

DOCUMENT RESUME

02988 - [A2013092]

[Validity of the Army's Evaluation of a Technical Proposal].  
B-188529. July 14, 1977. 7 pr.

Decision re: Ken-Mar Machine and Health Equipment Co.; by Paul  
G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -  
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Army Armament  
Materiel Readiness Command, Rock Island, IL.

Authority: A.S.P.R. 2-501(i). A.S.P.R. 1-705.4. 4 C.F.R.  
20.2(a). 53 Comp. Gen. 357. B-182921 (1975). B-175305  
(1972).

The protester questioned the validity of the evaluation of its technical proposal. The protest that the evaluation scheme was improper was untimely since it was filed after receipt of the technical proposals. It would be improper to reevaluate the protester's technical proposal as supplemented by additional information developed by the protester during agency debriefing and obtained through an agency report submitted in connection with the protest. (Author/SC)

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**DECISION**



*BROSNAN  
P.L. II*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE: B-188529**

**DATE: July 14, 1977**

**MATTER OF: Ken-Mar Machine and Health Equipment, Inc.**

**DIGEST:**

1. Protest that evaluation scheme in first-step solicitation of two-step procurement was improper because it provided for evaluation of capacity of small business offeror is untimely because evaluation terms were clear from face of solicitation and protest was filed after receipt of technical proposals.
2. Protester's oral remark regarding subcontracting during discussions held in connection with first step of two-step procurement was not sufficient to put agency on notice that protester's proposed levels of effort did not include significant effort which was to be subcontracted where proposal and written clarifications did not so indicate and protester's oral statement did not indicate that levels of effort were incomplete.
3. It would be improper to reevaluate protester's technical proposal as supplemented by additional information developed by the protester during agency debriefing and obtained through agency report submitted in connection with protest.

This protest concerns the validity of the Army's evaluation of Ken-Mar Machine and Health Equipment's (Ken-Mar) technical proposal for furnishing 50 caliber machine guns.

The procurement was initiated pursuant to two-step formal advertising on November 3, 1976 with the issuance of Step I request for technical proposals (RFTP) No. DAAA09-77-B-2000 by the Army Armament Materiel Readiness Command. The RFTP requested proposals for the multi-year production of 13,092 M2, 50 caliber, heavy barrel machine guns including special tooling, final acceptance inspection test equipment (FAITE) and pre-production evaluation of the Government's technical data package. Pre-production evaluation was required since the M2 machine gun has not been produced since 1945 and although the technical data package was redrawn in 1967 it does not reflect modern dimensioning and tolerancing.

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After the issuance of two amendments to the RFTP: 0001 on December 7, 1975 and 0002 on December 22, 1976, three technical proposals were received on January 26, 1977. After the initial evaluation, the proposal submitted by Ken-Mar was considered reasonably susceptible of being made acceptable and on February 3 Ken-Mar was supplied with a list of points for clarification. On February 8, representatives of Ken-Mar and the Army met to discuss the supplemental data submitted in response to the Army's questions. The Army reevaluated Ken-Mar's technical proposal and concluded that it was not acceptable primarily because its level of effort estimates were too low. On February 16 the agency determined that since Maremont Corporation, New England Division (Maremont) submitted the only acceptable technical proposal the two-step advertising procedure should be discontinued and sole-source negotiations with Maremont initiated.

After Ken-Mar was informed of the Army's determination, that firm requested a debriefing which was held on February 22. As a result of the debriefing the Army agreed to review its position. After the Army completed its review and informed Ken-Mar that it still considered that firm's proposal unacceptable, Ken-Mar protested to this Office.

Initially Ken-Mar's protest was based on the premise that the rejection of its proposal because its manpower estimates were deemed too low was improper since manpower estimates relate to the capacity of an offeror to perform the contract whereas Armed Services Procurement Regulation (ASPR) § 2-501(i) (1976) provides that capacity and credit are not to be evaluated on the first step of a two-step procurement. Further, Ken-Mar notes that, ASPR § 1-705.4(a) (1976), provides that only the Small Business Administration has the statutory authority to determine the capacity of a small business like Ken-Mar. Essentially Ken-Mar claims that it was improper for the Army to evaluate manpower estimates in the step-one technical evaluation and that, in any event the RFTP does not clearly indicate that level-of-effort estimates would be used as an evaluation criterion.

Paragraph 10 of the RFTP, as amended states:

"10. The following factors will be used in the evaluation of technical proposals. Proposals which are inadequate or lack credibility in any one of the factors may be determined unacceptable.

"a. The offeror's expressed understanding of the total technical requirements.

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"b. The offeror's proposed plan to perform the Pre-Production Evaluation requirement and coordinate the required engineering changes into production.

"c. The offeror's proposed plan of manufacture to deliver acceptable weapons in accordance with the planned delivery schedule.

"d. The offeror's proposed quality assurance plan for conforming with the requirements of MIL-Q-9858 and for delivering a quality weapon system."

