

143659



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cylink Corporation

File: B-242304

Date: April 18, 1991

Robert B. Fougner, Esq., for the protester.
Robert G. Bugge, Esq., for The Racal Corporation, an interested party.
Stephen J. Nuebeck, Esq., Internal Revenue Service, Department of the Treasury, for the agency.
Barbara R. Timmerman, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the procuring agency improperly relaxed a mandatory solicitation requirement that data encryption equipment be endorsed by the National Security Agency (NSA), where the procuring agency knew prior to the closing date for receipt of proposals that NSA no longer issued such endorsements and that the agency would accept equipment that was not endorsed, but which NSA had approved for the intended use, yet did not notify offerors, other than the awardee, of its changed requirements.

2. Procuring agency's communications with the awardee concerning the awardee's offered delivery and warranty terms constituted discussions since delivery and warranty provisions were material solicitation terms to which a proposal had to conform to be acceptable; once discussions were held with the awardee, discussions had to be conducted with all offerors in the competitive range.

DECISION

Cylink Corporation protests the award of a fixed-price contract to The Racal Corporation under request for proposals (RFP) No. IRS-C-90-088 issued by the Internal Revenue Service, (IRS), Department of the Treasury, for high speed data encryption equipment for seven work sites. Cylink contends that Racal's proposal should have been rejected as technically unacceptable because it did not include a National Security Agency (NSA) endorsement of the equipment, as required by the RFP.

We sustain the protest because we find that IRS improperly relaxed a mandatory solicitation requirement for the NSA endorsement without notifying other offerors of the changed requirements.

The synopsis of the procurement in the July 26, 1990, edition of the Commerce Business Daily (CBD) advised potential offerors that the data encryption equipment to be procured must be NSA-endorsed. The RFP, issued on August 13, 1990, required that the data encryption equipment comply with Federal Standard (FED-STD) 1027, which provides minimum general security requirements for telecommunications equipment and systems and set out the following clause, which used to be contained in the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-8.112-13 (1989),1/ which required that:

"[i]f a requirement for the encryption protection of unclassified digital information in the telecommunications environment is specified elsewhere in this requirements document, all cryptographic components, equipment, systems, and services offered to meet that requirement must comply with FED-STD 1027 and be endorsed as so complying by the National Security Agency prior to being proposed."

Offerors were informed that award would be made to the responsible offeror whose conforming offer was the most advantageous, considering price and technical factors. The RFP listed, in order of importance, delivery/installation, warranty, and training plan, as technical evaluation factors^{2/} and provided that technical and cost factors were of equal weight. The RFP also reserved the right to make award without discussions on the basis of initial proposals.

From the 11 prospective offerors solicited, IRS received 3 offers, including those of Racal and Cylink, and determined that only the offers of Racal and Cylink were technically acceptable. In the agency's evaluation of initial proposals, Cylink's proposal was rated slightly higher technically than

1/ This FIRMR clause no longer exists.

2/ Technical acceptability was not a stated evaluation factor.

Racal's proposal but was significantly higher priced. The contracting officer determined that Cylink's slight technical advantage was not worth its higher price and made award to Racal on the basis of the initial proposals. This protest followed.^{3/}

Cylink protests that Racal's proposal should have been rejected because it did not comply with the solicitation requirement that the equipment be endorsed by NSA as complying with FED-STD 1027.^{4/} The protester contends that only two vendors (not including Racal) currently have high speed data encryption equipment that is endorsed by NSA as meeting the requirements set forth in the RFP,^{5/} and that NSA no longer issues endorsements of FED-STD 1027 compliance. Cylink argues that the agency either waived or relaxed this mandatory RFP requirement, without notice to other offerors, and that, if it had known that NSA's endorsement was not required, it would have priced its proposal differently.

The agency admits that Racal's offered equipment is not NSA-endorsed and that NSA no longer issues the endorsements required by the RFP. This responsibility was transferred on January 1, 1988, from NSA to the National Institute of Standards and Technology, which has not yet implemented a product endorsement program. NSA, in the interim (and only at the request of a federal agency), evaluates modifications to previously endorsed products for the limited purpose of determining whether the modified device would comply with the FED-STD 1027 requirements applicable to the specific use solicited.

The agency states, and the record shows, that Racal manufactures a NSA-endorsed encryption device, albeit one that does not meet the high speed data transmission requirements of the solicitation. Racal and IRS state that the high speed equipment offered by Racal to satisfy the RFP requirements is a modified version of its endorsed, lower speed data encryption device, and that they have sought NSA's evaluation and approval to use the modified equipment. The agency admits in its protest report that NSA's "approval" is not the same as

^{3/} Performance of the contract has been suspended pending our decision in the protest.

^{4/} On October 20, 1988, FED-STD 1027 was redesignated as Federal Information Processing Standard 140 by the National Institute of Standards and Technology. 53 Fed. Reg. 41,221 (1988).

