



GAO

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: Telephonics Corporation

File: B-401647; B-401647.2

Date: October 16, 2009

Paul F. Khoury, Esq., Nicole Owren-Wiest, Esq., Trayce Winfrey Howard, Esq., and Julie A. Dunne, Esq., Wiley Rein, for the protester.

John W. Chierichella, Esq., Anne B. Perry, Esq., Keith Szeliga, Esq., Jessica Mailman, Esq., Jesse J. Williams, Esq., and Marko W. Kipa, Esq., Sheppard Mullin; Richard A. Sauber, Esq., Deneen J. Melander, Esq., and Rebecca LeGrand, Esq., Robbins, Russell, Englert, Orseck, Untereiner & Sauber; Joseph O. Costello, Esq., Northrop Grumman Corporation, for Northrop Grumman Cobham Intercoms LLC, the intervenor.

Wade L. Brown, Esq., and Walter Harbort, Jr., Esq., U.S. Army Materiel Command. David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of this proposal.

DIGEST

Protest challenging exclusion of protester's proposal from revised competitive range is denied where proposal was both lower rated under technical factor and significantly higher priced than the two proposals included in competitive range; agency reasonably found it had no reasonable chance of being selected for award.

DECISION

Telephonics Corporation, of Farmingdale, New York, protests the U.S. Army Materiel Command's (AMC) exclusion of its proposal from the competitive range, and the subsequent award of a contract to the Northrop Grumman Cobham Intercoms LLC (NGCI), a joint venture of Northrop Grumman Electronic Systems and Cobham Defense Products, under request for proposals (RFP) No. W15P7T-08-R-L405, for the VIS-X, an improved vehicle intercom system (VIS). Telephonics challenges the agency's evaluation of proposals and conduct of the procurement.

We deny the protest.

A VIS provides communications between crew members and interfaces with vehicle radio systems in tactical combat vehicles. The agency reports that, while the current tactical VIS—the AN/VIC-3(V), produced by Northrop Grumman (with Cobham as a

major subcontractor), and installed in approximately 80,000 Army vehicles--has been a highly reliable communications system, and its design has evolved to accommodate new vehicle configurations and address parts obsolescence, its technical capabilities do not meet current agency needs. Contracting Officer's Statement (COS) at 2.

The VIS-X specification identified mandatory threshold and optional objective requirements, as well as two categories of contemplated configurations, including a Basic Configuration and an Extended Configuration (which provides capabilities such as an Ethernet interface, Voice over Internet Protocol, radio remote control, and interface to network radios). Offerors were required to describe in their proposals the system design of their overall proposed production systems and how they will meet the requirements of the VIS-X Performance Specification. RFP § L.3.3.1. The solicitation identified four specific vehicle configuration types--the M1A2 Abrams tank (Extended Configuration), M2A2 Bradley Fighting Vehicle (Extended Configuration), Up-Armored HMMWV (Basic Configuration), and the Family of Medium Tactical Vehicles (FMTV) (Basic Configuration)--for which the offeror was instructed:

to provide its approach for planning, installing, and testing its Proposed Production System in the vehicle configurations listed below. The four vehicles listed are representative of the anticipated VIS-X implementations. The proposal shall contain all aspects including, but not limited to, technical considerations, hardware requirements, scheduling, and manpower resources. The proposal shall identify any risks in integrating the proposed system(s) in these vehicles and how those risks will be mitigated. The proposal shall contain a detailed listing of the electronic boxes, headsets, and installation kits required to equip each vehicle type with a VIS-X.

RFP § L.3.3.2.

The solicitation provided for award of a fixed-price indefinite-delivery/ indefinite-quantity, firm-fixed price and time-and-materials (T&M) contract for engineering and production of the VIS-X, with a 5-year base period and five 1-year options, to the offeror whose proposal represented the "best value" under four factors: (1) technical (with subfactors for system design, vehicle implementation, supportability, and production readiness); (2) performance risk (assessment of the relative risk associated with the offeror's proposal and likelihood of success, as indicated by the offeror's record of past performance); (3) price; and (4) small business participation plan. Price was to be calculated as the sum of the fixed-price and T&M items listed in section B of the solicitation for the base and option periods "as calculated in the MS Excel" spreadsheet included with the solicitation; the spreadsheet specifically required offerors to price installation kits only for the M1A2 Abrams, M2A2 Bradley, Up-Armored HMMWV, and FMTV configurations

specified above. RFP § L.1.3, VISXPrice.xls. The technical factor was more important than performance risk, which was more important than price, which was significantly more important than small business participation.

