

# DECISION



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

FILE: B-186107

DATE: August 19, 1976

MATTER OF: Essex Electro Engineers, Inc.

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## DIGEST:

1. Initiation of pre-award surveys prior to final evaluation of proposals, and referral to Small Business Administration (SBA) of contracting officer's finding of nonresponsibility based on lack of tenacity and perseverance, does not indicate that agency regarded proposal as acceptable or that subsequent finding of technical unacceptability was result of bad faith or attempt to circumvent SBA role.
2. Where solicitation requires informational submissions to demonstrate that offerors' products will conform to essential requirements of specifications and offeror responds to agency request for additional clarifying information with only blanket offer to conform, agency may properly reject proposal due to informational deficiencies in proposal which indicate lack of understanding of specification requirements.

Essex Electro Engineers, Inc. (Essex) protests the decision of the U.S. Army Mobility Equipment Research and Development Center, Fort Belvoir, Virginia, to exclude it from the competitive range under that activity's request for proposals (RFP) DAAG53-76-R-0752. The rejection of the Essex proposal followed that firm's refusal to provide requested information concerning technical aspects of its proposal. Nonetheless, Essex contends that the decision was arbitrary and capricious and was part of the Army's on-going effort to improperly exclude it from consideration for award, which Essex claims is evidenced by the Army's finding, prior to the technical evaluation, that Essex lacked tenacity and perseverance and was not a responsible offeror.

The protester's assertion is based primarily on the somewhat involved history of this procurement. Initially issued on September 8, 1975, for the manufacture and delivery of 500 KW, 50/60 Hz generator sets in accordance with Purchase Description MIL-G-52880(ME), the solicitation was amended nine times with the ninth and final amendment setting forth substantial information submission requirements and extending the closing date for receipt of proposals to April 14, 1976.

The RFP did not require the submission of a detailed technical proposal. However, Section D of the RFP required offerors to submit certain information concerning proposed component make-up and component operation. This information was to be evaluated to determine conformance to the requirements of the purchase description. According to the Army, a detailed technical proposal was unnecessary because the majority of the generator set would have to consist of existing commercial, "off-the-shelf" components. The requested information was necessary, however, because the purchase description was being used for the first time and it was essential to obtain information from offerors on component make-up and operation of major components to assure that specifications would be met and that offerors understood the requirements.

Proposals were received from seven firms, including Essex. After a technical evaluation was made, discussions were conducted with offerors during which various informational deficiencies in proposals were pointed out. The deficiencies in the Essex proposal were discussed with Essex on December 22, 1975, and confirmed by letter of December 24, 1975.

Essex then supplemented its proposal with a letter dated January 9, 1976. This response, along with the written responses of other offerors, was submitted to evaluators who on January 19, 1976, concluded that all offerors but Essex were technically acceptable. The Essex proposal was regarded as informationally deficient in some areas and as reflecting an inadequate understanding with respect to certain requirements.

Nevertheless, during the time frame of January 1976, a decision was made to initiate pre-award surveys even though it appeared that amendment of the RFP would later be necessary because of funding difficulties. At this time, the Army reports, it was expected that additional information could be obtained from Essex to resolve the informational deficiencies in its proposal; as a result, a pre-award survey was made of Essex.

The pre-award survey report recommended that no award be made to Essex because that firm's prior performance history indicated that it lacked tenacity and perseverance. The contracting officer then determined Essex to be nonresponsible on this basis and forwarded the determination to the Head of the Procuring Activity and to the regional office of the Small Business Administration (SBA) pursuant to Armed Services Procurement Regulation (ASPR) 1-705.4(c)(vi)(1975 ed.). On

B-186107

March 12, 1976, SBA notified the Army that it would appeal the determination. Essex also protested the determination to this Office on March 16, 1976.

On March 11, 1976, an RFP amendment was issued which, inter alia, reduced the quantity of generator sets to be procured and deleted certain technical requirements. Although the amendment was not initially sent to Essex, it was subsequently determined that discussions should be conducted once more with Essex in an attempt to resolve the informational deficiencies in its prior submissions. The amendment was sent to Essex on March 22. Essex submitted a revised price proposal a few days later.

