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Evans

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ICS Systems Integration Division

File: B-252143

Date: June 2, 1993

J. Robert Steelman, Esq., for the protester.
J.L. Hester, for Interdyne Corporation, an interested party.
Craig R. Schmauder, Esq., Beth Kelly, Esq., and Matthew D. Thomason III, Esq., Department of the Army, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that one of awardee's offered products does not meet solicitation requirements is denied where agency found that descriptive literature submitted with awardee's proposal indicated compliance with specifications, and protester has not shown that agency's conclusion was unreasonable.

2. Protest alleging that agency engaged in technical leveling with awardee by informing it twice during discussions that an offered product did not meet solicitation requirements is denied where the agency's discussions did not provide awardee with the opportunity to correct weaknesses that were due to the firm's lack of diligence, competence, or inventiveness, but instead merely informed awardee that proposed improvement over specified configuration was not acceptable for the item's intended use.

3. Protest alleging that two of awardee's offered products are foreign end products, and therefore should have been subjected to application of a Buy American Act price differential in the evaluation, is denied; the contracting officer properly relied on the awardee's certification that it was offering domestic end products in the absence of any information to the contrary.

DECISION

ICS Systems Integration Division protests the award of a contract to Interdyne Corporation under request for proposals (RFP) No. DACA78-92-R-0046, issued by the U.S. Army Corps of Engineers for supply of miscellaneous

equipment, tools and services to the Egyptian navy under a Foreign Military Sales (FMS) agreement.

We deny the protest.

BACKGROUND

The RFP contemplated award of a single firm-fixed-price contract for 67 contract line items (CLIN) representing the various supplies and services required. Section M of the RFP provided that the award would be made to the offeror submitting the lowest priced, technically acceptable proposal. For the purpose of determining technical acceptability, the RFP required offerors to submit descriptive literature for each item offered.

Both ICS and Interdyne submitted proposals by the July 16, 1992, closing date. Following an initial evaluation of the proposals, discussions with both offerors, amendments to the specifications, and a request for revised proposals, the agency requested best and final offers (BAFO) by December 11. The agency found both BAFOs to be technically acceptable. Since Interdyne offered the lowest price ($3,372,548.10 versus $3,568,257 for ICS), the agency awarded it the contract on January 19, 1993.

ICS alleges that the award to Interdyne was improper for several reasons. First, ICS contends that one of the items Interdyne offered, a spectrometer,[1] does not meet the RFP's stated requirements. In addition, ICS asserts, another of the items--a bending machine--was unacceptable as initially offered; ICS alleges that the agency improperly led Interdyne to offer an acceptable machine through successive rounds of discussions designed to bring its proposal up to the level of ICS's acceptable proposal. Finally, ICS argues that two of Interdyne's offered items--a flexible borescope and a radial drill--are of foreign origin, and therefore should have been subjected to a price penalty in accordance with the Buy American Act. As discussed below, we find no merit to ICS's allegations.

TECHNICAL ACCEPTABILITY

The RFP required a spectrometer capable of analyzing four elements--carbon, boron, phosphorous and sulfur--and capable of being expanded, through the addition of photo-multiplier tubes, to analyze additional elements. The specification

[1]A spectrometer is used to identify elements, such as the metals comprising an alloy, by analyzing the light the elements emit.

provided:

> "The spectrometer shall utilize a focal curve that is provided with pre-drilled locations for exit slots and photo-multiplier tubes for the installation of additional element analysis capabilities in the future."

According to the descriptive literature submitted with Interdyne's proposal, the spectrometer the firm offered utilizes a metal strip with exit slits that have been etched from a computerized filmscan. The strip contains 195 of these preprogrammed exit slits, and can accommodate photo-multiplier tubes for expansion. ICS alleges that these "pre-aligned batch of exit slits [on a] strip" are not the same as "pre-drilled exit slit locations," and therefore do not meet the stated requirement. ICS characterizes the Interdyne approach as relying upon fixed exit locations representing only "estimated" wavelength positions; because of individual tolerance differences among the components of the spectrometer, the wavelengths allegedly will not be exactly aligned with the exit slits on the focal curve. The ICS system, on the other hand, is a movable system which allows the user, according to ICS, to "fine tune each wavelength in a correct profile" by manually aligning the exit slit with the spectral line on the focal curve. Since the unit offered by Interdyne does not have this fine-tuning capability, ICS argues, it does not meet the specifications.

The procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's item; we will not disturb this technical determination unless it is shown to be unreasonable. See Sheffield Schaudt Grinding Sys. Inc., B-246699, Mar. 27, 1992, 92-1 CPD ¶ 313. ICS has not made such a showing here.

The agency states that the pre-aligned, etched exit slits on the Interdyne unit meet the stated requirement for predrilled exit slit locations, as they are inherently capable of analyzing the four elements listed in the RFP, as well as many others, within the required tolerances. Interdyne's descriptive literature supports the agency's conclusion, stating that the exit slits for more than 190 elements are located on the focal curve to ensure optical stability, and are permanently fixed to provide consistently accurate results. The primary difference between the two units in this regard appears to lie in their operation--the ICS unit requires fine-tuning by the operator using refractor plates, while the Interdyne unit does not. Although ICS argues that the fine-tuning approach will provide greater accuracy, the agency determined that Interdyne's pre-aligned exit slits are potentially more

accurate because there is no need for a skilled operator to fine-tune the spectral lines.

ICS' assertions aside, it has presented no clear evidence that the Interdyne item's etched, pre-aligned slits provide less than the required degree of accuracy. The RFP did not require the spectrometer to be capable of operator fine-tuning, Interdyne's literature on its face was found to show that the item will meet the specified RFP requirements, and ICS has not pointed to any particular requirement Interdyne's item cannot meet. Neither has ICS shown--even assuming that acceptance of Interdyne's item represents a relaxation of the exit slit requirement--that it was prejudiced in the sense that it too would have offered an item with etched, pre-aligned exit slits had it been aware of the agency's interpretation of this requirement. See Propper Mfg. Co., Inc., B-245366, Dec. 10, 1991, 92-1 CPD ¶ 14. We therefore have no basis to question the agency's conclusion that the Interdyne spectrometer meets the exit slit requirement.[2]

The specification also required that the spectrometer's diffraction grating have a "blaze angle" of between 200-300 nanometers (nm). ICS defines the blaze wavelength as the point at which the spectrometer grating has the greatest efficiency. According to Interdyne, a grating with a blaze wavelength of 200 nm provides optimal results for copper, phosphorous, boron and sulfur (the four primary elements the RFP requires to be analyzed). While Interdyne's spectrometer has a blaze wavelength of 400 nm in the first order (the primary diffraction wavelength), its descriptive literature states that the system is designed to use mostly spectral lines in the second order, where secondary diffraction occurs; the second order is always half the wavelength of the first, so the 400 nm blaze wavelength in the first order translates into 200 nm in the second order. Since the Interdyne spectrometer uses the second order to analyze most elements, including the four elements listed above, and has a 200 nm blaze angle in the second order, the agency found that it met the 200-300 nm blaze angle requirement.

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[2]ICS also alleges in connection with the exit slit requirement that the Interdyne unit is not susceptible of quick and easy expansion to analyze additional elements. However, this assertion is contradicted by Interdyne's descriptive literature, which (1) shows that the spectrometer can analyze most elements without expansion, and (2) states that additions may be easily and inexpensively made. The agency confirms that the unit may be immediately expanded by adding photo-multiplier tubes. We therefore reject ICS's unsupported allegation.

ICS alleges that the Interdyne approach fails to meet the requirement for a blaze angle between 200-300 nm because the RFP does not authorize use of the second order. Since Interdyne's first order blaze wavelength is outside the required range, ICS argues, the offered item is unacceptable.

The record does not support ICS's position. While the blaze angle requirement as stated in the RFP did not expressly authorize use of the second order of diffraction, it did not prohibit this approach, nor did it otherwise indicate that only the first order of diffraction could be used. In fact, the specification implicitly authorizes use of the second order in section 3.7.1.1, which defines the maximum reciprocal linear dispersion values for both the first and second orders. We conclude that the agency reasonably found Interdyne's proposed spectrometer, with a blaze angle of 200 nm in the second order, compliant with the RFP requirement for a blaze angle between 200-300 nm.[3] It follows that the agency properly determined that the spectrometer was acceptable.

