



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Mobile Telesystems, Inc.

**File:** B-245146

**Date:** December 18, 1991

Richard D. Gluck, Esq., Robins, Kaplan, Miller & Ciresi, for the protester,  
Alfred J. Verdi, Esq., for NAV-COM Inc., a subsidiary of Magnavox Government and Industrial Electronics Company, an interested party.  
Roger S. Sabin, Esq., Defense Information Systems Agency, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that agency improperly made award on the basis of initial proposals under a negotiated brand-name-or-equal procurement to a firm whose proposal was allegedly "nonresponsive" because its "equal" product, at the time of proposal submission, did not conform to a listed salient characteristic--approval by an international organization--is denied where the "equal" awardee's initial proposal clearly promised the required approval and shortly after proposal submission furnished the agency with confirmation of its product's approval.

### DECISION

Mobile Telesystems, Inc. (MTI) protests the award of a contract to NAV-COM, Inc., a subsidiary of Magnavox Government and Industrial Electronics Company, under request for proposals (RFP) No. DCA100-91-R-0129 issued by Defense Information Systems Agency<sup>1</sup> for portable satellite telephone terminals. MTI contends that NAV-COM's proposal was unacceptable, since it did not meet a mandatory certification requirement at the time of proposal submission, and that the agency engaged in improper discussions with the awardee.

<sup>1</sup>This is a new name for what was formerly the Defense Communications Agency. The name change was effective June 25, 1991.

We deny the protest.

This procurement is for 33 portable satellite telephone terminals with an option for two additional terminals. The RFP required "Mobile Telesystems, Inc. Model TCS-9200 portable INMARSAT<sup>2</sup> terminals, brand name or equal" and, in listing the brand-name's salient characteristics, stated that "[i]n order to meet mandatory technical specifications, terminals shall . . . be type approved by INMARSAT and comply with the Technical Requirements for INMARSAT Standard-A Ship Earth Stations (Issue 3) dated 24 May 88 and published by INMARSAT." The RFP's "Brand Name or Equal" clause stated that the agency would base its determination of the acceptability of proposed "equal" products on "information furnished by the offeror or identified in the proposal as well as other information reasonably available." The clause further advised that offerors could propose product modifications to make a proposed "equal" product conform to the brand-name product, if the proposed modifications were clearly described. The RFP also stated the agency's intent to evaluate proposals and award the contract without discussions if practicable and to this end required offerors to demonstrate in their technical proposals that their proposed equipment met all salient characteristics.

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<sup>2</sup>INMARSAT is the acronym for the International Maritime Satellite Organization. INMARSAT is an international cooperative formed for the purpose of using satellites to improve maritime communications and safety. INMARSAT operates capacity on a number of satellites that together with coast earth stations--the stations link the satellites to national and international fixed telecommunications networks--provide telecommunications coverage of most of the world's surface. INMARSAT sets technical standards and certifies product compliance in the area of satellite telecommunications.

On the June 3, 1991, closing date for receipt of proposals, NAV-COM submitted its offer of an "equal" product,<sup>3</sup> noting that the proposed equipment "is scheduled to receive INMARSAT type approval on or about 4 June 1991" and that NAV-COM would provide a copy of the INMARSAT type approval certificate. As promised, INMARSAT approved NAV-COM's equipment on June 4. By letter dated June 12, NAV-COM furnished the agency with a copy of the INMARSAT type approval. On August 1, the agency awarded the contract to NAV-COM, as the lowest-priced technically acceptable offeror, on the basis of initial proposals. On August 9, MTI protested the award to our Office.<sup>4</sup>

As a preliminary matter, the agency and NAV-COM assert that MTI is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991), arguing that MTI has no direct economic interest which will be affected by the award of the contract, since (1) MTI's offer was the second most expensive proposal out of eight technically acceptable proposals (ranked six proposals behind NAV-COM); (2) MTI did not challenge the acceptability of any intervening offeror; and (3) MTI is not next in line for award under the stated evaluation criteria. We disagree. A primary allegation of the protester is that the agency engaged in improper discussions with the awardee. Were MTI to prevail on this issue, we could recommend the reopening of discussions with all offerors, necessitating a call for best and final offers (BAFO) from all offerors in the competitive range in which case MTI would have an opportunity to revise its pricing and contend for award. Since the agency does not assert that MTI, which apparently submitted a technically acceptable proposal, is not within the competitive range, MTI has sufficient direct economic interest to maintain its protest. See Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 6, 1990, 90-2 CPD ¶ 381; Sach Sinha & Assocs., Inc., B-236911, Jan. 12, 1990, 90-1 CPD ¶ 50.

