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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aerospace Design, Inc.

File: B-247938

Date: July 21, 1992

Brian J. Donovan, Esq., Jones & Donovan, for the protester.
Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for Israel Military Industries, Inc., an interested party.
Neil L. Hirsh, Esq., Department of the Navy, for the agency.
Richard P. Burkard, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation required offerors seeking waiver of first article testing to identify the prior contracts under which the item or similar items had been tested and approved, the contracting agency reasonably denied waiver since the only two contracts identified by the offeror were awarded to a wholly-owned subsidiary of the offeror rather than the offeror itself and there was no indication that the subsidiary would be involved with performance of the contract.

2. Protest that awardee's offer should have been rejected as materially unbalanced because it contains a disparity between base and option prices is denied where record shows that offer does not contain overstated charges for any items.

3. Where agency identifies no significant technical deficiencies in the proposals, protest allegation that the agency failed to hold discussions with offerors and request best and final offers is not supported by record since, under these circumstances, discussions which merely afford offerors an opportunity to submit revised proposals are adequate.

4. Protest that agency engaged in improper discussions with awardee is dismissed as untimely where it was not filed within 10 working days after the protester knew of the protest basis.

DECISION

Aerospace Design, Inc. protests the award of a contract to Israel Military Industries, Ltd. (IMI) under request for proposals (RFP) No. N00104-91-R-K051, issued by the Department of the Navy for MK-2 Mod 6 arming devices to be used in the Navy's MK-48 torpedo. The arming device performs the final electrical switching and mechanical alignment to arm the exploder and contains the primary explosive which detonates the torpedo's warhead. Aerospace complains principally that the agency should have waived the RFP's first article testing requirement for it. In addition, the protester argues that the agency should have rejected IMI's offer as materially unbalanced and that the award was improper because the agency failed to conduct discussions with it.[1]

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

The RFP was issued on March 19, 1992, and sought offers for 515 arming devices as well as for an option quantity of up to 515 additional devices. With respect to the option quantities, offerors could submit separate unit prices based on four stepladder or incremental quantities. The RFP provided that options would be evaluated in determining the low-priced offeror and that, for evaluation purposes, the price provided for 100 percent of the option quantity would be considered. The contract was to be awarded to the lowest-priced offeror.

The RFP required that offerors submit first article samples. The RFP contained a clause stating that the government has the option to waive the requirement for first article testing in instances where identical or similar items have been previously tested, evaluated and approved under identical or similar specifications. Nevertheless, the RFP warned offerors that they should not anticipate such a waiver, even though such waivers may have been granted previously under other contracts for the same item. The RFP required that offerors proposing to furnish material previously evaluated and approved and wishing to rely on

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[1]In its initial protest, Aerospace also alleged that IMI's offer was subject to a "50% add-on" for purposes of price evaluation and that IMI's offer had expired at the time of award. The agency answered these arguments in its report. Aerospace did not respond to the agency's rebuttal in its comments. Therefore, we deem these issues to be abandoned, and we will not address them. Vanguard Research, Inc., B-242633; B-242633.2, May 30, 1991, 91-1 CPD ¶ 517.

such prior approval must provide information such as the relevant contract numbers and approval agencies.

The agency received six offers by the May 15 closing time for receipt of proposals. On August 26, the agency issued amendment No. 2 to the RFP,[2] which provided that the agency would evaluate transportation costs for purposes of determining the lowest offer and that revised offers were to be submitted by September 17.

All six offerors submitted revised proposals. The protester requested in its proposal that the government waive first article testing for its item. The request was based on two contracts referenced in its offer which Aerospace states were awarded to another firm, "a wholly-owned subsidiary of Aerospace Design, Inc." The agency declined to waive the requirement for Aerospace. IMI neither requested nor received a waiver.

The agency evaluated pricing of each offer based on the total price of the following: (1) basic quantity of 515 units; (2) option quantity of 515 units; (3) transportation costs; and (4) the agency's cost to test the first article samples. The agency determined that IMI's total evaluated price was low, while the protester's was second low.[3] On February 21, the Navy awarded IMI the contract. This protest followed.

