



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

3502110

Decision

Matter of: Essex Electro Engineers, Inc.
File: B-250862.2
Date: October 22, 1993

Michael R. Hatcher, Esq., Israel and Raley, for the protester.
Daniel Laguaite, Esq., Department of the Navy, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly eliminated proposal from competitive range where proposal did not contain information which would demonstrate that the offered product would comply with the specifications as required by the solicitation.
2. Protester's allegation that agency decided to reevaluate proposals with the specific intent of excluding the protester's proposal is denied where record shows that the agency's decision to reevaluate proposals was necessitated by its discovery that its previous evaluation was flawed and where the record shows that the reevaluation was conducted in accordance with the solicitation.
3. Allegation that agency misled protester during discussions into believing that its unacceptable technical proposal required only minor revisions to become acceptable is denied where the discussion questions posed by the agency clearly expressed the agency's serious concerns about the proposal.

DECISION

Essex Electro Engineers, Inc. protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. N00421-92-R-0086, issued by the Department of the Navy, Naval Air Warfare Center, Patuxent River, Maryland, for an electronic load bank to be used to simulate constant power load characteristics of aircraft radar equipment. Essex alleges that the Navy evaluated its proposal in a manner "designed to exclude Essex" from the

competition and "deliberately misled Essex" during discussions.

We deny the protest.

The RFP contemplated the award of a fixed-price contract for the load bank to the low-priced, technically acceptable offeror. The acceptability of technical proposals was to be determined in accordance with six factors: (1) electrical design; (2) mechanical design; (3) thermal design; (4) parts and materials; (5) reliability, maintainability and safety; and (6) capability. The RFP required that the technical proposal contain "descriptive literature . . . necessary to establish that the composition of the equipment offered meets each of the requirements of the specifications," and that the proposals include information on the electrical, mechanical and thermal design of the proposed load bank. For example, the RFP required proposals to "[d]iscuss the electrical and electronic aspects of the design being proposed. Describe circuitry, components, theory of operation, performance analyses and testing" and "[d]iscuss how the proposed design accomplishes each electrical and electronic requirement." In another example, the RFP required that proposals "[d]iscuss the mechanical and structural aspects of the design being proposed."

This protest is Essex' second challenge of the exclusion of its proposal from the competitive range. The Navy had previously eliminated Essex' proposal from the competitive range based on its determination that Essex would be unable to provide the load bank at its offered price, which the agency believed to be too low.¹ We sustained Essex' protest against the initial competitive range exclusion. Essex Electro Engr's, Inc., B-250862, Feb. 23, 1993, 93-2 CPD ¶ _____. Although Essex' price was substantially below the prices of the other offerors and the government estimate, the Essex proposal received a technical rating equal to the ratings assigned to the other proposals. We concluded that, under these circumstances, the contracting officer could not reasonably eliminate the Essex proposal because of its low price; rather, the agency should have conducted discussions to eliminate any concerns about Essex' price. We recommended that the Navy include Essex' proposal in the competitive range and solicit new best and final offers (BAFO).

The Navy explains that after receiving our decision, the contracting officer concluded that the original technical evaluation was invalid since the agency's evaluators had not

¹The agency found the Essex proposal to be technically unacceptable but capable of being made acceptable.

properly evaluated the technical proposals to determine compliance with the load bank specifications set forth in the RFP. Specifically, the chairman of the technical evaluation board acknowledged to the contracting officer that the evaluators had assigned full credit to proposals which simply "parroted" back the specifications or gave blanket offers to comply with the specifications. The contracting officer directed the evaluators to reevaluate all of the proposals in the competitive range prior to discussions.

Although the evaluators originally found that the Essex proposal was technically unacceptable but capable of being made acceptable, based on the reevaluation, the evaluators determined that the Essex proposal was technically unacceptable and not capable of being made acceptable without major revisions. This conclusion was based on the lack of specific information in the Essex proposal. For instance, the evaluators concluded that the electrical and electronic aspects of the Essex proposed design were not acceptable and that the appropriateness of the control circuitry design could not be determined. Also, the evaluators concluded that the thermal aspects of the Essex proposed design were not acceptable and that the Essex proposal did not demonstrate the maximum power dissipation capability of the transistors and heat sink to be used in the proposed design. The evaluators also concluded that parts and materials used in the Essex proposed design could not be evaluated because they were not identified and that the proposal did not adequately address a number of other areas of the specifications. To comply with our recommendation to include Essex's proposal in the competitive range, the agency provided a list of 19 discussion questions to Essex.

Essex responded to the questions but objected to the Navy's request for specific design information, stating that offerors were not required to have completed the design work. The evaluators, after reviewing the responses, determined that Essex' proposal did not demonstrate that its proposed electronic load bank would comply with many of the specifications. The agency concluded that Essex' proposal would require a major revision to become acceptable and eliminated it from the competitive range. This protest followed.

The protester alleges that the agency's reevaluation of its proposal following our initial decision and the request for detailed design information were "designed to exclude Essex from further consideration." Essex maintains also that the Navy "deliberately misled the firm during discussions" because the agency never advised Essex that its proposal was reevaluated as technically unacceptable and not capable of

being made acceptable; rather, Essex states that it understood that the agency believed that its proposal was capable of being made acceptable with only minor revisions. Essex also asserts that the Navy misled the firm, through the framing of the discussion questions, into thinking that only minor proposal revisions were necessary. Finally, the protester contends that the Navy did not comply with the recommendation contained in our prior decision that the "Navy include the Essex proposal in the competitive range and solicit new BAFOs."