^{5/} NSA publishes a catalog of equipment that has been endorsed as meeting FED-STD 1027.

an NSA "endorsement."^{6/} Nevertheless, IRS argues that the intent of the endorsement clause--to ensure product compliance with the FED-STD 1027 security requirements--has been met, since NSA, after the closing date for receipt of proposals, approved Racal's offered equipment for the use sought by the RFP.

We find that the agency improperly relaxed the mandatory solicitation requirement for NSA's endorsement without issuing an amendment to afford all potential offerors an opportunity to respond to the relaxed requirements. It is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. W.D.C. Realty Corp., 66 Comp. Gen. 302 (1987), 87-1 CPD ¶ 248. Thus, when, either before or after receipt of proposals, the government changes or relaxes its requirements, it must issue a written amendment to notify all offerors of the changed requirements. See Federal Acquisition Regulation § 15.606(a).

Here, the record indicates that IRS knew prior to the September 21 closing date for receipt of proposals that NSA no longer issued the endorsements required by the RFP and that offerors could seek NSA approval of previously endorsed equipment that had been modified for the use sought by the RFP. Indeed, IRS informed Racal (and only Racal) more than 2 weeks prior to closing that it should seek NSA's approval of its equipment. On September 4, IRS urged NSA to approve Racal's high speed data encryption equipment, and on September 28, after closing, IRS again requested that NSA approve Racal's modified encryptor. NSA approved Racal's device on November 7, apparently after some discussions with Racal. Given these circumstances, it is apparent that the NSA-endorsement of the data encryption equipment, as required by the RFP, was not necessary, as indicated by the agency's relaxation of this requirement for Racal.

The agency's failure to notify offerors of its changed requirements may have significantly compromised full and open competition. Eleven prospective offerors were solicited, but only 3 offerors submitted proposals, one of which was

^{6/} NSA's endorsement means that the endorsed equipment meets all the requirements of FED-STD 1027, while NSA's approval only indicates that the approved equipment is suitable for the particular use and does not necessarily meet all the minimum security requirements in FED-STD 1027. In this regard, it is apparently much quicker and easier to obtain NSA's approval than it was to obtain NSA's endorsement (when NSA was still endorsing equipment).

determined to be technically unacceptable. Since the CBD synopsis of this procurement informed offerors that the NSA endorsement was a mandatory requirement, we think that other prospective offerors may well have been deterred from competing because of this requirement, especially since NSA's endorsement program was terminated in December 1987 and, thus, new equipment could not be endorsed as meeting FED-STD 1027. Moreover, Cylink states in an affidavit that it would have adjusted its competitive pricing had it known that the NSA-endorsement requirement would be relaxed, resulting in a different competitive environment.^{7/} See MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶ 434 (where we sustained the protest against the agency's waiver of a domestic source restriction where the protester, a domestic concern, relied upon the restriction in its proposal pricing). Under the circumstances, the agency should have revised the solicitation to reflect the relaxed requirements and permit all potential offerors an opportunity to compete on that basis. See Mantech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336. Accordingly, we sustain Cylink's protest on this basis.

Moreover, from our review of the record, we find that IRS conducted discussions with Racal and allowed that firm to revise its proposal, but did not conduct discussions with the protester or request best and final offers.^{8/} Specifically, IRS requested "clarifications" from Racal concerning, in part, the failure of the firm to address the delivery of equipment to the seven required locations and the inconsistency of the firm's offered standard commercial warranty with the RFP warranty provisions. Racal, in answering the agency's inquiries, in effect revised its proposal in these regards.

Warranty and delivery provisions are material terms and conditions of the RFP with which a proposal must conform to be acceptable. See Industrial Lift Truck Co. of New Jersey; Dowering Equipment, Inc., 67 Comp. Gen. 525 (1988), 88-2 CPD ¶ 61; Montgomery Furniture Co., B-229678, Mar. 1, 1988, 88-1 CPD ¶ 212. Accordingly, we find that the agency's communications with Racal, and Racal's revision of its proposal, constituted discussions. Once discussions are held with one offeror in the competitive range, discussions must be conducted with all offerors in the competitive range and those offerors must have the opportunity to submit revised

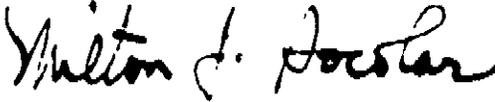
^{7/} Cylink also states in the affidavit that it invested considerable time and expense to have its high speed data encryption equipment endorsed by NSA.

^{8/} Cylink has not specifically protested this matter.

proposals. See Motorola, Inc., 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604. That did not occur here.

We recommend that the agency resolicit, clearly stating its actual needs with respect to any NSA endorsement. If a firm other than Racal is the successful offeror, the agency should terminate Racal's contract for the convenience of the government and make award to that firm. We also find that Cylink is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991). The protester should submit its claim for such costs directly to IRS. 4 C.F.R. § 21.6(e).

The protest is sustained.


for Comptroller General
of the United States