

Matter of: Orbital Sciences Corporation

File: B-254698

Date: January 5, 1994

Leo Cook for the protester.

Lynn Hawkins Patton, Esq., Department of Commerce, for the agency.

Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency's decision not to require interfacing of offerors' radiosondes with existing government computer systems prior to award is denied where protester has not shown that the agency's determination of its minimum needs was unreasonable.

2. Protest against agency's decision not to include post-award interfacing costs as a price-related factor in the solicitation is denied where record shows that the decision had the effect of increasing competition and was not prejudicial to the protester.

DECISION

Orbital Sciences Corporation (OSC) protests the terms of invitation for bids (IFB) No. 52-DGNW-3-00092, issued by the Department of Commerce for an indefinite quantity of radiosondes which are meteorological sensing telemetry instruments used by the agency's National Weather Service (NWS) to measure atmospheric conditions. NWS radiosondes are carried into the atmosphere attached to balloons and tracking equipment on the ground, known as the MicroART ground system, receives and translates data from the instruments. OSC alleges that the solicitation was defective.

We deny the protest in part and dismiss it in part.

The IFB contained three line items. Item Nos. 1 and 2 were for radiosondes to be awarded separately to different firms in order to maintain dual sources for the critically needed instruments. Item No. 3 called for the supply of

transponders--a type of amplifier used with radiosondes in certain atmospheric conditions. The items specified by the IFB are subject to a Qualified Products List (QPL) requirement. At all times relevant to this protest, three firms--OSC, VIZ Manufacturing Company, and Vaisala, Inc.--have had radiosondes on the agency's QPL.

The IFB provided that if a manufacturer's radiosonde model had not been interfaced with NWS' MicroART ground tracking system, the government would, after award, write the necessary software to accomplish compatibility. The QPL requirements established by NWS in 1991 do not require compatibility of the radiosondes with the agency's MicroART system as a precondition to award. While OSC's model had previously been interfaced at government expense under an earlier contract, VIZ's and Vaisala's models had not been interfaced. In the event the government was unable to achieve compatibility between the models and the tracking system, the IFB provided that the contract would be terminated for the convenience of the government.

In addition to the bid prices submitted by competing firms, the IFB contained two other price-related factors which were to be added to the offeror's prices to determine which bid was low--the cost of shipping radiosondes by ground transportation and the cost of lifting gas necessary to take them into the atmosphere.

On August 30, OSC filed its protest challenging the solicitation terms. The agency opened bids on August 31. VIZ was the apparent low bidder for item No. 1 and OSC's price for the item was \$2,202,765 higher. Vaisala was the apparent low bidder on item No. 2 and OSC's price was \$351,939 higher. On September 30,¹ NWS awarded item No. 1 to VIZ and item No. 2 to Vaisala.

OSC alleges that the solicitation violated 41 U.S.C. § 253c (1988), which governs the establishment of qualification requirements bidders must meet before award, since bidders were not required to demonstrate, at their own expense prior to award, that their products met all applicable specifications--including compatibility with the MicroART ground tracking system. OSC also argues that the solicitation failed to meet the requirement of Federal Acquisition Regulation (FAR) § 14.201-8(a) that the solicitation list all "foreseeable costs to the Government"

¹Awards were made notwithstanding the protest because the agency determined that urgent and compelling circumstances significantly affecting the interests of the United States would not permit the agency to wait for a decision by this Office before making award. 31 U.S.C. § 3553(c) (1988).

as price-related factors designed to establish which bid was in fact low. In this regard, OSC maintains that the government's cost to perform the post-award software effort with the MicroART ground tracking system should have been listed as a price-related factor and suggests that, had a proper estimate of this cost been included in the IFB, the protester would have received the award for item No. 2 in competition with Vaisala. The protester does not challenge the award to VIZ for item No. 1.

In response, the agency maintains that it reasonably determined that the post-award interface effort should be performed by the government because NWS could not release to manufacturers the MicroART ground system software necessary to perform the effort so that the firms could accomplish the interface as part of the QPL process. NWS explains that release of the MicroART software would compromise proprietary data of currently compatible radiosonde manufacturers, including OSC. The agency also reports that it had to have complete control of the software effort to ensure that the system would function properly and to obtain information concerning how the product interfaces with the MicroART system in the event malfunctions occur and "troubleshooting" is necessary.

NWS also points out that it did not require compatibility as a QPL requirement in an effort to increase competition and argues that OSC is attempting to restrict competition through its protest. Finally, the Navy has estimated its interface cost for the Vaisala model to be \$88,525 and argues that, even if that cost had been included in the IFB as a price-related factor, OSC's bid for item No. 2 still would have exceeded Vaisala's by \$263,414.