On March 29, the SBA sent the Army its appeal. The SBA stated that Essex had a good record of prior performance and that the Government was responsible for all delinquencies which had been charged to Essex during the previous year. SBA requested reversal of the contracting officer's determination.

On April 8, 1976, the Army sent Essex a letter stating that its proposal "indicates certain deficiencies and lack of information requested to permit a full evaluation \* \* \*." These deficiencies were described and Essex was requested to "respond to the above deficiencies" by April 15, 1976.

Counsel for Essex responded by letter of April 13, contending that the company's previous responses constituted a fully conforming offer to the RFP and certifying that Essex would perform in accordance with the solicitation. Counsel also stated that he presumed that the information being requested related to Essex's "capacity to perform" because the letter was not signed by the contracting officer, because the April 15 submission date was after the April 14 closing date for receipt of proposals, and because a pre-award survey team told Essex "that their offer was responsive and therefore only their ability to perform need be evaluated."

Proposals were again evaluated, with the Essex proposal being evaluated on the basis of the information previously submitted. The Essex proposal was evaluated as technically unacceptable because it was inadequate and incomplete and indicated that the offeror "may not understand the requirements of the subject RFP." Essex was then notified by letter dated April 30, 1976, that it was no longer in the competitive range. The Army also informed SBA by letter dated May 26, 1976, that it would not take any action on the SBA appeal in light of the finding of technical unacceptability.

Essex argues that this procurement chronology demonstrates that the Army has engaged in bad faith efforts to avoid making award to Essex. It contends that SBA's appeal of the nonresponsibility determination indicates that the Army's determination was arbitrary and capricious, and asserts that the subsequent determination of technical unacceptability was merely an attempt to circumvent the role of SBA and the statutory preference for small business. In this regard, Essex states that its proposal could not be unacceptable because under ASPR 1-705.4(c)(vi) the referral to SBA of the nonresponsibility determination could not have been made until after its offer had been determined to be "responsive" or "technically acceptable." Essex further contends that since a detailed technical proposal was not required, the technical evaluation to which Essex was subjected actually went to a determination of the firm's ability to perform and is subject to SBA's Certificate of Competency procedures. With regard to the evaluation itself, Essex claims that it furnished all information required by the RFP and that the Army improperly asked it to provide "more information than was set forth in the solicitation without issuing amendments \* \* \* increasing the Government's requirements," all for the purpose of permitting the Army to reject the Essex proposal on the basis of the Army's "undefined and unexpressed subjective intent."

We do not agree that the record demonstrates bad faith on the part of the Army. ASPR 1-905.1(d) provides that generally information regarding the responsibility of a prospective contractor shall be obtained only with respect to those "within range for an award." While responsibility determinations are normally performed only after a particular offeror has been evaluated as a prospective awardee, contracting officers may seek the information necessary for such determinations prior to that time. See ASPR 1-905.2. Here the contracting officer, for reasons of urgency, requested pre-award surveys on seven offerors prior to the final evaluation of their offers in an attempt to reduce the amount of time required to ultimately award a contract. This approach has been used by procuring activities in other cases. See Adam David Company; B-186053, July 28, 1976, 76-2 CPD \_\_\_; Datametrics, B-184732, July 29, 1976, 76-2 CPD \_\_\_. Furthermore, the contracting officer's determination that Essex was nonresponsible was not unreasonable in view of the pre-award survey recommendation. Although SBA takes the position that the delinquency of Essex on prior contracts was in fact the fault of the Government (a position with which we have no reason to disagree since the record is otherwise silent on the point), there is no assertion that the contracting officer was aware of this at the time he made his determination in reliance on the pre-award survey. In short,

we do not find that the nonresponsibility determination was made in other than good faith or that it "tainted" the subsequent finding of technical unacceptability as alleged by Essex.

Neither do we believe that the referral to SBA conclusively establishes that the Army had found the Essex proposal to be technically acceptable. ASPR 1-705.4(c)(i) does state that "under no circumstances will a referral be made to the SBA prior to a determination by the contracting officer that the offer of the small business concern is responsive." However, it appears that this language refers to situations where a proposal "is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit," ASPR 1-705.4(c), rather than to situations encompassed by ASPR 1-705.4(c)(vi), where the nonresponsibility determination is based on lack of tenacity or perseverance. Even if the quoted language is regarded as applicable to this situation, however, we could not say that the submission to SBA conclusively established that the Army viewed the Essex proposal as acceptable when the record clearly shows that in fact the Army never made such a determination. The most that could be said in this case is that the referral was premature. A referral under these circumstances, however, does not preclude a subsequent bona fide determination of technical unacceptability. See Datametrics, supra, where we held that the issuance by SBA of a Certificate of Competency with respect to one offeror, which resulted from an agency's premature referral under ASPR 1-705.4(c), did not bar the agency's subsequent award of a contract to another offeror whose proposal was evaluated as more advantageous after receipt of best and final offers.

Accordingly, on the basis of this record, it is our view that the technical evaluation of the Essex proposal was not part of any on-going bad faith effort to disqualify Essex and was not an improper attempt to avoid SBA's role in the procurement (which, since the nonresponsibility determination was based on lack of tenacity and perseverance, was limited to the filing of an appeal which would be finally resolved by the Army. ASPR 1-705.4(c)(vi)). Therefore, we think the technical evaluation must stand or fall on its own merits, without regard to the prior determination of nonresponsibility.

The RFP, as finally amended, required the submission of a variety of information, including manufacturer's recommendations, pertaining to the various components of the generator sets to be furnished. The Army found that Essex did not provide

sufficient information in several areas or else provided information which suggested a lack of understanding of requirements. Essex, with support from SBA, claims that it did furnish all required information and that there was no basis for the Army's conclusion that it lacked an understanding of requirements. Our review of the areas under contention shows the following:

(a) the RFP required submission of a bill of material showing price breakdown and manufacturer's name and part number for various components. For three of the components, including electrical instrumentation and switchgear, Essex listed its own part numbers. The Army, in its first request for additional information, asked Essex to supply "details" on those part numbers. In response, Essex submitted the following:

"Essex #A717-1 is the Instrumentation package which will be designed to meet all the requirements of the specification. All instruments as required will be in accordance with MIL-M-10304, and will be designed to operate in conjunction with an associated transducer to measure the required parameters. The transducers will be designed to meet all specification requirements utilizing solid state components to meet the environmental requirements, all transducers will be epoxy encapsulated."

A similar statement was furnished in connection with the Essex #A717-2 switchgear. The Army found this response to be inadequate and requested Essex to amplify its description of these components "by part numbers for major parts, physical configuration and applicable interface information" specifically so that the Army could evaluate the components "to determine acceptability." The reply from counsel for Essex reaffirmed the protester's "capacity" to manufacture generator sets in accordance with the specifications but provided no other information because "No other information is required by the terms of the RFP."

(b) The RFP required a technical explanation of the approach for the control module and parallel module. The Essex explanation did not identify part numbers; the Army requested Essex to furnish the name and part number of the automatic control components; and the Essex response stated in part that "The Automatic Control System will be designed by Essex under part number A717-4." The Army found the explanation, as supplemented, to be inadequate and requested Essex to "amplify

your description of these components to include information on control on one generator and multiple generators." Counsel for Essex replied that the required technical explanation had previously been provided.

(c) The RFP requested engine manufacturer's recommendations regarding the warning points for high oil temperature, low oil pressure and high coolant temperature. The Army asked Essex to "verify" the information it originally submitted. Essex then submitted revised figures. The Army found these figures to be technically inadequate, and informed Essex that they "do not meet the alarm requirements of the specification" and requested "clarification of alarm and trip points for coolant and oil temperatures." Counsel for Essex responded that Essex believed the specification requirements were satisfied by the information previously submitted.

