

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-184913

DATE: January 22, 1976

MATTER OF: Radix II, Inc.

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DIGEST:

1. Where proposal is alleged by protester to be technically responsive and within competitive range, GAO will not question contrary determination since record indicates reasonable basis for such determination. Further, price need not be considered in determination of competitive range unless offer is first deemed technically acceptable.
2. Where Army found proposal to be technically unacceptable and not within competitive range, Army did not have duty to negotiate with protester.
3. In negotiated procurement, pursuant to ASPR § 3-508.4(b) (1975 ed.), request in writing must be made by unsuccessful offeror before procuring activity must give debriefing. Here, since written request was not received, Army acted properly in not affording protester debriefing.
4. Charges of lack of good faith and incompetence on part of agency are not substantiated by record when only proof offered by protester is "rumor."
5. Issues raised initially in protester's response to agency report are untimely pursuant to Bid Protest Procedures when protester knew or should have known of these issues when protest was initially filed.

On June 27, 1975, request for proposals (RFP) No. DAAK02-75-R-0797 was issued by the Army Mobility Equipment Research and Development Center. The solicitation was for a negotiated procurement of an Optical Measurement Control System (OMCS) for the Army Night Vision Laboratory. The Army solicited 133 prospective offerors, with a closing date for receipt of initial proposals of July 28, 1975. Three firms submitted proposals:

<u>Firm</u>	<u>Firm Fixed Price</u>	<u>Discount</u>
Tektronix, Inc.	\$112,400	Net
Scope Electronics, Inc.	120,348	0
	108,135 (alternate bid)	
Radix II, Inc.	49,799	0

A technical evaluation of the proposals was conducted and on the basis of the results the contracting officer made a determination that the proposal submitted by Radix II, Inc. (Radix), was technically unacceptable and was, therefore, not within the competitive range for the purpose of negotiations within the meaning of Armed Services Procurement Regulation (ASPR) § 3-805.1(a)(1975 ed.). Based on this determination, discussions were limited to the other two offerors and after receipt of best and final offers award was made to Tektronix Corporation (Tektronix) on August 29, 1975, in the total amount of \$98,700.

Radix protests award of a contract to Tektronix and contends that its proposal was technically responsive, while costing less than the Tektronix proposal; that the Army was arbitrary and capricious in finding its proposal to be technically unacceptable, and that the Army, therefore, should have conducted negotiations with it.

ASPR § 3-805.1(a), *supra*, provides in pertinent part that "[w]ritten or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range." The determination as to which proposals are within the competitive range is to be made by the contracting officer "on the basis of price or cost, technical or other salient factors and shall include all proposals which have a reasonable chance of being selected for award." ASPR § 3-805.2(a) (1975 ed.).

In the instant case, Army technical evaluators determined that the Radix proposal did not meet the solicitation requirements with regard to input/output BCD data bits, which the agency describes as "of prime importance to the desired system." With regard to the Radix proposal, a memorandum from the project engineer, one of the evaluators, dated August 1, 1975, states in pertinent part:

"The Radix II proposal is technically not acceptable. Specifically, the Radix II proposal does not discuss their interface against the requirements of the

mandatory specification. As a result of contacting Radix II the proposed interface was clarified. The Radix II proposed interface will handle under software control 128 input and 128 output BCD bits. The OMCS requirement is for 160 input and 173 output BCD bits to be under software control. This requirement is non-negotiable and if lowered would severely affect the OMCS performance capabilities."

We have recognized that a reasonable degree of administrative discretion is permissible in determining whether a proposal is within the competitive range. Conwed Corporation, B-179295, February 19, 1974, 74-1 CPD 79. Further, we have stated that we will not question the agency's determination unless it was arbitrary or unreasonable. Pacific Training & Technical Assistance Corporation, B-182742, July 9, 1975, 75-2 CPD 22; cf. Conwed Corporation, supra.

Although Radix contends that its proposal was technically responsive and that the Army arbitrarily found it to be technically unacceptable, we find no support in the record for these contentions. As noted above, the Army found Radix's proposal to be technically unacceptable because it inadequately provided for input/output BCD data bid requirements, nonnegotiable requirements "of prime importance to the system." Radix's allegations that its proposal was responsive is conclusory. As such it does not adequately respond to those technical objections raised by the Army. Moreover, the agency report makes clear, and Radix does not dispute, that the Radix proposal contained other serious deficiencies. In pertinent part an October 10, 1975, memorandum from the project manager, detailing the Army's objections to the Radix proposal, states:

"The failure on the part of Radix II to correctly analyze the interface requirement is by no means the sole deficiency in their proposal. In the judgement of the evaluators the actual technical proposal was grossly inadequate and unresponsive in its treatment of the Government's objective in this procurement, i.e., an integrated computer controlled system for Optical Measurement. The actual technical proposal (section II) is only two pages in length. It simply lists the hardware and software items to be delivered and does not address

in any substantive way the interfacing of the computer with the existing measurement system or the problems associated with implementation of the algorithm provided in the mandatory specification. In fact, the proposal does not even mention the sequence of operations or processes involved in the required task. The proposal Introduction (Section I) indicates that the system proposed is 'a trivial adaptation of an already developed Radix II product' but that claim is not substantiated in the proposal in terms of examples of prior accomplishments or by way of adequate treatment of this specific problem. Radix II clearly did not demonstrate in their proposal, (or otherwise) comprehension of, or expertise in, the computer system problem which is the essence of this procurement. Moreover, Radix II did not adequately address either the training requirements or warranty provisions as specified by the RFP."

On the other hand, the same memorandum describes the Tektronix proposal as--

"* * *[E]xcellent in terms of technical content, organization, responsiveness to overall and specific requirements of the OMCS system and clarity of presentation. As required by the RFP, Tektronix addressed each requirement of the Mandatory Specification on a paragraph by paragraph basis. (Radix II chose to ignore this procedure although specifically required by the RFP). Tektronix also provided clear comprehensive answers to each of the 'Questionnaire' items as opposed to Radix II's marginal to unsatisfactory response in this area. Tektronix's proposal demonstrated excellent technical competence and a clear understanding of the specific requirements of the OMCS application. The interface question has been addressed to the satisfaction of the evaluators. (By way of comparison, The Tektronix discussion of technical requirements was 15 pages in length, the Radix II discussion a little over one page, the Tektronix response to the technical questionnaire was 5 full pages, the Radix response one page of word or phrase answers.) * * *"

Therefore, based on the above memoranda of evaluations, it is clear that the Army carefully considered Radix's proposal and had an adequate basis for finding its proposal to be technically unacceptable. On the other hand, the Tektronix proposal was carefully evaluated and found to be acceptable to the Army's needs.

With regard to the price differential between the Radix proposal and the Tektronix proposal, we have held that the question of price need not be considered in determining whether an offer is within the competitive range unless the offer is first deemed to be technically acceptable. Pacific Training & Technical Assistance Corporation, supra. Since the Army determined that Radix's proposal was not within the competitive range, the fact that the price of Radix's proposal was lower than that of Tektronix is irrelevant. Additionally, we note that section "D" of the instant solicitation states that "Suppliers proposals will be evaluated first to ascertain if they satisfy the stated requirements of the RFP." Therefore, based on the record before us we find that the Army acted properly in determining Radix's proposal outside the competitive range even though it was lower priced.

Having determined the Radix proposal to be technically unacceptable and therefore not within the competitive range, the Army had no duty to negotiate with Radix. As noted above, ASPR § 3-805.1(a), supra, requires written or oral discussions "* * * with all responsible offerors who submit proposals within a competitive range * * *" (Emphasis supplied.) Conwed Corporation, supra.

Radix also raises a number of other issues. First, Radix alleges that the Army failed to provide it with a debriefing after Radix requested a debriefing in writing pursuant to ASPR § 3-508.4(b) (1975 ed.). Correspondence and internal memoranda submitted by Radix in support of this allegation show that Radix made certain requests to the Army for information pursuant to provisions of the Freedom of Information Act, 5 U. S. C. § 552 (1970). However, the record does not indicate that a written request for a debriefing was ever made to the Army as required by ASPR § 3-508.4(b), supra. Accordingly, as a written request for a debriefing was not received from Radix, the Army acted properly in not providing Radix with a debriefing.

Second, Radix alleges lack of good faith, and incompetence on the part of the Army in the instant procurement. Specifically, Radix alleges that the instant procurement was "earmarked" for Tektronix; that the Army evaluator who verbally contacted Radix on July 28, 1975, to clarify part of the Radix proposal either willfully misunderstood Radix's response or was incompetent. In support of its charge that the instant procurement was earmarked for Tektronix, Radix cites "rumor."

We have carefully examined the record concerning Radix's serious charge that the procurement was "earmarked" for Tektronix. However, other than self-serving internal Radix memoranda, the record is devoid of support. In view of this lack of support in the record we therefore cannot agree with Radix's charges in this regard. Moreover, we do not consider "rumor" as substantive proof in support of Radix's charge that the procurement was "earmarked" for Tektronix. As the agency report notes "* * * the subject RFP and specifications * * * were reviewed and approved by the General Services Administration (GSA) to assure technical adequacy. The procurement was synopsisized and appeared in the Commerce Business Daily, with additional potential [offerors] * * * solicited through the GSA Bidders Mailing List. This resulted in the RFP ultimately being issued to 133 prospective [offerors] * * *." We agree with the Army in its conclusion that "[t]hese actions * * * are hardly calculated to insure an award to a contractor who has been pre-selected as alleged by Radix." Radix's charges of willful misunderstanding or incompetency on the part of the Army evaluator who contacted Radix, are similarly unsubstantiated by the record. Mere allegations by Radix, unsubstantiated by substantive evidence, will not suffice to prove charges of malfeasance or incompetency of Army procurement officials.

Third, Radix alleges that ASPR § 3-508.2(a) (1975 ed.), which provides that prompt notice be given to an offeror whose proposal has been found to be unacceptable, was not followed by the Army in the instant procurement. Fourth, Radix alleges that Tektronix failed to submit a technical proposal in response to the subject RFP.

Allegations three and four, above, were raised for the first time by Radix in its November 25, 1975, reply to the Army report. Yet, it is clear that these issues were known or should have been known to Radix when it submitted its protest letter to our Office (September 5, 1975). Our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975) § 20.2(b)(2), provide that bid protests must be filed not later than 10 days after the basis for the protest is known or

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should have been known. Since Radix knew or should have known of these issues, but did not raise them when it filed its protest initially, these issues must be considered untimely and cannot be considered on their merits.

Accordingly, the protest is denied.

R. F. Kellner
Deputy Comptroller General
of the United States