Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Intermagnetics General Corporation

File: B-255741.2; B-255741.3

Date: May 10, 1994

Marcia G. Madsen, Esq., and Brian W. Craver, Esq., Morgan, Lewis & Bockius, for the protester.
Patrick G. Brady, Esq., Carpenter, Bennett & Morrissey, for Oxford Instruments, Inc., an interested party.
William R. Squires III, Esq., Davis Wright Tremaine, and Alan C. Rither, Esq., for Battelle Pacific Northwest Laboratories; and James Tower and Paul R. Davis, Esq., Department of Energy, for the agency.
Daniel I. Gordon, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that contracting activity improperly failed to investigate whether an awardee would comply with the Buy American Act is denied where the contracting activity had no information indicating that the product to be furnished was a foreign end product; it was therefore proper to rely on the offeror's self-certification without further investigation.

2. Contracting activity properly found that awardee's proposal substantially complied with solicitation requirement for inclusion of particular data in its proposal where information not provided was relatively minor and protester benefited from similar flexibility in the evaluation of its proposal.

DECISION

Intermagnetics General Corporation (IGC) protests the award of a contract to Oxford Instruments, Inc. under request for proposals (RFP) No. 199308, issued by Battelle Pacific Northwest Laboratories (Battelle), a management and operating contractor for the Department of Energy (DOE). IGC questions the conduct of discussions and the evaluation of proposals.

We deny the protest.

Battelle issued the RFP on August 12, 1992, for the design and fabrication of an ultrahigh field nuclear magnetic resonance (NMR) magnet system for the Environmental and Molecular Sciences Laboratory research facility near Richland, Washington. The NMR magnet will assist in the study of molecular structure and will be a key component of the spectrometer, a device used to analyze waste materials at DOE's Richland site. The contemplated contract is expected to advance the state-of-the-art in this area.

The RFP provided for the evaluation of proposals based on the following: technical approach (30 percent of the overall score); institutional resources (15 percent); qualifications of key management personnel and other assigned staff (15 percent); relevant experience and prior performance (10 percent); and proposed firm, fixed price (30 percent).

As issued, the RFP required that the magnet have a minimum field strength of 23.5 Tesla and a clear bore diameter of 65 millimeters. These two parameters are critical in determining the usefulness of the magnets for exploring molecular structure: a magnet with a higher field strength (measured in Tesla) has more stored energy and is capable of studying larger molecules; similarly, the larger the open area in the center of the magnet (that is, the clear bore diameter), the greater the capability of the magnet. The RFP added that Battelle would pay a set incentive dollar amount, in addition to the fixed contract price, if the magnet system actually delivered exceeded the minimum requirements. The RFP generally required that proposals "provide a full discussion of [the offerors'] approach to accomplishing the final design required by Part I of the Statement of Work. This discussion should be complete and detailed. . . ." Further, regarding the NMR magnet system design, the RFP stated specifically that proposals:

> "shall include a conceptual design of an NMR Magnet System that has a maximum field strength that measures at least 23.5 Tesla . . . and that has a clear bore diameter of at least 65 millimeters. The offeror shall provide a detailed analysis of the magnetic field parameters, field uniformity, and field stability with the proposed conceptual design. . . . The conceptual design of the magnet shall be accompanied by detailed calculations of the magnetic field parameters throughout the probe region of the vertical room temperature bore."

The RFP stated that, pursuant to the Buy American Act, 41 U.S.C. §§ 10a-10d (1988), preference would be given to

domestic end products. Offerors were required to identify proposed end products which would not be domestic.

Initial proposals were submitted by the November 20, 1992, due date by Oxford and IGC, among others. Based on site visits and discussions with the offerors, Battelle concluded that there was an unacceptably high risk of failure for any offeror attempting to provide a 23.5 Tesla magnet with a 65 millimeter bore under a fixed-price contract because those specifications were well beyond the state-of-the-art in this field. For that reason, Battelle issued amendment No. 6 on April 30, 1993. The amendment modified various portions of the RFP and requested revised proposals by May 21. Specifically, amendment No. 6 directed offerors to "[a]mend all [RFP] references to performance criteria" to "a minimum of 21.1 Tesla" for field strength and "a minimum of 51 millimeters" for bore diameter. The amendment included revised incentive payment tables reflecting these reduced minimum requirements.

On May 7, Battelle issued a clarification to the amendment, stating, in relevant part, as follows:

> "It is Battelle's desire to establish a contract for the design and fabrication of a 23.5-Tesla NMR magnet with a 65-millimeter bore diameter. Fixed price proposals should reflect these criteria. . . . The minimum acceptance criteria [of 21.1 Tesla field strength and a clear bore diameter of 51 millimeters] will only apply to final acceptance [and] should not form the basis of design and fabrication. . . ."

