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**Comptroller General
of the United States**

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

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Decision

Matter of: Wiltex Inc.

File: B-297234.2; B-297234.3

Date: December 27, 2005

Joseph J. Petrillo, Esq., Petrillo & Powell, PLLC, for the protester.
Merilee D. Rosenberg, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's selection decision is sustained where the record shows that the awardee's proposal failed to address material solicitation requirements and that the agency failed to treat offerors equally by making award to the awardee despite the deficiencies in its proposal, while finding the protester's proposal unacceptable for similar deficiencies.

DECISION

Wiltex Inc. protests the award of a contract to Medical Gas Technology (MGT) under request for proposals (RFP) No. 528A7-33-05, issued by the Department of Veterans Affairs (VA) for installation of a scroll medical air compressor unit at the Syracuse, New York, VA Medical Center. The protester contends that the agency improperly awarded to MGT on the basis of a proposal that failed to address all material solicitation requirements.

We sustain the protest.

The RFP provided for award to the offeror whose proposal was determined most advantageous to the government, price and other factors considered, with past performance and technical, when combined, of equal importance to delivery availability and price. RFP at 22. The RFP advised offerors that the agency intended to evaluate offers and award a contract without discussions, but reserved to the agency the right to conduct discussions if determined by the contracting officer to be necessary.

The solicitation defined the “performance requirements--salient characteristics” of the unit sought; among the requirements were the following pertaining to warranty and warranty service:

Contractor to provide 36 month warranty, onsite staff training, and proof that the installer of the medical air system have a minimum of 5 years experience of installing medical air systems, able to provide 24 hours onsite warranty service within 2 hours of being notified; and

Guarantee from manufacturer that medical air system will have replacement parts available for a minimum of 10 years from date of installation.

RFP at 7. Elsewhere, the RFP instructed offerors to include the following information in their technical proposals, with the admonition that “failure to address any one of the items listed may result in the rejection of the offer”:

1. Availability of parts, diagnostic software and equipment: Document location of stocked parts and delivery time. Identify and document source of supply and average delivery time for items not stocked. State manufacturer guarantee for length of time they will support medical air system.
2. Ability to meet response time listed in the specification: Describe plans to meet the response times listed in the specification. Demonstrate evidence of company’s ability to respond to emergency situation and fully discuss the staffing managerial plans to be implemented to meet the response time specified.
3. Conformance to the latest specifications document and list any discrepancies between the proposed medical air system and the specifications.
4. Describe in detail the rigging, installation, and test process being proposed to install the medical air system.

RFP at 20-21. The RFP also instructed offerors that “[t]he proposal should describe the past experience of the company in providing maintenance on the equipment specified in this solicitation within the past three (3) years.” RFP at 21.

Six proposals were received by the September 1, 2005 closing date. According to the contracting officer, he “made a decision to include 5 of the 6 proposals received in the competitive range.” Contracting Officer’s Statement, Nov. 1, 2005, at 1. Wiltex’s proposal was one of those included. The contracting officer’s competitive range determination was apparently made prior to technical evaluation of the proposals,

however, and when the technical evaluation was performed, four of the five proposals in the competitive range, including Wiltex's, were determined to be technically unacceptable and eliminated from consideration. After all proposals other than MGT's had been eliminated from consideration, the project engineer notified the contracting officer of a change in the agency's requirements. The contracting officer notified MGT of the change, and, in response, MGT reduced its price from \$96,500 to \$94,900. The agency subsequently awarded a contract to MGT; upon notification of the award, Wiltex protested to our Office.

In its initial protest, Wiltex argued that its proposal was technically compliant and lower in price (at [deleted]) than MGT's, and that it thus represented the best value to the government. The VA responded that the protester's proposal had failed to comply with a large number of the RFP's technical requirements, and that the contracting officer had properly determined it to be technically unacceptable. The contracting officer noted that Wiltex's proposal consisted exclusively of product model specifications copied from the manufacturer's literature and that it lacked required information pertaining to past performance; technical references; availability and location of parts, software, and equipment; delivery times; emergency response time; staffing and managerial plans to meet emergency needs; discrepancies between the proposed medical air compressor and the specifications; the rigging, installation, and test process proposed; and on-site training. Contracting Officer's Statement, Nov. 1, 2005, at 1. Upon receipt of the agency report, which included evaluation documentation and a copy of the awardee's proposal, Wiltex abandoned its argument that its proposal, as submitted, was technically compliant, but raised the supplemental argument that it was unreasonable for the agency to have awarded to MGT because MGT's proposal, like the protester's, lacked material information required by the RFP.¹

¹ The protester also raised an argument relating to discussions. As noted above, the awardee was told of a change in the agency's requirements and allowed to revise its price, after the other proposals had been eliminated from consideration. Arguing that this constituted discussions with MGT, Wiltex asserts that the contracting officer should have conducted discussions with it as well because its proposal was initially included in the competitive range. Wiltex's argument is without merit. It is true that, where discussions are conducted, they must be held with all offerors whose proposals are in the competitive range. Federal Acquisition Regulation (FAR) § 15.306(d)(1). It is clear from the record, however, that the contracting officer's initial action, although labeled a competitive range determination, could not have been that, since it was made prior to technical evaluation of proposals; instead, the contracting officer was apparently merely determining which proposals were competitively priced. In any event, contracting officers are free to end consideration of a proposal determined to no longer have a reasonable chance of being selected for award, even if it was initially included in a competitive range, regardless of the status of discussions with that offeror. FAR § 15.306(d)(5). The contracting officer's initial
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Based on the record before us, we agree with the protester that MGT's proposal failed to address material solicitation requirements and, as a consequence, did not provide a proper basis for award. In this connection, any proposal that fails to conform to material terms and conditions of an RFP should be considered unacceptable and may not form the basis for an award. SWR, Inc., B-284075, B-284075.2, Feb. 16, 2000, 2000 CPD ¶ 43 at 3. While MGT's proposal contained more information than Wiltex's, it still did not address a number of the RFP's material requirements, including the requirement for proof of ability to furnish 24-hour on-site warranty service within 2 hours of notice and the requirement for a guarantee from the manufacturer that replacement parts would be available for a minimum of 10 years from the date of installation.² The contracting officer acknowledges that the awardee's proposal did not address the latter requirement. With regard to the former requirement, the contracting officer argues that MGT demonstrated its ability to respond to service calls within the required timeframe by including in its proposal literature from Powerex, the manufacturer of its proposed air compressor system, that stated as follows:

Powerex also has over 200 trained and authorized service centers in the U.S. These local distributors have parts and service available normally 24 hours a day 7 days per week.

Since there is no indication in MGT's proposal that either it or its installer is a Powerex authorized service center, we are not persuaded by the contracting officer's argument. Moreover, MGT did not otherwise address the requirement.

We also think that the evaluators unreasonably determined that MGT had demonstrated acceptable experience. As previously noted, the RFP instructed offerors "to describe the past experience of the company in providing maintenance on the equipment specified in this solicitation within the past three (3) years." While MGT's proposal described the company's experience in selling air processing systems and the experience of its installer in installing them, MGT's proposal furnished no description of experience on the part of either in providing maintenance on the systems once installed.³ Despite MGT's failure to furnish

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"competitive range" is thus irrelevant; the relevant question, discussed below, is whether the agency properly decided to eliminate Wiltex's proposal from consideration and to make award to MGT (with or without discussions).

² While not raised by Wiltex in its protest, MGT's proposal also did not address the requirements for a 36-month warranty and for on-site staff training.

³ One of the technical evaluators in fact made mention of this omission in his narrative comments, noting that "Installation discussed, but not maintenance."

evidence of the type of experience specifically required by the RFP, the technical evaluators rated its proposal as acceptable under the experience evaluation factor. This, we think, was unreasonable.

In sum, because we conclude that the VA could not reasonably have determined MGT's proposal, as submitted, to be technically acceptable, MGT's proposal could not form the basis for award. Further, while both Wiltex and MGT submitted technically unacceptable offers, the agency essentially overlooked the deficiencies in MGT's proposal while rejecting Wiltex's proposal for similar deficiencies. This disparate treatment was inconsistent with the agency's duty to treat offerors equally, and thus was improper. See Infrared Tech. Corp.--Recon., B-255709.2, Sept. 14, 1995, 95-2 CPD ¶ 132 at 4-5.

We recommend that the agency conduct discussions with, and solicit revised proposals from, MGT, Wiltex, and any other offeror which it determines would have a reasonable chance of award if given the opportunity to improve its proposal through discussions. If, once the agency has evaluated the revised proposals, it determines that the proposal of an offeror other than MGT represents the best value to the government, we recommend that the agency terminate the award to MGT and make award to the offeror selected. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2005). In accordance with section 21.8(f) of our Regulations, Wiltex's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel