



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

# Decision

**Matter of:** Federal Bureau of Investigation; Mid-Atlantic Industries, Inc.--Reconsideration  
**File:** B-245551.2; B-245551.3  
**Date:** June 11, 1992

Calvin E. Jones, Sr., for the protester.  
James J. Jasinski, Federal Bureau of Investigation, for the agency.  
Robert C. Arsenoff, Esq., and John W. Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Prior decision sustaining protest because award was made to other than the low-priced technically acceptable offeror on the basis of initial proposals is reversed where supplemental information, not previously supplied by the agency because it was not relevant to the issues raised by the protester, shows that discussions were held and best and final offers were received and considered prior to award.
2. Protester's proposed maintenance plan which required agency to ship transcribing and dictating equipment off-site to obtain repairs within a 12-day period was reasonably judged by agency to be technically inferior to awardee's plan under which equipment was to be repaired on-site within 1 hour.
3. Agency reasonably rated protester's past performance as below average where solicitation required offerors to provide a list of three of their own customers for transcribing and dictating equipment and protester provided a list of firms which were not its own customers.
4. Where solicitation explicitly provided for price/technical tradeoffs and a comparative assessment of technical proposals, agency reasonably determined that a contract based upon awardee's technically superior proposal justified paying a 16-percent higher price to that firm.

## DECISION

The Federal Bureau of Investigation (FBI) and Mid-Atlantic Industries, Inc. request reconsideration of our decision,

Mid-Atlantic Indus., Inc., B-245551, Jan. 16, 1992, 92-1 CPD ¶ 80, in which we sustained Mid-Atlantic's protest against the award of a contract to Dictaphone Corporation under request for proposals (RFP) No. 5085 for transcribing and dictating equipment and related warranty and maintenance services.

#### BACKGROUND

In its original protest, Mid-Atlantic made two principal allegations: that its low-priced, technically acceptable, proposal was improperly evaluated and that the price/technical tradeoff represented by the award to the higher-priced Dictaphone was unjustified. We did not decide these issues because, from the record presented for our review, it appeared that the award had been made to other than the low-priced technically acceptable offeror on the basis of initial proposals in contravention of the statutory prohibition against such awards, 41 U.S.C. § 253b(d)(1)(B) (1988). Specifically, although the record showed that both the protester and the awardee had submitted acceptable offers and that the protester's price was lower, the record did not show that discussions had been conducted or that best and final offers (BAFOs) had been requested, received and considered prior to award. As a result, we sustained the protest. We recommended that the competition be reopened, discussions held and BAFOs requested, received and considered. We also found that Mid-Atlantic was entitled to be reimbursed for its protest costs.

In its request for reconsideration (B-245551.2), the FBI argues that our decision was based on a "factual misunderstanding" and, in support of this position, provides evidence which shows that oral and written discussions were conducted and that BAFOs were requested, received and considered prior to the award to Dictaphone. The agency requests that we reverse our decision to the extent it was based on a conclusion that award was made on the basis of initial proposals, and it also requests that we now decide the issues originally raised by the protester.

In lieu of responding directly to the agency's reconsideration request, Mid-Atlantic elected to file a request of its own (B-245551.3). Mid-Atlantic does not dispute that discussions were held or that the agency requested BAFOs. Rather, the protester essentially argues that BAFOs were irrelevant to the merits of the issues it originally raised (and which were never addressed on the merits) and, on the strength of the previous record, the protester requests that we modify the remedy contained in our earlier decision from a reopening of competition to a directed award to it.

For the reasons discussed below, we grant the FBI's reconsideration request and, in doing so, we consider the protester's allegations not previously addressed--which, in turn, we deny. As a result, we reverse our original decision and withdraw our finding that Mid-Atlantic is entitled to reimbursement for its protest costs. Further, we deny Mid-Atlantic's request that we modify our original remedy because that request is academic in light of the reversal of our earlier decision.

#### RECONSIDERATION MATTERS

The Competition In Contracting Act of 1984 (CICA) obligates an agency, upon being notified of a protest filed with this Office, to submit "a complete report . . . on the protested procurement," including "all relevant documents." 31 U.S.C. § 3553(b)(2) (1988). Our Regulations in turn require an agency to "file a complete report on the protest" and to furnish, "as appropriate . . . all evaluation documents . . ." 4 C.F.R. § 21.3(c) (1992). The FBI explains that it did not submit information relating to the conduct of discussions and the solicitation, receipt and evaluation of BAFOs because, in its view, such information was not relevant to the issues actually raised by Mid-Atlantic in its protest.

In our view, a complete report involves more than a narrowly-focused narrative that is directly responsive to the protest allegations. It should also include a sufficiently comprehensive overview of the procurement so that the basic facts and circumstances of the procurement will be apparent. The report submitted in this case made no mention of discussions, and the FBI's final award recommendation submitted for our review, which was dated 3 days before award, was based upon the evaluation of initial proposals and initial prices. The FBI's explanation--that its final recommendation document was prepared in anticipation that BAFOs would not likely alter the award decision--was not included in its original report. Thus, the obvious reasonable conclusion to be drawn from this report was that discussions had not been conducted and that BAFOs had not been requested.

Our Regulations provide for reconsideration of a bid protest decision when the party seeking reconsideration can show factual or legal errors in our decision. See 4 C.F.R. § 21.12. However, we generally do not entertain agency requests for reconsideration based upon the presentation of facts or arguments directly relevant to the protest issues that the agency could have provided for our initial review

but did not, General Servs. Admin.--Recon., 69 Comp. Gen. 345 (1990), 90-1 CPD ¶ 321; Department of the Army; Wilcox Elec., Inc., B-232693.2; B-232693.3, July 26, 1989, 89-2 CPD ¶ 83; Department of the Navy--Recon., B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728. In this case, even though the agency should have provided sufficient information to indicate, as a factual matter, that discussions had been held, this information was not directly relevant to the issues raised by Mid-Atlantic. Thus, unlike in prior cases where an agency simply omitted information or arguments that would have buttressed its position, here the omitted information had nothing to do with the agency's position on the protest--it went simply to the overall factual context of the procurement and resulted in our erroneous understanding of what had occurred. In such circumstances, we think it appropriate to grant the agency's request for reconsideration.

Accordingly, we grant the FBI's request for reconsideration and, in consequence, proceed to decide the issues originally raised by Mid-Atlantic.

#### ORIGINAL PROTEST ISSUES

The RFP contemplated a 1-year, fixed-price, indefinite quantity requirements contract with 2 option years for dictating and transcribing equipment to be used at various FBI locations across the country. The contractor also is required to provide a 2-year warranty and limited maintenance services during the warranty period; after expiration of the warranty, the contractor is to provide on-site maintenance services.

Section M.1 of the RFP contained a narrative description of a two-step evaluation process to be used in determining which offer presented the greatest advantage to the government with price more important than technical merit. First, proposals were to be screened by the evaluators to determine whether they met mandatory minimum technical requirements. Second, the technically acceptable proposals were to be comparatively evaluated by the evaluators on the basis of the following "subjective technical factors": production capability, contractor support, technological upgrades/evolutions, and past performance. In addition, section M.2 of the RFP listed the following evaluation criteria which were to be used in the evaluation and the award decision in order of importance as follows:

- " I. TECHNICAL MERIT . . . /PRICE<sup>1</sup>
- II. VENDOR SUPPORT AND PAST PERFORMANCE
- III. OPERATIONAL RELIABILITY
- IV. TECHNOLOGICAL EVOLUTION."

Price was to be evaluated for realism and reasonableness and, although the narrative description stated that price was more important than technical merit, the RFP also stated that the contracting officer would determine what combination of price and technical merit represented the greatest advantage to the FBI in making an award.

The report of the technical evaluators, which did not cover price, followed the section M.2 criteria except the second criterion, "VENDOR SUPPORT" and "PAST PERFORMANCE," was divided into two factors: "VENDOR SUPPORT" and "PAST PERFORMANCE," which were individually rated. "TECHNICAL MERIT . . . /PRICE," the first listed section M.2 criterion, was evaluated on a go-no-go basis in conformance with the screening process described in section M.1 to determine compliance with the mandatory minimum requirements. All three initial proposals were found to be acceptable in this regard. With respect to the comparative analysis performed by the panel under the other section M.2 criteria, the proposals of Dictaphone and Mid Atlantic were rated as follows:

<u>Category</u>	<u>Dictaphone</u>	<u>Mid-Atlantic</u>
Vendor Support	Above Average	Below Average
Past Performance	Above Average	Below Average
Operational Reliability	Above Average	Above Average
Technological Evolution	Average	Average

With respect to Mid-Atlantic's past performance, the evaluators were concerned that the three references provided