Aerospace argues first that the agency erred in not waiving the requirement for first article testing for it. Aerospace asserts that although the contracts listed in its offer were awarded to a "wholly-owned subsidiary" of Aerospace, it actually supplied the arming devices. The protester also refers to additional contracts, not listed in its offer, under which it has allegedly supplied "MK-2 devices" to the Navy. The protester argues that the agency's decision to require testing is not supported by "reasoned judgment" since the contracting officer did not conduct a meaningful investigation and evaluation or attempt to obtain evidence bearing on Aerospace's request for a waiver.

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[2]Amendment No. 1 to the RFP, issued March 27, is unrelated to the issues raised in this protest.

[3]The protester questions the agency's method of calculating the total evaluated price using the above-listed factors. The record shows, however, that under any of the methods discussed, IMI's price remains low as long as first article testing is not waived for the protester. Consequently, we have no basis to object to the agency's determination that IMI submitted the low-priced offer.

First article testing and approval ensures that the contractor can furnish a product that conforms to all contract requirements. Federal Acquisition Regulation (FAR) § 9.302. An agency decision to waive or not to waive first article testing for a particular contractor is subject to question only where we find it to be unreasonable. Aero Components Co. of Arlington, Inc., B-244407, Aug. 27, 1991, 91-2 CPD ¶ 206.

In our view, the agency's decision to deny waiver of first article testing for Aerospace was clearly not an abuse of the agency's discretion. The Navy simply had no basis to waive this requirement. The only information Aerospace provided to the agency was its assertion that the Navy awarded two contracts to a firm which it characterized as a "wholly-owned subsidiary." The protester essentially expected the agency to conduct an investigation to determine whether waiver would be appropriate based on the relationship of the protester and its "subsidiary," the extent of the protester's involvement as the actual manufacturer of the devices under the listed contracts, and the performance of the protester and its key personnel under other unnamed contracts.

Agencies are not obligated to search for information, beyond what is already in its possession, in an attempt to establish whether first article testing should be waived; rather, the offeror seeking the waiver bears the responsibility for supplying sufficient information. See L.L. Rowe Co., B-220973, Feb. 27, 1986, 86-1 CPD ¶ 204. We therefore do not agree with the protester that the Navy was required to investigate the performance of the listed contracts to determine such matters as the extent of the protester's involvement in the performance of the listed contracts or its involvement in other unlisted contracts.

Moreover, the agency points out that even if it determined that Aerospace had been involved with prior acceptable performance with its subsidiary, there was no indication that the subsidiary would be involved with performance of this contract. Aerospace's offer itself casts doubt about whether the entities which performed the listed contracts would be the same as those which would perform the current contract; the protester stated in its proposal that it intended to perform the contract at the facilities of another apparently unrelated firm.

In light of the critical application of the item, the considerable potential explosive hazard it presents, and Aerospace's failure to furnish information which would establish that it had successfully furnished this item, we cannot conclude that the Navy abused its discretion by requiring first article testing for Aerospace.

Next, the protester argues that IMI's offer should have been rejected as materially unbalanced. Aerospace's argument is based on the fact that IMI's lowest per unit price for the option quantity is 26 percent lower than the its basic per unit price. In other words, if the agency exercises the option and orders all, or nearly all, of the 515 option items, the price for the option quantity will be substantially lower than the price the Navy will pay for the basic quantity. Aerospace contends that this pricing structure demonstrates that the offer was improperly front-loaded and therefore unbalanced. The record shows that the protester's price of $476.17 each was slightly lower than IMI's unit price of $488.14 for the basic quantity, while IMI's price of $359.70 if all the option quantities are ordered was lower than the protester's unit price of $476.17 for the same option quantity. As a result, the protester argues, if the Navy does not exercise the option and purchase a large quantity of the items under the option, the government will not obtain the lowest price.[1]

The concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. An offer can be rejected as materially unbalanced where: (1) it is mathematically unbalanced, that is, where nominal prices are offered for some of the items and enhanced prices for other items; and (2) there exists a reasonable doubt as to whether award based on a mathematically unbalanced offer will result in the lowest cost to the government. Virginia Mfg. Co., Inc., B-241404, Feb. 4, 1991, 91-1 CPD ¶ 113.