Amendment No. 7 extended the closing date for receipt of revised proposals to May 28. Based on review of the revised proposals, Battelle issued amendment No. 8 on July 7, raising specific discussion items with each offeror and also requiring all offerors to initial an attached document in order to signify commitment to satisfy certain minimum requirements. Those commitments reflected the reduced requirements of amendment No. 6 (for example, 21.1 Tesla for field strength and 51 millimeter bore diameter). Among the specific issues raised with Oxford was the percentage of its proposed system that would be considered domestic end products under the Buy American Act. Oxford responded by certifying that 52 percent of the cost of the end product was projected to be domestic; Oxford subsequently revised that figure to 50.24 percent.

Based on the offerors' responses to amendment No. 8, Battelle established a competitive range which included IGC and Oxford. After further negotiations with the firms in the competitive range, Battelle issued amendment No. 9 on

August 11. The amendment set a due date of August 23 for receipt of best and final offers (BAFO); that date was later postponed to September 2. In addition, amendment No. 9 included a complete copy of the statement of work, which repeated the requirements set forth in amendment No. 6, including a field strength of at least 21.1 Tesla and a bore diameter of at least 51 millimeters.

Oxford's BAFO was lower priced and higher rated technically than IGC's. Oxford's technical proposal received 628 of 700 available points; IGC's proposal received 580 points. Oxford's proposal received higher scores than IGC's in the areas of technical approach, institutional resources, and experience, with experience accounting for approximately half of Oxford's point advantage and institutional resources accounting for about a third. Based on a BAFO price of $7,000,000, Oxford's proposal received a price score of 299 of 300 available points; IGC's price of $7,500,000 resulted in a price score of 279 points.

The total point scores for the two proposals were thus 927 for Oxford's and 859 for IGC's. The source selection official determined that Oxford's proposal was technically superior to IGC's by a significant margin and represented the best overall value. Award was made to Oxford on October 29, 1993.

IGC challenges both the conduct of discussions and the evaluation of proposals. Before turning to the specific protest grounds, we note that federal procurement statutes and regulations do not apply per se to a management contractor such as Battelle; such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130. Our review is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. Id.

IGC first argues that Battelle improperly failed to investigate whether more than 50 percent of the cost of Oxford's end product would be produced in the United States. While IGC's initial protest alleged that Oxford's proposed end product was not domestic, that specific allegation was abandoned and replaced by a more general claim that, because the certified domestic content only slightly exceeded 50 percent and because Oxford would rely on its foreign parent in contract performance, Battelle had a duty to investigate the domestic content issue more thoroughly.

Under the Buy American Act, there is an evaluation preference for domestic end products; pursuant to that preference, the evaluated price for a nondomestic end

product is 12 percent higher than the offered price where, as here, a competing domestic offer is from a small business concern. See Federal Acquisition Regulation (FAR) § 25.105(a). For a manufactured end product to be deemed domestic, the cost of its components mined, produced, or manufactured in the United States must exceed 50 percent of the cost of all its components. FAR § 25.101.

Here, Oxford certified that 50.24 percent of the cost of the end product would be produced in the United States. Although 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, where the agency has no information prior to award indicating that the product to be furnished is a foreign end product, the agency may properly rely on the offeror's self-certification without further investigation. ICS Sys. Integration Div., B-252143, June 2, 1993, 93-1 CPD ¶ 417. While Oxford certified that only slightly more than 50 percent of the cost of the end product would be domestic and indicated that a considerable part of the manufacturing would be performed abroad by an affiliate, neither that information, nor any other information available to Battelle prior to award, called into question the accuracy of Oxford's domestic end product certification (and, indeed, during the protest IGC presented no evidence inconsistent with the certification). Battelle therefore acted reasonably in accepting the certification.

In any event, Battelle reports that adding the 12-percent Buy American differential to Oxford's offered price (thus raising Oxford's price some 4 percent above IGC's) would not have affected the source selection, in light of the technical superiority of Oxford's proposal and the RFP's assigning more weight to technical factors than to price. In this regard, it appears that even after adding the price differential to Oxford's price, Oxford would have received an overall technical/price score (895 points) significantly higher than IGC's (859 points). In a negotiated procurement, it is permissible to award to a foreign offer if it is determined to be the best offer considering the combination of evaluated price (including any Buy American differential) and technical rating. Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶ 431.

IGC also alleges that Battelle encouraged the protester during discussions late in July to change its original teaming arrangement in order to present an entirely American team. Because IGC followed that suggestion and changed teaming partners, it contends that it "possibly lost credibility by submitting a somewhat limited final proposal in a short 2-week period allowed for response [to the request for BAFOs]." Battelle explicitly denies having

encouraged IGC to change its teaming arrangement so as to propose an "all-American" team, and the contract file provides no support for IGC's allegation. Furthermore, nothing in the RFP provided for any preference to be given to domestic offerors (apart from the potential price evaluation preference for domestic end products).

With respect to the technical evaluation, IGC contends that Oxford's proposal failed to conform to the minimum technical requirements of the RFP. Because Oxford's BAFO clearly proposed a magnet system providing at least 21.1 Tesla field strength and a 51 millimeter bore diameter, the key question is whether those specifications were the minimum requirements in effect at the time BAFOs were requested, or whether the requirements remained at the earlier, higher level of 23.5 Tesla field strength and 65 millimeter bore diameter.

IGC concedes that amendment No. 9 identified the requirements for the field strength and bore diameter as 21.1 Tesla and 51 millimeters, respectively. IGC contends, however, that amendment No. 9 relaxed the requirements, which had allegedly been restored by the May 7 clarification letter, and that it left too short a time for the revision of proposals and should therefore be considered ineffective.[1] If IGC believed that amendment No. 9 was defective because it did not allow adequate time for the revision of proposals, a protest raising that issue, to be timely, had to be filed not later than the closing date for receipt of BAFOs. 4 C.F.R. § 21.2(a)(1) (1993). IGC's alleged assumption that no other offeror would be able to take advantage of the relaxation of the specifications cannot render timely a post-award protest of the terms of an amendment to the RFP.

Accordingly, by the time BAFOs were requested, the minimum requirements for the relevant specifications were 21.1 Tesla for the field strength and 51 millimeters for the bore diameter. Oxford's BAFO satisfied both these requirements and it was thus properly found acceptable in this regard.

IGC also contends that Oxford's proposal failed to satisfy the RFP requirement that proposals include a "conceptual design" and various related data. In this regard, IGC notes that evaluators criticized the lack of detail in Oxford's proposal. One evaluator wrote that Oxford had "not submitted a proposal per se, but simply indicates that they

---

[1]Battelle maintains that the May 7 letter did not restore the stricter standards and that amendment No. 9 merely restated the relaxed requirements.

will meet the minimum performance specifications established by Battelle. The details of the planned approach must therefore be inferred. . . ."

In reviewing a protest against the propriety of an evaluation, it is not our function to independently evaluate proposals and substitute our judgment for that of the contracting activity. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Rather, we will review an evaluation only to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation. Id. The fact that a protester disagrees with the contracting activity's judgment does not itself justify sustaining the protest. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Battelle maintains that Oxford's proposal presented a conceptual design, and that considerable analysis and information, while absent in the written proposal, were presented orally at site visits to Oxford facilities. Based on our review of the record, we find no basis to question Battelle's judgment that Oxford proposed a conceptual design for the NMR magnet system. During the hearing conducted in connection with this protest, our Office confirmed that Oxford had provided a substantial amount of the narrative and analysis required by the RFP. Although IGC argues that Battelle should not have considered data presented at site visits but not formally included in Oxford's proposal, we believe that Battelle acted reasonably in considering information gained during site visits in evaluating Oxford's proposal. See generally Adak Communication Sys., Inc., B-226952, June 1, 1987, 87-1 CPD ¶ 556.

Our review confirms, however, that Oxford did not provide, either in the proposal or during the site visits, all of the information required by the RFP. For example, Oxford concedes that it did not directly present detailed calculations of the magnetic field parameters throughout the probe region of the magnet's bore or a plan for servicing the Joule-Thomson refrigerator (which maintains the very low temperature needed in the magnet), both required by the RFP. Oxford's explanation is that the calculations required were "a theoretical concept, purely a mathematical computation" whose absence did not affect the magnet design; and that the Joule-Thomson refrigerator service plan was "trivial" because the servicing necessary for the refrigerators proposed was minimal and routine.

As to the information which was not supplied, the question is whether Battelle could reasonably conclude that Oxford had substantially complied with the requirement for submission of data and whether Oxford's proposal could be accepted on that basis. A contracting agency may properly

determine that a proposal is technically acceptable where it is in substantial, although not total, compliance with a solicitation requirement. Sabreliner Corp., B-248640; B-248640.4, Sept. 14, 1992, 92-2 CPD ¶ 222. The propriety of such a determination turns on whether it prejudices any other offeror and whether the proposal meets the agency's needs. Id.

