



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Trijicon, Inc.

File: B-244546

Date: October 25, 1991

Glyn A.J. Bindon, Trijicon, Inc., and Alan A. Pemberton, Esq., Covington & Burling, for the protester.
Michael A. Hordell, Esq., Petrillo & Hordell, for S-Tron, Inc., an interested party.
Michael B. Briskin, Esq., and Denise C. Scott, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency abandoned the stated evaluation criteria is sustained where solicitation provided that technical factors were more important than cost, and record indicates that agency's scoring practice resulted in award to the low-cost, technically acceptable offerors without properly assessing relative technical merit.
2. Contentions that agency improperly disregarded mandatory solicitation provisions limiting offerors to modified non-developmental items and requiring past production experience are denied where: (1) the agency accepts an item not previously produced but for which development is complete; and (2) the solicitation clause permitted the agency to consider past experience producing optics equipment of similar complexity to determine whether the offeror possessed the capacity to manufacture at the rate required in the solicitation.
3. Argument that one awardee's price contained impermissible front-end loading is dismissed as untimely where the protester had sufficient information to raise this issue prior to filing its initial protest but did not raise the issue until submitting its comments on the agency report.

DECISION

Trijicon, Inc. protests the award of contracts to Hughes Leitz Optical Technologies, Inc. (Hughes), Optic-Electronic Corporation (OEC), and S-Tron pursuant to request for

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proposals (RFP) No. DAAA21-91-R-0024, issued by the Department of the Army for modified non-developmental telescopes to be used with M-16 rifles and squad automatic weapons. Trijicon contends that the Army's evaluation improperly abandoned the evaluation methodology stated in the RFP, and that the Army's award to S-Tron impermissibly waived a mandatory RFP requirement and overlooked excessive front-loading in S-Tron's price.

We sustain the protest.

BACKGROUND

The Army issued the RFP on March 5, 1991, seeking fixed-price offers for telescopes for the M-16 rifle and squad automatic weapons. These telescopes are to include laser eye protection, tritium illuminated reticles,¹ and lens covers.

The RFP here envisioned a two-step procurement. First, proposals were to be scored and rated, and up to three offerors were to be selected for parallel contracts for the delivery of 75 telescopes and 15 mounting units for testing. (The first-step selection is the subject of the current protest.) Next, the RFP anticipated the selection--based on test results for the delivered hardware and on price--of one of the three initial awardees for receipt of a production contract by the exercise of an option.

The evaluation scheme in the RFP for selecting initial awardees weighed proposals in three areas: technical, management, and price. The technical and management factors were comprised of four subfactors each. Three of the four subfactors within the technical factor were to be scored, while one was to be rated either acceptable or unacceptable; all of the subfactors under the management factor were to be rated either acceptable or unacceptable.

The three scored subfactors in the RFP were optical, mechanical/physical, and environmental/durability.² Within these subfactors, the RFP also included a substantial number

¹ A reticle is the system of lines, dots, cross hairs, or wires, in the focus of the eyepiece of an optical instrument.

² The technical subfactor "safety and length," rated either acceptable or unacceptable under the evaluation criteria, was not included within the technical factor score. Since compliance with this subfactor was mandatory, any unacceptable rating would have rendered an offeror ineligible for award.

of evaluation elements, explained in detail in section M of the RFP. Specifically, the optical subfactor consisted of 10 weighted and scored elements; the mechanical/physical subfactor consisted of 18 weighted and scored elements; and, the environmental/durability subfactor consisted of 9 weighted and scored elements.

The RFP required that proposals be acceptable under the management factor, and under the one rated technical subfactor, to be considered for award. Among acceptable proposals, the RFP here advised offerors that technical factor scores--comprised of the numerical total for the three scored subfactors, and all the scored elements therein--would be considered more important than price, and that the government reserved the right to award to other than the lowest-price offeror. For example, in its executive summary, the RFP specifically advised offerors that:

"[t]echnical is considered more important than Total Price for the selection of Base Contract(s). Thus, the Government reserves the right to award to other than the lowest priced offeror."

Likewise, section M of the RFP advised that award would be made to the proposal that served the best interest of the government.

