Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canberra Industries, Inc.

File: B-271016

Date: June 5, 1996

John G. Tamburro, Esq., and Michael A. Zebarth, for the protester.
David C. Rickard, Esq., Defense Nuclear Agency, for the agency.
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DIGEST

1. Protest that agency improperly relaxed requirement regarding performance certifications is denied where there is no showing that the protester was prejudiced by the agency's actions.

2. Agency properly accepted awardee's certification that its proposed pedestrian radiation detector complied with the solicitation's commercial item requirement where the product has been sold to the general public and the modified product offered, based on newer software, is the result of a minor modification which does not change the product's physical characteristics or function.

DECISION

Canberra Industries, Inc. protests the award of a contract to Rados Technology, Inc. under request for proposals (RFP) No. DNA001-95-R-0045, issued by the Defense Nuclear Agency (DNA) for pedestrian radiation detection equipment. Canberra asserts that Rados did not submit product certifications or offer a commercial product as required by the solicitation.

We deny the protest.

The RFP contemplated the award of a fixed-price contract to the lowest-priced, technically acceptable offeror for 48 pedestrian radiation detectors[1] capable of detecting special nuclear material (SNM), which is weapons grade highly enriched uranium or plutonium. Section C.3 of the RFP stated:

[1]The basic requirement is for 36 units; 12 detectors are optional units.

"Proposals shall be deemed non-responsive if each of the following performance specifications is not addressed in the technical proposal. General statements such as 'monitor meets or exceeds all performance specifications' will not suffice."

Section C.4 of the RFP listed 15 performance specifications which proposals were required to address. Specifically, this RFP section provided that the proposed monitor "must be certified" as capable of detecting a specified amount of Cesium in a particular background radiation environment in at least 15 out of 20 passages when the source moves horizontally through the center of the portal at a speed of approximately 3.3 feet per second, and at all vertical positions from floor level to 84 inches above floor level. Similarly, RFP section C.4 provided that the contractor "shall certify" that the nuisance alarm rate of the proposed monitor "is less than 1 nuisance alarm in 1000 passages." With regard to these requirements, the RFP stated that the "[c]ontractor shall provide complete details as to the testing method" used to verify the detection sensitivity and the nuisance alarm rate.

The solicitation also included the clause found at Defense Federal Acquisition Regulation Supplement (DFARS), § 252.211-7012, "Certifications-Commercial Items," which provides that "[o]ffers received in response to this solicitation that do not offer commercial items shall not be considered for award."[2] Pursuant to that clause, offerors were required by the solicitation to certify whether the items proposed were commercial items, defined by the clause as follows:

"(b)(1) 'Commercial items' means items regularly used in the course of normal business operations for other than Government purposes which:
(i) have been sold or licensed to the general public;
(ii) have not been sold or licensed, but have been offered for sale or license to the general public;
(iii) are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time:
(iv) are described in paragraphs (i), (ii), or (iii) that would require only minor modification in order to meet the requirements of the procuring agency.
(2) 'Minor modification' means a modification to a commercial item that does not alter the commercial item's function or essential physical characteristics."

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[2]This clause was subsequently deleted from the DFARS by Defense Acquisition Circular No. 91-9, Nov. 30, 1995, to conform to changes in the Federal Acquisition Regulation implementing the provisions of the Federal Acquisition Streamlining Act of 1994, with regard to the acquisition of commercial items.

Initial proposals were received from six offerors, including Canberra and Rados. Canberra offered its JPM-21A pedestrian monitor and submitted preliminary testing information and results. Rados offered its RTM-950 gamma portal monitor. With regard to the performance specifications contained in RFP section C.4, Rados's proposal stated: "The Pedestrian Monitor meets or exceeds all of the requirements." No certifications or any indication of test results were provided with Rados's proposal. Both Canberra and Rados certified that their proposed monitors were commercial products under subclause (b)(1)(i), that is, the item "have been sold or licensed to the general public."

The agency included all six proposals in the competitive range and subsequently conducted written discussions with each offeror. The discussion letters sent to Canberra and Rados requested that each offeror "[p]rovide certification that the performance specifications in [the solicitation], respectively entitled 'Detection Sensitivity' and 'Nuisance Alarm Rate Certification,' can be achieved without modification using the units you have proposed."

Both Canberra and Rados submitted best and final offers (BAFO) by the September 19 due date. In response to the solicitation requirements and DNA's request for certifications, Canberra's BAFO contained a four-page certification section regarding detection sensitivity and false alarm rate. The section described Canberra's testing procedures and provided test results. As to detection sensitivity, Canberra's documentation demonstrated that it had performed tests at three positions, floor level, waist level and head level, and that the source was moved through the monitor with an average velocity of 3.3 plus or minus 0.3 feet per second. Overall, the documentation submitted by Canberra indicated that the proposed JPM-21A monitor met the specifications of the RFP concerning detection sensitivity and false alarm rate.