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<sup>3</sup>NAV-COM's new, single carrying case, model No. MX 2020P MAGNAPhone. NAV-COM's proposal states that the firm has manufactured INMARSAT terminals since 1983 and that the new model, which is specifically designed to be an INMARSAT terminal, includes many RFP required features found in NAV-COM's INMARSAT approved, two-carrying case, model MX2400T PLUS that was first introduced in 1987.

<sup>4</sup>We note that the agency has determined that urgent and compelling circumstances warranted proceeding with partial performance of the contract for delivery of 11 of the 33 terminals.

MTI contends that the award is improper because NAV-COM's proposed equipment did not meet the RFP's mandatory technical specifications when NAV-COM submitted its offer. Essentially, MTI argues that NAV-COM's proposed product had to meet all salient characteristics at the closing date for submission of initial proposals to be considered an "equal" of the specified brand-name product.<sup>5</sup>

Generally, in a brand name or equal procurement, the agency is responsible for evaluating the data submitted by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's product as equal. See Phillips Med. Sys. N. Am. Co., B-237598.2; B-238599.2, Apr. 17, 1990 90-1 ¶ 395. In making these determinations, the agency enjoys a degree of discretion that we will not disturb absent a showing that the determinations are unreasonable. VG Instruments, Inc., B-241484, Feb. 7, 1991, 91-1 CPD ¶ 137 (agency reasonably relied on assurances from the offeror of a new "equal" product when due to the product's newness there was a dearth of technical information on which to base a technical evaluation).

While MTI points out that the brand name or equal clause expressly warns that "[m]odifications proposed after proposal opening to make a product conform to a brand name product referenced in the RFP will not be considered," offerors under the instant RFP were free to advance, in their initial proposals, proposed modifications of their offered "equal" products. In this regard, the "brand name or equal" clause expressly permits an offeror to propose in an initial proposal "modifications" to its proposed "equal" product "so as to make it conform to the requirements of the RFP." Consequently, modifications--if sufficiently described in the initial proposal to be technically acceptable to the agency--may be actually accomplished in the interval between the initial proposal closing date and contract performance. That is, there is no inherent requirement in brand name or equal procurements that offered "equal" products actually exist at the time the proposal is submitted. VG Instruments, Inc., supra. Similarly, the agency, after receipt of proposals, may, without opening

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<sup>5</sup>We note that MTI urges that NAV-COM's proposal was not responsive to the RFP. The absolute formality of the concept of "responsiveness," as used by MTI, generally does not apply to negotiated procurements as it applies to sealed bid procurements. See Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. Consequently, in its consideration of offers under negotiated procurements an agency has greater flexibility than it enjoys in its consideration of sealed bids.

discussions, obtain confirmation that a proposed "equal" product will meet RFP requirements. DEST Corp., B-221869, Apr. 7, 1986, 86-1 CPD ¶ 344.

We do not read the RFP requirement for INMARSAT type approval as a requirement for proven pre-proposal performance. Rather, we see the type approval requirement as providing the agency with assurance that INMARSAT will grant the agency equipment access to its satellite network. In this regard, the RFP does not specify that INMARSAT type approval must be effective prior to the closing date for receipt of initial proposals. In the absence of a requirement for a history of proven performance, there is no absolute requirement for the submission of test data proving proposed capabilities with initial proposals. See VG Instruments, Inc., supra.

NAV-COM's proposal stated exactly how and when the firm would obtain INMARSAT's approval of its "equal" product so as to conform to the brand-name product's salient characteristic of having INMARSAT type approval. We regard NAV-COM's promise to shortly obtain INMARSAT type approval as the same as a proposed modification to its product to meet specification requirements,<sup>6</sup> in that the actual approval of NAV-COM's product may occur after closing without a need to revise the product that was offered in NAV-COM's proposal. See Phillips Med. Sys. N. Am. Co., supra. NAV-COM had obtained INMARSAT's approval for similar products and there is no reason to believe that it would not be able to again obtain the requisite approval for the product proposed under this RFP, given that the product was designed to INMARSAT standards and the months-old approval process had nearly reached culmination. Indeed, it appears the agency could simply have verified the NAV-COM product's pending approval by directly contacting INMARSAT. Therefore, we find reasonable the agency's acceptance of NAV-COM's proposal, which promised INMARSAT type approval prior to contract performance.

MTI contends that the award is improper because discussions occurred between NAV-COM and the agency without other offerors being afforded an opportunity to submit BAFOs. Initially, MTI alleged that the agency improperly discussed extensions of the contract performance deadlines, the pricing of competing offerors, and NAV-COM submission of technical information concerning the INMARSAT type approval. The agency has furnished affidavits denying MTI's

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<sup>6</sup>As indicated above, MTI characterizes NAV-COM's obtaining INMARSAT type approval after receipt of proposal as a "modification" to its offered product.

allegations,<sup>7</sup> and MTI has not rebutted the agency-furnished affidavits save to the extent that MTI now contends that:

"NAV-COM's submission of INMARSAT type approval certification after the closing date for the submission of bids, and the government's acceptance of that certification, fall squarely within the meaning of 'discussion'.<sup>8</sup>"

MTI contends that the agency could not have accepted NAV-COM's proposed modification of its "equal" product without NAV-COM's June 12 letter forwarding evidence that the modification had in fact been accomplished. In MTI's view, the letter gave NAV-COM the opportunity to modify its

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<sup>7</sup>On June 13, the agency sent certain clarification letters to the offerors. The agency letter to NAV-COM did not mention the INMARSAT type approval, but did inquire as to another aspect of NAV-COM's proposal. The agency sought clarification of NAV-COM's intent to assist users, after delivery of the terminals, by obtaining INMARSAT terminal identification numbers and commissioning each terminal into INMARSAT. From our review of NAV-COM's proposal, NAV-COM had made this promise in its initial proposal and the agency's question merely clarified this intent. The agency's only other pre-award communication with NAV-COM occurred on June 17, when NAV-COM was asked to confirm that, in the event of an award, NAV-COM would perform the work itself and therefore was not required to submit a small business subcontracting plan. We regard these communications between the agency and NAV-COM as "clarifications."

<sup>8</sup>Federal Acquisition Regulation (FAR) § 15.601 defines "discussion" as:

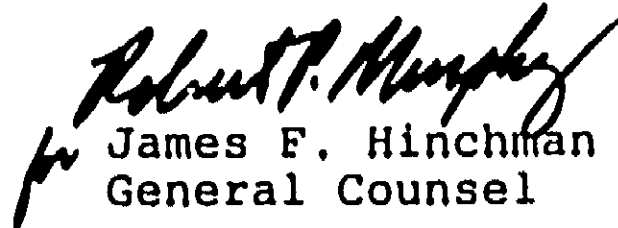
"'Discussion' . . . means any oral or written communication between the [g]overnment and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the [g]overnment, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

A "clarification," on the other hand, is a communication with an offeror "for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal" that "does not give the offeror an opportunity to revise or modify its proposal." Id.

proposal to "comply with perhaps the most important single technical requirement in the entire solicitation."

As discussed above, NAV-COM's proposal stated the exact nature of its compliance with the INMARSAT type approval requirement and the agency reasonably accepted the proposal. NAV-COM's June 12 letter merely confirmed that NAV-COM did what its initial proposal committed itself to do--obtain prompt INMARSAT approval. See DEST Corp., supra. Thus, we think the June 12 letter is best characterized as an offeror originated clarification. As discussions did not occur between the agency and NAV-COM, the agency was not required to open discussions with the other competitive range offerors, and could properly award the contract on the basis of initial proposals. See Emerson Elecs. Co., B-213382, Feb. 23, 1984, 84-1 CPD ¶ 223.

The protest is denied.

  
for James F. Hinchman  
General Counsel