



Comptroller General
of the United States

:023249

Washington, D.C. 20548

Decision

Matter of: King Radio Corporation

File: B-253565

Date: September 24, 1993

Anthony P. Tumminello, Esq., for the protester.
William T. Mohn, Esq., Department of the Navy, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging rejection of protester's proposal based on its failure to comply with the solicitation's requirement for contractor testing on proposed collision warning system is denied where solicitation, read as a whole, required that such testing be conducted no later than 4 months after contract award and protester's proposed schedule for testing was 4 1/2 months after award.
2. Protest challenging agency's evaluation of the awardee's proposal and determination that the awardee's technical approach should be upgraded to reflect its identification and proposed resolution of a problem that the agency did not know existed is denied where the record establishes that the protester was not prejudiced by the agency's consideration of the proposed modification because the determinative factor in its selection of the awardee's proposal was the fact that it did not pose certain risks that were inherent in the protester's nonconforming schedule for contractor testing.
3. Protest allegation--first raised in comments on the agency report--that agency misled the protester during discussions to believe that its proposed performance schedule was acceptable is dismissed as untimely where the record establishes that the protester was aware of the specific reason for the rejection of its proposal prior to the time it filed its initial protest.

DECISION

King Radio Corporation protests the award of a contract to B.F. Goodrich FlightSystems, Inc. under request for proposals (RFP) No. N00019-93-R-0003, issued by the Department of the Navy for collision warning systems. King Radio contends that the agency's rejection of its proposal was improper because it was based on the erroneous conclusion that the proposal did not meet the solicitation's performance schedule.

We deny the protest in part and dismiss it in part.

The RFP, issued on November 30, 1992, contemplated the award of a firm, fixed-price contract for collision warning systems; the systems warn student pilots of the danger of a mid-air collision. The RFP required offerors to produce two "production representative" systems. The successful offeror was required to produce the first such system and install it no later than 3 months after contract award. Section No. 3.4 of the RFP required the contractor to produce the second system and install it to support Navy flight testing no later than 4 months after contract award. Section No. 3.3.5 of the solicitation specifically stated that the contractor shall conduct flight testing prior to Navy testing. Section No. 3.5 advised offerors that the Navy's own technical assessment was anticipated to begin 4 months after contract award.

The RFP set forth the following three evaluation factors in descending order of importance: technical approach, cost, and management approach. The technical approach area included four subfactors in descending order of importance; the offeror's ability to meet or accelerate the program schedule was the second most important subfactor. The RFP stated that the agency would award the contract to the offeror whose proposal represented the best value, considering all factors.

The Navy received two proposals by the January 29, 1993, closing date. On March 26, the Navy sent evaluation notices to the offerors; in King Radio's notice, the agency warned the firm that its plan to have Navy testing begin before King Radio's own development and testing was completed was unacceptable.

Discussions were held and best and final offers (BAFO) were requested. The agency received BAFOs from both offerors. On May 6, the agency completed its evaluation of the offerors' BAFOs. The agency concluded that Goodrich's BAFO met all the requirements of the solicitation and that King Radio's BAFO did not meet the solicitation's requirement

that contractor testing be conducted prior to Navy testing. Specifically, the Navy found that King Radio's proposed schedule indicated that contractor testing would continue until 4 1/2 months after contract award while the solicitation required the testing to be completed within 4 months after award. The Navy concluded that Goodrich's proposal represented the best value to the government, and made award to Goodrich on May 10. Following its May 23 debriefing, King Radio filed a protest with our Office challenging the rejection of its proposal.

King Radio contends that the agency improperly rejected its proposal based on the erroneous assumption that King Radio's proposed schedule for contractor testing did not meet the schedule requirements in the solicitation. According to the protester, the solicitation did not require completion of contractor testing within a specified time period.

To be reasonable, an interpretation of a solicitation provision must be consistent with the solicitation when read as a whole and in a reasonable manner. Air Prep. Tech., Inc., B-252833, June 14, 1993, 93-1 CPD ¶ 459. Here, the language in the RFP paragraphs concerning testing does not support the protester's claim that the solicitation failed to specify a time period in which contractor testing must be accomplished. To the contrary, paragraph No. 3.3.5 specifically required the contractor to conduct flight testing prior to Navy testing; paragraph No. 3.4 required installation of the second system "to support Navy flight testing no later than [4] months after contract award"; and paragraph No. 3.5 advised that "[the] Navy technical assessment [is] anticipated to begin [4] months after contract award."

A reasonable reading of these paragraphs establishes that the contractor must complete flight testing no later than 4 months after award because the Navy anticipates that it will begin its own testing 4 months after award. Contrary to the protester's suggestion, the fact that no paragraph in the solicitation states that "[a]ll contractor testing must be completed not later than [4] months after contract award" does not detract from the fact that the only reasonable interpretation of the solicitation as a whole leads to the same conclusion.

In support of its position, the protester points to the language in paragraph No. 3.5 which states that the Navy anticipates that it will begin testing the system 4 months after contract award. According to the protester, the phrase "anticipated to begin [4] months after contract award" does not indicate that Navy testing is "either required or even scheduled to begin at such time." [Emphasis in original.] Contrary to the protester's suggestion, the use of the word "anticipated" does not detract from the

requirement in the solicitation that the contractor complete its testing within 4 months after contract award. Instead, it merely indicates that the agency's testing of the equipment is dependent on various factors, including the protester's successful installation and testing of the equipment.

The protester points to section F of the RFP, "Deliveries or Performance," which calls for delivery of the second system 4 months after contract award. To be consistent with section F, the protester argues, section No. 3.4, entitled "Installation for Navy Flight Testing," reasonably can be interpreted to require only that the contractor deliver the warning system within 4 months after contract award. The protester claims that the timeframe for the other tasks called for by the RFP, such as installation and testing, is a matter to be resolved during contract performance.

The protester's narrow interpretation of section F to support its argument that section No. 3.4 reasonably can be interpreted to require only that the contractor deliver the warning system within 4 months after award is unreasonable. While the protester correctly states that section F calls for "delivery" of the second production system within 4 months of award, section 3.4 plainly states that "[t]he contractor shall produce a second production representative system and install it . . . to support Navy flight testing no later than [4] months after contract award." [Emphasis added.] The only reasonable interpretation, which gives full effect to both sections, is that the solicitation's 4-month performance requirement encompasses services other than mere delivery of the equipment; in essence, in the context of the RFP, the "delivery" called for by section F includes the installation and testing of the equipment called for by the statement of work.

To arrive at King's conclusion that the schedule for installing and testing the equipment is a matter to be resolved during contract performance, one must virtually ignore the language set forth in the RFP indicating that the proposed performance schedule is one of the most important evaluation subfactors under the technical approach area, the most important evaluation area. By listing schedule as an evaluation area and advising offerors that their proposals would be evaluated to determine the extent to which the offeror seems likely to meet or accelerate the program schedule, the RFP clearly contemplated the evaluation of the offerors' proposed performance schedules. It is not reasonable to conclude that the agency would assume the risk of unsuccessful performance by allowing the offerors to leave a significant gap in their proposed scheduling for installation and testing to be determined after contract award.

In sum, since the RFP required the contractor to test its proposed equipment within 4 months after contract award, and since the protester's proposed schedule for performing this task was 4 1/2 months after contract award, the agency reasonably concluded that the protester's proposal failed to conform to the performance schedule in the solicitation.

The protester generally argues for the first time in its comments on the agency report that the agency's evaluation of the awardee's proposal was improper. According to the protester, the awardee's score was raised improperly because the awardee proposed a modification of the aircraft transponders. As a result, the protester contends that the agency should have either modified the RFP or provided the firm with "all information necessary and the opportunity to respond."

The agency explains that the awardee identified and proposed a solution to a problem that the agency was not aware existed. According to the agency, the problem stems from the fact that the transponders in the system are commercial and must be modified to suppress electromagnetic interference to levels currently required by the Federal Aviation Administration.

Our review of the record establishes that notwithstanding the fact that the agency considered the awardee's proposed modification to the aircraft transponders to be a positive aspect of its proposal warranting an increase in its overall rating under the technical approach area, the proposed modification was not the determinative factor in selecting the awardee here. Rather, the agency concluded that given the risk of unsuccessful performance of the contract within the agency's minimum timeframe which was inherent in King Radio's proposed schedule and was not present in the awardee's proposal, the awardee's higher-priced proposal represented the best value to the agency. In sum, there is nothing in this record that remotely suggests that the protester was prejudiced by the agency's evaluation of the awardee's proposal. See Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379 (prejudice is an essential element of a viable protest).

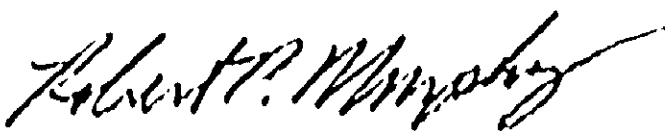
Finally, the protester argues for the first time in its comments on the agency report that the agency advised it during discussions that its proposed BAFO schedule was acceptable; therefore, the agency should be estopped from claiming that the firm's BAFO fails to comply with the delivery schedule in the RFP.

While the agency disputes the protester's allegations concerning the content of the discussions, we need not review the protester's allegation because it is untimely. Where a

protester initially files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements. Our Regulations do not contemplate the unwarranted piecemeal presentation or development of protests. Victor Assocs., Inc., B-241496.2, Mar. 13, 1991, 91-1 CPD ¶ 278.

Here, the record establishes that the agency informed the protester that its proposal was rejected for failing to conform to the solicitation's schedule requirements and the agency subsequently debriefed the protester--prior to the its filing of the current protest--by informing the firm specifically that its proposal did not meet the requirement for contractor testing to be accomplished no later than 4 months after the award of the contract. Indeed, the protester concedes in an affidavit submitted by one of its representatives that it was so advised after discovering that its proposal was rejected. Since it is clear that the protester was aware of the agency's reason for rejecting its proposal when it filed its initial protest, the objection to the adequacy of the discussions and the alleged inconsistency in the agency's view of the acceptability of its proposed schedule were untimely raised in its comments on the agency report, and will not be considered.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel