



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Paragon Dynamics Incorporated; Process Control Technology, Inc.

File: B-251185; B-251185.2; B-251185.3

Date: March 17, 1993

DECISION

Paragon Dynamics Incorporated and Process Control Technology, Inc. (PCT) protest request for proposals (RFP) No. F04611-92-R-0044, issued by the Department of the Air Force for a indefinite quantity of digital acquisition systems (DAS) for use at the Air Force Flight Test Center, Edwards Air Force Base, California.

We dismiss the protests.

The RFP, issued on July 28, 1992, contemplated the award of a firm, fixed-price, indefinite quantity, indefinite delivery contract for a DAS "comprised of off-the-shelf equipment and software," capable of acquiring, reducing, analyzing, and displaying scientific data. The RFP requested the submission of technical, cost, and administrative proposals, and contained detailed instructions regarding the preparation of proposals.

The solicitation advised that proposals would be evaluated with regard to compliance with the RFP's specifications, passing a benchmark/live test demonstration, and price. With regard to the benchmark/live test demonstration, the RFP stated that:

"The low offeror submitting documentation to indicate compliance with the specification will run a one-time, pass/fail benchmark/live test demonstration at the contractor's facility, witnessed by government representatives. No second chances will be allowed in the case of failure to pass the benchmark/live test demonstration."

The RFP specified that the benchmark/live test demonstration was required to be conducted on a DAS identical to the systems described in the offeror's proposal, and listed and described 16 "key features" that the offered DAS would have to successfully demonstrate at the benchmark/live test demonstration. In response to various vendor questions, the agency reiterated in an RFP amendment the mandatory nature

of the requirement for a "pre-award benchmark" that was to be conducted on the low-priced, technically compliant DAS, shortly after it was found compliant with the specification requirements.

The agency received proposals from Paragon at a price of \$2,477,271.55, Cyber at a price of \$2,695,300, and PCT at a price of \$3,460,340, by the RFP closing date of September 11. The proposals were evaluated for compliance with the technical requirements of the solicitation by the agency's Data Acquisition Computer Systems (DACS) committee. After requesting that Paragon clarify certain areas of its technical proposal, the DACS committee found Paragon's proposal, as well as the proposals of Cyber and PCT, technically compliant with the RFP specifications.

A benchmark/live test demonstration was then conducted at Paragon's facility on October 6. Paragon used simulated inputs and outputs for its benchmark/live test demonstration rather than the actual DAS it proposed as required by the RFP. Because of this, Paragon was unable to demonstrate 10 of the 16 key features identified in the RFP and thus was found by the agency to have failed the benchmark test. Paragon was informed that its DAS failed the benchmark test at the conclusion of the test.

A benchmark/live test demonstration of the DAS proposed by Cyber was subsequently conducted. The agency determined that Cyber's DAS satisfactorily demonstrated all 16 of the key features required by the RFP.¹ Cyber was thus selected for award.

Paragon, which first protested on November 2, argues that the RFP was defective in that it contained conflicting and unreasonable requirements. Paragon points to various sections of the RFP, which describe the scope of the contract, and the work to be accomplished thereunder, in part, as the selection, integration, and fabrication of a DAS. Paragon contends that these provisions, which presumably are to be accomplished after award of a contract, conflict with the requirement that the DAS identified by an offeror in its proposal be available for the benchmark test, which, as specified in the RFP's evaluation scheme, was to be performed prior to contract award. Paragon, while conceding that its DAS was unable to demonstrate 8 of the 16 key features during the benchmark test, also contends that the RFP's requirement that a DAS identical to that proposed by

¹The documentation submitted with the agency report on the protest confirms that Cyber successfully passed all aspects of the benchmark test.

the offeror be available for the benchmark test was unreasonable.

Under our Bid Protest Regulations, a protest concerning alleged improprieties apparent on the face of the solicitation is required to be filed, either with the agency or our Office, prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992); PEC Constr., Inc., B-245462, Oct. 1, 1991, 91-2 CPD ¶ 277. Although Paragon apparently argues that the requirement that the benchmark test be performed prior to award on a DAS identical to that proposed by the offeror in its proposal, when considered in conjunction with the sections of the solicitation describing the scope of the contract and the work to be accomplished thereunder, constituted a latent defect in the RFP (i.e., a defect which could not be detected prior to closing), it is clear that any ambiguity in this regard was apparent on the face of the solicitation and thus had to be protested prior to closing in order to be timely. Inland Marine Indus., Inc., B-249914; B-249918, Dec. 24, 1992, 92-2 CPD ¶ 442.