(d) The RFP requested the location where environmental testing would be conducted. Essex stated that the testing "may be performed at AETL, Fullerton, California." The Army then asked Essex to "Provide data on Environmental test chamber at AETL." Essex submitted an AETL data sheet showing an altitude test chamber of 15' by 10'. The Army regarded this chamber as too small because the generator set was to be 20'x8'x10'. It informed Essex that the AETL data indicated that the chamber would not meet specification requirements and requested Essex to "update" its submission. Counsel for Essex replied that the pre-award "survey team was informed and Essex hereby reconfirms that AETL will have a chamber fully meeting all of the size requirements \* \* \* " The pre-award survey team was told this, it was verified by DCASR, and the pre-award survey team agreed that this was sufficient."

The final technical evaluation of the Essex proposal stated the following:

" \* \* \* The information supplied by \* \* \* Essex is not sufficient to make a technical evaluation. Since only in-house assembly numbers were supplied and no physical description or parts breakdown of the assemblies was included, it is impossible to evaluate whether these assemblies will perform as required by the specification or be compatible with other assemblies. The lack of information necessary to make a technical evaluation of the functional

and physical adequacy of the electrical instrumentation and switch gear is considered to be a gross omission of data vital to the evaluation process. A single assembly number for these components clearly does not demonstrate that the component will include all the control switches, instruments, etc. necessary to meet the requirements outlined above, particularly when it appears the assemblies have never been built.

\* \* \* \* \*

" \* \* \* Previous submissions by \* \* \* /Essex/ indicates that the /control and parallel/ modules would be solid state, contain a 555 IC chip and meet all the requirements of the specification. It was also stated that the parallel module would use a Woodward SPM Synchronizer. An in-house part number A717-4 was assigned to the automatic control system although the system had not yet been designed or manufactured. The proposer indicates that the system would consist of one set control module and one parallel control module.

" \* \* \* The request for a technical approach concerning the automatic control system was included in the solicitation and amendment 0009 due to the importance of these components. The customers for the 500 KW gen sets intend to use them as standby emergency power sources. The power operation of the automatic control system is essential to the successful completion of this mission since it contains the circuitry which will automatically start and parallel the generator set(s) should a failure of the prime power source occur.

" \* \* \* The information supplied by \* \* \* /Essex/ was insufficient to make a technical evaluation, since only an in-house assembly number and very inadequate description of a yet to be designed system was provided. This is considered to be a very gross omission of



information which is essential to make a thorough technical evaluation. Since the automatic control system is the very heart of the standby system a demonstrated understanding of its operation is necessary for evaluation. It was recognized that assembly of the purchased items to form the generator set could be handled by an assembler but when vital parts are manufactured in-house, evidence of a thorough understanding of the requirements is absolutely necessary.

\* \* \* \* \*

" \* \* \* MIL-G-52880 requires that the alarm points for oil and coolant temperature be 5°F below the associated trip.

\* \* \* \* \*

" \* \* \* Previous submissions by \* \* \* /Essex/ indicated that the warning point for high coolant temperature would be  $200 \pm 3^{\circ}\text{F}$  and the trip point  $205 \pm 3^{\circ}\text{F}$ . The high oil temperature warning point would be  $250 \pm 3^{\circ}\text{F}$  and trip point  $255 \pm 3^{\circ}\text{F}$ .

" \* \* \* The warning and trip points specified by \* \* \* /Essex/ provide for an initial 5°F differential but when the specified tolerances are taken into consideration a possible overlap would occur (i.e., a trip point of  $205-3$  ( $202^{\circ}\text{F}$ ) and a warning point of  $200 + 3$  ( $203^{\circ}\text{F}$ ) for coolant temperature) allowing the trip to take place before alarm. The design requirements recognize that the shutdown point may vary but that the 5°F differential between shutdown and warning would remain.

