

Matter of: Diagnostics, Inc.
File: B-261712
Date: September 28, 1995

P. David Newsome, Esq., Conner & Winters, for the protester.
Len Licursi for UCC Incorporated, the interested party.
Lenore K. Strakowsky, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's decision to request best and final offers (BAFO) is untimely where not filed prior to the time set for receipt of BAFOs.
2. Agency properly eliminated protester's proposal from consideration for award where protester's proposal was ambiguous with respect to its commitment to perform required electromagnetic interference testing, and, despite the agency's repeated discussion questions, the protester did not correct the ambiguity.

DECISION

Diagnostics, Inc. protests the award of a contract to UCC Incorporated under request for proposals (RFP) No. N68335-95-R-0010, issued by the Department of the Navy for hydraulic fluid contamination particle counters. The protester contends that the agency failed to allow sufficient time to prepare its best and final offer (BAFO), and that the contracting officer improperly rejected its proposal.

We deny the protest.

The RFP, issued on October 10, 1994, contemplated the award of a fixed-price contract for a base quantity of 60 particle counters, with options for up to 180 additional units to be

provided over a 3-year period.¹ Offerors were required to submit separate technical and price proposals. For the basic and option quantities, section B of the RFP required offerors to submit fixed unit and extended prices for the counters, and for additional data and test reports. Technical proposals were to be evaluated on a pass/fail basis in accordance with the factors and subfactors listed in the RFP. Price was to be evaluated for fairness and reasonableness. Award was to be made to the lowest-priced, technically acceptable offeror.

Five firms, including the protester and the awardee, responded to the RFP. The Navy's technical evaluation team concluded that all five initial proposals were technically unacceptable, but were susceptible of being made acceptable through discussions. The contracting officer eliminated two proposals from further consideration; the agency then conducted discussions with the remaining three firms, including Diagnostics.

In a letter dated May 16, 1995, and faxed to the offerors that day, the contracting officer announced that discussions had concluded and requested BAFOs "by 12:00 p.m., Eastern Daylight Time, 17 May 1995." That letter also stated that if offerors elected not to revise their proposals, their initial offers would be treated as BAFOs.

UCC and another offeror submitted BAFOs; Diagnostics did not submit a BAFO. Based on her review of the protester's initial proposal, and in light of Diagnostics's responses to various discussion items, the contracting officer concluded that the protester's proposal was ambiguous and could not be considered for award. The contracting officer awarded the contract to UCC on May 31, and Diagnostics filed this protest in our Office on June 14.

Diagnostics argues that the agency allowed insufficient time to prepare and submit a BAFO. The protester also argues that the agency improperly rejected its initial proposal.

The protester's allegation that the agency did not allow sufficient time to prepare and submit a BAFO is untimely. A protest challenging an agency's request for BAFOs generally

¹The hydraulic fluid contamination particle counters/monitors are bench-top units designed to measure the particulate contamination level of various samples of hydraulic, cooling, and lubricating fluids from ships, aircraft, and support equipment systems. The units are to be used on Navy and Marine Corps shipboard and landbased intermediate maintenance activities, laboratories, and training centers.

must be filed prior to the time established for receipt of BAFOs. See 4 C.F.R. § 21.2(a)(1) (1995); Select, Inc., B-246167, Oct. 24, 1991, 91-2 CPD ¶ 372. Here, the contracting officer's May 16 letter requested BAFOs "by 12:00 p.m., Eastern Daylight Time, 17 May 1995"; Diagnostics received that letter on May 16.² Instead of raising an objection to the deadline for submitting BAFOs prior to 12 p.m. May 17, Diagnostics waited until 10 working days after contract award, or June 14, to raise its objection. Thus, this allegation is untimely and will not be considered.²

With respect to the protester's contention that the agency improperly rejected its initial proposal, this allegation is without merit.

It is undisputed that the RFP contained minimum requirements regarding "electromagnetic interference" (EMI) testing. Diagnostics stated in its initial proposal that the units it proposed had not been subjected to the required EMI testing, and that any modifications to the equipment resulting from the EMI tests had not been included in its unit prices. The agency considered this aspect of the protester's proposal ambiguous, and raised its concerns regarding the EMI testing requirement during several rounds of written discussions with Diagnostics. In its responses to the discussion items, Diagnostics stated that it would address the agency's concerns regarding EMI testing in its BAFO; however, the firm did not submit a BAFO.

An offeror has an obligation to submit a proposal which fully demonstrates that it meets solicitation requirements.

²Although it appears that Diagnostics faxed a letter to the contracting officer requesting an extension of time to submit its BAFO, that letter did not reach the contracting officer until after 12 p.m. on May 17. Also, this letter did not protest the BAFO request.

²In cases where the protester did not have a reasonable opportunity to file its protest before the time set for receipt of proposals--for example, where a solicitation amendment being challenged was not received until 1 day before proposals were due--we have applied the rule at 4 C.F.R. § 21.2(a)(2), which states that protests of other than solicitation improprieties must be filed within 10 days after the protester knew or should have known the basis for protest. See, e.g., The Big Picture Co., B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166. Even if that rule were applied here, this ground of protest nevertheless is untimely since it was not filed until June 14. See Merck & Co., Inc., B-248655, May 19, 1992, 92-1 CPD ¶ 454.

See Cyber Digital, Inc., B-255225, Feb. 18, 1994, 94-1 CPD ¶ 123. Here, Diagnostics's initial proposal did not clearly indicate that the protester was agreeing to perform the required EMI testing. While the agency provided Diagnostics several opportunities to correct that ambiguity through repeated discussion questions, the protester's responses failed to resolve the ambiguity.³ Further, based on the responses to the agency's discussion questions, the contracting officer reasonably concluded that Diagnostics intended to address the outstanding EMI testing issue in its BAFO. Diagnostics did not submit a BAFO, however, and thus failed to correct the ambiguity in its initial proposal.

The protester argues that despite the fact that it knew that its initial proposal did not contain prices for all the items specified in the RFP and that the EMI testing issues raised during negotiations concerned material requirements of the RFP, it was misled into believing that its proposal nevertheless would be eligible for award based on the following statement in the agency's May 16 letter: "In the event you elect not to revise your offer, your original offer will be considered your [BAFO]." The protester's interpretation of the agency's statement is unreasonable. The plain meaning of the statement is that if an offeror chose not to revise its initial proposal, it need not submit a BAFO, and would be considered for award on the basis of its initial proposal. There is no basis for interpreting that statement as an assurance that the agency would ignore ambiguities or deficiencies in Diagnostics's proposal.

Based on our review of the record, we find that the contracting officer reasonably concluded that Diagnostics's proposal remained ambiguous with respect to EMI testing following discussions. Since the proposal thus failed to conform to a material requirement of the solicitation, the contracting officer properly decided to eliminate the proposal from further consideration. See Compressed Air Equip., B-246208, Feb. 24, 1992, 92-1 CPD ¶ 220.

The protest is denied.

\s\ Christine S. Melody
for Robert P. Murphy
General Counsel

³Diagnostics does not dispute that EMI testing was a material requirement of the RFP. In its comments on the agency report, Diagnostics admits that the EMI testing issues the agency raised during discussions were "major issues" which could have an impact on price.