



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

Decision

Matter of: Cubic Automatic Revenue Collection Group
File: B-249058.2
Date: November 24, 1992

John J. O'Brien, Esq., and Gerald H. Werfel, Esq., Arent, Fox, Kinter, Plotkin & Kahn, for the protester.
C. L. Brainard, Esq., Department of the Treasury, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging exclusion of proposal from the competitive range based on pre-award demonstration tests of protester's proposed equipment which were conducted by the agency is denied where the test results demonstrate that the proposed equipment is technically unacceptable.

DECISION

Cubic Automatic Revenue Collection Group protests the award of a contract to Schwartz Electro-Optic, Inc. under request for proposals (RFP) No. CS-91-048, issued by the Department of the Treasury, United States Customs Service, for narrow beam cargo container range finders. Cubic principally contends that its exclusion from the competitive range based on the results of the agency's pre-award demonstration test of the firm's equipment was improper.

We deny the protest.

The RFP, issued on June 28, 1991, contemplated the award of a firm, fixed-price contract for 41 range finders, 42 operator/maintenance manuals, and 6 training videotapes. The range finders are used to measure the interior and exterior dimensions of full or partially-filled cargo containers; the purpose of making these measurements is to discover false compartments in the containers that could be used for transporting contraband. The solicitation stated that while the agency prefers that the range finder's operating range measure between 10 and 90 feet, it must, at a minimum, have an operating range between 10 and 60 feet with an accuracy of plus or minus 1 inch. The RFP also stated

that the distance measurement must be able to be made from targets ranging from 10 percent to 90 percent reflectivity.

The RFP advised offerors that the agency would award the contract to the responsible offeror whose proposal was determined to be most advantageous to the government, considering price and other factors. The solicitation provided the following factors and their relative weights: technical approach (40 points); prior experience (35 points); technical understanding (35 points); capability (30 points); the range finder's ability to measure distances at 60 feet (25 points); performance under condensed water operations (20 points); and the range finder's ability to measure distances greater than 60 feet (15 points).

Five firms submitted proposals by the July 29 closing date. After the initial evaluation, the agency determined that the five proposals were within the competitive range. Discussion letters were issued to all the offerors on September 10 and best and final offers (BAFO) were requested by September 16.

After the evaluation of the offerors' BAFOs, the agency determined that three of the offerors' proposals were "so weak and/or deficient that they had no reasonable chance for award." As a result, BAFOs from the two remaining offerors, Cubic and Schwartz, were requested by September 25.

After receipt of BAFOs, the technical evaluation panel discovered that Cubic had submitted test data showing the accuracy of its range finder from 20 to 40 meters (approximately 65 to 130 feet) only. Since the agency was concerned about the absence of data regarding the range finder's capability for accurate measurement at less than 20 meters, the agency subsequently determined that it should reopen negotiations with the offerors in the competitive range.

The agency also noted that the firm submitted test data on the range finder prior to setting the instrument's offset which showed that the deviation from the distance was always less than the measured distance, e.g., the deviation for 21 meters was -0.030. (According to Cubic, instrument offset compensates for the fact that it takes a minute fraction of a second for the returning signal which has been reflected back from the target to be processed through the instrument. The instrument must be adjusted to compensate for the delay; the adjustment is referred to as the "offset.") Contrary to the protester's suggestion that the agency did not conduct meaningful discussions with it because the agency did not advise Cubic that it should address the negative deviation in its BAFO, we find that

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The agency requested BAFOs from the offerors and advised Cubic that, in order to conclude negotiations, its BAFO should provide at a minimum "information on distances of 3 to 20 meters." The agency also requested that the offerors provide their proposed instruments for testing purposes. The offerors were furnished a copy of the agency's test plan and were informed that the testing would be conducted with target reflectivity of 10 percent, 50 percent, and 90 percent, at distances of 10 to 60 feet at increments of 10 feet.

On February 26, the agency tested the two offerors' instruments; however, it did not test their accuracy at 90 percent target reflectivity because the agency did not have such a target. After purchasing a target with 90 percent reflectivity, the agency conducted a second test on March 10. Both tests of Cubic's instrument resulted in the determination that Cubic's proposal was technically unacceptable because its instrument was not in compliance with the technical evaluation criterion regarding measurement of distances at 60 feet, and the solicitation requirement that it have the ability to meet the minimum operating range between 10 to 60 feet with an accuracy of plus or minus 1 inch. Since the test results for Schwartz's proposed instrument revealed that its instrument was "always on target," the agency decided to make award to Schwartz. Cubic's protest to our Office followed.

