



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Paramax Systems Corporation; CAE-Link Corporation

File: B-253098.4; B-253098.5

Date: October 27, 1993

Anne H. Warner, Esq., for Paramax Systems Corporation, a Unisys Company; and Stuart B. Nibley, Esq., and Michael B. Hubbard, Esq., Jeyfarth, Shaw, Fairweather & Geraldson, for CAE-Link Corporation, the protesters.

Timothy Sullivan, Esq., and Martin R. Fischer, Esq., Dykema Gossett, for Statistica, Inc., an interested party.

Andrea E. Brotherton, Esq., Department of the Navy, for the agency.

John W. Van Schaik, Esq., and Glenn Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where, after receipt of best and final offers, an agency permits one offeror to submit information that makes its proposal acceptable by stating that the firm agrees to an RFP limitation on fees for cost-plus-incentive-fee work, the agency must conduct discussions with all other offerors whose proposals were in the competitive range and permit all offerors to submit revised proposals.

DECISION

Paramax Systems Corporation and CAE-Link Corporation protest the award of a contract to Statistica, Inc. under request for proposals (RFP) No. N61339-92-R-0051, issued by the Department of the Navy for design and installation of the defense satellite communications system training device (DSCS-TD), which is a computer based system for training service personnel in the operation, maintenance, repair, alignment and testing of the defense satellite communications system (DSCS). Paramax and CAE-Link argue

*The decision issued on October 27, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

that the Navy held discussions with Statistica after the submission of best and final offers (BAFO) and improperly failed to conduct discussions with other offerors whose proposals were in the competitive range.

We sustain the protests.

The DSCS is used by the Army, Navy, Air Force and the State Department for voice and data communications. The DSCS-TD is to provide instruction and practice in the knowledge and skills required to operate and maintain the DSCS. The RFP contemplated proposals for lots I through IX. Lot I, which made up the basic requirements of the solicitation, included 10 line items for designing and constructing 5 training suites, technical data, training programs and other related supplies and services. Lot II consisted of additional option quantities of the line items called for in lot I; lots III through VIII consisted of 5 years of logistics support options; and lot IX was an option for transition services.

Lots I and II of the RFP contained a combination of cost-plus-incentive-fee (CPIF), firm, fixed-price, and time-and-materials line items. Lots III through IX also included both fixed-price and CPIF line items. RFP amendment No. 0002, which was issued before initial proposals were submitted, required offerors to propose a fee of not more than 12 percent for the CPIF line items in lots I and II, and not more than 9 percent for lots III through IX.

The RFP stated that award would be made to the offeror whose proposal offered the best value to the government and that the proposals would be evaluated in five areas: training, system design, management, logistics, and cost. The RFP stated that the training area would be considered more important than the system design and management areas together, which were of equal importance, and the logistics and cost areas were of equal importance and of less importance than system design and management. Additionally, the RFP advised that under the management area, the evaluation would include consideration of each offeror's past performance to establish performance risk. Each of the evaluation areas included evaluation factors and/or elements.

The Navy received six proposals prior to the closing date. After evaluating the proposals, the Navy established a competitive range which included the proposals of Paramax, CAE-Link, Statistica and another offeror. The agency then conducted discussions with the competitive range offerors and requested BAFOs. All four competitive range offerors submitted BAFOs by the January 8 closing date. The proposals were evaluated and rated using an adjectival

rating scheme and were assigned risk ratings in each of the evaluation areas.¹ Generally, Statistica's proposal was rated higher than the others, (deleted).

The agency evaluated the realism of each offeror's proposed costs. The proposed and evaluated costs of Paramax, CAE-Link and Statistica were as follows:

	Paramax	Statistica	CAE-Link
Proposed	[deleted]	[deleted]	[deleted]
Evaluated	[deleted]	[deleted]	[deleted]

On March 15, the source selection authority decided to award the contract to Statistica. On April 5, a Navy contract specialist discovered that Statistica's BAFO was internally inconsistent regarding the maximum fee proposed for the CPIF items in lots III through IX. In one place, Statistica's BAFO repeated the following language set forth in amendment No. 0002 of the RFP:

"FOR CPIF ASPECTS: MIN. FEE, NOT LESS THAN 3%
MAX. FEE, NOT GREATER THAN 9%

"THESE VALUES SHALL BE USED FOR LOT III THROUGH
LOT IX."

In contrast, under the heading "LOT III SUMMARY TOTALS," Statistica's BAFO stated a maximum fee of 12 percent and stated a dollar figure which was 12 percent of the total CPIF target cost. Similarly, with regard to lots IV through IX, Statistica's BAFO included the same statement that the maximum fee was 12 percent and included maximum fee dollar figures that were 12 percent of the CPIF target costs.

Based on this discovery, the contracting officer determined that the agency needed additional information regarding Statistica's BAFO. On April 5, the contract specialist called and informed a representative of Statistica that there appeared to be an error in the maximum fee proposed in the firm's BAFO. In response, Statistica stated in an April 5 letter that "Statistica hereby acknowledges in the above referenced solicitation that for Lots III through IX the maximum fee should be no more than 9%." Upon receipt of this representation, the Navy awarded the contract to Statistica.

¹The agency used a color-coded evaluation scheme under which blue indicated excellent, green indicated acceptable, yellow indicated marginal, and red indicated unacceptable.

In their initial protests, Paramax and CAE-Link raised numerous issues concerning the technical evaluation, the cost/price evaluation and the agency's judgment that Statistica's proposals offered the best value to the government. After they received the agency's responses to their initial protests, both Paramax and CAE-Link filed additional protests in which they argue that Statistica's BAFO was unacceptable since it proposed fees for the CPIF line items in lots III through IX in excess of the fee limitation set forth in the RFP. In addition, according to the protesters, since Statistica's BAFO was unacceptable as submitted, the Navy's communication with Statistica and Statistica's April 5 response were essential for determining the acceptability of Statistica's BAFO and therefore constituted discussions. The protesters also argue that Statistica's April 5 letter amounted to discussions since it was incorporated into the contract thereby allowing Statistica to revise its proposal. Finally, the protesters argue that the discussions with only Statistica were improper since Federal Acquisition Regulation (FAR) § 15.611(c) requires that if discussions are reopened after BAFOs, the agency is required to request additional BAFOs from all offerors whose proposals are still in the competitive range.

In response, the Navy and Statistica argue that the contract specialist's communication with Statistica and the firm's response did not constitute discussions; rather, Statistica was simply permitted to correct a mistake in its BAFO in accordance with FAR § 15.607(a), which permits the correction of minor informalities or irregularities and apparent clerical mistakes in proposals. The agency maintains that the maximum fee which Statistica intended can be ascertained from the RFP and Statistica's BAFO since, although the BAFO included maximum fees of 12 percent for lots III through IX, the BAFO also stated a maximum fee of 9 percent for those lots. According to the Navy, since the RFP only allowed a maximum fee of 9 percent for lots III to IX, and an acceptable maximum fee (9 percent) was stated on the face of the BAFO, correction of the error required no documents outside of the BAFO and, therefore, the communications between the agency and Statistica did not amount to discussions.

In addition, Statistica notes that its target fee was far less than the RFP's maximum fee limitation and that, since the cost reimbursement line items in question were incentive fee items, the maximum fee would only be earned if costs were reduced enough to raise the fee above the target fee in the contract. Statistica also argues that, in addition to the contingent nature of the maximum fee, the difference between a 9-percent fee and a 12-percent fee is

insignificant in relation to the overall amount of the contract.² Under these circumstances, Statistica argues that it makes no sense to assume that Statistica would have risked losing this contract over a contingent potential gain that is small in relation to the overall price of the contract. Statistica maintains that the only logical conclusion that can be drawn from its BAFO is that the firm intended to be bound by the 9-percent maximum fee limitation set forth in the RFP for lots III through IX and, therefore, the 12-percent fee was a clerical mistake that was correctable without discussions.

Concerning correction of mistakes in proposals, FAR § 15.607(a) directs contracting officers to examine proposals for "minor informalities and irregularities and apparent clerical mistakes." FAR § 14.405 (referenced in FAR § 15.607(a)) explains that minor informalities or irregularities are matters of form and not substance. As discussed below, the protester's inclusion of a 12-percent fee, making its proposal unacceptable, did not constitute a minor informality that could be clarified or corrected without conducting discussions. Mine Safety Appliances Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76 (inclusion in BAFO of a fee exceeding statutory limits made proposal unacceptable and did not constitute a minor informality).

Here, under lots III through IX, Statistica's BAFO stated a 12-percent maximum fee for the CPIF line items and, under each of those lots, the BAFO listed maximum fee amounts that were 12 percent of the target cost of each lot. Thus, both the fee percentage and the actual fee amounts proposed by Statistica for lots III through IX exceeded the 9-percent limitation in the RFP. In addition, the actual maximum incentive fee amounts proposed for each of those lots matched the percentage indicated. Thus, there was no error in the mathematical calculation of the maximum fees for lots III through IX in Statistica's BAFO.

Statistica has submitted affidavits in which its personnel assert that the 12-percent maximum fees in lots III through IX were simply the result of a clerical error in which the incorrect maximum fee percentage was inserted under each lot and then repeatedly multiplied out in finalizing the BAFO. In addition, the Navy and Statistica state that Statistica's BAFO repeated the RFP language which limited the fee available for lots III through IX to 9 percent. The Navy and Statistica argue that, from this language, a 9-percent maximum fee can be ascertained from Statistica's BAFO.

²Statistica states that the total value of the difference between the 12-percent fee and the 9-percent fee permitted by the RFP for lots III through IX is [deleted].

Although the Navy and Statistica argue that a 9-percent maximum fee can be ascertained from the BAFO, the language which they reference is contained on a page in the RFP on which offerors were to submit some prices. While the protester retyped the form into its word processing system, there is no evidence that it was aware of the limitation. Additionally, the RFP language does not propose a maximum fee percentage of 9 percent or any other percentage; it simply states: "MAX FEE, NOT GREATER THAN 9%." (Emphasis added.) Rather than an error of form, which could be corrected without discussions, the 12-percent maximum fees listed in Statistica's BAFO for the CPIF line items in lots III through IX made the BAFO unacceptable. The BAFO did not conform to a material term of the RFP. For this reason, correction could only be accomplished through discussions. Mine Safety Appliances Co., supra; HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188.³

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. FAR § 15.601; HFS, Inc., supra.⁴ Since Statistica's BAFO was unacceptable as a result of the 12-percent maximum fees, the contract specialist's request, and Statistica's April 5 response-- which was incorporated in the contract and which made the BAFO acceptable--amounted to discussions. FAR § 15.601; Information Ventures, Inc., B-245128, Dec. 18, 1991, 91-2 CPD ¶ 558; ALT Comms., Inc., B-246315, Mar. 2, 1992, 92-1 CPD ¶ 248. It is a fundamental principle of federal procurement that all offerors must be treated equally. Information Ventures, Inc., supra. The conduct of discussions with one offeror requires that discussions be conducted with all offerors whose proposals are within the competitive range and that the offerors have an opportunity to submit revised offers. Id. Therefore, discussions should have been reopened with all offerors in the competitive range and a second round of BAFOs should have been requested.

Statistica and the Navy, nonetheless, argue that neither Paramax or CAE-Link were prejudiced by the agency's failure

³In addition, the 12-percent maximum fee proposed by Statistica exceeded the 10-percent limit on fees for cost-plus-incentive-fee contracts set forth in FAR § 15.903(d).

⁴It is also clear from the facts above that the Navy could not allow Statistica to revise its proposal under either FAR § 52.215-10(c), governing the late receipt of BAFOs, or FAR § 52.215-10(g), which allows for the consideration of a late modification of an otherwise acceptable proposal. See HFS, Inc., supra.

to reopen discussions and permit the submission of BAFOs by all offerors in the competitive range. They first note that the communications between the Navy and Statistica occurred after the evaluation was completed and after Statistica's proposal had been selected as the best value to the government. Under these circumstances, and considering the small impact of a 12-percent fee on CPIF line items, as opposed to a 9-percent fee, Statistica and the Navy argue that the protesters were not prejudiced. In addition, according to the agency, the source selection authority considered proposed and evaluated target fees in the selection decision and did not consider maximum fees. Therefore, the agency argues that the proposed maximum fees had no impact on the selection decision.

If a solicitation, proposed award, or award does not comply with statute or regulation (that is, where there is a violation of applicable regulations by the agency), we will sustain the protest unless we conclude, based on the record, that the protester would not have been the successful offeror absent the violation. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401; Federal Data Corp., 69 Comp. Gen. 196 (1990), 90-1 CPD ¶ 104. Here, there is a reasonable possibility that the protesters were prejudiced by the agency's failure to hold an additional round of discussions and allow them to revise their cost/price proposals, as the agency permitted Statistica.

Prejudice here did not result from the change to Statistica's BAFO per se; as the agency argues, it appears that proposed maximum fees played no role in the selection decision. Rather, Paramax and CAE-Link were prejudiced because they were not treated equally since they were not given the same opportunity as Statistica to participate in discussions and to amend their cost/price proposals after BAFOs. Had the protesters been given that opportunity, they might have been able to improve their competitive positions. For example, Paramax argues that in the cost evaluation, the Navy significantly overestimated the costs of Paramax performing the contract, specifically because the Navy understated the labor hours which Paramax proposed for certain cost reimbursement line items and also because the agency failed to credit the firm with substantial cost savings due to [deleted]. Had the Navy held cost/price discussions with Paramax and given Paramax an opportunity to submit a revised BAFO, Paramax may have been able to justify its proposed costs by, for instance, explaining the Navy's alleged error in counting the firm's proposed labor hours, or by [deleted]. Under the circumstances, we conclude that Paramax and CAE-Link were prejudiced by the agency's failure

to conduct additional discussions and to allow them to amend their proposals.⁵

As noted above, the protesters raise a number of other issues concerning the Navy's evaluation of the technical proposals and performance risk. Since post-BAFO discussions, which were conducted with only Statistica, concerned only that firm's cost/price proposal, and since, the agency may, in its discretion, conduct discussions only concerning cost/price issues and only permit revisions to the cost/price proposals, we will address the other issues raised by the protesters to ensure that the non-price portion of the protesters' proposals were evaluated properly.

First, Paramax challenges [deleted] rating assigned to it in the training evaluation area. The record shows that this rating was in part, although not exclusively, based on the fact that [deleted]. Paramax argues that there was no RFP requirement that all work be performed in the same location and therefore it was inconsistent with the RFP to criticize it for failing to propose to do so. In addition, Paramax argues that this criticism was unreasonable since effective dialogue and communications often occur by electronic means even when parties are in the same physical location.

The evaluation of proposals is primarily within the discretion of the procuring agency, not our Office; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. Consequently, we will not make an independent determination of the merits of offers; rather we will examine the agency evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114. The fact that the protester disagrees with the agency's judgment does not render the evaluation unreasonable. Id.

We think that the RFP reasonably permitted downgrading of Paramax's proposal under the training evaluation area [deleted]. One of the factors listed under that RFP evaluation area was "Soundness of planned approach." Under that

⁵The agency concedes that it erred in its cost evaluation of lot II of the Paramax proposal. According to the Navy, when the error is corrected, the overall evaluated cost for Paramax changed from [deleted] to [deleted]. Correction of this error also indicates that Paramax's competitive position could improve when the agency makes a new best value determination following discussions and the submission of revised BAFOs.

factor the agency could reasonably criticize a firm's proposal to perform certain types of work with personnel in more than one location. The Navy concluded that under Paramax's courseware development approach, which called for work to be done in two locations, it would be difficult to maintain design consistency and avoid differences in form and instructional structure. Paramax's disagreement does not render the evaluation unreasonable. Litton Sys., Inc., supra.

Paramax also contends that the agency failed to conduct an adequate assessment of the performance risk of Statistica's proposal. According to the protester, Statistica needed to hire [deleted] for the contract, and planned to perform the contract in a facility which it did not have when it submitted its proposal. In addition, Paramax argues that Statistica's staffing of a smaller earlier contract was "troubled" and, for these reasons, Statistica's proposal should have been given a high risk rating.

The Navy explains that while Statistica proposed to hire numerous employees for the contract, Statistica's proposal showed that the firm previously has successfully hired large work-forces for complex projects. In addition, the agency maintains that risk is minimized under Statistica's proposal since delivery will not take place for 3 years, allowing a gradual hiring plan. Although Paramax argues that Statistica proposed to hire most of its key employees for the contract, only [deleted] to be hired, while [deleted] other key positions were proposed to be staffed by current employees. In addition, although Statistica had not previously occupied the facility which it proposed for this contract, the agency reports that the evaluators were aware of no circumstances that caused this to be a risk. While Paramax disagrees with the agency's assessment of each of these factors, and with the overall low risk rating assigned to Statistica's proposal, that disagreement does not render the evaluation unreasonable. Litton Sys., Inc., supra.⁶

Turning to CAE-Link's other allegations, in its initial protests, CAE-Link listed 10 specific areas where it asserts that its proposal was unreasonably found to contain weaknesses or where the agency criticized its proposal for failing to meet requirements which were not set forth in the RFP. The agency, in its report on the protest, responded in detail to each of the protester's arguments concerning CAE-Link's evaluated weaknesses. The protester,

⁶CAE-Link also challenges that Navy's performance risk assessment of Statistica's proposal, essentially for the same reasons as Paramax. Accordingly, we find no merit to this allegation by CAE-Link.

in its comments, did not substantively respond to, or rebut in any way, the agency's persuasive explanation of its evaluation, other than to state that it stood by its protest contentions. The agency's detailed explanations are reasonable on their face. Further, our review of CAE-Link's proposal and the evaluation documentation shows that the evaluation was reasonable.

For example, similar to Paramax, the evaluators criticized the CAE-Link proposal [deleted]. Although CAE-Link argues that this criticism indicates that the agency had an unstated requirement that all work be located in the same place, as we stated concerning the Paramax proposal, the RFP reasonably permitted the agency to consider the proposed location of personnel as an issue in the evaluation and the concern raised by the agency was reasonable.

The agency also states that CAE-Link failed to understand the risks associated with interactive courseware development. CAE-Link argues that its proposal clearly recognized the potential risks. The agency references a provision of CAE-Link's proposal which states: "[deleted]." According to the Navy, this language shows that CAE-Link did not consider large scale courseware development to be a risk. Given the CAE-Link proposal language, we have no basis to challenge the Navy's view.

The agency also criticized the CAE-Link proposal because the proposed [deleted] was not commercial off-the-shelf equipment. Although in its protest, CAE-Link argued that its [deleted], in fact, was off-the-shelf equipment, the protester references nothing in its proposal that demonstrates this and the agency's investigation revealed otherwise. We think the judgment of the evaluators was reasonable.

We recommend that the Navy reopen discussions with all offerors in the competitive range and request a new round of BAFOs. Whether those discussions concern more than cost proposals is a matter for the agency's discretion. If a firm other than Statistica is selected as a result of the agency's evaluation of BAFOs, then the Navy should terminate Statistica's contract for the convenience of the government and make award to that firm. We also find that CAE-Link and Paramax are entitled to recover the costs of filing and pursuing their protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with

4 C.F.R. § 21.6(f), certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the Navy within 60 days after receipt of this decision.

The protests are sustained.

Comptroller General
of the United States