Here, Battelle maintains that the information which Oxford failed to provide was of only peripheral importance, and that Oxford's proposal met Battelle's needs despite the absence of that information. Our review confirms that, when the material presented during the site visits is taken into account, the remaining information not provided by Oxford appears relatively minor. While IGC asserts that the missing information was material, it does not claim that Oxford's proposed magnet system, without that information, would not meet Battelle's needs.

In this regard, we note the limited role of the conceptual design and supporting data. It was the technical approach, not the conceptual design or the data, which was to be rated in the RFP evaluation scheme; as IGC concedes, the conceptual design and data were merely a means for the agency to evaluate that approach. Our review of the record confirms that the information provided by Oxford was sufficient for Battelle to evaluate Oxford's understanding of the contract work, the feasibility of its design, and the likelihood that the design would satisfy Battelle's requirements.

In any case, our review indicates that IGC could not have been prejudiced by Battelle's treatment of Oxford because IGC benefited from similar flexibility. See Planning Sys. Inc., B-246170.4, Dec. 29, 1992, 92-2 CPD ¶ 445. According to Battelle, the BAFO submitted by IGC and its new teaming partner was deemed technically acceptable, even though it was different from the prior proposals of both IGC and that partner and was not accompanied by updated supporting data. Battelle reports that various aspects of the design discussion in the BAFO submission did not reflect the new design, and that the revisions in the design rendered irrelevant some of the data submitted by IGC and its new partner regarding their respective prior designs.

Our review of IGC's BAFO confirms that the revised design of IGC and its new partner superseded the pre-BAFO submissions. In the cover letter accompanying its BAFO, IGC stated that the company had "completely revised its proposed approach" and that the BAFO design modified both IGC's and its partner's prior designs. The BAFO pointed out specific areas in which prior design information was no longer accurate and for which the integrated design was "not yet

fully optimized." In addition, the protester concedes that its BAFO was "somewhat limited" and did not include data in at least two areas for which the RFP required information, although IGC argues, as does Oxford regarding the information that it did not submit, that the missing information is unimportant and is, in any event, "implied" or "apparent" from other technical information in the proposal.

Notwithstanding the absence of data required by the RFP, Battelle considered IGC's BAFO to have essentially complied with the RFP requirements for submission of a conceptual design and related data. In so doing, Battelle appears to have applied the same flexible approach to the evaluation of both IGC's and Oxford's proposals, and we therefore conclude that IGC was not prejudiced by Battelle's flexibility in this regard. See Planning Sys. Inc., supra.

Finally, IGC contends that Battelle departed from the RFP evaluation criteria by allegedly failing to give IGC credit for proposing to design to bore diameter and field strength specifications above the minimum requirements, and failing to give IGC adequate credit for experience identified in its proposal. The evaluators' contemporaneous rating sheets, however, demonstrate that IGC did receive credit for its goal of designing a magnet system that exceeded the minimum bore diameter and field strength. Indeed, its proposal received a near-perfect score in the area of technical approach. Battelle explains that IGC's ambitious design goal did not lead to an even higher score because the evaluators took into account the uncertainty about whether IGC could actually achieve that goal and the lack of a contractual commitment by IGC to meet the more demanding performance levels.[2] This evaluation of IGC's technical approach appears both reasonable and consistent with the evaluation criteria.

Our review of the record also supports the reasonableness of Battelle's evaluation of IGC's experience. As noted in the final report of the source evaluation panel, Battelle questioned IGC's past performance because, in a prior contract involving similar technology, IGC had been behind schedule and over budget. Since IGC has not rebutted the

---

[2]In addition, Battelle notes that IGC's rating in the area of technical approach reflected other concerns of the evaluators, such as concern about the proposed program management plan (which was also evaluated as part of the technical approach). The evaluators criticized the management plan's failure to explain communications between IGC and its new teaming partner. IGC has not argued that this criticism was unreasonable.

factual accuracy of this evaluation, we have no basis to question Battelle's evaluation of IGC's proposal in this area.[3]

The protest is denied.

for Robert P. Murphy
Acting General Counsel

[3]IGC also contends that Battelle may have preferred Oxford's proposal due to Battelle's having recently obtained an Oxford magnet in another procurement. While it is apparently true that Battelle acquired an Oxford magnet in that other procurement, nothing in the record supports IGC's allegation that this influenced the evaluation in the procurement at issue in this protest (although, under the prior performance evaluation criterion, performance under a recent magnet contract could properly have been considered).