TECHNICAL EVALUATION

Cubic contends that the agency's evaluation of its proposal, resulting in the determination to exclude its proposal from the competitive range, was improper because it was not in accordance with the stated evaluation criteria in the solicitation. In this regard, the protester argues that notwithstanding the absence of a technical evaluation factor for measurements of less than 60 feet, the agency rejected the protester's proposal because its instrument allegedly failed to accurately measure distances less than 60 feet.²

¹(...continued)

such notification was not necessary because the agency assumed that Cubic easily could make internal corrections to compensate for the range finder's understated measurement, and thus did not regard this as a deficiency.

²We will not consider the merits of the protester's argument that the agency's decision to test its instrument was improper because of the absence of a testing provision in the initial solicitation. Under our Bid Protest Regulations, protest allegations such as this one must be raised

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To the extent that the protester argues that the agency's decision to test the measuring device at distances less than 60 feet was improper because it was a departure from the evaluation criterion which called for capability to measure distance "at 60 feet," solicitations must inform offerors of the basis for evaluation and the evaluation must be based on the factors set forth in the solicitation. In this regard, a solicitation is to be read as a whole, giving meaning to every section, including the specifications. See Irwin & Leighton, Inc., B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208. The evaluation factors do not establish a set of different requirements than the specifications, rather, they are included to guide offerors on how to prepare an objectively reviewable response to the solicitation's requirements, including the requirements in the specifications. Id.

We find the protester's narrow interpretation of the evaluation criteria unreasonable. The solicitation provided that the proposals would be evaluated based on several factors, with technical approach considerations listed as the most important evaluation area. In this area, each offeror was required to demonstrate its ability to design a range finder that will perform in accordance with the performance specifications; the specifications, in turn, stated that the minimum operating range of the range finder must be between 10 and 60 feet and that the optimum range is between 10 and 90 feet. Consistent with the specifications, the technical evaluation factors included two areas concerning the range finder's capability to measure distances. The first area provided that the "offeror must clearly demonstrate that [its proposed range finder] will measure distances at 60 feet with precise accuracy and performance"; the second area contemplated allocating points to an offeror if it demonstrated that its range finder was capable of measuring distances greater than 60 feet. In reading the solicitation as a whole, including the fact that the specifications clearly called for measuring capability at less than 60 feet, the offerors could not reasonably conclude that the agency envisioned evaluating the proposed instruments to

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no later than 10 working days after the basis of the protest was known or should have been known. 4 C.F.R. § 21.2(a)(2). By letter dated January 14, 1992, the agency informed Cubic that it needed its proposed instrument so that the agency could test it. Cubic was on notice of the agency's intention to test its instrument; therefore, Cubic was required to object to the agency's decision to test within 10 days after the protester received notice of the agency's intention. Since Cubic did not lodge its objection concerning the testing until July 24, this protest basis is untimely.

determine whether the proposed instrument was capable of operating only--as the protester suggests--at 60 feet.

ELIMINATION FROM THE COMPETITIVE RANGE

Cubic contends that the agency improperly eliminated its proposal based on the results of the pre-award demonstration tests that the agency performed on its instrument. According to the protester, the agency should not have rejected its proposal on the basis of the test results, but rather should have afforded the firm another opportunity to have its instrument tested.

The determination of whether an offeror's proposal is within the competitive range is primarily a matter within the discretion of the contracting agency since it is responsible for defining its needs. We will not disturb an agency's competitive range decision absent a showing that it was unreasonable or contrary to procurement statutes or regulations. BASIX Controls Sys. Corp., B-212668, July 2, 1984, 84-2 CPD ¶ 2.

As a preliminary matter, we do not agree with the protester's assertion that the agency conducted the pre-award demonstration test on an impermissible "pass/fail" basis. Clearly, benchmark tests are "strong evidence" of system capabilities which must be considered in the determination of technical acceptability. QAO Corp; 21st Century Robotics, Inc., B-232216; B-232216.2, Dec. 1, 1988, 88-2 CPD ¶ 546. While we have criticized the strict application of pass/fail test criteria that lead to the automatic and final exclusion of a potentially acceptable proposal, these cases generally involve situations where the offeror has been unable to demonstrate compliance with only one of a number of mandatory requirements and is eliminated from the competition solely for that reason. Checkpoint Sys., Inc., B-245834, Feb. 3, 1992, 92-1 CPD ¶ 136. Here, there was essentially one performance specification in the solicitation and it called for the contractor's instrument to have a minimum operating range between 10 and 60 feet with an accuracy of plus or minus 1 inch. Despite this stated requirement, most of the test data submitted by Cubic only established its instrument's capability to measure at distances from 20 to 40 meters (approximately 65 to 130 feet) with a glass prism--the ideal reflective surface--as a target, and subsequently the two pre-award demonstration tests of Cubic's proposed instrument revealed that Cubic's instrument only met the accuracy requirement at 20 feet; with the exception of the 20-foot distance, Cubic's instrument's measurement of distances less than 60 feet was inaccurate by an average of at least 3 inches.