With respect to price, the RFP required a price for delivery of the test hardware, as well as prices for each of several production option quantities. Concurrent with the receipt of initial proposals, the agency was to identify the option quantity ranges to be evaluated for source selection purposes. The combination of the offered price for the test hardware and the option quantities selected for evaluation purposes was to form the basis for the total evaluated price.

Six offerors responded to the solicitation by the April 12 due date. In addition to the evaluation provisions set forth in the RFP, the Army followed a Source Selection Plan (SSP) in evaluating the proposals. The SSP directed evaluators to rate initial proposals using a three-color coding system. For each one of the 37 scored evaluation elements under the three technical subfactors, the SSP instructed evaluators to assign a color rating of green, amber, or red. A green rating was used to indicate that the proposal met or exceeded the RFP requirements; an amber rating was used to indicate that the proposal might meet the RFP requirements; a red rating was used to indicate that the proposal did not meet the RFP requirements. After the award of color ratings, the SSP directed that the ratings be converted to a numerical score. Green ratings were to

receive all available points; amber ratings were to receive 30 percent of available points; red ratings were to receive none of the available points.

All proposals were eventually found acceptable under the management factor and under the technical subfactor safety and length. The Army scored the initial technical proposals, held discussions with all six offerors, and requested and received best and final offers (BAFO). In rescoring the technical proposals, based on BAFO submissions, the Army awarded perfect technical scores to four of the six offerors, and determined that five of the six were technically equal. The offerors, their scores and total evaluated prices are shown below:

	<u>Score</u>	<u>Total Evaluated Price</u>
Trijicon	100	\$ 20,856,000
Hughes	100	14,641,766
S-Tron	100	14,013,054
Company A	100	24,413,000
OEC	98	17,062,075
Company B	94	41,638,000

Since the five proposals that scored 98 and above were found technically equal, the Army awarded contracts to the three lowest-priced proposals: Hughes, S-Tron, and OEC. This protest followed.

DISCUSSION

Failure to Follow Evaluation Criteria

Trijicon first argues that the Army abandoned the RFP evaluation scheme by using a scoring method that essentially converted a comparative evaluation scheme to one favoring the lowest-priced technically acceptable offer.³ According to Trijicon, even though the RFP evaluation scheme listed in great detail the technical subfactors and elements to be scored, and stated that technical merit was more important than price, the relative merits of different proposals were overlooked because of the evaluation methods specified in the SSP.

³ Trijicon's initial letter of protest also included several other contentions, each of which were addressed in detail in the Army's report. Since Trijicon did not reply to the Army's detailed responses to those issues, we consider them abandoned, and will not discuss them further. See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338.

The Army denies that this procurement was converted to one that favored the lowest-priced technically acceptable proposal. The Army argues first that most of the RFP's evaluation requirements were expressed as a range of values, and therefore it would have been inappropriate to award additional points to proposals that offered a product that exceeded that range. Next, after explaining the evaluation methods used here--a technical evaluation by color coding followed by converting those results to numerical scores--the Army argues that even if its evaluation did favor the lowest-priced, acceptable proposals, Trijicon was not prejudiced because its proposal was priced higher than that of the three offerors which received contracts.

Our review must begin with the terms of the RFP to establish the type of evaluation set forth therein. While procuring agencies must have broad discretion in determining the evaluation plan they use, they do not have the discretion to announce in the solicitation that one plan will be used, and then follow another in the actual evaluation. Cenci Powder Prods., Inc., 68 Comp. Gen. 387 (1989), 89-1 CPD ¶ 381. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Greenebaum and Rose Assocs., B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212.

As explained above, the RFP here sets forth 37 separately scored evaluation elements under the three technical subfactors. Our review of these evaluation elements, each explicitly listed in section M of the RFP, indicates that at least half of them are stated in terms of technical minimums that could be exceeded by an offeror⁴--for example, the evaluation element under the mechanical/physical subfactor requiring "[g]reater than or equal to 5.6 degrees Full Field-of-View" capability. When evaluation criteria are written in this way, and proposals are to be evaluated and scored for technical merit on a comparative basis, an offeror can reasonably expect that a product that exceeds the minimum requirement--5.6 degrees full field-of-view--will receive a greater score than one that merely meets the requirement. Therefore, based on the terms of the technical evaluation elements, and the RFP's explicit guidance to

⁴ As stated previously, the Army argues that most of the evaluation elements are stated as performance ranges, and thus, offerors should not receive a higher score for exceeding those ranges. This argument is simply not supported by the record. Even though the Army cites one such evaluation element, our review indicates that the example is not representative of the 37 scored elements in the RFP.

offerors, this RFP clearly indicated that technically superior proposals were favored over proposals that were technically acceptable.