In its BAFO, Rados stated that it was proposing modifications to the monitor it had initially offered. Specifically, Rados offered the same detector but with different software--the Real-Time Multitasking Operation System QNX4 with a Graphic User Interface QNX-Windows. As with its initial proposal, Rados's BAFO contained no certifications, testing descriptions, or test results. Rados responded to DNA's certification request by stating: "Detection Sensitivity and Nuisance Alarm Rate are part of the parameter set of the measuring software. They can be changed by the on line terminal."

In evaluating Rados's BAFO, the agency expressly documented the fact that "[c]ertification of detection sensitivity and nuisance alarm rate was not provided." The agency also noted that Rados's response "does not assure that both requirements [detection sensitivity and nuisance alarm rate] can be satisfied simultaneously." Rados's BAFO was for $928,800 versus Canberra's price of $968,912. Based on its lower price, Rados's proposal was selected for award.

Canberra asserts that Rados's proposal failed to comply with the RFP requirement that offerors submit certifications that the proposed monitor met the detection sensitivity and false alarm rate specified in the RFP and, therefore, should not be eligible for award. Canberra also asserts that Rados's modified RTM-950 fails to meet the commercial product requirement of the solicitation. Specifically, the protester claims that the proposed item has not been sold or licensed to the general public and that the software revisions offered in Rados's BAFO do not fit within the definition of a minor modification.

In responding to the protest, DNA acknowledged that, prior to award, the testing and certification requirements contained in section C.4 of the RFP were "dropped." More specifically, the agency states, "[the] [s]ource selection was made without regard to this request or offerors' compliance with it."

It is a fundamental rule of competitive procurement that all offerors be provided a common basis for submission of proposals. AT&T Communications, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247. Federal Acquisition Regulation (FAR) § 15.606(a) requires that: "when, either before or after receipt of proposals, the Government [materially alters] its requirements, the contracting officer shall issue a written amendment to the solicitation." Thus, if DNA believed the RFP did not reflect the agency's minimum needs or was otherwise defective, DNA was obligated to amend the RFP, particularly since DNA was prepared to make an award on the basis of revised needs. FAR § 15.606(c) (where an award to a selected offeror involves a departure from the RFP-stated requirements, the agency is required to issue an amendment to all offerors to provide them with an opportunity to propose on the basis of the revised requirements). However, even where an agency improperly relaxes its requirements by selecting a proposal that fails to comply with material solicitation requirements, our Office will not sustain a protest challenging that award absent evidence that the protester was prejudiced, for example, that the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. Labrador Airways Ltd., B-241608, Feb. 13, 1991, 91-1 CPD ¶ 167; AT&T Communications, supra. Here, although DNA clearly violated the FAR, the record does not show that Canberra was prejudiced thereby.

Specifically, despite the fact that the agency report explicitly alleged lack of prejudice, Canberra failed to provide any information to establish that it was materially prejudiced; Canberra has not even alleged that it would have altered its proposal or reduced its price had it known of the relaxed specification. While Canberra states it "assigned a PhD Nuclear Physicist . . . to this project to produce [its] certification document for over a week," Canberra has not provided any information showing its costs for this effort, and it is not apparent from the record why the costs involved in preparing the certifications would have accounted for the $60,000 price difference between Rados's and Canberra's proposals. Since Canberra

has not provided information establishing the likelihood that it was prejudiced by the agency's improper action, we cannot find on that record that the agency's actions affected the protester's competitive position in this procurement. See Labrador Airways Limited, supra.

Regarding the commercial item status of Rados's monitor, the determination of whether a product is a commercial item is largely within the discretion of the contracting agency, and will not be disturbed by our Office unless it is shown to be unreasonable. Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ ___; Komatsu Dresser Co., B-255274, Feb. 16, 1994, 94-1 CPD ¶ 119. The record here establishes that the RTM-950 is Rados's standard pedestrian monitor and has been regularly sold to laboratories, nuclear plants, and scrap metal dealers. Information furnished by Rados to DNA identifying, for example, commercial sales to power plants in Argentina, Germany, and Switzerland, confirms the commercial nature of the RTM-950. As to the software modification, nothing in the record indicates that the modification is other than a minor modification to the monitor's operating system. Specifically, the new software is a commercially available program (under the name UNIX) that merely replaces the software Rados previously used. DNA explains that Rados has not changed the basic operation of its monitor, but has changed the interface to make the monitor more "user-friendly." According to the agency, the software will modernize the way in which the results observed by the detector are reported to the user. Since this modification does not alter the function or the physical characteristics of the monitor, we find that the modified RTM-950 fits within the definition of a commercial product.[3]

Accordingly, the protest is denied. We are, however, by separate correspondence, bringing the violation of FAR § 15.606 to the attention of the Director of DNA for whatever action he deems appropriate to preclude a recurrence.

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[3]Canberra also complains that Rados is not a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. § 35-45 (1994), and that Rados is not a responsible offeror. Our Office does not consider protests against a contractor's Walsh-Healey legal status. Oliver Prods. Co., B-245762, Jan. 7, 1992, 92-1 CPD ¶ 33. Regarding Rados's responsibility, we do not review an agency's affirmative determination of responsibility absent a showing of possible bad faith by procurement officials or misapplication of definitive responsibility criteria; there is no indication of either in this case. See King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.