



Comptroller General
of the United States

Washington, D.C. 20548

91-2 CPD 516

Decision

PR

Matter of: Tektronix, Incorporated

File: B-244958; B-244958.2

Date: December 5, 1991

Joel R. Feidelman, P.C., Esq., and Terry E. Miller, Esq.,
Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Rand L. Allen, Esq., Wiley, Rein & Fielding, for Hewlett-
Packard, an interested party.

David C. Rickard, Esq., Defense Nuclear Agency, for the
agency.

Richard P. Burkard, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Solicitation provision requiring that equipment be commercially available is not satisfied where the components of the equipment are commercially available but the equipment end item itself is not.

2. While agency improperly waived material requirement in request for proposals for a commercially available system in accepting awardee's product, General Accounting Office will not disturb the award because the equipment satisfies the agency's needs and there is nothing in the record that suggests that the protester was prejudiced.

DECISION

Tektronix, Incorporated protests the award of a contract to Hewlett-Packard Company, under request for proposals (RFP) No. DNA001-91-R-0040, issued by the Defense Nuclear Agency (DNA) for digitizing waveform recorders. Tektronix challenges the award on the grounds that the awardee's recorders do not meet the RFP's commerciality requirement, as well as two of the solicitation's technical requirements. The protester also argues that the agency improperly conducted discussions with the awardee.

We deny the protest.

The RFP was issued on May 9, 1991, and provided that award would be made to the low-priced, responsible offeror whose proposal is determined to be acceptable under the technical requirements listed in the RFP and is able to meet the delivery schedule. The RFP contemplated the award of a fixed-price requirements contract for the recorders and associated manuals covering a base and two option periods.

The RFP's statement of work provided as follows:

"1.0 SCOPE: The scope of work to be accomplished consists of procuring commercial, direct off-the-shelf digitizing waveform recorders. . . ."

* * * * *

"1.2 OBJECTIVE: To replace the DNA-owned existing digitizers and oscilloscopes with commercial, off-the-shelf digitizing waveform recorders."

In addition, the RFP listed "minimum technical requirements which each proposed system must meet" that included the requirement that each be "commercially available and demonstrated at the time of issuance of Request for Proposal(s) (RFP)." Also, the RFP required that the system be "capable of internally generated sample rates from 125 Mega Sample/second (MSa/s) to 2 [Giga Samples/second]" and a requirement that the system have an "internally generated and remotely operated autocalibration mode."

The agency received five proposals in response to the RFP; Tektronix submitted two alternative proposals, both of which were found technically acceptable as submitted. During the evaluation of Hewlett-Packard's proposal, the agency made a telephone call to that firm in order to "clarify" whether that firm's product would meet the RFP's autocalibration requirement. After its receipt of the Hewlett-Packard response, the agency found the firm's product to be acceptable and made award to that firm on the basis of its initial proposal because its price was the lowest. One of Tektronix's proposals, attributed to Analytek in agency evaluation documents, offered the next lowest price. This protest followed.

Tektronix argues that the Hewlett-Packard waveform recorder should not have been accepted because the awardee offered a system which was not commercially available on May 9, the date the RFP was issued. In the alternative, the protester argues that even if we find that the RFP did not require that the waveform recorder itself be commercially available but that it be made from commercially available components,

the Hewlett-Packard waveform recorder is still not acceptable because two of its three main components do not meet the RFP's commerciality requirement.

The agency's response is essentially that it considers the Hewlett-Packard proposal to be acceptable because the data which the firm submitted with its proposal showed the commercial availability of its "equipment." The agency does not directly address the protester's contention that the RFP required that the entire "system," i.e., the waveform recorder, be commercially available as opposed to just its components.

Hewlett-Packard argues that it did offer a "commercially available system" and in support of its position states that "each component was commercially available at the time of issuance of the RFP as was the test methodology behind the system." The awardee further argues that it is within the agency's discretion to determine "that a system whose components and test methodology are commercial meets the RFP's requirements."

In determining the meaning of particular solicitation provisions, the solicitation must be read as a whole and in a manner that gives effect to all of its provisions. National Projects, Inc., 69 Comp. Gen. 229 (1990), 90-1 CPD ¶ 150. In reviewing an agency's selection decision under the solicitation, we will examine the evaluation to ensure that it was reasonable and consistent with the solicitation evaluation criteria. SeaSpace, B-239295, July 13, 1990, 90-2 CPD ¶ 33. Here, for the reasons stated below, we find that the RFP did require that the "system" or the waveform recorders themselves be commercially available and that Hewlett-Packard's product did not comply with this RFP requirement. We do not, however, sustain the protest because it appears from the record that the Hewlett-Packard system will meet the agency's needs, and the protester, which offered a significantly higher-priced product, was not prejudiced by the agency's waiver of the commerciality requirement.

The RFP's statement of work provided that the agency wished to purchase "commercial off-the-shelf recorders." Further, the RFP specifically listed as a minimum requirement that the "system" be commercially available. We think that this language makes it clear that the solicitation required that

the "system" or the complete recorder be commercially available.¹ In our view, "commercial off-the-shelf digitizing waveform recorders" means operating units which are complete and commercially available.

The Hewlett-Packard waveform recorder consists of essentially three major components: a Digitizing Oscilloscope Module, a model 16500A Logic Analysis System Mainframe, and a System Splitter Kit. The record contains no evidence that Hewlett-Packard has ever commercially offered these components together as a waveform recorder. The awardee states that the recorder was commercially available when the RFP was issued, but that conclusion is supported only by evidence that the components were available commercially and that its "test methodology" (*i.e.*, how the components can work together to meet the RFP requirements) was documented in March 1988.

Since the commerciality provision was a part of the RFP's SOW and was a listed evaluation criterion, it was a material part of the solicitation which the agency may not waive for one offeror. SeaSpace, supra. Since the agency accepted the Hewlett-Packard proposal despite the noncompliance with the commerciality requirement as set forth in the RFP, it effectively waived the requirement for the firm.

We do not, however, find that the agency's waiver of the commerciality requirement placed Tektronix at a competitive disadvantage. It is evident from the agency's acceptance of the Hewlett-Packard system on the basis of the firm's assurances that its components were commercially available, and from the agency's defense of this protest in light of the facts in the record, that the agency's needs can be met

¹RFP amendment No. 4, which contained offerors' questions and agency responses concerning the procurement, included a question from a firm which used the term "equipment" as opposed to "system" in asking whether modifications to the commercial item would be permitted. The agency merely replied that no modifications would be permitted. We do not agree with the awardee that the agency's failure to object to the firm's use of the term "equipment" in the question constituted its adoption of that broader term. See, e.g., Sony Corp. of Am., B-224373.2, Mar. 10, 1987, 87-1 CPD ¶ 267, where a solicitation requirement for commercially available "equipment" could be satisfied by a "system" made up of commercially available components.

by a recorder that is not commercially available.² The protester has not argued or even suggested in any way that it would have offered a different system if it had known that the agency was willing to accept one configured from commercially available components or that it would have lowered its price for the system it did offer if it had known of the relaxed requirement. Nor is there anything in the record suggesting that additional firms would have entered the competition if the agency had clearly communicated its less restrictive needs to the marketplace.

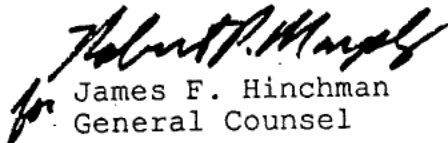
We will not sustain a protest in which an agency relaxed its requirements for one offeror absent some evidence in the record that the protester was prejudiced. See Labrador Airways Ltd., B-241608, Feb. 13, 1991, 91-1 CPD ¶ 167. Here, the protester has not even alleged that it was prejudiced in formulating its offer. We therefore conclude that the agency's improper action did not affect the protester's competitive position and we deny this portion of the protest. Id.

We deny two additional protest grounds raised by Tektronix. First, the protester argues that Hewlett-Packard's product does not comply with other mandatory technical requirements of the RFP, namely, that the recorders be capable of taking data at rates of two Giga Samples per second (GSa/s) and that the recorders autocalibrate. The agency contends and we agree, that Tektronix misunderstands the Hewlett-Packard system. The awardee's recorder does not use a "phase shifter" in the way Tektronix believed, and the protester has not established that the agency is wrong in its view that the technology actually used will take data at the required GSa/s rate. Also, we find that DNA is reasonable in concluding that Tektronix misreads the RFP autocalibration requirement as "self-calibration"--while Hewlett-Packard's product requires user operation, it calibrates automatically when an "on" button is pushed. The protester's mere disagreement with the agency on these issues does not render the evaluation unreasonable. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

²We note that the record supports the agency's view that the components of the awardee's system were commercially available. For example, the digitizing oscilloscope included in Hewlett-Packard's offer was described in sales literature in February 1991, and Hewlett-Packard has provided sales information showing substantial commercial sales for the model prior to May 1991 when the RFP was issued. While the System Splitter Kit was apparently not marketed as a single entity, the protester does not dispute that items comprising the kit were all commercially available before May 1991.

Second, Tektronix argues that the agency improperly held discussions with the awardee regarding the autocalibration requirement. We find that the communication between the awardee and the agency did not rise to the level of discussions, but was merely a clarification. Based on the record, we conclude that the contact did not result in a revision or modification to Hewlett-Packard's proposal. Hewlett-Packard's response to the agency inquiry merely restated information already contained in the proposal with language which was virtually identical to the language contained in the proposal. See Louis Berger & Assocs., Inc., B-233694, Mar. 28, 1989, 89-1 CPD ¶ 347; Metron Corp.--Recon., B-227014, Sept. 25, 1987, 87-2 CPD ¶ 299.

The protest is denied.


for James F. Hinchman
General Counsel