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<sup>1</sup>The record does not contain an explanation as to why price was given a priority in section M.1 over technical merit but placed on a par with it in section M.2; however, it is clear from the rest of the RFP that price and comparative technical merit were to be carefully weighed in making a trade-off decision to determine which proposal presented the best advantage to the government and offerors were specifically advised that award need not be made on the basis of low price.

by Mid-Atlantic to satisfy a solicitation requirement were firms which had purchased the Sony equipment the protester offered but were not in fact customers of Mid-Atlantic. In connection with vendor support, Dictaphone offered on-site maintenance during the warranty period (even though none was required by the RFP) with a mean-down-time-to-repair of less than 1 hour. Mid-Atlantic, on the other hand, offered an off-site plan which would require the agency to ship most equipment to be repaired to Mid-Atlantic's Bladensburg, Maryland facility for repair with a down time of 12 days. The agency also was concerned that the protester's post-warranty maintenance plan involved the use of Sony dealers over whom Mid-Atlantic has no control.

As indicated above, discussions were held with each offeror. In the protester's case, the firm was specifically questioned as to why it could not provide on-site maintenance during the warranty period for all equipment under the contract in light of the fact that it was willing to cover some of the equipment in this manner. While Mid-Atlantic's response described the benefits of the plan which was originally proposed, it included no changes.

As a result of BAFOs, the prices of Dictaphone and Mid-Atlantic were:

Dictaphone	\$729,211 <sup>2</sup>
Mid-Atlantic	\$628,858

The contracting officer specifically considered the 16 percent difference in price and concluded that the technical superiority of Dictaphone in terms of its proven past performance and better maintenance plan warranted paying the additional amount. Accordingly, the contract was awarded on August 22.

The protester maintains that its proposal was unfairly downgraded under the factors relating to vendor support and past performance and argues that the price/technical trade-off is unjustified in light of the essential technical equality of the equipment offered in the two competing proposals.

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<sup>2</sup>Only Dictaphone lowered its price as the result of BAFOs. In expectation of relatively insignificant changes as the result of BAFOs, it appears that the final award determination was prepared prior to their receipt and justified a price/technical tradeoff on the basis of Dictaphone's initial price of \$746,500.

In reviewing protests against the propriety of an agency's evaluation of proposals, it is not the function of this Office to independently evaluate those proposals. Rather, the determination of the relative merits of competing proposals is primarily a matter of agency discretion which we will not disturb unless it is unreasonable or inconsistent with the stated evaluation criteria. The mere fact that a protester disagrees with the agency does not render an evaluation unreasonable. Ebasco Constructors, Inc., et al., B-244406 et al., Oct. 16, 1991, 91-2 CPD ¶ 341.

With regard to its low ranking on vendor support because of its off-site maintenance plan, the protester argues in essence that this should not have been a discriminating factor in the award decision because it is proposing quality equipment (as evidenced by its high rating for operational reliability) which will rarely need repair. Additionally, the protester calculates that the FBI's cost of shipping the machines to its firm for repair will not, even in the worst case of machine failure rates, approach the savings represented by awarding on the basis of low price.

As the protester points out, on-site maintenance during the warranty period was not mandatory. Nonetheless, the RFP made it clear that technically acceptable maintenance plans were to be comparatively evaluated. There is nothing in the record which indicates that vendor support received greater emphasis in the evaluation than was indicated in the RFP evaluation criteria.

In our view, the agency reasonably preferred Dictaphone's mean down time of less than 1 hour for on-site repairs to Mid-Atlantic's 12-day off-site repair program. Under the protester's approach, the agency would incur shipping costs whenever equipment had to be sent to the protester for repair, its employees would be less productive for longer periods of time in the absence of equipment that was being repaired, and relatively high-level personnel in local field offices who do not have clerical support would be inconvenienced by personally having to prepare equipment for shipment and by functioning without the equipment for the repair period. The agency also points out that equipment which retains data on a magnetic surface by means of magnetic remanence could not be serviced off-site without first being inventoried and having components with stored data removed because certain data may not leave the control of the FBI. Although Mid-Atlantic asserts that these concerns are overstated because it proposed to provide quality equipment which would seldom require repair, Dictaphone's equipment, as the protester concedes, is as reliable as the Sony equipment offered by Mid-Atlantic. Moreover, it is not disputed that repair services could be required during the course of the contract notwithstanding the quality of the equipment.