Four vendors, including Telephonics and NGCI, submitted initial proposals by the closing time. AMC included all four proposals in an initial competitive range. Following discussions, the proposals were evaluated as follows:

	NGCI	Telephonics	Offeror A	Offeror D
Technical				
System Design	Outstanding	Acceptable	Acceptable	Good
Vehicle Implementation	Good	Acceptable	Acceptable	Acceptable
Supportability	Outstanding	Acceptable	Good	Good
Production Readiness	Outstanding	Good	Good	Acceptable
Overall Technical	Outstanding	Acceptable	Acceptable	Good
Performance Risk	Low	Low	Low	Low
Small Business	Outstanding	Outstanding	Acceptable	Outstanding
Price	[\$REDACTED]	[\$REDACTED]	[\$REDACTED]	[\$REDACTED]

VIS-X Source Selection Interim Evaluation and Competitive Range, Feb. 19, 2009, at 110, 167.

Based upon the interim evaluation results, the source selection authority (SSA) determined that Telephonics's and Offeror A's proposals had no reasonable chance for award and accordingly excluded them from the competitive range, leaving only NGCI's and Offeror D's proposals in the competitive range. In this regard, Telephonics's and Offeror A's proposals were both significantly higher priced and lower rated under the technical factor than NGCI's and Offeror D's proposals. Specifically, Telephonics's price was [REDACTED]% higher than NGCI's, and its proposal received only an overall acceptable technical rating, with 3 significant strengths, 10 strengths and 7 weaknesses. In contrast, NGCI's proposal received an overall outstanding technical rating, with 12 significant strengths, 22 strengths, and no weaknesses. (The agency concedes, in response to the protest, that Telephonics's proposal should have received one additional significant strength and two additional other strengths. Agency Supplemental; Report, Aug. 31, 2009, at 7-10.) Ultimately, following the submission of final proposal revisions, the SSA determined that NGCI's proposal offered the best value to the government, and thus made award to NGCI.

Telephonics challenges the evaluation of proposals and conduct of the procurement in several respects. We have considered all of Telephonics's arguments and find that none furnishes a basis for questioning the agency's decision to exclude Telephonics's

proposal from the competitive range. We discuss the protester's most significant arguments below.

UNSTATED EVALUATION CRITERIA

Telephonics asserts that a number of the evaluated strengths for NGCI's proposal were unrelated to the stated evaluation criteria. In this regard, the agency determined that the fact that NGCI's proposed VIS-X system—which was built upon and developed from the currently fielded legacy Northrop Grumman VIS system—would be interoperable and backwards compatible with the current legacy system, offered a number of significant advantages to the government. Specifically, the agency assigned significant strengths to NGCI's proposal on the basis that its proposed system: will be interoperable and backwards compatible with the current legacy system components, thus permitting partial upgrades and, in an emergency, permitting a maintainer of a legacy system to replace a legacy component with a VIS-X component; reused [REDACTED] the power, radio and interconnecting cables already in the supply system and available at fielded unit locations and, for the most part, did not require additional mounting brackets or cables, or rerouting of cables for the four evaluated vehicle configurations, thus facilitating a faster vehicle upgrade through simply changing out legacy boxes with their VIS-X counterparts; offered an [REDACTED] to the legacy system, thus permitting soldiers currently trained on the legacy system to use the new VIS-X system without additional training; will facilitate supportability by reusing [REDACTED] the legacy system cables, mounting fixtures and headsets, as well as reusing over [REDACTED]% of [REDACTED] that are in the current supply system; will result in enhanced production readiness by reusing [REDACTED] legacy LRUs, headsets, cable, brackets and hardware parts, which have already completed qualification testing and have been approved by the government, and reusing established test processes; and will further enhance production readiness by using the existing manufacturing facilities and previously qualified processes, proven tooling, trained personnel, and supply chain. Subfactor Final Evaluation Reports. Telephonics asserts that these evaluated strengths resulted from the application of unstated evaluation criteria.

In evaluating proposals, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 4. Here, the solicitation required offerors to describe in their proposals how their proposed VIS-X system design will comply with the Performance Specification, which required that the systems “be modular to give economical flexibility in equipping a large variety of vehicles with varying requirements,” PS § 3.1.2; recognized that partial VIS upgrades were likely by organizing the requirements into broad “collections of functions that are likely to be required in vehicle configurations with the separation made in order to provide a more economical implementation when the full functionality is not required,” *id.*; and stated that “[i]t shall be preferable, but not required, that VIS-X components use

existing [legacy VIS] mounting locations and fastener provisions whenever possible.” Id. § 3.3.3. Furthermore, the solicitation both specifically required offerors to discuss in detail their approach to installation, supportability (including “supportability supply chain”), and production readiness, and listed these factors as technical evaluation subfactors. RFP §§ L.3.3.3.2, L.3.3.3, L.3.3.4, M.1.1. In addition, the RFP advised that proposals “will be evaluated to determine the extent to which successful performance is contingent upon unproven devices and techniques that require excessive development.” RFP § M.1.1.1(b). Offerors clearly were on notice from these provisions that the evaluation would include consideration of the extent to which the proposed VIS-X system would be a modular system that facilitates partial and/or more rapid upgrades, and enhances supportability, through reuse of and/or interoperability and backwards compatibility with the legacy system. These are precisely the aspects of NGCI’s proposal that resulted in the identified evaluated strengths. Accordingly, we find nothing improper in the evaluation’s recognizing NGCI’s advantages in these areas.

PRICE

Telephonics challenges the price evaluation on the basis that it did not encompass the total price associated with NGCI’s approach to meeting the Performance Specification requirements. In this regard, Telephonics asserts that, while NGCI’s overall VIS-X solution was evaluated on the basis of having [REDACTED] core LRU types, the total evaluated price for NGCI’s proposal included only the price of the [REDACTED] LRU types required for the four vehicle configuration types specified in the solicitation—M1A2 Abrams Extended Configuration, M2A2 Bradley Extended Configuration, Up-Armored HMMWV Basic Configuration, and FMTV Basic Configuration. Telephonics Comments, Aug. 21, 2009, at 27-33. In contrast, Telephonics asserts, its proposal was evaluated on the basis of [REDACTED] LRU type for all vehicles and all configurations.¹

This argument is without merit. Although offerors were required to propose unit prices for “all system components required to meet all threshold requirements and any objective requirements offered,” that is, for their overall VIS-X solution, RFP § L.3.5, VISXPrice.xls, the solicitation specifically provided, with respect to the above four specified vehicle configuration types, that the required detailed listing of the electronic boxes, headsets, and installation kits necessary for equipping each vehicle type with a VIS-X “shall also be used as a basis for the Offerors pricing proposal.” RFP § L.3.3.2. Telephonics acknowledges that, under the solicitation, “the Total Evaluated Price was to be calculated based on the VIS-X components

¹ AMC challenges as misleading Telephonics’s characterization of its proposed approach as consisting of [REDACTED] LRU type; according to the agency, Telephonics’s approach relative to NGCI’s in fact required [REDACTED] boxes and [REDACTED] types of boxes. Agency Supplemental Report, Aug. 31, 2009, at 2-3.

necessary to satisfy the four sample vehicle configurations identified in the RFP,” Telephonics Comments, Aug. 21, 2009, at 31, but complains that this permitted NGCI, with its modular technical solution, to “game the price evaluation by offering [REDACTED] different core components, [REDACTED] of which fortuitously were not required to meet those specific configurations.” *Id.* In other words, according to the protester, [REDACTED] core components necessary to meet the requirements in the VIS-X Performance Specification were not included in the Total Evaluated Price. However, any objection to the evaluation approach set forth in the solicitation was required to be raised prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2009).²

DISCLOSURE OF PROPRIETARY INFORMATION

On March 4, 2009, nearly 3 months prior to the May 29 source selection decision, AMC was advised in writing by Northrop Grumman Electronic Systems, one of the NGCI joint venture members, that its employees had received Telephonics proprietary technical data, pricing data, and hardware from Northrop Grumman Aerospace Systems, which had been furnished the information and hardware by Telephonics in connection with a program (the Fire Scout helicopter program) that was unrelated to the VIS-X procurement. AMC then conducted a review of NGCI’s VIS-X proposal, which indicated that NGCI’s initial technical design was based on Northrop Grumman Corporation’s current legacy system; Northrop Grumman Electronic Systems received Telephonics’s proprietary information from Northrop Grumman Aerospace Systems in September 2008, after submission of NGCI’s initial proposal in April 2008; the subsequent changes to NGCI’s proposal appeared to be related directly or indirectly to government discussion items or RFP amendments, and did not incorporate any Telephonics proprietary information; and NGCI’s unit pricing for components remained the same from the initial to final proposal. AMC concluded that there was no evidence that the disclosed Telephonics information was reflected in NGCI’s proposal. Memorandum for the Record, Disclosure of Receipt of Potential Proprietary Information, May 4, 2009; Northrop Grumman Electronic Systems Letter to AMC, Mar. 4, 2009. Telephonics asserts that AMC’s investigation was unreasonably limited in scope.

Telephonics’s argument provides no basis to challenge the procurement. The procurement integrity provisions of the Office of Federal Procurement Policy Act contain two restrictions related to disclosing or obtaining bid or proposal

² In any case, AMC reports—and Telephonics has not shown otherwise—that the four vehicles specified in the solicitation as the basis for the total price calculation are the most common vehicles in the Army’s inventory, and that 99% (that is, all but two) of the specification requirements are reflected in these representative vehicle (and thus in the evaluated price). Agency Supplemental Report, Aug. 31, 2009, at 24-25.

information. 41 U.S.C. § 423(a) and (b). First, the act prohibits a government official from “knowingly disclos[ing] contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 423(a). Second, the Act provides that “a person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 423(b). However, under the heading “Savings provisions,” the Act further provides that “This section does not . . . restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 423(h).

Here, the protester has not asserted that any government official disclosed Telephonics’s proprietary information, or that Northrop Grumman Aerospace Systems wrongfully obtained it; on the contrary, the record clearly indicates that Telephonics voluntarily provided the information to Northrop Grumman Aerospace Systems. Instead, the essence of the matter is that Northrop Grumman Aerospace Systems allegedly did not properly safeguard the information, with the result that it was furnished to Northrop Grumman Electronic Systems personnel. Although the agency views the facts here as falling within the Act’s “Savings provision,” quoted above, it nevertheless conducted an investigation, which led it to conclude that there was no evidence that the disclosed information was incorporated in NGCI’s proposal.³ Likewise, Telephonics has not shown that features of NGCI’s proposal appear to be derived from the disclosed information. Finally, to the extent that Northrop Grumman Aerospace Systems failed to properly safeguard Telephonics’s proprietary information, the matter constitutes a private dispute, outside of our bid protest jurisdiction. Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 17. We conclude that given the record here, Telephonics’s allegations regarding this matter do not provide a basis for sustaining the protest.

CONCLUSION

We will review an agency’s evaluation and exclusion of a proposal from the competitive range for reasonableness and consistency with the solicitation criteria and applicable statutes and regulations. Novavax Inc., B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 13. Agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. FAR § 15.306(c)(1); D&J Enter., Inc., B-310442, Dec. 13, 2007, 2008 CPD ¶ 8 at 2. Here, Telephonics’s price was approximately [REDACTED]% higher than NGCI’s, and Telephonics received only an overall acceptable technical rating, in

³ We need not resolve whether the Act’s “Savings provision” applies since the record here does not evidence any competitive prejudice to Telephonics from the disclosure.

contrast to NGCI's overall outstanding rating. Likewise, Telephonics's price was [REDACTED]% higher than Offeror D's, and Telephonics received only an overall acceptable technical rating, in contrast to Offeror D's overall good rating. Although Telephonics asserts that its proposal should have received an overall technical rating of "at least" good, Telephonics Comments, Sept. 8, 2009, at 11, increasing its rating would still leave Telephonics's proposal less advantageous technically and significantly higher priced than NGCI's, and [REDACTED]% higher priced than Offeror D's. We conclude that there is no basis to question AMC's determination that Telephonics's proposal had no reasonable chance for award, and its consequent elimination of that proposal from the revised competitive range.

The protest is denied.

Lynn H. Gibson
Acting General Counsel