

K4313



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Defense Systems Concepts

File: B-712755.2

Date: July 1, 1991

John R. Tolle, Esq., Barton, Mountain & Tolle, for the protester.

Michael L. Halperin, Esq., for Raytheon Company, an interested party.

Greg H. Petkoff, Esq., and Maj. Francis Lamir, Department of the Air Force, 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. Protester was properly excluded from competitive range where agency reasonably concluded that firm had no reasonable chance for award because of significant technical deficiencies identified in its proposal which was rated by the agency's technical evaluators as "unacceptable" under two of the solicitation's four technical evaluation factors.

2. Protest that agency improperly changed requirements after excluding protester from the competitive range is denied where, contrary to protester's contention, changed requirements did not alter the basic contract objective of miniaturizing and packaging electronics into a fabricated expendable decoy meeting performance and compatibility requirements, and protester was not prejudiced by not having an opportunity to submit a proposal based on changed requirements.

3. Agency's failure to promptly notify unsuccessful offeror of award is a procedural defect that does not affect the validity of a contract award.

Decision

Defense Systems Concepts protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. F33615-90-R-1433, issued by the Air Force for design, fabrication and testing of millimeter wave (MMW)

decoys.^{1/} Defense Systems contends that any deficiencies in its proposal did not justify excluding it from the competition since it offered a cost savings and only one proposal was left in the competitive range.

We deny the protest.

BACKGROUND

This acquisition was preceded by a 1986 exploratory development effort in which the Air Force awarded contracts to Defense Systems and the Raytheon Company to fabricate an MMW decoy model, run computer simulations and develop solid state electronics. The current RFP contemplates award of a cost-plus-fixed-fee contract for an advanced development effort. The technological objective of the solicitation is to miniaturize and package solid state electronics, use existing monolithic millimeter integrated circuit (MMIC) technology and, for the first time, to fabricate a functional MMW expendable decoy based upon the earlier nonfunctional mock-up model.

According to the solicitation, award is to be made to the offeror that submits the best overall offer, considering the following criteria in descending order of importance: (1) technical acceptability; (2) reasonableness, realism and completeness of proposed cost; and (3) management capabilities. Technical acceptability is to be determined in accordance with the following factors listed in descending order of importance:

- a. Understanding of the Problem.
- b. Soundness of Approach.
- c. Special Technical Factors.
- d. Compliance with Requirements.

Each of these factors includes an extensive narrative explanation. Performance on prior relevant contracts is to be considered in the evaluation of each of the technical factors.

The Air Force received two offers, from Raytheon and Defense Systems. The agency's technical evaluation board reviewed the proposals and assigned adjectival ratings to the proposals under the technical criteria. The evaluation board rated Raytheon's proposal exceptional under three of the four technical factors and acceptable under the fourth factor, Compliance with Requirements; Raytheon was given an overall rating of exceptional.

^{1/} Combat aircraft eject the decoys to avoid being shot down by a missile.

The evaluation board rated Defense Systems' proposal unacceptable overall based on unacceptable ratings under the Soundness of Approach and Compliance with Requirements criteria and "acceptable (minus)" ratings under the other two technical factors. The board explained that the firm proposed a technical manual and a simulation not required by the RFP while failing to adequately describe or demonstrate how it would meet critical requirements such as power output, dispenser compatibility, modulation and packaging. According to the board, much of Defense Systems' proposed effort belongs in exploratory development, not in an advanced development program. For example, the evaluation board noted that Defense Systems' proposal included a heavy emphasis on "breadboarding," which is appropriate to exploratory development, rather than "brassboarding," typical to an advanced development effort.^{2/}

The board also expressed concern that Defense Systems proposed to use three major subcontractors, an approach it viewed as very complex to manage and presenting serious schedule risk. According to the evaluation board, Defense Systems also proposed insufficient labor hours and an incorrect mix of those hours, with too much emphasis on program management at the expense of design engineering. Based on these concerns, the evaluation board stated that the overall risk of Defense Systems' proposal was very high because the firm's proposed approach included too much development work and its assessment of the tasks necessary to complete the program was unrealistic. According to the board, Defense Systems was not likely to complete the program on schedule.

In its report to the contracting officer, the technical evaluation board recommended that Defense Systems' proposal not be included in the competitive range and that the contract be awarded to Raytheon. According to the board, by virtue of the design it proposed and its extensive experience, Raytheon has a high probability of performing at an acceptable level with very low risk. The board also stated that for Defense Systems' proposal to be considered technically acceptable, a total rewrite would be necessary.

^{2/} A breadboard is a structure that offers a designer the flexibility to manually rearrange electronic devices and connections in a laboratory environment. A brassboard is used to build hardware that is unalterable and closely resembles the form of an item to be used in the field.

Based on the recommendation of the technical evaluation board, the contracting officer determined that Defense Systems' proposal was unacceptable and outside the competitive range. As a result, the agency conducted discussions with only Raytheon and awarded a contract to that firm.

PROTEST ALLEGATIONS

Defense Systems argues that it was improperly excluded from the competitive range since its proposal met the RFP requirements and offered the government a cost savings. According to the protester, the deficiencies found in its proposal were informational in nature and could easily be corrected in limited discussions. The protester also maintains that after excluding it from the competition, the Air Force changed its requirements without amending the solicitation and giving Defense Systems an opportunity to respond and that the agency failed to promptly notify the firm that its proposal had been rejected.

ANALYSIS

Based on our review of the record, we conclude that the agency reasonably found Defense Systems' proposal technically unacceptable based on its unacceptable rating under the two technical evaluation factors. In this respect, as we explain in detail below, we believe the record reasonably supports the agency's view that Defense Systems' proposal failed to demonstrate that it would meet a number of the solicitation requirements, including power output, packaging, aero-mechanical design, dispenser compatibility and modulations. Moreover, we agree with the agency that Defense Systems' lower cost proposal could not be made acceptable without major revisions or additions and conclude that the agency reasonably included only Raytheon in the competitive range. Although the agency changed its requirements after excluding Defense Systems from the competitive range, we also conclude that the protester suffered no prejudice as a result. Finally, Defense Systems was not prejudiced by the agency's failure to notify it promptly that its proposal had been rejected.

The Evaluation

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them and must bear the burden of any difficulties resulting from a defective evaluation. Therefore, our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the agency evaluation record to ensure that it was reasonable and consistent with the stated evaluation criteria. Mere

disagreement with the agency does not render the evaluation unreasonable particularly where, as here, the procurement concerns sophisticated technical hardware. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114.

We first address Defense Systems' arguments that its proposal met the requirements of the solicitation and should not have been found technically unacceptable. In general, Defense Systems argues that its proposal adequately described how it would meet the requirements of the solicitation such as power output, packaging, aeromechanical design, dispenser compatibility and modulations and that any questions could have been easily resolved in discussions.

For instance, the protester argues that, contrary to the agency's position, its proposal included adequate data to show that it would meet the RFP power output requirements since it included a three-fold improvement in amplifier architecture. According to Defense Systems, it proposed a circuit refinement, improved couplers and high electron mobility transistor devices and each of those improvements was extensively explained in its proposal.

In response, the Air Force notes that Defense Systems' proposal correctly stated that improvements are needed in existing MMIC technology to meet the solicitation's effective radiated power (ERP) requirement. Nonetheless, the Air Force states that Defense Systems proposed an unproven and risky design architecture without substantiating in its proposal that any of its three proposed improvements would provide the required results. For example, although Defense Systems' proposal states that it has expended considerable effort in the coupler design area, the agency states that the firm proposed to use a coupler design that past performance has shown to be unreliable. Under the circumstances, the agency maintains that Defense Systems' proposal should have included the results of its design effort in order demonstrate that its coupler design would work. According to the Air Force, the calculation of ERP in Defense Systems' proposal was unsubstantiated and if the firm's proposed improvements did not provide the needed results, it would not meet the ERP requirement.

The record does not show that the agency's evaluation of Defense Systems' proposal to meet the power output requirements was unreasonable. Defense Systems maintains that its proposal extensively explained its proposed three-fold improvement in amplifier architecture and asks what other data it could have included. Nonetheless, the firm does not dispute the agency's position that its proposed architecture is unproven and that its proposal included no test data to substantiate that the improvements it proposed will provide

the required results. Moreover, although it had the opportunity to do so, Defense Systems does not argue in its protest submissions that it possesses test data or other information that demonstrates the reliability of its proposed amplifier architecture.

Defense Systems also argues that its proposal was unreasonably criticized for not including a packaging approach. The protester maintains that given its experience on the earlier contract and the experience of its team members, who it refers to as "world leaders in packaging MMIC chips," the Air Force has no basis upon which to question its packaging ability. The protester also argues that its proposal included hundreds of lines regarding packaging.

In response, the agency explains that it does not question Defense Systems' packaging ability, but rather the lack of a packaging approach in its proposal. According to the agency, although the objective of the contract is a fully-functional, self-contained decoy with electronics and the various subsystems packaged inside, Defense Systems proposed no design approach that demonstrated subsystem packaging. Defense Systems' proposal states that it would perform a "packaging tradeoff study" to select the best approach. The agency maintains that this statement, taken in context, shows that Defense Systems has not yet determined how the decoy design will be packaged and that the firm's proposal stressed analysis rather than proposing a specific design approach.

We conclude that the agency reasonably determined that a major weakness in Defense Systems' proposal was its failure to propose a specific packaging approach. The statement of work requires packaging of electronics and the subsystems inside the body of the decoy and the Soundness of Approach evaluation factor required offerors to "recommend a specific intended approach" to meeting the requirements. Although Defense Systems argues that its proposal included hundreds of lines on packaging, the protester's submissions do not reference a specific packaging approach in its proposal.

We also reject the protester's contention that it was unreasonable to criticize its packaging ability given the firm's successful performance under the previous developmental contract and its proposed team members. Although the RFP stated that past performance would be considered in the evaluation, the solicitation also required offerors to demonstrate their capabilities in their proposals and there is no legal basis for favoring a firm based solely on presumptions resulting from its prior performance. Intelcom Support Servs., Inc., B-225600, May 7, 1987, 87-1 CPD ¶ 487.

Similarly, with respect to the capabilities of Defense Systems' team members, the technical evaluation of a proposal is based on information submitted in it and an offeror runs the risk of having its proposal rejected if it does not submit an adequately written one. Intelcom Support Servs., Inc., B-225600, supra. Although the team assembled by Defense Systems may be impressive, the agency could not credit the firm with a packaging approach that was not spelled out in its proposal.

Defense Systems also challenges the agency's contention that the firm did not propose a specific aeromechanical design. According to the protester, the Air Force must have ignored pages 31 through 33 and 42 through 43 of its proposal, which address this issue. Also, Defense Systems maintains that it was told during a demonstration of its mock-up supplied under its prior contract that Air Force engineers prefer its design over that referred to in the solicitation. Based upon this and given its team members which have had demonstrated aeromechanical design experience, the protester argues that the agency should have asked for clarification if it had any doubts concerning this matter.

Again, the Air Force argues that Defense Systems' proposal emphasizes analysis and leaves the specific aeromechanical design up for debate. We have reviewed the protester's proposal, including the pages referenced, and we agree with the agency. Although the proposal discusses a "decoy aerodynamic design, development and test plan" and includes a short list of "design considerations," the firm refers to no specific aeromechanical design in its proposal. Further, as explained above, the agency could not give the firm credit for capabilities possessed by the firm or its team members not spelled out in its proposal.

We also conclude that the other criticisms of Defense Systems' proposal were reasonable. For instance, although the protester argues that the agency's concerns about compatibility were caused by a simple typographical error which the agency should have recognized, the firm has not refuted the agency's contention that a decoy built according to a drawing in the proposal would not be compatible with the Air Force's dispenser system. Also, the protester has not refuted the agency's contention that its proposal did not demonstrate that it understood what the modulation capabilities set forth in the RFP required of the firm's chosen design. Similarly, we have carefully reviewed the protester's arguments concerning the Air Force's criticism of Defense Systems' extensive use of "breadboarding" as opposed to "brassboarding" in its proposal as well as the number of labor hours proposed for the total effort, and we find here too that the record supports the agency's judgment.

Based on the unacceptable ratings under two of the four technical evaluation factors, we conclude that the agency reasonably rated Defense Systems' proposal unacceptable overall.

The Competitive Range Exclusion

Given the unacceptability of the protester's proposal, we find that the agency reasonably excluded it from the competitive range. The Federal Acquisition Regulation (FAR) provides that the competitive range must include all proposals that have a reasonable chance of being selected for award and that any doubt as to whether a proposal is in the competitive range should be resolved by inclusion. FAR § 15.609(a). While the determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of the procuring agency's discretion, we closely scrutinize any evaluation that results in a competitive range of one; such a competitive range, however, is not per se illegal or improper. See Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273; Comten-Comress, B-183379, June 30, 1975, 75-1 CPD ¶ 400.

Here, the protester's proposal did not include a specific approach for some required tasks, as the RFP required, and lacked supporting data in other areas. Although Defense Systems contends that any deficiencies in its proposal were only "informational," we think, based on our detailed review and for the reasons set forth above, that the record reasonably supports the agency's conclusion that the proposal could not be made acceptable without major revisions and additions, particularly in the areas where the proposal did not include any specific design approaches. That being so, the decision to exclude the proposal from the competitive range was proper. See Intraspace Corp., 69 Comp. Gen. 351 (1990), 90-1 CPD ¶ 327; Comten-Comress, B-183379, supra.

Defense Systems' contention that its proposal should have been included in the competitive range because it proposed a lower cost than did the awardee is without merit. The solicitation made it clear that technical merit was the most important evaluation factor and where a proposal is judged technically unacceptable, an agency is not obligated to consider its lower proposed cost. See Intraspace Corp., B-237853, supra.

Other Issues

Defense Systems also maintains that the Air Force amended the RFP statement of work without giving the firm an opportunity to respond to the new requirements. According to the protester, the changes made in the statement of work included

reducing the deliverables from 20 to 7, the addition of a major capability, as well as 3 other material changes and the addition of technologies not covered by the original statement of work. Defense Systems argues that these changes altered the nature of the item.

The Air Force explains that the original statement of work required delivery of 20 decoys in order to demonstrate productivity. When it became evident that 20 decoys would not accomplish this objective, the required quantity was reduced to 7 since funds were not available for a sufficient quantity to demonstrate productivity. The objective of the solicitation is to miniaturize and package electronics into a fabricated MMW expendable decoy meeting performance and compatibility requirements. We agree with the Air Force that the reduced quantity to be delivered under the contract did not change the technological objective and was not a significant change in the solicitation.

The Air Force also explains that the original statement of work was amended to include the benefits of Raytheon's proposal in order to contractually bind Raytheon to provide what it proposed.^{3/} According to the agency, Raytheon's proposal was technically acceptable without the changes, but the changes improved the statement of work.

Besides decreasing the deliverables and doubling the required spatial coverage, among other changes, the amended statement of work changed the decoy's required ERP and operational lifetime and added polarization. We do not agree with Defense Systems that these and other changes altered the character of what was being procured. We have reviewed the original and the amended statement of work and conclude that the changes did not alter the basic objective of miniaturizing and packaging electronics into a fabricated MMW expendable decoy. Under the circumstances, and since Defense Systems' proposal to meet that objective was reasonably rejected as unacceptable, we do not believe it was prejudiced by not having an opportunity to submit a proposal based on the changed requirements. See Universal Technologies, Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63.


Finally, Defense Systems complains that, in violation of FAR §§ 15.609(c) and 15.1001(a), the agency failed to promptly notify the firm that its proposal had not been selected for award. In this regard, the protester claims that the agency's failure to properly notify it that its proposal was unacceptable as opposed to merely losing the competition to the

^{3/} Our discussion here is necessarily limited because portions of the statement of work are classified.

awardee resulted in its expending funds unnecessarily on arguments raised in its initial protest. That protest was, according to the protester, grounded on different arguments from those used in subsequent protest based upon the rejection of its proposal as unacceptable.

While agencies are required to provide prompt notice of the rejection of proposals, we generally view tardiness in notifying unsuccessful offerors as merely a procedural defect. See Adams Corporate Solutions, B-241097, Jan. 9, 1991, 91-1 CPD ¶ 24. We fail to understand exactly what "substantial additional costs" the protester incurred because of the agency's failure to inform it that its proposal was considered unacceptable until after the award. It seems to us that the arguments to be made against the agency's evaluation of Defense Systems' proposal are substantially the same whether or not the agency concluded that the proposal was unacceptable or just not as good as the awardee's. In addition, the Air Force has suspended performance under the contract pending the resolution of the protest so Defense Systems suffered no procedural disadvantage because of the notice defect.

The protest is denied.


for James F. Hinchman
General Counsel