Furthermore, the evaluation scheme that contemplated a pass/fail, pre-award benchmark on the low-priced, technically compliant offer was completely unambiguous. Indeed, it is clear from Paragon's proposal that the firm was aware that the solicitation required that the benchmark/live test demonstration be conducted on a DAS identical to the system it described in its proposal and was not misled in any way by the allegedly conflicting requirements of the RFP. In this regard, Paragon referred to the benchmark test in its proposal as follows:

"Although the [g]overnment's desire to test the actual DAS hardware prior to contract award is certainly understandable, Paragon would consider it irresponsible to acquire such a quantity of equipment for which it might or might not have future use.

"For this reason, Paragon proposes to use simulated inputs and outputs for the benchmark test."

Since it is clear from the above statement, which explicitly recognizes the agency's "desire to test the actual DAS hardware prior to contract award," that Paragon was fully aware of the requirements concerning the benchmark test prior to the submission of its proposal,² its protest,

²The record indicates that the Air Force elected to perform the benchmark on Paragon's system after some discussions with Paragon, which the Air Force interpreted as evidencing (continued...)

concerning the allegedly conflicting provisions of the solicitation and the reasonableness of the benchmark test requirement, is untimely. See Control Module, Inc., B-236417, Sept. 6, 1989, 89-2 CPD ¶ 219.

Paragon also contends that the DAS proposed by Cyber is not an "off-the-shelf" system as required by the solicitation. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may pursue a protest. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract, 4 C.F.R. § 21.0(a). While determining whether a party is interested involves consideration of a variety of factors, a protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Paragon, which has not challenged the eligibility of PCT for award, and whose DAS failed the benchmark/live test demonstration and is thus no longer being considered for award, is not an interested party eligible to protest that Cyber's DAS is not an off-the-shelf product because Paragon would not be in line for award if its protest on this basis were sustained. See Corrugated Inner-Pak Corp., B-233710.2, Mar. 29, 1989, 89-1 CPD ¶ 326.

PCT, which filed its protest on November 19, after it was informed by the agency of Paragon's protest, also contends that the solicitation was defective. Specifically, PCT argues that the RFP was unclear as to whether the benchmark test would be run on the DAS' of all offerors or only the DAS of the offeror submitting the low-priced acceptable proposal, and that the RFP was ambiguous because it erroneously stated that the proposals would be evaluated for compliance with section L-III (c) of the solicitation, which referred to the submission of cost proposals, rather than section L-III (b), which referred to the technical requirements of the solicitation. PCT also contends that the benchmark test requirement is insufficient to determine if the DAS' proposed by the offerors will meet the agency's requirements.

Here too, it is clear that any ambiguities created by the allegedly defective solicitation provisions to which PCT refers, as well as the terms of the benchmark test requirement, were apparent from the face of the solicitation, and

²(...continued)

Paragon's intent to make available the system it proposed for the benchmark, instead of using simulated inputs and outputs.

thus had to be protested prior to the closing date for receipt of proposals in order to be timely. 4 C.F.R. § 21.2(a)(1); Inland Marine Indus., Inc., supra. PCT's arguments, raised for the first time in its protest filed more than 2 months after the closing date, are thus untimely and will not be considered.

PCT also contends that the agency's request that Paragon clarify certain areas of its technical proposal prior to the conduct of the benchmark constituted an "improper contact" with Paragon, and questions whether the agency may also have had the same type of "improper contacts" with Cyber. Protests not based upon alleged improprieties in a solicitation must be filed no later than 10 days after the protester knew, or should have known, of the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). PCT's contention that the agency engaged in "improper contacts" with Paragon and may have engaged in "improper contacts" with Cyber is based upon information contained in Paragon's protest to our Office, which PCT received on November 2. Because PCT's protest, filed on November 19, was not filed within 10 days of when PCT received a copy of Paragon's protest, its protest on this basis is also untimely and will not be considered.

The protests are dismissed.



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