On the basis of a direct comparison between the competing maintenance plans, the agency found Dictaphone's proposed on-site repair plan to be technically superior since Dictaphone's program did not require the agency to prepare and ship equipment in need of repair to one central location from a number of sites throughout the country and since it offered completed repairs in significantly less time than Mid-Atlantic's proposed program. We see nothing unreasonable in that competitive evaluation.

Mid-Atlantic argues that had on-site maintenance been mandatory it would have addressed it. The record shows that during discussions the agency questioned the protester as to why it could not provide on-site service during the 2-year warranty period for all equipment; the protester simply explained its proposed approach to repairs and declined to offer on-site maintenance.

With regard to its below average rating for past performance, the protester does not suggest that the list of references it provided are in fact its own customers. Rather, Mid-Atlantic argues that the RFP required references relating to the Sony equipment it proposed to supply. Mid-Atlantic explains that it followed the solicitation explicitly and notes that it only recently became associated with Sony and, as a result, it could not provide references from customers to whom it has supplied Sony equipment.

We have read the requirement in the RFP for customer references and we conclude that it should have been clear that the agency was seeking information pertaining to the past performance of the offeror and not simply information on the hardware proposed. Offerors were required to provide a list of at least three "of their customers (as references . . . where the hardware, software and firmware, or close representations thereof, being proposed has been installed and is currently operational." Under the past performance evaluation factor, the agency was concerned with "administrative aspects of performance" such as adherence to contract schedules and customer satisfaction. In the context of this solicitation, which requires the contractor to provide significant administrative, logistical and maintenance support for the equipment to be provided, we think the past performance criterion should reasonably have led offerors to submit references on their own past performance on contracts for the same or similar equipment and services and not simply references on the specific hardware proposed.

Here, Mid-Atlantic could have satisfied the requirement by listing three of its customers who had purchased other than Sony equipment. The protester did not. The agency downgraded Mid-Atlantic because in contacting its references the agency discovered that they had no relationship with the



protester. The agency states that Mid-Atlantic's past performance could not be assessed because it did not provide customer references of its own. Under the circumstances, we find the agency's evaluation under this factor to be reasonable.

To the extent that Mid-Atlantic challenges the agency's price/technical tradeoff we note that agencies have broad discretion in making such determinations which are subject only to the tests of rationality and consistency with the established evaluation factors. Universal Technologies, Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63. This is true even where, as here, the solicitation describes price as more important than comparative technical merit but does not specify that price will be the determinative factor in making the award. Centrex Constr. Co., Inc., B-238777, June 14, 1990, 90-1 CPD ¶ 566. In these circumstances, the agency retains the discretion to select a higher-priced but more highly rated proposal if it reasonably determines that such an award is in the government's best interests. Frequency Eng'g Labs. Corp., B-225606, Apr. 9, 1987, 87-1 CPD ¶ 392.

We think the FBI made a reasonable price/technical tradeoff in awarding the contract to Dictaphone. The RFP provided that award did not have to be made to the low priced offeror and it specifically provided for price/technical tradeoffs if the contracting officer determined that the acceptance of a higher priced technically superior proposal was in the best interests of the government. The contracting officer determined that Mid-Atlantic's lower price was reflective of a comparatively weak plan for repairing equipment (which itself would involve costs to the FBI that Dictaphone's would not) and a questionable record of past performance-- matters which resulted in the firm's receiving below average ratings in the most important comparative technical criteria--vendor support and past performance.

The contracting officer noted that Dictaphone on the other hand was rated above average in these technical areas. The record reflects that in reaching his decision, the contracting officer also considered the 16 percent higher price offered by Dictaphone and concluded that it was worth the additional expense to obtain on-site maintenance with a low down time for repairs from a contractor with an established record of performance in supplying and servicing the equipment it proposed. In our view, the record supports the reasonableness of this price/technical tradeoff which was consistent with the evaluation formula set forth in the RFP. Frequency Eng'g Labs. Corp., supra.

Accordingly, Mid-Atlantic's original protest allegations are denied.

CONCLUSION

Since as a result of the foregoing analysis there is no basis for sustaining Mid-Atlantic's protest, we reverse our earlier decision and withdraw our finding that the protester is entitled to be reimbursed for the costs of filing and pursuing its protest. In light of that conclusion, it would serve no useful purpose to consider Mid-Atlantic's reconsideration request that we modify our original decision and we, therefore, deny that request.

*for* Milton J. Houston  
Comptroller General  
of the United States