" \* \* \* The warning and trip points provided by \* \* \* /Essex/ indicate a lack of understanding as to the basic requirement. Attempts at obtaining clarified information from this proposer have not succeeded. A thorough understanding of the warning and alarm requirements is essential to meet the requirements of the specification. The importance of these systems cannot be overstated. If alarm does not occur before trip, a shutdown will take place before an operator knows there is an abnormal condition and therefore would not be able to take action to correct it.

\* \* \* \* \*

" \* \* \* MIL-G-52880 require that the two Preproduction Sets undergo altitude tests as described in MIL-STD-705B. MIL-STD-705B requires that the chamber used for this test be of sufficient size that no wall is less than 4.5 ft from the set and the top of set must be a minimum of 3 ft from the ceiling.

" \* \* \* /Counsel for Essex/ states that the Government has been informed that \* \* \* (AETL) \* \* \* will have a test chamber of sufficient size in time to perform the required testing.

" \* \* \* Previous submissions indicated that \* \* \* /Essex/ would conduct environmental testing at AETL. The altitude test would be conducted in a chamber 15 ft long x 10 ft diameter.

" \* \* \* The approximate size for the 500 KW generator set is 20 ft x 8 ft x 10 ft high. Obviously, the set will not fit into a chamber that is only 15 ft long much less will the proposed chamber meet the size requirements of MIL-STD-705B. To propose a chamber so grossly insufficient definitely demonstrates a lack of understanding of the requirements.

" \* \* \* Amendment 0007, permitted the use of a mountain method for altitude testing. Information received since this amendment has not indicated that this alternate method would be used.

" \* \* \* The information submitted by \* \* \* /Essex/ pertaining to the items listed \* \* \* above indicate that he may not understand the requirements of the subject RFP. Since this information is inadequate and in some areas incomplete, \* \* \* /Essex/ is not considered to be technically acceptable."

Based on this record, we do not agree with Essex that the Army could not properly request additional data bearing on the information initially requested and evaluate proposals on the basis of that additional information. The RFP clearly provided that proposal evaluation would be based on the information submitted. We think that where the information submitted is

not sufficiently meaningful to permit an evaluation, amplifying or clarifying information may properly be requested. Indeed, that is precisely the thrust of ASPR 3-805.2(a), which provides that where there is doubt as to whether a proposal is in the competitive range, the doubt shall be resolved by including the proposal in the range rather than rejecting it out of hand. In effect, what the Army did here was entirely consistent with ASPR 3-805.2 and 3-804.3(a). It asked Essex for additional information where it was needed, and it pointed out deficiencies where they were apparent (i.e., with respect to the warning points for oil and coolant temperatures and the testing chamber).

Thus, this case is readily distinguishable from Moxon, Incorporated/ SRC Division, B-179160, March 13, 1974, 74-1 CPD 134, the principal case relied on by Essex. In Moxon, the protester's proposal had been rejected as technically unacceptable because it did not contain various detailed explanations and was primarily "a read back of the specification." We held that the elimination of Moxon was improper because the RFP set forth the Government's requirements in a "very detailed manner" and did not request offerors "to explain their proposals in detail." In Moxon, however, the agency rejected the protester's proposal after initial evaluation, without giving the firm an opportunity to provide the information the evaluators believed necessary to view the proposal as acceptable. Here, of course, Essex was not rejected initially; rather, it was given opportunities to amplify the information it provided in its proposal, and it was not eliminated until after it declined to furnish the additional requested information. Clearly, the mere claim of ability to satisfy specification requirements is insufficient where the offeror is on actual notice that the agency expects and needs detailed information. Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400.

Furthermore, we do not find the Army's overall technical evaluation to be unreasonable. We think the evaluators could reasonably find that a listing of in-house part numbers with which they were not familiar and which represented equipment not yet designed or manufactured was inadequate for evaluation purposes. We think the evaluators also could properly be concerned about the possibility, indicated by the Essex data, that the coolant temperature "trip point" could be reached prior to the "alarm point," and that an unsuitable testing chamber would be utilized.

With regard to the testing chamber, the record shows that after submission of the April 13, 1976, letter on behalf of Essex and prior to final evaluation of the Essex proposal, the technical evaluators were informed by the contracting officer that the deficiency noted in the initial evaluation "was clarified by the pre-award survey" which found that the testing would be performed in an alternative, acceptable manner. Nonetheless, the evaluator, as indicated above, stated that he did not have information indicating that this alternative method would be used and the contracting officer informed Essex that one of the reasons its proposal was rejected was that its "proposal failed to provide information on the test chamber as proposed by you \* \* \* to accommodate the generator sets during test which indicates a lack of understanding of the test requirements." The evaluator's position is technically correct, since counsel for Essex, instead of providing information on the alternative testing method in his April 12 letter, merely stated that the pre-award survey team had been apprised that Essex would be able to meet the testing requirements. On the other hand, it appears that the Army had information from Essex indicating that it had arranged to satisfactorily comply with the test requirement. Under these circumstances, we would question the rejection of the Essex proposal had it been based solely on this ground. However, it is clear that the Army also relied on other substantial grounds for finding the Essex proposal to be unacceptable, and it therefore appears that the overall evaluation was not arbitrary or without a reasonable basis.

We also find that the Army's April 8, 1976, request for additional information was adequate. Although in some respects the request could have been more specific--instead of expressing specific concern with regard to the tolerance overlap of the maximum coolant temperature and alarm point, the Army's letter merely stated that the "design parameters provided do not meet the alarm requirements of the specification"--it does not appear that Essex was prejudiced, since Essex neither queried the Army as to the specifics of the deficiency nor furnished any additional information in response to the more specific requests contained in the letter.

Furthermore, we think Essex acted at its peril when it decided not to furnish the requested information and to "presume" that the request was in connection with the protester's "capacity to perform" rather than the technical acceptability of its proposal, particularly in light of the statement in the Army's letter that it lacked information "to permit a full evaluation" of the Essex proposal. It is true that the letter

(erroneously) requested a response from Essex by April 15, 1976, rather than April 14, the previously established closing date. However, we think the presence of this apparent clerical error should have prompted Essex to query the Army on this point also rather than to "presume" that this date somehow modified the explicitly stated purpose of the information request. We also see no significance in the fact that the letter was signed by the procuring activity's Acting Chief of the Production Division, Procurement and Production Office, rather than the contracting officer. The Army reports that the letter was prepared with the knowledge and guidance of the contracting officer and was within the scope of the authority of the Acting Chief.

With regard to the protester's contention that the technical deficiencies found by the Army relate to "capacity" (responsibility) and therefore are subject to SBA's Certificate of Competency procedure, we have often pointed out that technical evaluations properly may encompass areas which in formal advertising would relate to bidder responsibility. See, e.g., 53 Comp. Gen. 388 (1973); 52 id. 854 (1973); Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366; Harry Kahn Associates, Inc., B-185046, July 19, 1976, 76-2 CPD \_\_\_\_. Offeror understanding of agency requirements is one such area. MEI-Charlton, Inc., B-179165, February 11, 1974, 74-1 CPD 61. Here, although offeror understanding of requirements was not explicitly set forth as an RFP evaluation factor, section D of the RFP, as finally amended, did specify that the information requested was to be evaluated "to determine acceptability of offers" (which, since no other evaluation factors were set forth and award was to be made "to that responsible offeror who submits an acceptable offer at the lowest evaluated price," could only reasonably refer to conformance with specifications). The Army's finding that the Essex proposal was not acceptable was based on the protester's failure to provide sufficient information to permit evaluation of certain aspects of generator set operation and on the protester's furnishing of information which indicated non-compliance with specification requirements, all of which led the Army to conclude that Essex lacked understanding of the RFP requirements. We think the finding of "lack of understanding" in these circumstances clearly relates to technical acceptability rather than to capacity/responsibility and therefore is not a matter for determination by SBA.

B-186107

In view of the above, we find that rejection of Essex because of the informational deficiencies in its proposal was a proper exercise of administrative discretion and not subject to objection by this Office. See PRC Computer Center, et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35.

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of the United States