With respect to the evaluation process, Trijicon argues that the methodology described in the SSP, and used to evaluate proposals here, failed to recognize qualitative differences between the proposals. According to Trijicon, the SSP resulted in the award of the same color--and ultimately the same score--to proposals that merely met the evaluation requirements, and to proposals that exceeded the requirements. Then, Trijicon argues, once the distinction between proposals was lost, due to the evaluation method, the contracting officer determined that the proposals were technically equal, and awarded contracts to the three proposals with the lowest cost.

Our review of the Army's evaluation method here, and its application, supports Trijicon's protest. As described above, the SSP stipulated the award of a green rating for every facet of a proposal that met or exceeded the stated evaluation elements. In addition, after rating the technical elements of proposals, the SSP prescribed the subsequent conversion of ratings to numerical scores. Since every green rating received 100 percent of all available points for that element (a perfect score), a technically superior proposal received the same score as one that was merely acceptable. Once all acceptable proposals were assigned perfect scores, as was preordained by the SSP, the contracting officer determined that the proposals must be technically equal, and made award to the three lowest cost proposals. Thus, in our view, the evaluation scheme in the RFP was converted to one resulting in selection of the low-priced, technically acceptable proposal.

An example of this methodology at work can be seen in the scoring of proposals under the element of weight. Weight was one of the elements of the mechanical/physical subfactor of the technical factor. Since a heavier telescope is presumably more difficult to use, the RFP, at paragraph M.3.1.5q., stated that the Army preferred a telescope weighing 1.0 kilogram or less. Despite this stated preference in the RFP, Trijicon's telescope, weighing only 0.47 kilograms, received the same (perfect) score as telescopes weighing 0.70, 0.56, and 0.477 kilograms.⁵

⁵ Weight is not the only technical evaluation element for which differences between proposals were lost in the evaluation process. Our review indicates that for several other criteria, Trijicon's proposal should have received a higher score than proposals that merely met the RFP requirement, but did not exceed it.

Under the terms of the SSP, an offeror would only receive less than a perfect score when it could not establish its ability to produce a telescope weighing less than 1 kilogram--i.e., when its proposal was not clearly acceptable. In our view, this process converted the original evaluation scheme in the RFP from one seeking technical superiority, to one that favored the lowest-cost, technically acceptable proposal.

Further, we disagree with the contention that even if the Army did abandon the evaluation scheme in the RFP, Trijicon was not prejudiced because of its higher cost. Trijicon's evaluated cost of \$20.8 million was the fourth-low out of the six proposals, and was approximately \$3.8 million higher than the highest-priced awardee. Trijicon cites several features of its telescope that it claims would support its higher price--i.e., fabrication with forged and machined aluminum housings, contributing light weight and durability, and the use of fiber optic technology in the reticle, contributing increased visibility at low light levels. Thus, Trijicon was prejudiced here because it was induced to propose a technically superior telescope when a less sophisticated product might have been acceptable.⁶ Since every technically acceptable proposal received a perfect score under the evaluation scheme, there is no evaluation information to support any assertion by the Army that Trijicon's proposal was not worth the additional cost.

In fact, none of the award decisions made here can be said to have a reasonable basis since there is insufficient evidence in the evaluation materials to conclude that any of the proposals were anything other than acceptable--thus, earning a green rating, and a perfect score. Since agencies may not specify that technical superiority will be more important than cost, then make award decisions as though the RFP provided for award to the lowest-cost, technically acceptable offeror, we sustain the protest. Hattal & Assocs., B-243357; B-243357.2, July 25, 1991, 70 Comp. Gen. ____, 91-2 CPD ¶ 90; RCA Serv. Co., B-219406.2, Sept. 10, 1986, 86-2 CPD ¶ 278.

Waiver of Mandatory RFP Requirements

Trijicon next argues that the Army waived a mandatory experience requirement in the RFP, and accepted a non-developmental item in awarding a contract to S-Tron. With respect to experience, paragraph L.3.1.2 of the RFP required that an offeror demonstrate that it has "produced

⁶ In fact, Trijicon claims that it could have proposed a less sophisticated telescope had it known that the Army would not reward technical superiority.

at the minimum monthly rates as specified" within the past 5 years. The paragraph also requires offerors to

"...provide sufficient details, such as; available corporate facilities, subcontractor facilities, if required, skilled personnel, and past history of manufacturing optics that will demonstrate the offeror's ability to meet the Government's requirements."

This provision was included within the evaluation scheme by paragraph M.3.1.8, which stated that an offeror would be rated acceptable or unacceptable based on its ability to comply with the provision in paragraph L.3.1.2. The RFP also stated, in several places, that the Army was seeking modified non-developmental items in response to the solicitation.

Since the Army admits that S-Tron has not previously manufactured a rifle telescope, Trijicon argues that the S-Tron proposal cannot possibly have met the mandatory experience requirement of the RFP, or the RFP's requirement that offerors submit modified non-developmental items. Thus, according to Trijicon, the award to S-Tron was improper.

The Army responds that the RFP requirement for manufacturing experience within the past 5 years (at the quantities specified) is not limited to experience manufacturing telescopes. In fact, the Army argues that since it sought modified non-developmental equipment, no offeror could claim experience manufacturing precisely the same equipment sought here. Instead, the Army rated S-Tron acceptable on this mandatory evaluation requirement because of S-Tron's prior experience manufacturing night vision goggles. According to the Army, both are optical devices, and S-Tron produced the goggles at a rate sufficient to indicate that it could meet the delivery requirements here.

In response to Trijicon's argument that S-Tron also could not meet the RFP's requirement to submit modified non-developmental equipment, the Army argues that S-Tron's telescope qualifies as a modified non-developmental item because S-Tron had been developing its telescope for approximately 10 months by the time it submitted its proposal; therefore, only little or no further development was needed. On this basis, the Army concluded that S-Tron's telescope was acceptable, and that S-Tron would be able to meet the accelerated delivery requirements in the solicitation.

We do not find the Army's conclusions unreasonable on either count. While we agree with Trijicon in its assertion that

the Army has broadly interpreted the production requirement provisions set forth at paragraph L.3.1.2., the language only requires a showing that the offeror has produced at the specified rates within the past five years. In this regard, the paragraph anticipates that offerors might demonstrate their capacity to meet the required production levels by providing past history of manufacturing optics. Based on this provision within the RFP, we find it was reasonable for the Army to consider S-Tron's past production of night vision goggles as evidence of its ability to meet the requirements here. See Kollmorgan Corp., B-2426602, June 5, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 529.

Likewise, we find reasonable the decision to accept S-Tron's product even though the RFP specified that the Army was seeking a modified non-developmental item. The RFP here recognized that no offeror would be able to satisfy the Army's requirement with off-the-shelf equipment, yet sought to take advantage of existing equipment that could be quickly modified to meet the agency's needs. The record shows that even though S-Tron's product was not yet commercially available, development was essentially complete.⁷ As the Army explains, the general statutory definition of a non-developmental item, set forth at 10 U.S.C. § 2325 (Supp. II 1990), includes an item being produced that is not yet in use or not yet available in the commercial marketplace. Thus, since even a non-modified non-developmental item need not be in use, and since no offeror was capable of offering an item currently in production because each offeror's product required modification, S-Tron's product, in our view, was reasonably considered acceptable. We deny this ground of Trijicon's protest.

Nonetheless, even though we reject Trijicon's contention that the Army acted unreasonably in awarding to S-Tron for given these RFP requirements, if the Army decides to amend the solicitation and request revised BAFOs based on other recommendations in this decision, we believe the Army may want to consider addressing the ambiguities now apparent in its request for a modified non-developmental item, and in its evaluation provision requiring mandatory production experience.

⁷ The Army's conclusion has been supported by the facts. The RFP here required test equipment delivery within 45 days of contract award. S-Tron's subsequent delivery of such equipment within that time supports the Army's conclusion that the S-Tron telescope was essentially ready for production.

Impermissible Front-Loading By S-Tron

We dismiss as untimely Trijicon's argument that S-Tron's proposal price contained impermissible front-end loading. In its initial protest, Trijicon claimed that award to S-Tron was improper because S-Tron's price for the test equipment--phase 1 of the procurement--was significantly higher than Trijicon's phase 1 price. In fact, rather than claim that S-Tron's price was unbalanced, Trijicon stated that the Army should have awarded initial contracts based on phase 1 prices alone, provided subsequent prices were within appropriate guidelines. This claim cannot be fairly construed to include an assertion that Trijicon's price was unbalanced.

In our view, Trijicon had the information necessary to pursue a claim of unbalanced pricing when it received the Army's June 6 letter advising unsuccessful awardees of the selection decisions and award prices. However, only when Trijicon submitted its comments on the agency report was this issue alleged and developed. While we have broadly construed Trijicon's initial protest letter in other areas, we consider this issue untimely, since it was not raised in the initial protest letter, and was not raised within ten days of the time Trijicon became aware of its basis for protest. See 4 C.F.R. § 21.2(a)(2) (1991).

RECOMMENDATIONS

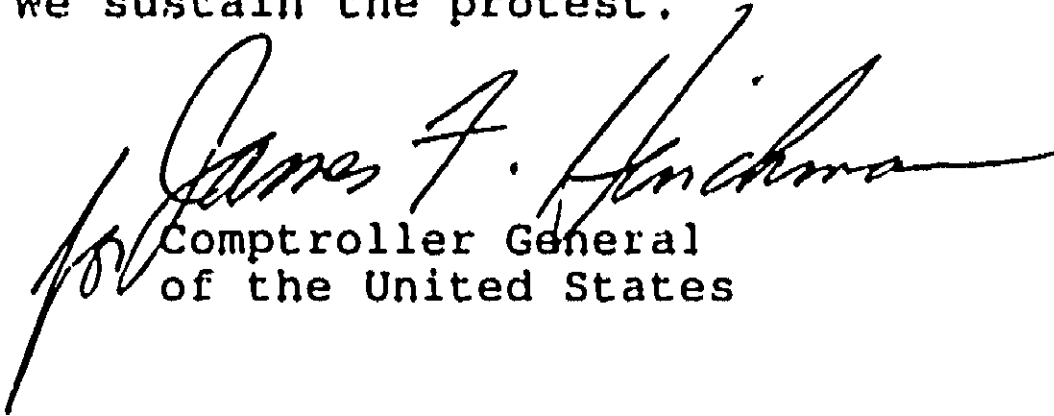
For the reasons stated above, we find that the Army's evaluation of proposals here, in essence, converted an RFP seeking relative technical merit to one that instead favored the lowest-cost, technically acceptable proposal. Our review of the specific evaluation criteria together with the RFP's stated preference for modified non-developmental items leads us to conclude that an evaluation methodology requiring award to the low, technically acceptable offerors may, in fact, be consistent with the Army's minimum needs. As a result, we recommend that the Army reconsider its evaluation scheme, and the criteria therein, and revise the solicitation to reflect the agency's needs for telescopes. In addition, we recommend that the Army clarify the ambiguities, as discussed above, regarding the RFP's stated requirements for modified non-developmental items and mandatory production experience. After modifying the RFP, the Army should permit the offerors to submit revised BAFOs, and should evaluate the proposals in a manner consistent with the stated evaluation criteria and make awards accordingly.

In the alternative, if the Army concludes that it prefers to retain the evaluation scheme set forth in the RFP--i.e., to award to the proposals with the greatest technical merit--we

recommend that the Army reevaluate the BAFOs based on relative technical merit and make appropriate price/technical tradeoff decisions.

With respect to the ongoing contracts, the Army has received the test items from the three initial awardees, but has not completed testing and has elected not to exercise a production option until learning the outcome of this protest. We recommend that the Army not exercise any production option of the initial awardees unless they are again successful under the revised competition. We also find that Trijicon is entitled to the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991). Trijicon should submit its claim for such costs directly to the agency.

We sustain the protest.


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