Similarly, we do not agree with the protester's argument that the agency should not have eliminated it from the competitive range because the technical evaluation criterion, entitled technical approach, only stated that an "offeror must clearly demonstrate their ability to design a . . . range finder that will perform in accordance with the performance specifications." (Emphasis added.) Notwithstanding the agency's use of the term "design," the agency clearly intended to evaluate the acceptability of the offerors' actual proposed instruments as indicated by its decision to conduct a live test demonstration. Cubic did not, at any time during the procurement process or during its subsequent protest, indicate that it intended to provide an alternate range finder for the one it proposed to furnish and the one it allowed the agency to test. Instead, Cubic specifically stated that it would "deliver [its] RED DOT EDM with the addition of a 2x pistol sight and backlit LCD to meet the [agency's] specific requirement." The proposal and the instrument that Cubic submitted to demonstrate its current technical merit directly bear on its ability to design an instrument and--more importantly--its ability to furnish an acceptable instrument, since the firm specifically stated that it would only make minor alternations to its current instrument.

Based on our review of the record, we do not think it was unreasonable for the agency to find the protester's proposed instrument technically unacceptable and, thus, to exclude its proposal from the competitive range. Initially, Cubic submitted theoretical calculations on its instrument's ability to measure distances accurately rather than providing actual test data with its initial proposal. In response to the agency's subsequent notification that its proposal was deficient and that it should "[p]rovide supporting data to support [its] accuracy and precision claims," Cubic merely provided test data showing its capability at measurements of 20 to 26 meters. After reviewing this information, the agency gave Cubic another opportunity to demonstrate that its instrument was capable of accurately measuring distances less than 60 feet. The agency specifically requested that Cubic provide information on its instrument's capability to measure distances less than 60 feet and that Cubic furnish the agency with its proposed range finder. Cubic's response to the second BAFO request advised the agency that it does not test its instrument "at distances of 3 to 20 meters since it does not test the overall accuracy of the instrument."

Despite the agency's requests for information from the time it requested initial proposals to the time it requested Cubic's second BAFO, Cubic did not demonstrate during these repeated opportunities, including the demonstration test,

that its proposed instrument will meet the agency's specifications. To the contrary, the tests showed that its instrument did not conform to the specifications. Accordingly, the rejection of Cubic's proposed instrument as technically unacceptable was proper even though Cubic offered a lower price than the awardee, since a technically unacceptable offer can be excluded from the competitive range irrespective of its lower offered price. See TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37.

IMPROPER TESTING

The protester contends that the inaccurate measurements revealed in the agency's test of its instrument were not caused by a failure of the instrument, but instead were due to the agency's failure to properly use the instrument and interpret its measurements. To support this assertion, the protester has provided our Office with independent laboratory results to show that its instrument's measurements are always within 1/2 inch above or 1/2 inch below the measured distance.

According to the agency, it conducted the tests on Cubic's instrument in accordance with the manual that accompanied the instrument. In this regard, the agency states that the measurements were properly taken from the face of the instrument (rather than from the optical center or keyboard) and the offset¹ was set according to the manual. Similarly, there is no evidence to support the protester's speculation that the agency improperly set the measurements on the instrument to feet and inches.

We have carefully reviewed the descriptions of the two tests set forth in the record and we simply find no basis to question the results or the agency's conclusion that Cubic's instrument did not meet the specification requirements. The fact that another laboratory test produced different results, and that the protester strongly believes that its equipment is accurate, are not reasons enough for us to object to the agency's technical determination in this matter. See Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421.

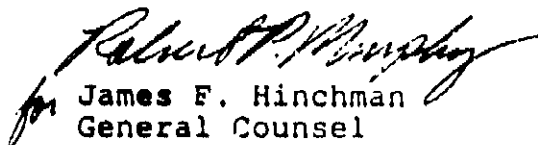
¹As discussed above, instrument offset compensates for the fact that it takes a minute fraction of a second for the returning signal which has been reflected back from the target to be processed through the instrument. The instrument must be adjusted to compensate for the delay; the adjustment is referred to as the "offset."

To the extent that the protester argues that the second test was improper because the testing was not conducted at the testing site indicated in the agency's letter, we note that the protester's and the awardee's instruments were both tested at the same location. As a result, the protester was not prejudiced by the change in the testing site.

UNEQUAL TESTING

Cubic also contends that the first test was conducted unequally because the agency did not test the awardee's instrument in the same manner or at the same distances as the protester's. In this regard, the protester contends that the awardee's instrument was tested only from 10 to 40 feet rather than from 10 to 60 feet. As discussed above, the agency conducted two tests on the proposed instruments. While the awardee's instrument was not tested at the 60-foot range in the first test, it was tested later from the 10 to 60 feet range in the second test. As a result, we fail to see how the protester was prejudiced, since the second test was conducted to test the measuring devices in accordance with the agency's stated distance intervals and reflectivity targets.

The protest is denied.


for James F. Hinchman
General Counsel