At a hearing held in connection with this protest, we received testimony from the two contracting officers responsible for the procurement (at different times) and the chairman of the evaluation board. Based on that hearing, and our review of the evaluation record and the submissions of the parties, we conclude that the Navy reevaluated the Essex proposal in a manner consistent with the evaluation scheme set forth in the RFP. We also conclude that Essex was not misled by the agency and that the decision to exclude the Essex proposal from the competitive range was reasonable and consistent with the recommendation in our earlier decision.

The evaluation of technical proposals and the resulting determination as to whether an offer is in the competitive range are matters within the discretion of the contracting agency. Consequently, we will review an evaluation solely to ensure that it was reasonable and consistent with the solicitation and applicable procurement laws and regulations. Discount Mach. & Equip., Inc., B-248321, July 22, 1992, 92-2 CPD ¶ 44. Offers that are technically unacceptable as submitted and would require major revisions to become acceptable are not required to be included in the competitive range for discussion purposes. Third Millennium, Inc., B-241286, Jan. 30, 1991, 91-1 CPD ¶ 91.

Initially, the protester basically contends that the agency during discussions requested design information for evaluation which was not required by the RFP. We disagree. The RFP required proposals to include design detail sufficient to show compliance with the specifications. The RFP required that proposals "[d]iscuss" numerous aspects of "the design being proposed," including electrical design, mechanical design, technical design, and parts and materials. Thus, the request during discussions for detailed design information for evaluation was entirely consistent with the RFP.

Further, the Navy properly eliminated Essex' proposal from the competitive range as technically unacceptable because, even after responding to detailed discussion questions seeking design information, the Essex proposal did not

demonstrate how the firm's proposed load bank would comply with the specifications. For example, with respect to electrical design, the evaluators found that the "appropriateness of the control circuitry design cannot be determined" and that Essex' proposal did not demonstrate that the proposed design would satisfy the response time requirements under certain modes of operation specified in the RFP. The agency also found that the thermal aspects of the proposed design were unacceptable, noting among other problems, that the proposal did not demonstrate the maximum power dissipation capability of the transistors and heat sink used in the proposed design. The evaluators also noted that Essex' proposal did not identify the parts and materials to be used in the proposed load bank and that "virtually all design work remains to be done." Indeed, even after Essex was given the opportunity to respond to the agency's detailed discussion questions, it appeared to agency officials that Essex had offered to modify a conventional load bank without describing how the modification would be accomplished. Video Transcript (VT) at 12:12; 12:16-12:17. Essex has not rebutted the agency's conclusion that its proposal was unacceptable. We have no basis to object to that conclusion. In addition, since major revisions to the proposal would be required in order for it to become technically acceptable, the agency reasonably excluded the Essex proposal from the competitive range based on its discussion responses. Third Millennium Inc., supra.

We also conclude that there is no evidence in the record to support the protester's suspicion that the agency reevaluated the Essex proposal in bad faith in order to exclude it from the competitive range. The contracting officer and the chairman of the evaluation board each testified at the hearing that the proposals were reevaluated because the original evaluation had not ensured that the proposals demonstrated compliance with the specifications. VT at 10:01-10:02; 12:19-12:20; 13:59-14:02; 14:10. Our review of the record supports this testimony. As we discussed in detail above, in fact, the RFP required that proposals include substantial information on the design of the offeror's proposed load bank and, since the original technical evaluation did not include an assessment of whether the proposals included that information, the agency reasonably decided that reevaluation of the proposals consistent with the RFP was required.

Essex also alleges that the discussion questions misled the firm into believing that its proposal required only minor revisions which could be corrected in a BAFO. We disagree. We do not think that the protester reasonably could have thought that its proposal required only "minor revisions." Contrary to the protester's assertion, the 19 discussion

questions were clearly framed in a manner which expressed the Navy's substantial concerns.² For example, the protester was asked to describe the design work remaining to be done on the proposed load bank, to describe the control circuitry, and to explain how its proposed product met solicitation requirements for transistors, and other essential components. Essex was asked to address requirements for power dissipation and load response. In our view, these discussion questions were straightforward and we fail to see how Essex was misled by these questions. In addition, the protester's own response to the questions demonstrated that it understood that the agency sought detailed information from the firm which would demonstrate compliance with the required design.

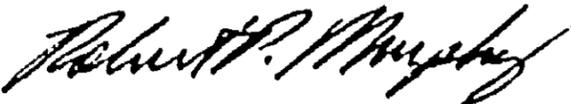
The protester also argues that it was misled by the detailed discussion questions because the detailed questions were inconsistent with Essex's understanding that its proposal required only minor revisions based on the results of the agency's initial evaluation previously disclosed to Essex. As discussed above, we are not persuaded that the discussions were misleading. Essex was afforded an opportunity to show that its proposed product complied with the specifications. Essex simply declined to show that its proposed product would meet specifications; indeed, it continues to object to the agency's attempts to ascertain whether its offered product would comply with the specifications.

Finally, concerning compliance with the recommendation in our prior decision, as explained, only after receipt of our decision did it become apparent that the evaluators failed to ensure that the proposals demonstrated compliance with the RFP specifications. Thus, we think the agency's decision to reevaluate proposals was consistent with our recommendation, which contemplated that the agency conduct

²Essex also alleges that the questions presented to the other offerors requested significantly less design information than the questions directed to Essex. While the agency provided more questions to Essex than to the other offerors, the agency states, and the record shows, that the questions asked of Essex were of the same detail as required of the other firms. In our view, the number of questions posed to Essex reflects the lack of design detail contained in its proposal.

discussions, since in order for discussions to be meaningful, they must be based on an accurate evaluation of the weaknesses or deficiencies in the proposals.

The protest is denied.


for James F. Hinchman
General Counsel