Paragraph 5B as amended provides:

"The offeror's technical proposal is presumed to represent his best effort to respond to the solicitation. Any technical proposal that lacks credibility in terms of technical program plan or schedule commitments, or lacks credibility in terms of proposed level of effort will be deemed reflective of inherent lack of technical competence or indicative of failure to comprehend the overall scope of contract requirements and may be considered unacceptable. (See Para 10 for specific evaluation factors.)" (Underlining supplied.)

Paragraph 5C began as follows:

"C. TECHNICAL PROPOSALS

The proposals shall be structured to conform to the organization of evaluation considerations as outlined below."

Paragraph 5C(1) concerned the Technical Program Plan and required submission of information concerning four elements:

- "a. PPE Plan
- "b. Production Plan
- "c. Quality Plan
- "d. Man Loading Plan"

Under the Man Loading Plan, estimated man months (level-of-effort) was to be furnished for the following listed efforts:

- "1. Preproduction Evaluation Effort
- "2. Production Effort
- "3. Quality Assurance Effort
- "4. Test and Evaluation Effort
- "5. Documentation Effort"

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In view of the above-cited portions of the RFTP we believe it should have been clear to Ken-Mar that proposed levels of effort required to be submitted for the various tasks would be an important part of the agency's technical evaluation. Further, Ken-Mar did not complain of the evaluation scheme until its technical proposal was rejected. 4 C.F.R. 20.2(a) (1977) states that protests based on alleged solicitation improprieties must be filed prior to bid opening or the closing date for receipt of proposals. In addition we have held in connection with two-step procurements that solicitation improprieties must be protested prior to the step-one closing date. 53 Comp. Gen. 357 (1973); Norris Industries, B-182921, July 11, 1975, 75-2 CPD 31. Accordingly, this portion of Ken-Mar's protest is untimely and will not be considered. However, Ken-Mar's complaints about the actual evaluation of its technical proposal are timely and will be considered.

The agency's narrative justification for the rejection of Ken-Mar's technical proposal states in part:

"The offeror failed to adequately demonstrate his understanding of the total technical requirements as identified under Technical Program Plan, page 4, paragraph C.1 of the IFB. Specifically, he failed to submit an adequate plan to perform the detailed scope of the Preproduction Evaluation requirement as identified on page 4, paragraph C(1)(A). Also paragraph C(1)(d), page 5 of the IFB required offeror to identify his man months level-of-effort for PPE, Production, Quality Assurance, Test and Evaluation and Documentation. This level-of-effort is considered to be inadequate in the areas of PPE and Quality Assurance.

"The offeror was required to address his capability, which is the understanding of the complexity of the procurement so as to assure successful contract accomplishment, in terms of management, organization, personnel, related technical expertise and physical facility for performing the contract requirements in accordance with his total technical program plan. The offeror did not portray an adequate understanding of the complexity and magnitude of the total PPE effort and its significance in transitioning the PPE results to the manufacturing and production of complete weapons."

Ken-Mar disputes the agency's conclusion in this regard on the basis that its man-month estimates contained in its technical proposal do not represent the total effort for the project but merely the in-house

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effort to be expended by Ken-Mar. The protester argues that it intends to subcontract a significant portion of the work and has provided our Office with revised man-month estimates "backed up" with written subcontractor quotations. It is contended that these total level-of-effort estimates were not submitted in connection with the protester's technical proposal because the first-step RFTP specifically provided that pricing information was not to be submitted and all of Ken-Mar's subcontractors provided it with written cost estimates rather than estimates expressed in terms of man-months.

Further, Ken-Mar insists that its representatives attempted to inform agency personnel at the February 8 clarification conference that it intended to subcontract a significant portion of the effort. However, Ken-Mar claims that agency representatives did not seem to be interested. Ken-Mar has submitted affidavits executed by its representatives in support of this point.

Accordingly, the protester concludes that the Army acted improperly by not asking it for clarification of its level-of-effort estimates when it was informed of Ken-Mar's intent to subcontract some of the effort and by refusing to consider Ken-Mar's clarifying information submitted after its proposal was rejected.

We do not believe that Ken-Mar could have reasonably concluded from the terms of the RFTP that it was supposed to withhold its total level-of-effort estimates until it submitted its price proposal. We can find no provision in either the RFTP, its amendments or in any of the questions and answers in the pre-proposal conference which can be reasonably interpreted to require or even permit an offeror to withhold information concerning its subcontracted effort until the step-two pricing proposal is submitted. In fact the RFTP specifically required:

"Man Loading Plan - The offerors shall furnish estimated man-months levels of effort for each element listed below for total contract performance.  
\* \* \* (Emphasis supplied.)"

Further, in this regard we do not believe the fact that Ken-Mar chose to acquire its subcontractor quotations on the basis of cost rather than level of effort is relevant to the issue of whether the RFTP required that offerors propose their total levels of effort in the step-one technical proposal.

Regarding the Army's awareness of the basis of Ken-Mar's level-of-effort estimates the agency contends that Ken-Mar's

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proposal as supplemented by the requested clarifications nowhere put it on notice that Ken-Mar planned to subcontract, other than for the production of certain minor parts and related production planning concerning such parts and some gage fabrication. Further, the agency maintains that it was never informed during discussions with Ken-Mar representatives that a major portion of the pre-production effort would be subcontracted. The Army has submitted affidavits executed by its representative concerning the content of the discussions.

Although the affidavits of the Ken-Mar personnel indicate that they orally informed the agency that a major portion of the engineering effort was to be subcontracted, Ken-Mar has not pointed out nor have we been able to find in any of Ken-Mar's written submissions any statements that can reasonably be interpreted to indicate that Ken-Mar intended to subcontract over 450 man-months of pre-production engineering effort or over 300 man-months of quality assurance effort. The agency's evaluation of the total level of effort offered in Ken-Mar's technical proposal was only 275 man-months for pre-production engineering and 855 man-months for quality assurance. Nor are we able to discover anything in Ken-Mar's written submissions which indicates that the level-of-effort estimates proposed represented anything less than the total effort required to perform the contract.

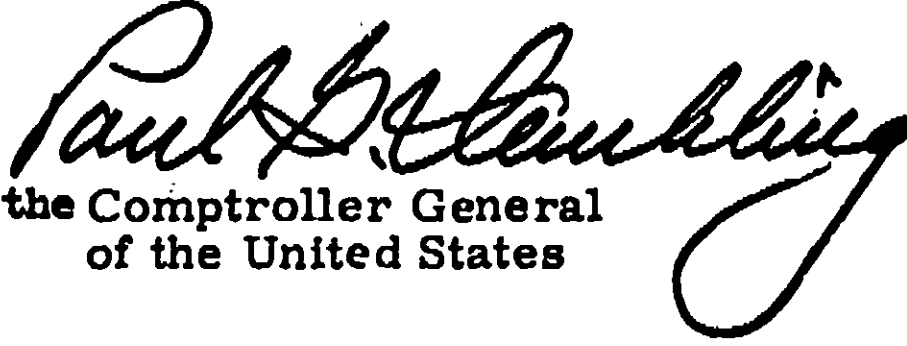
We have held that the scope and content of discussions conducted in connection with the first step of a two-step procurement are matters of judgment on the part of the procurement agency, which we will not question unless the agency acts arbitrarily or unreasonably. See B-175385, September 24, 1972. Here the agency pointed out 29 instances where clarification was needed, many of which concerned the various level-of-effort estimates (in this connection Ken-Mar raised its level-of-effort estimate for pre-production engineering from 68 to 171 man-months) and held a meeting with Ken-Mar representatives where these matters were discussed. Although Ken-Mar's affidavits indicate that agency representatives were informed that Ken-Mar intended to subcontract a substantial portion of the work, affidavits submitted by agency personnel indicate that although subcontracting was mentioned during the meeting, at no time did Ken-Mar representatives disclose that they intended to subcontract a major portion of the engineering effort valued at several million dollars. Nor does the record show that Ken-Mar ever informed the agency that the subcontractor effort referred to in discussions was not included in the proposed level-of-effort estimates.

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We do not believe that the agency acted improperly in failing to follow up the oral statement made by Ken-Mar's representative during the discussions. It is our view that the burden here was on Ken-Mar to clearly and specifically inform the agency that its level-of-effort of estimates excluded significant matters which were to be subcontracted. In this connection the agency could not be expected to know that Ken-Mar would improperly interpret the provisions of the RFTP as only requiring the submission of in-house level-of-effort estimates. In our view Ken-Mar not only misinterpreted the terms of the RFTP regarding the level-of-effort estimates it did not act reasonably when it sought to inform the agency of this most crucial element of its technical proposal by an oral statement which did not specifically relate subcontracting to the proposed levels of effort. Ideally, Ken-Mar should have clearly indicated either in its technical proposal or in its written clarifications that its level-of-effort estimates excluded significant subcontractor effort. Ken-Mar had an excellent opportunity to inform the agency when it increased its pre-production level-of-effort estimate in its proposal clarification but it did not do so. At a minimum Ken-Mar should have explicitly stated during the oral discussions that its level-of-effort estimates as set forth in its technical proposal did not include a specific amount of effort which was to be subcontracted.

In any event Ken-Mar maintains that it has provided both the Army and this Office with new material in the form of revised level-of-effort estimates which now include the subcontractor effort and which should be used by the agency in a reevaluation of Ken-Mar's proposal. It clearly would be improper for the agency to reevaluate Ken-Mar's technical proposal as supplemented by additional materials it has developed after it has had the opportunity to participate in a debriefing and to examine the Army's level-of-effort estimates submitted with its report to this Office.

Accordingly, the protest is denied.

  
For the Comptroller General  
of the United States