



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Watchdog, Inc.  
**File:** B-258671  
**Date:** February 13, 1995

Gerald J. Kern for the protester,  
David M. Lamensdorf, for Safe Environment Engineering, an  
interested party,  
Milton D. Watkins, Esq., Department of the Air Force, for  
the agency,  
Henry Gorczycki, Esq., and James A. Spangenberg, Esq.,  
Office of General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Protest that award was improperly made on a low-priced,  
technically acceptable basis instead of the best value basis  
assertedly required by the solicitation is dismissed as  
untimely where the solicitation contains a patent ambiguity  
in that it provides for both bases for award.

### DECISION

Watchdog, Inc. protests an award to Safe Environment  
Engineering under request for proposals (RFP) No. F34650-  
94-R-0058, issued by the Department of the Air Force for a  
Personal Hazardous Area Monitoring System (PHAMS)<sup>1</sup> for use  
at Tinker Air Force Base, Oklahoma. Watchdog claims that  
the award was improperly made on a low-priced, technically  
acceptable basis, instead of the best value basis which  
Watchdog asserts was called for by the RFP, and that  
Watchdog was not capable of satisfying the government's  
requirements and was otherwise not responsible.

We dismiss the protest.

The Air Force issued the RFP on February 22, 1994,  
contemplating the award of a firm, fixed-price contract.  
The Solicitation/Contract form, Standard Form 1447, and

<sup>1</sup>The PHAMS is a system of remote radio units and hazardous  
gas detectors which are carried by workers in hazardous  
areas to monitor the working environment. The radio units  
and gas detectors notify a central computer monitor by radio  
of dangerous conditions. Most detectors also alert the  
worker carrying the device to the presence of dangerous  
gases.

Section B of the RFP--the schedule of supplies or services and prices--solicited proposals for a "Watchdog II system." Section B listed the following requirements for the system:

"Watchdog II system (personnel hazardous area monitoring system) consisting of central monitoring console, satellite charger units, monitors and remote transceivers."

Although section B did not state that proposals would be accepted for products "equal" to the brand name Watchdog II system, the RFP incorporated by reference the provision at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000, "Brand Name or Equal."<sup>2</sup>

The RFP included the contract award provisions of Federal Acquisition Regulation (FAR) § 52.215-16 and DFARS § 252.211-7014, both of which state that:

"award will be made to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the [g]overnment, cost or price and other factors, specified elsewhere in the solicitation, considered."

The first part of section M listed the following evaluation factors "in descending order of importance:"

"1. ALL LISTED REQUIREMENTS FOR WATCHDOG II SYSTEM WHICH ARE IN . . . SECTION B (quoted above) MUST BE FULLY COMPLIED WITH.

---

<sup>2</sup>The description of the Watchdog II system in section B only lists its components, not salient characteristics. Notwithstanding the statement in DFARS § 252.210-7000, the IFB does not list the salient characteristics of the Watchdog II system that offered "equal" products must meet to be considered acceptable. Although Watchdog initially protested that the award was improper because no product is equal to the Watchdog II system, it did not rebut the agency's assertion that the IFB contemplated that "equal" products that met the RFP requirements would be considered acceptable, as indicated by the competitive nature of this RFP; instead Watchdog protested that the award was improper because it was not consistent with the RFP's "best value" evaluation scheme. Under the circumstances, we consider Watchdog to have abandoned its contentions that the RFP improperly permitted the submission of equal products. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

"2. [The evaluation preference applicable to small disadvantaged business concerns, see DFARS 252.219-7007, Alternate I.]

"3. TECHNICAL EVALUATION<sup>3</sup>

A. COMPLIANCE WITH REQUIREMENTS FOR COMPONENTS SUPPLIED

1. REMOTE RADIO DEVICES
2. SATELLITE CONSOLE UNITS
3. CENTRAL CONTROL CONSOLE
4. ENVIRONMENTAL MONITORING EQUIPMENT
5. AUDIBLE/VISUAL ALARMS

B. COMPLIANCE WITH STATEMENT OF WORK

1. INSTALLATION
2. TRAINING
3. DOCUMENTATION

C. COMPLIANCE WITH PERFORMANCE REQUIREMENTS (FROM TECHNICAL SPEC)

1. SYSTEM CAPACITY
2. SYSTEM COMMUNICATION RANGE
3. ENVIRONMENTAL MONITORING SENSITIVITY/CAPACITY
4. MANUAL/AUTOMATIC ALARM CAPABILITY
5. AUTOMATIC SYSTEM COMPONENT FAILURE SENSING
6. SOFTWARE EASE OF USE
7. MISCELLANEOUS SYSTEM OPERATION PARAMETERS:
  - I. UNINTERRUPTABLE POWER SUPPLY
  - II. SYSTEM UPGRADABILITY/EXPENDABILITY
  - III. COMPUTER PERFORMANCE
  - IV. HISTORICAL DATA STORAGE CAPABILITIES
  - V. VOICE COMMUNICATION CAPABILITY

D. PERFORMANCE RECORD

1. EXPERIENCE IN THE CONFINED SPACE MONITORING FIELD
2. DEMONSTRATED EXPERTISE

---

<sup>3</sup>All of the factors and subfactors were assigned points, which were not disclosed to the offerors, and the proposals were point scored with regard to each factor. The various weights assigned to each factor/subfactor varied widely, e.g., the first technical evaluation factor was assigned 25 points, the second 15 points, the third 55 points, and the fourth 14 points.

3. RECORD OF ON-TIME DELIVERY OF PRODUCTS AND SERVICES
4. PAST PERFORMANCE OF THE PRODUCT OFFERED
5. PAST PERFORMANCE OF MAINTENANCE SERVICE

#### "4. PRICE

NOTICE: Price will be evaluated by adding the extended prices for basic award and option quantities, if applicable, . . . When nonprice- and noncost-related factors are identified above, the (g)overnment reserves the right to award to other than the lowest responsive and/or responsive offeror. While the evaluation will strive for the maximum objectivity, professional judgment on the part of the government evaluators is implicit throughout the entire process. . . ."

The second section of section M stated:

"Award will be made on the basis of all or none. Notwithstanding any other provision on this solicitation, award of this contract will be made to the responsive, responsible offeror whose offer represents the low aggregate on all Item(s) shown in Section B of the schedule."

Finally, the cover letter to the RFP states that "[t]he award will be made to the lowest responsive, responsible technical proposal." Later in this same letter the following statements appear:

"It should be noted that the process places emphasis on the technical approach."

"The technical evaluation process . . . is very time consuming for all parties involved; more often however, the resultant contractor's quality and performance is better and less expensive to the tax payers than the alternative method of accepting the low bidder."

Only Watchdog and Safe Environment submitted proposals. Watchdog proposed its Watchdog II system and Safe Environment proposed a product allegedly equal to the Watchdog II system. The Air Force evaluated proposals, conducted discussions, and requested two rounds of best and final offers (BAFO) with the final BAFOs submitted on September 8. Safe Environment submitted the lowest-priced

---

'The protester states that it did not receive the cover letter prior to this protest.

BAFO at \$685,947 while Watchdog's BAFO price was \$1,086,000. Both proposals were considered to be acceptable.

On September 21, the Air Force awarded the contract to Safe Environment as the lowest-priced, technically acceptable offeror. This protest followed.

Watchdog's central protest ground is that the award basis of the lowest-priced, technically acceptable offer was inconsistent with the RFP, which assertedly required award on a best value basis. The Air Force responds that the RFP did not call for a best value source selection, but for award to the low-priced, technically acceptable offeror.

The award provisions included in the RFP clearly stated that award would be made to the offeror whose offer conforms to the solicitation and would be most advantageous based on price and other factors listed in the solicitation. These factors were listed in descending order of importance with price being of least importance. The RFP also stated that award might be made to other than the lowest priced offeror. These provisions describe a best value evaluation and source selection plan. See Macon Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93. On the other hand, the final paragraph in section M of the RFP states that award would be made to the lowest-priced, technically acceptable offeror, notwithstanding any other provision of the RFP.

A solicitation that provides for evaluation and award on both a best value basis and a low-priced, technically acceptable basis contains to a patent ambiguity, thus making the solicitation defective on its face. 841 Assocs., L.P.; Curtis Center Ltd. Partnership, B-257863; B-257863.2, Nov. 17, 1994, 94-2 CPD ¶ 193. An offeror may not compete under a patently ambiguous solicitation and then complain when the agency proceeds in a way inconsistent with one of the possible interpretations. Rather, the offeror must timely protest the solicitation defect--to be timely under our Bid Protest Regulations, a solicitation defect apparent on the face of the solicitation must be protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1994); see DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Since Watchdog did not protest until after award, its protest on this basis is thus untimely. Id.<sup>5</sup>

---


<sup>5</sup>The protester also alleges that the RFP technical specifications were not stated with enough specificity to protect the interests of the government. This issue is also untimely because it concerns solicitation defects apparent from the face of the solicitation which should have been protested prior to the date for submitting proposals.

(continued...)

Watchdog's remaining protest allegations are that Safe Environment is either unfit to perform or incapable of performing the contract requirements.<sup>5</sup> Basically, these are challenges to the Air Force's determination that Safe Environment is a responsible offeror. See Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422 (allegations concerning violations of law and poor business integrity are generally challenges to agency's affirmative determination of responsibility).

An agency's determination that an offeror is able to perform a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office, absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Where, as here, there is no such showing, we have no basis to review the protest.

The protest is dismissed.

  
 Robert P. Murphy  
 General Counsel

---

<sup>5</sup>(...continued)  
 4 C.F.R. § 21.2(a)(1).

<sup>6</sup>For example, Watchdog questions the quality of the awardee's experience, the awardee's capability to provide a quality product and in the time required, and the awardee's alleged violation of Federal Communications Commission rules and regulations concerning use of radio frequencies during a preproposal site test. The Air Force and Safe Environment fully responded to these allegations and the record provides no support for the protester's allegations.