TECHNICAL LEVELING

One of the RFP requirements was for a bending machine of the "swing arm" type. Interdyne initially offered a bending machine of the "clamp die" type, as Interdyne's supplier considered this an improvement over the swing arm design. The agency, in evaluating Interdyne's proposal, noted this as a deficiency, and so informed Interdyne in discussions on August 5, 1992. Interdyne replied on August 11, explaining that it had offered the clamp die model as an improvement over the specified design based on the manufacturer's experience as a supplier to the U.S. Navy. On September 8, the agency responded that the Egyptian navy had a specific need for a swing arm model. Interdyne submitted a revised proposal on September 17 offering a swing arm type machine.

ICS alleges that the agency's conduct was improper, essentially arguing that it amounted to technical leveling prohibited by Federal Acquisition Regulation (FAR) § 15.610(d)(1). ICS asserts that Interdyne's initial offer of a clamp-die type machine instead of a swing-arm type resulted from the firm's "lack of diligence, competence and inventiveness," and that the agency improperly brought the

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[3]ICS also challenged the technical acceptability of several other of Interdyne's offered items. However, ICS did not dispute the agency's responses to these allegations in its comments on the agency report. We therefore deem these issues abandoned. See Herman Miller, Inc., B-234704, July 10, 1989, 89-2 CPD ¶ 25.

swing arm requirement to Interdyne's attention numerous times in order to "bring its proposal up to the level of ICS."

We do not agree that the agency engaged in impermissible technical leveling here. Technical leveling occurs when the agency, through successive rounds of discussion, helps to bring a proposal up to the level of another proposal by pointing out weaknesses that remain in the proposal due to an offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them. FAR § 15.610(d)(1); Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. In this case, Interdyne's offer of a nonconforming bending machine was not the result of any lack of diligence, competence or inventiveness on its part; to the contrary, as Interdyne explained in responding to the agency's notice of the deficiency, it viewed its nonconforming offer as exceeding the specifications. It is clear from the record that Interdyne was aware of the stated requirement for a swing arm model; the agency did no more than inform Interdyne that the firm's alternative approach would not be acceptable for this procurement. We conclude that the agency's action was consistent with the FAR § 15.610 requirement that agencies conduct meaningful discussions with offerors, and did not amount to technical leveling.

BUY AMERICAN ACT COMPLIANCE

The RFP contained the Buy American Act and Balance of Payments Program clause at Defense FAR Supplement (DFARS) § 52.225-7001, which provides for an evaluation preference for domestic end items, and the Buy American Act--Balance of Payments Program Certificate at DFARS § 52.225-7000, which requires offerors to identify any nondomestic end items they intend to furnish. Interdyne identified several items of foreign origin, thereby certifying that the remaining items it was offering were domestic end items, that is, that at least 50 percent of the cost of each item was attributable to components manufactured in the United States or Canada. ICS alleges that Interdyne falsely certified that two of its offered items--an Olympus Corporation model flexible borescope and a NATCO/Carlton radial drill--are domestic end items with at least 50 percent domestic content.

Generally, an agency should not automatically rely on a domestic end product self-certification if it has reason to question whether a domestic product will in fact be furnished. Discount Mach. & Equip., Inc., B-242793, June 6, 1991, 91-1 CPD ¶ 541. However, where a contracting officer has no information prior to award indicating that the product to be furnished is a foreign end product, the contracting officer properly may rely on the offer's self-

certification without further investigation, Id. ICS does not identify any information on the face of Interdyne's proposal--and we have found none--calling into question the firm's domestic end product certification. ICS does not assert or offer any evidence that the contracting officer otherwise was on notice that the certification was not accurate. Therefore, under the above standard, the contracting officer reasonably relied on the certification.[1]

The protest is denied.

for James F. Hinchman
General Counsel

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[1]In response to the protest, the agency has furnished statements from Interdyne's borescope and radial drill suppliers certifying to the domestic content of these items: 67.5 percent domestic content for the borescope, and 53-55 percent domestic content for the drill. Although ICS subsequently submitted an apparently inconsistent statement from the borescope supplier stating that the item is made in Japan, we will not consider it because it was not filed before the record was closed. Moreover, even if the item were manufactured in Japan, and therefore subject to application of a 50 percent price differential in the evaluation, ICS was not prejudiced by the agency's failure to apply the differential. Application of a 50 percent differential to the price of Interdyne's borescope would have increased the firm's total evaluated price by only $20,790; Interdyne's evaluated price still would have been lower than ICS's.