The record in this case does not demonstrate that IMI's offer was mathematically unbalanced. Although there is a disparity between the proposed basic quantity and option quantity unit pricing, there is no indication, nor does Aerospace allege, that the higher basic pricing proposed by IMI is enhanced. An offer is not unbalanced absent evidence that certain prices are overstated. Virginia Mfg. Co., Inc., supra. The record shows that four of the six offerors proposed higher base quantity prices than IMI. Since there is absolutely no evidence in the record that IMI's offer contained prices which were overstated or enhanced, we disagree with the protester's assertion that IMI's offer was unbalanced. Ampex Corp., B-243855.3, Dec. 9, 1991, 91-2 CPD ¶ 525.

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[1]In this regard, the protester asserts that based on its experience with the Navy, it is unlikely that the option will be exercised. The Navy rebuts this assertion by stating that based on its projected requirement for the arming devices, it expects to exercise the option.

Next, the protester alleges that the agency improperly failed to conduct discussions with it and did not request best and final offers (BAFO). For the reasons discussed below, we disagree.

Generally, in a negotiated procurement, a contracting agency must conduct written or oral discussions with all offerors whose initial proposals are in the competitive range before awarding a contract. See FAR § 15.610(b); Israel Aircraft Indus., Ltd., B-239211, July 30, 1990, 90-2 CPD ¶ 84. Where, however, the contracting agency identifies no significant technical deficiencies in the proposals, discussions may be limited to an opportunity to submit revised proposals. American KAL Enters., Inc., B-232677.3, Feb. 3, 1989, 89-1 CPD ¶ 112. In this regard, contracting officers are required to issue requests for BAFOs to all offerors remaining in the competitive range. These requests must indicate that discussions are completed, state that this is an opportunity for offerors to submit BAFOs, and set a common cutoff date and time for the submission of BAFOs. FAR § 15.611. Where the contracting agency identifies no significant technical deficiencies in the proposals, however, discussions may be limited to an opportunity to submit revised proposals. Israel Aircraft Indus., supra.

Here, since the Navy found no technical deficiencies in the proposals of the competitive-range offerors,[5] discussions could be limited to an opportunity to submit revised proposals. Moreover, where, as here, an amendment to a solicitation does not specifically request offerors to submit their BAFOs, language giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of a request for BAFOs. Israel Aircraft Indus., supra. As stated, amendment No. 2 specifically requested that offerors submit revised proposals by September 17. Consequently, we have no basis to object to the agency's conduct in this regard.

Finally, in its comments on the agency's report, the protester attempts to raise a new ground of protest; it complains that the Navy's communication with IMI regarding English translated documents constituted discussions.

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[5]Aerospace asserts that the Navy should have discussed with the firm the waiver of first article testing. As stated, the agency is under no obligation to attempt to obtain additional information concerning the issue of waiver of first article testing. The lack of information supporting Aerospace's waiver request does not, in our view, constitute a significant technical deficiency in its proposal requiring discussions. See Engineered Air Sys., Inc., B-237214, Jan. 25, 1990, 90-1 CPD ¶ 107.

Aerospace maintains that the Navy therefore was obligated to conduct concurrent discussions with it.

We agree with the agency's argument that this issue is untimely raised. Our Bid Protest Regulations require that protests not based upon alleged improprieties in a solicitation be filed not later than 10 working days after the protester knew or should have known of the basis for the protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1992). When a protester supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. John Short & Assocs., Inc., B-239358, Aug. 23, 1990, 90-2 CPD ¶ 150. Here, Aerospace learned the basis of its contention that the Navy held improper discussions with IMI on April 23, when it received the Navy's protest report containing the correspondence upon which the protester's argument was based. Aerospace was therefore required to raise this issue by May 7, 10 working days later. TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160. Since Aerospace did not raise the issue until May 26, the issue is untimely and will not be considered.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel