



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Engineered Electric Company d/b/a/ DRS Fermont

File: B-295126.5; B-295126.6

Date: December 7, 2007

David Z. Bodenheimer, Esq., and Richard W. Arnholt, Esq., Crowell & Moring LLP, for the protester.

David T. Ralston, Esq., Philip A. Nacke, Esq., and Frank S. Murray, Esq., Foley & Lardner LLP, for Onan Corporation, an intervenor.

Brian E. Toland, Esq., Michael G. Skennion, Esq. and William J. Kampo, Esq., U.S. Army Materiel Command, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that agency misevaluated proposals is denied where record supports agency's evaluation regarding merits of firms' proposals and performance of prototypes furnished during earlier phase of acquisition.
 2. Allegation that agency engaged in unequal discussions is denied where record shows that discussions were appropriately tailored to firms' respective proposals.
 3. Allegation that agency engaged in misleading discussions is untimely where protester was aware during discussions that agency's questions were inconsistent with solicitation requirements, but did not raise the assertion until more than 10 days later.
-

DECISION

Engineered Electric Company d/b/a DRS Fermont protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W15P7T-04-R-A001, issued by the Department of the Army for various mobile electrical generators. DRS maintains that the agency misevaluated proposals and engaged in improper discussions.

We deny the protest.

The solicitation originally contemplated the award of up to three indefinite-delivery, indefinite-quantity contracts to design, build and furnish to the Army a new set of generators (variously sized and configured, and ranging from 5 to 60 kilowatts (kW)). Performance under the resulting contracts was to occur in three phases. During phase I, the contractors were to develop prototype generators, complete a maintenance demonstration, perform limited testing, and provide limited logistics data. At the conclusion of phase I, the solicitation and resulting contracts provided that the agency would perform a “downselect” among the phase I contractors and issue a delivery order to one of the contractors for performance of phases II and III. The protester and Onan Corporation received phase I contracts, and the phase II/III downselect is the subject of this protest.

The firms’ contracts, at clause H-13, set forth the procedures and evaluation criteria to be applied in the phase II/III downselect competition. That clause provides that the agency will award the phase II and III work to the contractor submitting the proposal deemed to offer the “best value” to the government, considering cost/price and the following non-cost/price factors (in descending order of importance): technical (with subfactors for key operational performance parameters--reliability, schedule, other key operational performance parameters, specific design characteristics, and design concept); integrated logistics support (ILS) (with subfactors for number of parts per generator family, other supportability analysis, logistics support, and maintenance planning); and small business participation plan. In order to receive consideration for award, a proposal had to be rated no less than acceptable for every factor and subfactor.

When performance of phase I was sufficiently complete, the agency solicited proposals from DRS and Onan. After evaluating those proposals, the agency established a competitive range comprised of only Onan’s proposal, and DRS filed a protest with our Office complaining that its proposal improperly had been excluded from the competitive range. In response, the agency advised that it would include DRS’s proposal in the competitive range; we therefore dismissed DRS’s protest. (B-295126.2, B-295126.3, Aug. 26, 2006). Thereafter, the agency issued a solicitation amendment that relaxed the specifications relating to the generators’ fuel efficiency standards. DRS filed a protest objecting to the revised specifications. We denied that protest, finding that the relaxed specifications were unobjectionable and enhanced competition. See Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.4, June 14, 2007, 2007 CPD ¶ 111.

The agency then engaged in discussions with both firms, and evaluated the revised proposals as follows:

Factor	Subfactor	Onan	DRS
Technical		Good	Unacceptable
	Key Operational Performance Parameters–Reliability	Outstanding	Acceptable
	Schedule	Outstanding	Unacceptable
	Other Key Performance Parameters	Acceptable	Acceptable
	Specific Design Characteristics	Good	Acceptable
	Design Concept	Good	Acceptable
ILS		Good	Good
	Number of Parts Per Generator Family	Good	Good
	Other Supportability Analysis	Good	Good
	Logistics Support	Outstanding	Good
	Maintenance Planning	Good	Acceptable
Cost/Price		\$88,146,211	\$88,487,822
Small Business Participation Plan		Acceptable	Acceptable

Agency Report (AR), exhs. 63, 64, at 2. On the basis of these evaluation results, the agency established a revised competitive range comprised of only Onan’s proposal, and advised the protester that its proposal would not be further considered. After receiving a debriefing, DRS filed the current protest.

