacceptable offeror is not an "interested party" under the General Accounting Office's Bid Protest Regulations to challenge the acceptability of awardee's proposal where there are other acceptable offers because, even if the protest were sustained, the protester would not be eligible for award.

DECISION

Mannesmann Tally Corporation protests the award of a contract to Federal Technology Corporation under request for proposals (RFP) No. 101-14-89, issued by the Department of Veterans Affairs (VA) for dot matrix utility printers. Mannesmann argues that its proposal was improperly rejected and the VA improperly evaluated the awardee's proposal which allegedly included unbalanced and unrealistic prices on optional maintenance work.

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

The RFP solicited offers for an indefinite quantity contract for a minimum of 6,850 printers to be ordered by the VA within 365 days of award and an option for an additional 13,700 printers over a 24-month period. The RFP also included basic and optional requirements for maintenance, manuals and a warranty.

The VA received proposals from 11 firms and after a number of initial offers were withdrawn or rejected and discussions were held, the agency requested best and final offers (BAFOs). In its BAFO, Mannesmann included the following provision in response to section C.8 of the RFP which concerned the maintenance to be provided by the contractor after the warranty period:

> "C.8 - Other (with pricing)
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> Maintenance Options
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> Mannesmann Tally offers the Government three different maintenance options.
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> 1. Contract Depot Repair - A malfunctioning unit is returned to a Mannesmann Tally Service Depot and is repaired and returned to the Government site in fourteen (14) or less days. The Government pays transportation costs to the depot and Mannesmann Tally pays return transportation costs.
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> Price Schedule -
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> Under Warranty - No Charge
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> After Warranty End Date - $6.64 per unit per month."

The VA rejected Mannesmann's proposal because agency officials concluded that by stating "[t]he Government pays transportation costs to the depot," Mannesmann had taken exception to the warranty clause referenced in the RFP and set out at Federal Acquisition Regulation § 52.246-17. At paragraph (b)(2), that clause states that transportation costs to return supplies under warranty to the contractor are to be borne by the contractor. The VA explains that the language inserted by Mannesmann in its BAFO indicated that it would charge the government for shipping items to Mannesmann to be repaired under warranty.

According to the VA, since this particular text, including the qualification concerning transportation costs along with a reference to the warranty, first occurred in Mannesmann's BAFO, there was no opportunity to raise the matter in discussions and Mannesmann's proposal was rejected. Seven technically acceptable offers remained and the VA awarded the contract based on the contracting officer's conclusion that Federal Technology offered the best value to the government consistent with the solicitation.

Mannesmann first protested to this Office on March 6, 1990. Subsequently, three other offerors under the solicitation, Datasouth Computer Corporation; Systems, Terminals & Communications Corporation; and Integration Technologies Group, filed protests concerning this procurement with the General Services Administration Board of Contract Appeals (GSBCA). Pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(6) (1990), we dismissed Mannesmann's protest since the procurement was the subject of protests before the GSBCA raising matters dispositive of the issue of entitlement to award. Mannesmann Tally Corp., B-238790, Mar. 22, 1990, 90-1 CPD ¶ 320.

The three GSBCA protests were later dismissed or denied. See Systems, Terminals & Communications Corp.; Integration Technologies Group, GSBCA Nos. 10525-P; 10538-P, (Mar. 19, 1990) 1990 BPD ¶ 68; DataSouth Computer Corp., GSBCA No. 10536-P, (Mar. 26, 1990) 1990 BPD ¶ 74; and Systems, Terminals & Communications Corp., GSBCA No. 10578-P, (June 11, 1990) 1990 BPD ¶ 151.

On June 13, Mannesmann notified this Office that as of June 11 when the GSBCA issued its final decision on the protest of Systems, Terminals & Communications Corp., there were no longer any protests pending before the GSBCA regarding this procurement.1/ On June 15, Mannesmann requested that we

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1/ Mannesmann never intervened before the GSBCA although it received notice of the protests in that forum.

consider its protest since none of the issues which it raised had been decided by the GSBCA. Also on that date, we notified the VA that we would consider Mannesmann's original protest.

As a preliminary matter, the VA argues that this Office lacks jurisdiction to consider Mannesmann's protest since the GSBCA previously considered protests relating to the same procurement.

The Competition in Contracting Act (CICA), which established the current protest jurisdiction of both this Office and the GSBCA, provides that a party who has protested a particular procurement with either our Office or the GSBCA "may not file a protest with respect to that procurement" with the other forum. 31 U.S.C. § 3552 (1988); 40 U.S.C. § 759(f)(1) (1988). We have interpreted these provisions as precluding a protester from maintaining duplicate actions in these two separate forums, but not as preventing a protester whose GSBCA protest is dismissed without prejudice from timely protesting here. See Telos Field Eng'g, 68 Comp. Gen. 295 (1989), 89-1 CPD ¶ 238. Similarly, our Regulations, which provide that a procurement, while under protest to the Board, may not be subject to a protest here, 4 C.F.R. § 21.3(m)(6), are intended only to preclude what the statute precludes: consideration by the two forums of the same matter at the same time. Sector Technology, Inc., B-239420, June 7, 1990, 90-1 CPD ¶ 536. Here, Mannesmann did not participate in any manner in the GSBCA protests and the issues raised by the protester--that its own proposal was improperly rejected and the awardee's prices were unbalanced--were not considered by the GSBCA. Under these circumstances and since the procurement is no longer under protest before the GSBCA--in our view, once the last protest was resolved the GSBCA's active consideration of the cases was over--the previous review of the procurement in that forum provides no impediment to our jurisdiction. Id.

Mannesmann first argues that its proposal was improperly rejected by the VA. According to Mannesmann, the VA's reading of its proposal was unreasonable and, if the agency had any doubt about the proposal, the matter should have been clarified with it or raised in discussions. The provision which Mannesmann inserted in its proposal referenced RFP section C.8, "Maintenance," which, as Mannesmann points out, specifically refers to maintenance "after the warranty period." Mannesmann argues that, given the context of section C.8 in the RFP, it was unreasonable for the VA to conclude that the language it inserted into its BAFO applied to the warranty period. Mannesmann also argues that in its BAFO it acknowledged, without exception, the warranty provision referenced in the solicitation and it intended its reference to section C.8 in the RFP to concern only maintenance after the warranty period.

An agency may properly reject as technically unacceptable a proposal which it initially finds acceptable if the BAFO is noncompliant with a material term or condition of the RFP. Digital Equip. Corp., 68 Comp. Gen. 708, (1989), 89-2 CPD ¶ 260. Also, an offeror must write its proposal so that proposal clearly demonstrates that it meets the material requirements of the RFP, otherwise the offeror runs the risk of having the proposal rejected. See RCA Serv. Co.; Harbert Int'l, Inc. & Morrison-Knudsen Servs., Inc., A Joint Venture, B-218191; B-218191.2, May 22, 1985, 85-1 CPD ¶ 585.

Although, as Mannesmann now argues, it may not have intended to alter the standard warranty provision by requiring the government to pay to ship warranty repair items, this intention is not clear from Mannesmann's BAFO. From the manner in which the BAFO provision is set out, one could read it as requiring the government to pay for shipping items to Mannesmann for repair under the warranty while specifying "No charge" for the warranty repair work itself. We recognize as the protester points out that the BAFO provision was in response to that portion of the RFP which concerned after-warranty maintenance. Nevertheless, Mannesmann, for reasons that are not clear, chose to include a reference to the warranty period. It was that reference along with the generalized material concerning charges to the government for transportation which resulted in the ambiguity. Since Mannesmann submitted a BAFO which was ambiguous at best with regard to warranty shipping costs, we have no basis for disturbing the agency's conclusion that the BAFO was technically unacceptable. The EC Corp., B-236973, Jan. 5, 1990, 90-1 CPD ¶ 23.

Further, we do not agree with Mannesmann's suggestion that the agency was obligated to contact the firm to clarify the deficiency it perceived in the protester's BAFO. While an agency may sometimes seek to clarify minor uncertainties in a particular proposal where, as here, the information sought is essential to determining its acceptability, a request for such information constitutes the reopening of negotiations, and an agency generally has no legal duty to reopen negotiations to permit a single offeror to submit a revised proposal. The EC Corp., B-236973, supra.

Mannesmann also argues that the award to Federal Technology was improper since that firm's prices were mathematically and materially unbalanced. Generally, a protester who submits a proposal which takes exception to a material requirement in the solicitation is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), to challenge the acceptability of the awardee's proposal when there are other

acceptable offers because even if the protest were sustained, the protester would not be eligible for award. Violet Dock Port, Inc., B-231857.2, Mar. 22, 1989, 89-1 CPD ¶ 292. That is the case here. Therefore, we will not consider these matters.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel