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

Decision

Matter of: Satellite Transmission Systems, Inc.

File: B-242389.2

Date: July 16, 1991

Alexander J. Kelly for the protester.
Clifton M. Hasegawa, Esq., Defense Communications Agency, for the agency.
Steven Gary, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Offeror was afforded reasonable opportunity to correct deficiencies in its proposal, and proposal was subsequently properly eliminated from the competitive range, where during discussions the agency asked how off-line equipment in proposed satellite communications system could be replaced without causing interruption to communications, as required by the solicitation, and the offeror responded that not all equipment could be so replaced; offeror's refusal to comply with mandatory solicitation requirement rendered its proposal technically unacceptable.

DECISION

Satellite Transmission Systems, Inc. (STS) protests the Defense Communications Agency's (DCA) award of a contract to Teletronics International, Inc. under request for proposals (RFP) No. DCA200-90-R-0058, for satellite communications terminal equipment. STS asserts that DCA improperly eliminated its proposal from the competitive range as technically unacceptable following inadequate discussions.

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

The solicitation called for off-the-shelf portable and fixed KU-band satellite communications terminal equipment, to be used for White House access to the Defense Satellite Communications System. STS' protest concerns paragraph 5.1 of the RFP's statement of work (SOW), entitled "Maintenance Actions," which states that the "portable terminals shall be configured so that the off-line terminal equipment can be worked on or changed out without affecting the on-line

equipment and the communications link." Based on its initial evaluation of STS' proposal, DCA concluded that STS' placement of a required low-noise amplifier--the first stage of amplification of the signal received from the satellite--in front of the antenna dish, precluded the safe replacement of a failed amplifier while the antenna was in operation. Specifically, the agency noted that STS proposed a design in which the low-noise amplifier is mounted on an arm suspended in front of the antenna dish, and that the same arm also supports the feed horn which transmits the power of the high power amplifier to the reflector (the antenna dish); as a consequence, replacing the amplifier while the antenna is in operation would expose a technician to dangerous levels of microwave radiation. The agency concluded, therefore, that to replace a failed low-noise amplifier the earth terminal would have to be shut down, thereby disrupting communications, contrary to SOW paragraph 5.1.

Accordingly, in a letter to STS listing seven "discussion items," DCA specifically referenced "SOW para 5.1" and the portion of STS' proposal that addressed that requirement. The discussion item then went on to state:

> "Narrative Description (of proposal ambiguity/ deficiency):
>
> Your proposal, Para 5.0, states 'off-line units can be worked on without affecting on-line equipment or the communications link.'
>
> Specific question:
>
> How will the off-line [low-noise amplifier] be worked on 'safely' without affecting the communications link?"

The letter advised STS that "if you do not respond satisfactorily to this discussion item, your proposal may be recommended for elimination from further consideration and be classified as unacceptable." In addition, the letter generally cautioned that "if after responding to the discussion items your proposal does not conform to the requirement, your proposal will be considered nonacceptable and you will be removed from further consideration."

In its response to the discussion item, STS stated that "the redundant [low-noise amplifier] subsystem cannot be worked on safely while the transmit system is operational. This is the only condition whereby you cannot work on or change out off-line terminal equipment without affecting the communications link." DCA subsequently advised STS that, because its antenna design was not in compliance with SOW paragraph 5.1,

the firm's proposal had been found technically unacceptable and would not be given further consideration for award.

STS asserts that the agency failed to conduct meaningful discussions; it maintains that the discussion item referencing SOW paragraph 5.0 was insufficiently explicit to advise the firm of the perceived deficiency in its proposal. According to the protester, had the agency's concerns been stated more clearly, its proposal could have been made acceptable by means of simple modifications to its antenna design. DCA responds that the discussion item adequately advised STS of the perceived deficiency. Moreover, according to the agency, STS' system design was not susceptible to a ready solution of the problem. Consequently, the agency maintains, the proposal clearly failed to meet a mandatory solicitation requirement, was technically unacceptable, and properly was eliminated from the competitive range.

One of the basic functions of discussions is to disclose deficiencies. In evaluating whether there has been sufficient disclosure of deficiencies in the course of discussions, our focus is not on whether the agency described deficiencies in such detail that there could be no doubt as to their identification and nature, but on whether the agency imparted enough information to the offeror to afford it a fair and reasonable opportunity to identify and correct deficiencies in its proposal. The degree of specificity necessary in disclosing deficiencies to meet the requirement for meaningful discussions is not a constant but, rather, varies according to the degree of specificity of the solicitation. Herley Indus., Inc., B-237960, Apr. 5, 1990, 90-1 CPD ¶ 364.

Here, as noted, paragraph 5.1 clearly required that terminals "be configured so that the off-line terminal equipment can be worked on or changed out without affecting the on-line equipment and the communications links." In the discussion item, the agency referenced both SOW paragraph 5.1 and the section in STS' proposal where STS addressed the requirements of that paragraph by parroting it back to the agency. (The proposal merely stated that "off-line units can be worked on without affecting on-line equipment or the communications link," without explaining how its proposed equipment would comply.) The agency specifically asked how the low-noise amplifier could be worked on safely without disrupting communications. In response, STS took specific exception to the requirement, indicating that its low-noise amplifier could not be worked on without affecting communications. Although STS maintains that it was inadequately advised of the deficiency, it is evident from its response--"the only condition whereby you cannot work on or change out off-line terminal equipment without affecting the communications link" --that it was or should have been aware that it was deviating

from SOW paragraph 5.1. We conclude that the discussion item imparted enough information to the offeror to afford it a reasonable opportunity to identify and correct the deficiency in its proposal. Herley Indus., Inc., B-237960, supra.

We further find that DCA had a reasonable basis for excluding the proposal from the competitive range. The evaluation of a proposal and the resulting competitive range determination are matters within the discretion of the contracting activity, since it is responsible for defining its needs and the best method of accommodating them. See SAMCO dba Advanced Health Sys., Inc., B-237981.3, Apr. 24, 1990, 90-1 CPD ¶ 413. Therefore, in reviewing a competitive range determination, we will not reevaluate technical proposals, but rather will examine the agency's evaluation only to ensure that it was reasonable and in accord with the evaluation criteria. Id. In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. See Cajar Defense Support Co., B-239490.2, Oct. 30, 1990, 90-2 CPD ¶ 346.

The requirement in issue clearly was material. DCA explains that SOW paragraph 5.1 is an essential requirement--and that STS' deviation therefore warranted its rejection--because the Defense Satellite Communications System, which the terminal equipment accesses, is used for critical White House communications that cannot be interrupted for maintenance. STS does not argue otherwise, and we find no basis for questioning DCA's determination of materiality; technical requirements that are stated in clear and unambiguous terms are presumed to be material to the needs of the government. See Oxford Medical, Inc.--Recon., B-224256.2, Feb. 24, 1987, 87-1 CPD ¶ 200. As STS did not correct its failure to comply with SOW paragraph 5.1 following discussions, the agency properly eliminated the firm from the competitive range based on technical unacceptability.

STS argues that the requirement under SOW paragraph 5.1 in fact is not necessary for its equipment due to the extremely high reliability of its low-noise amplifier; STS claims this high reliability obviates the need to replace a failed amplifier. This argument is untimely. In effect, the protester is arguing that the SOW overstates the agency's actual needs relative to STS' proposed amplifier. Protests based upon apparent improprieties in the solicitation must be filed prior to the closing date for the submission of proposals. See 4 C.F.R. § 21.2(a)(1) (1991). In other words, if STS believed SOW paragraph 5.1 was unnecessary due to the nature of its proposed amplifier, it was required to protest on that basis prior to the closing date. As STS did not do so, this aspect of its protest is untimely and will not be

considered. See International Training, Inc., B-242254, Mar. 13, 1991, 91-1 CPD ¶ 283.

STS believes it was misled into concluding that DCA did not perceive a serious deficiency in its proposal by the fact that the agency had found STS' design approach--the same one proposed here--acceptable under a previous procurement, based on an identically-worded SOW. The prior acceptance of a noncompliant offer, however, is in no way determinative of the acceptability of a similar offer in a subsequent procurement, since the acceptability of offers depends not on prior procurements but on the facts and circumstances of each particular procurement, see Alfa-Laval, Inc., B-221620, May 15, 1986, 86-1 CPD ¶ 464; the prior acceptance of a noncompliant offer does not require the agency to continue to make the same mistake. Wright Assocs., Inc., B-238756, June 12, 1990, 90-1 CPD ¶ 549. Here, DCA acted properly in rejecting STS' technically unacceptable offer.

STS protests that the award to Teletronics was improper on the basis that its proposal failed to comply with mandatory solicitation requirements. For example, based on a photograph of Teletronics's antenna system included in DCA's response to the protest, STS contends that it is apparent that Teletronics's system includes a fixed-site antenna, which fails to comply with provisions of the SOW requiring the antenna to be portable, weigh less than 200 pounds, and be capable of being set up virtually anywhere in 90 minutes or less. STS is not an interested party to protest the acceptability of Teletronics's proposal. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must have a direct economic interest that would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester lacks a sufficient economic interest, and thus is not an interested party, where it would not be in line for contract award if its protest were sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Here, the competitive range included a second firm whose proposal was determined acceptable by the agency, while STS' proposal, as indicated above, was properly

eliminated from the competitive range as technically unacceptable; thus, STS would not be in line for award if its protest in this regard were sustained, and is not an interested party.1/

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel

1/ DCA explains that the photograph of Teletronics's system was provided to STS only to indicate the position of the low amplifier; Teletronics's actual proposal offered a detachable pedestal assembly that is transportable and can be set up quickly, and specified a system weight of less than 200 pounds, in accordance with the RFP requirements.