Procuring agencies have the primary responsibility for drafting specifications that reflect their actual minimum needs; thus, the responsibility for establishing the testing procedures necessary to determine product acceptability is within the expertise of the cognizant technical activity. We will not question an agency's determination of its needs unless the record shows that the determination is unreasonable. Ingersoll-Rand Co., B-224706; B-224849, Dec. 22, 1986, 86-2 CPD ¶ 701. More particularly, in establishing such qualification requirements under 41 U.S.C. § 253c, an agency is obligated to honor the overall purpose of the statute, which is to encourage new competitors where there has been limited competition in the past. Id. In this latter regard, agencies are obligated to limit QPL requirements to "those least restrictive to meet the purposes necessitating establishment of the qualification requirement." 41 U.S.C. § 253c(b)(2).

Here, the agency's determination not to make MicroART compatibility a preaward QPL requirement, and to instead perform interfacing itself, was an attempt to broaden competition beyond OSC. The agency's decision was also based on its need to retain the MicroART software within the government to ensure that NWS could identify programming errors and to avoid the release of proprietary data contained in the software. OSC has presented no information rebutting the agency's determination and we have no basis to question the agency's determination. Ingersoll-Rand Co., supra.

OSC's position that 41 U.S.C. § 253c mandates that the interface requirement must be included as a solicitation requirement is without merit. As stated above, the statute requires an agency to limit QPL requirements to those which are least restrictive to meet agency needs in order to encourage new competitors. Thus, NWS' decision not to include interface as a QPL requirement is consistent with the statute. In addition, as the objective of our bid protest function is to ensure full and open competition for government contracts, we generally will not review a protest like OSC's that has the explicit or implicit purpose of reducing competition. In other words, a protester's presumable interest as the beneficiary of a more restrictive specification is not protectable under our protest function. Id.

OSC's argument that the agency was required to list the cost of the software effort as a price-related factor to be added to Vaisala's bid price, if accepted as valid, would also result in a more restrictive competition. The agency declined to list the interfacing costs in the IFB in order to promote competition among the three offerors on the QPL. A probable consequence of listing the cost of interfacing only for OSC's competitors would have been to perpetuate the incumbent protester's "lock" on the radiosonde market for NWS--a circumstance that would both restrict competition and limit the agency's ability to have multiple sources. Moreover, we believe it would be unfair to VIZ and Vaisala to adjust their bid prices for interfacing costs in this procurement without also adjusting OSC's price for the costs attendant to the government's earlier efforts to interface the protester's radiosonde.

In any event, the record establishes that OSC was not prejudiced by the failure to consider the interfacing costs since, based on the government's estimate of those costs, OSC's bid on item No. 2 would have exceeded Vaisala's bid by over \$250,000 had the costs been factored into the selection decision. While OSC has speculated that the agency has miscalculated its estimate and has not provided all relevant information regarding its long-term interfacing costs, the

agency denies the existence of any additional information and OSC has provided no documented estimate of its own which shows that Vaisala would not have been the low bidder had software costs been added to its price.² Thus, we conclude that even if the agency had considered the costs of interfacing Vaisala's radiosondes as a price evaluation factor, item No. 2 still would not have been awarded to OSC.

Finally, OSC, which was not the successful bidder under item No. 1 or 2, argues that its advantageous price for item No. 3 transponders--which was \$112,100 lower than VIZ's price (the only other bidder)--should be taken into consideration in determining that the protester offered the most advantageous price combination for item Nos. 2 and 3. This argument constitutes a challenge to the express terms of the IFB, which provided that item No. 3 would be separately awarded on the basis of low price to the successful bidder on either item No. 1 or 2. Under our timeliness rules, this argument had to be raised prior to bid opening; since it was not raised until the protester filed its comments on the agency report, the allegation is dismissed as untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993).

The protest is denied in part and dismissed in part.

Robert P. Murphy
Acting General Counsel

²The agency reports that its estimate of \$88,525 for in-house software costs was prepared in accordance with Office of Management and Budget Circular A-76. Adding this amount to Vaisala's price of \$1,708,611 would still mean that OSC's bid of \$2,060,550 was high by \$263,414. In addition, although OSC argues that an estimated \$23,689 in additional costs would be necessary to ensure compatibility between Vaisala's product and the agency's ground system, NWS points out that, even if those costs are taken into account, OSC would remain high on item No. 2 by \$239,725. Concerning the probable costs, OSC has asked this Office to consider a "similar" 1990 contract effort for interfacing radiosondes which was priced at \$383,449. As the agency points out, however, the contract effort to which OSC alludes was for both hardware and software, unlike the current software-only effort being undertaken by the government to ensure the compatibility of Vaisala's model, and the earlier contract price included profit and overhead which are not applicable to the government's continuing in-house effort.