

Arsenoff

145707



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

## Decision

**Matter of:** Mid-Atlantic Industries, Inc.

**File:** B-245551

**Date:** January 16, 1992

David M. Jones for the protester,  
James J. Jasinski, Federal Bureau of Investigation, for the  
agency,  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Protest is sustained where agency made award based on  
initial proposals to other than the low-priced, technically  
acceptable offeror.

### DECISION

Mid-Atlantic Industries, Inc. protests the award of a con-  
tract to Dictaphone Corporation under request for proposals  
(RFP) No. 5085, issued by the Federal Bureau of Investiga-  
tion (FBI) for dictating and transcribing equipment and for  
related warranty and maintenance services. The protester  
contends that the agency improperly awarded a contract to  
other than the low-priced, technically acceptable offeror  
and alleges that the evaluation of proposals was defective.

We sustain the protest because the record shows that the FBI  
improperly made the award based upon initial proposals to  
other than the low-priced, technically acceptable offeror.

The RFP contemplated a 1-year, fixed-price, indefinite quan-  
tity requirements contract with 2 option years for dictating  
and transcribing equipment. The contractor was also  
required to provide a 2-year warranty and limited mainte-  
nance services during the warranty period; after expiration  
of the warranty, the contractor was to provide on-site  
maintenance services.

The method of award provisions of the RFP established a  
multi-step evaluation process to determine which offer  
presented the greatest advantage to the government, with  
price more important than technical merit. First, proposals  
were to be screened by a technical evaluation panel to  
determine whether they met minimum mandatory requirements

set forth in section C.2 of the statement of work (SOW). Offers meeting the mandatory requirements were then to be comparatively evaluated on the basis of stated "subjective technical factors."

The contracting officer was then to consider these evaluations together with price in determining which offeror would receive the award. The RFP provided that the contracting officer could make award on the basis of initial offers if the price was determined reasonable and no unresolved technical issues remained; otherwise, discussions were to be conducted and, upon resolution of technical issues, best and final offers (BAFOs) were to be requested and evaluated for final award consideration. Three proposals were received. Only that of Mid-Atlantic at \$628,858 and that of Dictaphone at \$746,500 received consideration in the final analysis.

Technical evaluations were completed on August 19, 1991, and resulted in a determination that each offer met the minimum mandatory requirements set forth in the solicitation. A comparative assessment was made with respect to the following factors: vendor support, past performance, operational reliability, and technical evolution. Both Dictaphone and Mid-Atlantic were rated as above average on operational reliability and average on technical evolution. The difference came in the comparative assessment of past performance, on which Dictaphone was rated as above average and the protester below average, and vendor support where the same results occurred.

With respect to past performance, the agency was concerned because the references provided by Mid-Atlantic were firms which had purchased the brand of equipment offered by Mid-Atlantic but had not before dealt with the protester. In connection with vendor support, Dictaphone offered an on-site maintenance plan during the warranty period (even though none was required by the RFP), while Mid-Atlantic offered what the FBI considered a less desirable off-site maintenance plan for the same period. The agency also expressed concern about Mid-Atlantic's after-warranty maintenance plan, which involved the use of various authorized dealers.

The agency reports that the contracting officer then made a cost/technical tradeoff and, on August 22, awarded a contract to Dictaphone based upon that firm's higher-priced offer because he found that the \$100,358 difference in price between the awardee and the protester was outweighed by Mid-Atlantic's perceived deficiencies in vendor support and past performance.

The protester disputes its relatively low technical ranking and argues that it should have received the award as the low-priced, technically acceptable offeror. In this regard, Mid-Atlantic is particularly critical of its vendor support rating based on offering an off-site maintenance plan, since the RFP did not preclude such a plan during the warranty period and since the FBI never otherwise "requested" an on-site plan through discussions; the protester maintains that, had it known that the agency wanted such a plan, it could have provided one for approximately \$25,000, which would still mean that its offer would be approximately \$75,000 lower than Dictaphone's.

In reviewing the evaluation record supplied by the agency in the context of the protest allegations, we have been unable to find anything which shows that discussions were conducted or that the offerors were provided the opportunity to submit BAFOs. Instead, award was made on the basis of initial proposals to other than the low-priced offeror.

Under the Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(1)(B) (1988), an agency may make an award on the basis of initial proposals only where the solicitation advises offerors of that possibility and the competition demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government.<sup>1</sup> TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239. Where it appears that award will not result in the lowest overall cost to the government, the agency is not free to award on an initial proposal basis, but instead must conduct discussions and provide offerors with an opportunity to submit revised proposals in an attempt to determine the proposal most advantageous to the government. Schreiner, Legge & Co., B-244680, Nov. 6, 1991, 91-2 CPD ¶ 432. Stated differently, an agency is precluded from making award on the basis of initial proposals to any firm other than the one offering the lowest overall cost, if the low offeror is technically acceptable or capable of being made acceptable. Id. If the agency does make such an award, it has conducted an impermissible cost/technical tradeoff. TFA, Inc., supra.

Here, the record shows that Mid-Atlantic, the low-priced offeror, was determined to be technically acceptable with respect to the mandatory requirements of the RFP. No

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<sup>1</sup>In view of amendments to 10 U.S.C. § 2305(B)(4)(A), this restriction no longer applies to procurements covered by Title 10 of the United States Code; to date, however, no similar change has been made to the corresponding statute in Title 41 governing procurements by civilian agencies such as the FBI.

initial determination was ever made that the firm's proposal required discussions to be made acceptable. The contracting officer was then presented with a comparative evaluation which indicated that the protester was below average with respect to past performance and vendor support--specific subjective technical subfactors outlined in the RFP. At this point, the contracting officer decided to make award to the higher-priced offeror on the basis of its initial proposal based upon a cost/technical tradeoff. This is improper as an award based upon initial proposals under the circumstances here can only be made to the low-priced offeror. We therefore sustain the protest. In view of this conclusion, we find it unnecessary to address the protester's other contentions.

Since the protest was not filed with this Office within 10 calendar days after the award was made, performance of the contract has not been stayed,<sup>2</sup> Schreiner, Legge & Co., supra. We recommend that the FBI reopen negotiations with all three offerors, conduct discussions, and request a round of BAFOs. If a firm other than Dictaphone is selected as the result of the agency's evaluation of BAFOs, then the FBI should terminate Dictaphone's contract for the convenience of the government and make award to that firm. National Sys. Mgmt. Corp., 70 Comp. Gen. 443 (1991), 91-1 CPD ¶ 408.

Under the circumstances, the protester is also entitled to its costs of filing and pursuing the protest and should submit its claim for such costs directly to the FBI. Id.

  
Acting Comptroller General  
of the United States

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<sup>2</sup>The protester's assumption that its earlier agency-level protest requires a stay of performance is incorrect; a stay is only required when an agency is notified, within 10 calendar days of the award, that a protest has been filed with this Office. See CIRCON ACMI, Div. of Circon Corp., B-231108, Aug. 12, 1988, 88-2 CPD ¶ 144.