DRS has raised numerous assertions, principally relating to the agency’s technical evaluation and the adequacy of discussions. We have reviewed all of DRS’s assertions and find them to be either without merit or not properly for our consideration. We discuss DRS’s more significant arguments below.

TECHNICAL EVALUATION

DRS challenges the agency’s technical evaluation and, in particular, the agency’s conclusion that its proposal was technically unacceptable under the schedule subfactor of the technical factor. The central focus of DRS’s numerous evaluation arguments is that the agency essentially applied a more stringent standard in evaluating DRS’s proposal than it applied in evaluating Onan’s. DRS maintains, for example, that its proposal was downgraded for offering a schedule that had overlapping testing and design activities, but that Onan’s was not downgraded, even though Onan will have to conduct testing and design activities as well, and even though it did not propose a definitized schedule for those activities.

In reviewing protests concerning the propriety of an agency’s evaluation, it is not our role to reevaluate proposals; rather, we will examine the record to determine

whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation, as well as applicable procurement laws and regulations. L-3 Commc'n. Corp., BT Fuze Prods. Div., B-299227, B-299227.2, Mar. 14, 2007, 2007 CPD ¶83 at 6. There is no basis for objecting to the evaluation here. The record shows that there was a significant difference in the firms' success during phase I, and that this had a direct impact on both the proposal submission process and the firms' respective strategies for meeting the requirements of phase II.

With respect to Onan, the record shows that their generator sets are based on a relatively mature design concept, that the firm submitted detailed information relating to the predicted reliability of their generator sets, and that their generator sets performed successfully during the overwhelming majority of the required testing, with results that were consistent with the firm's reliability predictions. In this regard, the firms were required to calculate reliability predictions for their generator sets on the basis of the components included in the generators, and those estimates had to be greater than 750 hours mean time between effective function failure (MTBEFF). Onan's calculations showed estimates that exceeded the 750 hour MTBEFF requirement for all generator sets. AR, exh. 58, at 2. Onan's generator sets then performed during actual testing in a manner consistent with the reliability predictions; each of Onan's generator sets completed 800 hours of reliability maturation testing without major system or component failures; any failures were related to peripheral subsystems or components, such as muffler brackets and fuel level sensors. Id. Onan's generator sets also exhibited no degradation in performance when subjected to an array of electrical performance tests before and after the reliability maturation testing.

Further, Onan's generator sets met the overwhelming majority of other performance criteria outlined in the specifications, including overall generator set dimensions, environmental operation at extremes, noise suppression, transportability, maintainability, and winterization, with only minor deficiencies (for example, one generator set did not meet the specifications for noise suppression and two did not meet the weight requirements). AR, exh. 58, at 8-9, 11-14. Where the generator sets did not meet the specifications, Onan presented the agency with a detailed corrective action plan to address those matters. Id. Finally, Onan presented a workable, linear schedule that included phase I retesting to the limited extent that that would be required, a period devoted to resolving any deficiencies through redesign efforts, and a feasible interval for fabrication of the phase II pre-production models, without any overlap in activities that might jeopardize the overall schedule. AR, exh. 58, at 5-7.

In contrast, the record shows that the generator set prototypes built by DRS during phase I were beset with difficulties, apparently due to DRS's design concept, which would have required significant design modifications to address significant phase I test failures. AR, exh. 53, at 25-26. In particular, the record shows that, like Onan, DRS presented the agency with calculations showing predicted reliability estimates that exceeded the 750 hour MTBEFF requirement for all generator sets. However,

during testing, three of DRS's five generator sets failed to meet the specification's reliability maturation testing requirements and experienced six catastrophic failures of major system components or subsystems. Id. at 2-3. Notably, DRS's 15, 30 and 60 kW generator sets experienced alternator failures, and its 30 and 60 kW generator sets also experienced inverter failures prior to completing 400 hours of the 800 hour reliability maturation test. Id. As a consequence, while DRS was able to demonstrate the electrical performance of its smaller generator sets (the 5 and 10 kW sets), before and after performance of the reliability maturation testing, it was unable to demonstrate the electrical performance of the three larger generator sets that had experienced catastrophic failure. Id. Because of these failures, the agency concluded that DRS's design was not as mature after completion of phase I as it should be and, accordingly, that this would require the government to assume the risk that the DRS generator sets would not be able to meet the reliability maturation test requirement during phase II. Id.

The record also shows that the DRS generator sets failed a host of other testing requirements. For example, DRS did not provide complete data on the power quality at full set load rating for two of DRS's generator sets (the 5 and 10 kW sets), and all of DRS's generator sets failed to comply with the specifications for power quality requirements relating to voltage and frequency performance in the areas of voltage waveform, deviation, harmonics and voltage transients at rated load and at low power factor load. AR, exh. 53, at 10-17. DRS proposed a corrective action plan to address these failures, but the plan involved reliance on a simulation of actual generator set performance for each generator set size, followed by validation through retesting. The agency therefore found that:

The [o]fferor's approach is based entirely on a simulation process that the [o]fferor is still developing; none of the [p]hase I testing was acceptable and must be re-conducted in [p]hase II. This requires that the [g]overnment assume the very high performance risk based on the [o]fferor's results of post-[p]hase I simulation rather than on [p]hase I test data.

AR, exh. 53, at 15. Ultimately, in assessing the feasibility of DRS's proposed phase II approach, the agency concluded:

The SOW [statement of work] requires that the [o]fferor confirm the design approach and supply the [g]overnment with test data at the end of [p]hase I, allowing the [g]overnment to assess [the] maturity of the design prior to initiating [p]hase II of the program. Essentially, the [o]fferor is in the process of confirming design approaches, then assembling the hardware to conduct [p]hase I testing. This requires that the [g]overnment assume the risk of [p]hase II performance based upon limited electrical testing of the 60 kW prototype, leveraged onto the remaining sets . . . that have not been modified or tested. This

approach represents initiation of a [p]hase I design, not a mature design that is capable of a [p]hase II pre-production effort

AR, exh. 53, at 16.¹ In short, the agency concluded that, because of the numerous failures of the DRS generator sets during phase I, the firm would have to significantly reengineer its generator sets to make them compliant with the specifications, and then essentially perform the phase I testing regimen for a second time.

In its protest, DRS has largely ignored the agency's findings; DRS has not argued or otherwise demonstrated that the agency's evaluation conclusions with respect to the performance of its phase I prototype generator sets were incorrect or unreasonable, and the record clearly supports these conclusions.

The agency evaluated DRS's proposed phase II schedule in light of these phase I failures. The agency assigned DRS's proposed schedule an unacceptable rating because it appeared unrealistic in light of the significant redesign and retesting requirements (essentially phase I activities), as well as all phase II activities, that would need to be performed within the time constraint of the phase II performance period. For example, the agency found:

The [o]fferor's proposed [p]hase II schedule calls for completing four distinct activities in parallel in order to deliver the required 130 pre-production generator sets 11 months after contract award. These activities include: modification of inverter and governor control software; retest of [p]hase I testing at the [o]fferor's facility and at Aberdeen Test Center (ATC); completion of technical drawing packages; and design, fabrication and burn-in testing of 130 pre-production generator sets. The [o]fferor's approach shows that the design and component purchases of [p]hase II generator sets is approximately 50 [percent] complete prior to completing [p]hase I retest activities. For example, exhaust system components for [p]hase II generator sets are ordered and received prior to completing [p]hase I retest of noise performance. This approach presents the possibility that [p]hase II generator sets will not capture performance modifications necessary to comply with [p]hase I testing, or at a minimum, disrupt the [p]hase II schedule. The proposed schedule shows the development of drawings being completed prior to completion of [p]hase I retesting and after the start of the [p]hase II design and test phase of the program. The [o]fferor also proposes conducting environmental and rail impact tests at ATC on [p]hase I generator sets before they are upgraded with [p]hase II modifications.

¹ The record shows that four of DRS's generator sets (the 5, 10, 30 and 60 kW sets) also did not meet the specification requirements for noise. AR, exh. 53, at 17-23.

AR, exh. 53 at 5. Given the agency's unrefuted findings relating to the major failures of DRS's prototype generators during phase I, as well as the necessity for repeating many phase I activities, the agency's reservations about DRS's proposed phase II schedule--in particular, the resulting risk to the agency--were reasonable. In the final analysis, rather than demonstrating (as DRS contends) that the agency applied different standards in its evaluation of the two proposals, the record, in fact, shows that there was a wide disparity in the success of the firms' designs during phase I, and that the agency reasonably took this into account in its evaluation. We conclude that the agency reasonably assigned DRS's proposal an unacceptable rating under this subfactor.²

DISCUSSIONS

DRS maintains that the agency engaged in unequal discussions, specifically, that it was given more exacting questions and was required to provide far more detail in its responses than Onan. In effect, DRS is arguing that it was given a greater level of detail in its discussions than was given to Onan. We fail to see how providing more detailed discussions to DRS was improper or prejudicial to DRS. Discussions need not be identical; rather, discussions are to be tailored to each offeror's proposal. Federal Acquisition Regulation § 15.306(d)(1), (e)(1); PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 6. We find no impropriety here.

DRS also asserts that its discussions were misleading. As noted, the agency relaxed the solicitation's requirements relating to the fuel efficiency standards for the generator sets. The agency advised both offerors of its intention to relax the specifications, and requested comments relating to the revisions, by e-mail dated October 18, 2006. AR, exh. 30. DRS commented by letter dated October 23, stating that, in its view, the changes were unnecessary because it could meet the original, more stringent, standards. AR, exh. 31. Notwithstanding DRS's position, the agency revised the specifications on November 1. AR, exh. 32. Thereafter, by letter of November 2, DRS requested that the Army engage in discussions relating to the deficiencies identified in its original phase II and III proposal. In response, the agency provided DRS with two rounds of discussion questions, first by letter dated November 3, and subsequently by letter dated January 16, 2007. In both letters, the agency provided DRS with detailed questions that had been developed by the evaluators after their review of DRS's initial proposal, including questions relating to DRS's ability to meet the original, more stringent, fuel efficiency standards.

² DRS also asserts that the agency improperly made a cost realism adjustment in its evaluated cost. Since we conclude that the agency reasonably found the firm's proposal technically unacceptable, and firms were required to achieve a technical rating of at least acceptable under all of the evaluation factors and subfactors in order to be considered for award under phase II, DRS's proposal was unacceptable regardless of cost. We thus need not consider this argument.

DRS maintains that these discussions were misleading because they required it to address the original, more stringent, fuel efficiency standards. DRS claims that it was prejudiced by the agency's actions because addressing the original standards required it to divert resources it could have used to address the relaxed standards.³

Under our Bid Protest Regulations, protesters are required to file within 10 days of when they know or should know of their basis for protest. 4 C.F.R. § 21.2(a)(2) (2007). Here, as noted, the agency advised DRS of its intention to relax the specifications in October, and amended the specification in early November. On November 3, the agency provided DRS with the first round of discussion questions, which specifically required DRS to demonstrate its compliance with the original fuel efficiency standards. Upon receipt of these questions, DRS had all of the information necessary to assert that the discussions were misleading; DRS was fully aware that the questions related to the original standards rather than to the relaxed standards in the amended specifications. This being the case, this allegation of misleading

³ We note that the record appears to show that the agency discussed the earlier, more stringent fuel efficiency standards because of DRS's insistence, in its November 2 letter, that the agency afford it an opportunity to respond to the deficiencies identified in its initial phase II and III proposal and provide it an opportunity, essentially, to demonstrate its ability to meet the earlier, more stringent fuel efficiency standard. DRS wrote to the agency:

DRS Fermont is also concerned that the Purchase Description was revised following discussions with its competitor. DRS Fermont believes that had the government conducted discussions with DRS so that DRS Fermont would have had an opportunity to clarify and explain certain aspects of its proposal, it is possible that different decisions could have been made regarding the Purchase Description. However, as the government has now changed the Purchase Description based only on discussions with DRS' competitor, DRS Fermont is concerned that the changes to the PD may result in advantage to its competitor.

AR, exh. 33, at 2.

discussions had to be raised within 10 days after November 3. Since DRS did not file its protest until well after that time, this aspect of the protest is untimely and will not be considered.⁴

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ One aspect of DRS's misleading discussions argument is timely. DRS alleges that the agency misled it regarding its proposed sequence of testing during discussions. The record shows, however, that this aspect of DRS's proposed testing sequence was not central to the agency's criticism of DRS's schedule. Rather, as discussed, the agency's central concern was that DRS was proposing to progress to phase II with generator set configurations that had not passed major phase I testing requirements. AR, exh. 53, at 6. Thus, even if we agreed with DRS that discussions were misleading in this regard, it would have no effect on the decision to exclude DRS from further consideration because its schedule was unacceptable.