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

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Decision

Matter of: MadahCom, Inc.

File: B-298277

Date: August 7, 2006

Joel Singer, Esq., Sidley Austin LLP, for the protester.

Rod McCracken, Esq., and Amy Pereira, Esq., Army Corps of Engineers, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation requirements requiring compliance with specific radio frequency standard and minimum transmission range for equipment are unduly restrictive of competition where agency fails to provide reasonable basis for their inclusion in the solicitation.

DECISION

MadahCom, Inc. protests the terms of request for proposals (RFP) No. W912GB-06-R-0019, issued by the Army Corps of Engineers for provision and installation of mass notification systems (MNSes). The protester contends that various technical requirements of the RFP are unduly restrictive of competition because they are not reasonably related to the agency's needs for an MNS.

We sustain the protest.

BACKGROUND

An MNS is a system designed to transmit alert messages and related information to personnel in or near buildings during emergency situations. An MNS can be provided for a single building or for multiple buildings in, for example, a military base-wide system. Alert messages are triggered by an individual user authorized to use the MNS. In the case of a single-building MNS, the user triggers an alert message through the autonomous control unit (ACU) in the building. In the case of a base-wide MNS, the user triggers an alert message from the primary control center for the base, which in turns sends the alert message to the ACU in each building. Once an

ACU receives the alert message, it is sent to various devices, such as indoor and outdoor speakers and visual displays, that relay the alert to personnel.

The Department of Defense (DoD) requires that buildings provide “timely means to notify occupants of threats and instruct them what to do in response to those threats.” Unified Facilities Criteria (UFC) 4-010-01, DoD Minimum Antiterrorism Standards for Buildings, ¶ B-4.7. A separate UFC provides specific guidance for when an MNS is required in a DoD building, as well as design and operation requirements:

Beginning with the fiscal year 2004 construction program, mass notification is required in all new inhabited buildings, including new primary gathering buildings and new billeting. Mass notification is required in existing primary gathering buildings and existing billeting when implementing a project exceeding the replacement cost threshold specified in UFC 4-010-01. Mass notification is recommended in other existing inhabited buildings when implementing a project exceeding the replacement cost threshold. Mass notification is required for leased buildings, building additions, and expeditionary and temporary structures (see UFC 4-010-01).

UFC 4-021-01, Design and O&M: Mass Notification Systems, ¶ 1-6.1.

As discussed below, DoD has sought to procure MNSes for its bases in Europe under several different types and versions of solicitations. The current RFP seeks proposals to provide MNSes at U.S Army Europe (USAREUR) facilities in Germany. The RFP anticipates a fixed-price contract to install an MNS at Landstuhl; subject to availability of funds, the awardee may also be instructed to install MNSes at Camp Vilseck, Camp Grafenwoehr, and Kleber Kaserne. RFP at 3. Offerors are required to propose

all necessary personnel, materials, equipment, tools, supervision and other items and services to furnish, install, test and provide a custom emergency mass notification System (MNS), comprising of all hardware, software, controllers, speakers, wiring, and all other components of this system in a fully operational and operable condition inside of key installation buildings, administrative areas, and community areas to facilitate emergency notifications.

RFP, Specifications for Mass Notification System, at 4.

The USAREUR originally issued a solicitation for MNS requirements at 17 bases in Europe in December 2003. Contracting Officer’s Statement ¶ 1. The procurement of these requirements was subsequently assigned to the Corps in December 2004. Decl. of USAREUR Consequence Management Program Manager at 1. The Corps received the USAREUR’s statement of requirements (SOW) and issued a new

solicitation based on those requirements in July 2005. Contracting Officer's Statement ¶ 6. The RFP anticipated award of an indefinite-delivery/ indefinite-quantity (ID/IQ) contract, and included requirements that the MNS equipment be "Motorola, system ASTRO 25, repeater site trunking system or equal." Id. ¶ 8. MadahCom engaged in discussions with the Corps regarding various requirements, including the Motorola-based specifications and the ID/IQ contract type, arguing that they were unduly restrictive of competition. Id. ¶ 10. The Corps subsequently suspended the RFP "until further notice" on July 29, 2005. Id. ¶ 11.

In September 2005, the Corps sought to procure the MNS requirements through a competition for task orders open only to those firms that had earlier been awarded a multiple-award task order contract (MATOC) for construction of family housing. Id. ¶ 12. MadahCom, which did not have one of the MATOCs, filed a protest with our Office challenging the solicitation on grounds that the anticipated task orders exceeded the scope of the underlying contracts. MadahCom Protest, Sept. 20, 2005, at 2. During the course of the protest, the agency advised our Office that the task-order proposals submitted by the MATOC holders had expired, and that the agency would not seek to obtain new or extended proposals. The agency stated that it would instead reissue the July 2005 version of the RFP. Contracting Officer's Statement ¶ 14. The agency requested that our Office dismiss the protest based on the decision to take corrective action; we did so on February 3, 2006.

The agency reissued the July 2005 version of the RFP on February 3, 2006. On February 17, 2006, MadahCom filed a protest of this solicitation, arguing that numerous provisions were unduly restrictive of competition. MadahCom Protest, Feb. 17, 2006, at 2. The agency and protester's counsel engaged in discussions regarding the protest counts, and appeared to have reached an agreement regarding corrective action that would amend the solicitation. Protest, exh. 18, MadahCom Protest Withdrawal, Mar. 14, 2006. The agency then advised our Office that it intended to issue a revised solicitation, and MadahCom withdrew its protest. Id.

The agency issued a revised solicitation on March 30, 2006. Although many of the issues raised in MadahCom's prior protest had been resolved, the firm believed that the RFP still contained unduly restrictive provisions and submitted a series of questions to the agency. Contracting Officer's Statement ¶¶ 23-26. The agency addressed these questions in a solicitation amendment dated April 25, 2006. Following the issuance of the amendment, MadahCom filed the current protest on May 5, 2006, again alleging that several requirements of the solicitation were unduly restrictive of competition or ambiguous, and also alleging that the agency had failed to take adequate corrective action in response to its prior protest.

DISCUSSION

In preparing a solicitation, a contracting agency is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. § 305(a)(1)(A)(i),

(B)(i) (2000). A solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs or as authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a solicitation provision is challenged as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. ViON Corp., B-256363, June 15, 1994, 94-1 CPD ¶ 373 at 4-5. Our Office reviews the adequacy of the agency's justification by examining whether it is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3.

As discussed below, we believe the agency has not demonstrated that solicitation requirements for (1) compliance with the Association of Public-Safety Communications Officials International Project 25 (APCO 25) standard for radio transmissions, and (2) a 10-kilometer range for transmission and receiving stations are reasonably related to the agency's needs for an MNS.¹ We also believe that the protester's challenges to three solicitation provisions that the agency has now addressed through proposed corrective action in response to the protest are clearly meritorious and, therefore, warrant reimbursement of the protester's costs of pursuing the protest.

(1) APCO 25 STANDARD

The RFP requires that the wireless transmissions and equipment for offerors' proposed MNSes comply with the APCO 25 Statement of Requirements for land mobile radios (LMRs). An LMR is a handheld or vehicle-mounted non-tactical radio device operating within a specific frequency range that allows its user to communicate with another LMR user. Decl. of Agency Engineer, exh. 2, Army Supplement to DOD Policy for LMR Systems ¶ 3.a. As explained below, the RFP requires two field radios, a general category of radio which may include LMRs. RFP, Specifications for Mass Notification System, at 6.

APCO is an association of public safety organizations that publishes standards for communications technologies and advocates that governmental agencies adopt those standards. See APCO website, available at: <http://www.apcointl.org>. APCO 25 is a set of standards for digital radios for use by public safety agencies intended to

¹ The agency contends that it should be afforded additional deference here in our review of the manner in which it has solicited its needs, noting our decisions that have recognized that an agency may "define solicitation requirements to achieve not just reasonable results, but the highest level of reliability and effectiveness." Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 at 5. As discussed in the decision, however, the agency here has failed to provide any reasonable basis for its restrictive requirements, and did not demonstrate that the APCO 25 or 10-kilometer range requirements related to actual requirements, much less requirements pertaining to heightened levels of reliability and effectiveness.

enable them to procure and operate compatible LMRs. See Project 25 Statement of Requirements, available at: <http://www.apco911.org/frequency/documents/03-20-06-PublishFinalVersionofReformattedP25SoR.pdf>.

The RFP identified the following requirement for the MNS: “For the radio transmission of the alarm to the MNS in the buildings and any loudspeaker systems, a radio network shall be established with digital signal transmission according to APCO 25 standard.” RFP, Specifications for Mass Notification System, at 24; see also id. at 25-26. Although the APCO 25 standard applies specifically to LMRs, the agency explained that the APCO 25 standard for purposes of this solicitation applies to all wireless communications in the MNS, such as those from the base’s primary control center to each building’s ACU, and not just LMR transmissions:

GAO: Where is an APCO 25 compliant radio used in an MNS?

PROGRAM MANAGER: The entire system is APCO 25 compliant. . . . This is mostly dealing with the wireless communications portion of it so this would be getting the communications from the control station to the building itself. But when it’s transmitted in the building, it goes over a hard wire into speakers.

GAO: As a global requirement, under the solicitation, does every wireless transmission need to be APCO 25 compliant?

PROGRAM MANAGER: Yes.

Hearing Transcript (Tr.) at 19:14-20:4.

The protester contends that the APCO 25 requirement is unduly restrictive of competition because it is not required by UFC 4-021-01 and is not necessary to meet the agency’s general requirements for an MNS. The protester further contends that it is prejudiced by the requirement because its MNS does not comply with the APCO 25 standard, and MadahCom is thus effectively precluded from competing for the contract award. Protest at 15-16. The agency cites three primary rationales in support of the APCO 25 compliance requirement, which we discuss below.

(a) UFC 4-021-01 Requirements

The agency initially argued that APCO 25 compliance was required under DoD policy regarding MNSes: “UFC 4-021-01, which governs the solicitation, designates APCO 25 compliance for wireless MNS, as an advanced technology, which will increase functionality, reliability, and security.” Agency Memorandum of Law at 4. In its supplemental report, however, the agency conceded that the UFC did not require the APCO 25 standard. Supplemental Agency Memorandum of Law at 2.

During a telephone hearing conducted by our office, an agency engineer testified that she was the individual responsible for adding the APCO 25 compliance requirement to the RFP. Tr. at 25:3-8.² Despite the agency’s prior acknowledgment that UFC 4-021-01 does not require compliance with the APCO 25 standard, the agency engineer explained that APCO 25 compliance had been included in the solicitation because the standard was required under the UFC:

GAO: [D]o you know who introduced the APCO 25 standard? Was it the Army Corps or was it USAREUR? . . .

AGENCY ENGINEER: We set our specifications based on the UFC. In the appendix B, in specific, B 1, it actually speaks of the APCO 25 as being required.

Tr. at 24:3-13.

UFC 4-021-01, however, does not require use of the APCO 25 standard for an MNS. The only reference to APCO 25 in the UFC is found in a table of “Expected Near-term Mass Notification System Improvements,” at the section cited by the agency engineer in her testimony above:

Function	Current Capability	Expected Improvement
Wireless Communication	Many of the mass notification system radios available today are transmitting analog voice and frequency-shift keying (FSK) telemetry. Manufacturers have developed mechanisms for adding security that significantly reduces the chance of unauthorized commands being accepted. However, a person with a receiver tuned to the correct frequency can listen to the analog voice transmissions, and once voice communications are enabled, nearby unauthorized transmitters could be used to distort or override messages.	Adoption of the encrypted Association of Public Safety Communications Officials (APCO) Project 25 Protocol (when fully deployed and more broadly available) will further reduce the chances of unauthorized commands being accepted and will make interception of messages and commands very difficult.

² All of the agency engineer’s testimony herein has been translated from German. A translator participated in the hearing for the purpose of translating questions and responses for the engineer.

Protest, exh. 1, UFC 4-021-01, at B-1.

As shown above, the UFC provision cited by the agency engineer neither requires nor recommends APCO 25 compliance for an MNS. Rather, the UFC identifies APCO 25 as a possible future improvement.³ On this record, it is clear that UFC 4-021-01 does not require inclusion of the APCO 25 standard in a solicitation for an MNS. Further, we believe that the record shows that the agency engineer incorrectly believed that the APCO 25 standard was required by the UFC at the time she added this requirement to the RFP.

(b) Interoperability

The agency next contends that the APCO 25 standard requirement ensures that an MNS purchased by the agency under the contract will not commit the agency to proprietary technology for its MNS needs, and, therefore, the MNS procured under the solicitation will be interoperable with other MNSes and related communications systems. This argument, however, was first raised in the agency's memorandum of law, and was not supported by any statements by contracting officials or citations to written requirements or policy statements. See Agency Memorandum of Law at 3-4. During the hearing, we requested that the agency explain the basis for its position that APCO 25 compliance would achieve "interoperability." The agency program manager responded as follows:

The push for mass notification in facilities came in 2004 when it was mandated all new designs and buildings under current design were required to have mass notification. With that stated, USAREUR went forward with soliciting for a EUCOMM-wide mass notification contract. They could not get it to go forward and they turned it over to the Corps of Engineers in December 2004 for further action and then the research and everything ensued based on their requirements. The push was for USAREUR to get homogenous systems USAREUR-wide. Before then, individual facilities, even military components on those facilities were installing their own brand or type or favorite systems and many of them were not adherent to the UFC but we also know that the systems we are about to install or want to install will not be compatible with every system on all these facilities. It is future

³ The protester notes that several proposed revisions to UFC 4-021-01 delete any reference to APCO 25. Protester's Comments at 8-9. These versions, however, have not received final approval from DoD and thus only the version discussed above, dated December 2002, is current. See Supplemental Agency Memorandum of Law at 2-3. As relevant here, DoD has not issued a revision to this document that adopts APCO 25 as a required or recommended standard.

upgradable to when those systems are replaced that they will communicate with . . . each facilit[y's] central control station.

Tr. at 36:12-37:9.

During the hearing, we noted that the record to date had not addressed or supported the Corps's claim that its client, the USAREUR, had requested interoperability as a requirement for the MNS procurement or that the UFC requires the compatibility described by the agency. We requested that the Corps supplement the record in its post-hearing comments with documentation of any policies or guidance that supported the agency's position. Tr. at 37:10-38:4. In its response, the agency cited the USAREUR's initial MNS SOW that was provided to the agency when the Corps assumed responsibility for procuring the USAREUR's MNS needs. Decl. of Agency Engineer at 2. The USAREUR SOW provision cited by the agency, however, merely states that the MNS must "support expansion, be easily expandable, and modular." SOW for USAREUR MNS (Dec. 2, 2003), at 44. This SOW requirement does not clearly relate to the type of interoperability cited by the agency as its rationale for APCO 25 compliance, *i.e.*, ensuring compatibility with other systems and avoiding use of proprietary technology.

The agency has also not identified any requirements or policy statements that showed that APCO 25 had been adopted or will be adopted in the future for MNS requirements so as to provide for interoperability in the manner argued by the agency.⁴ Conversely, the agency has not demonstrated that use of non-APCO 25 standards for MNSes binds the agency to proprietary technology in a manner that would preclude the interoperability described by the agency. On this record, we believe that the agency's rationale regarding interoperability does not reasonably support the inclusion of the APCO 25 standard in the solicitation.

(c) Land Mobile Radios

The agency finally argues that because APCO 25 is a standard for land mobile radios (LMRs), requiring the entire MNS to comply with that standard will allow for potential benefits to be realized from the use of LMRs as part of an MNS. Supplemental Memorandum of Law at 3. In this regard, the agency suggests that, in the future, use of LMRs could allow individuals to trigger MNS alerts remotely, as

⁴ The agency also cites a February 2002 Army memorandum that states that Army LMRs are anticipated to achieve greater interoperability with other systems when the radios support the APCO 25 standard. Decl. of Agency Engineer, exh. 1, Army Plan for Narrowband Systems Operating in the Land Mobile Radio (LMR) Service, at 1. This memorandum, however, does not address MNS requirements and, as discussed below, the agency has not demonstrated that APCO 25 compliant LMRs are required for an MNS.

opposed to relying on a central command station to issue an alert. Id. The agency's argument regarding LMRs reverses somewhat the assumptions of its previous two rationales, namely, that the APCO 25 standard is a general requirement for an MNS. Here, by contrast, the agency's argument presupposes a need for an LMR that complies with APCO 25, and then asserts that the entire MNS, i.e., the wireless transmission equipment which relays alert messages throughout the system, must comply with APCO 25 in order to accommodate the LMRs.

The RFP, however, does not require an APCO 25 compliant LMR. During the hearing, the agency program manager acknowledged that the RFP does not require LMRs that comply with APCO 25, but rather requires only two "field radios" requested by the client: "Our solicitation doesn't require the use of [APCO 25 compliant LMRs] but we do have the offeror providing two field radios under our solicitation which is applicable to APCO 25 standards." Tr. at 18:2-5.

The agency further acknowledged that the future capability for remote triggering of alarms through the use of LMRs was not specifically requested by its client, the USAREUR, and is not required by the RFP. In fact, the agency does not know how the field radios will be used as part of the MNS; instead, individual base commands will determine such use:

GAO: . . . [W]hat would the present use of those two mobile radios be in the MNS?

AGENCY PROGRAM MANAGER: We don't have the specific answer to that other than these radios are to be turned over to the -- who is it? No, it's the installations communication officer. And the use of these others is per their discretion.

GAO: . . . [Y]ou don't have a specific use for these mobile radios anticipated?

AGENCY PROGRAM MANAGER: Negative. These systems are going to be turned over to the installation communications officers per installation. They are the ones responsible for the mass notification and emergency notification systems at each installation. Our task was to provide the base mass notification systems with the equipment that they requested and what they do with it and how they implement it is purely up to their coordination and SOPs.

Tr. 21:8-22:5

On this record, given that the RFP did not require the field radios to be APCO 25 compliant LMRs, and that the agency does not know how the requested field radios will be used by installations that receive an MNS under the contract, we believe that

the agency's rationale for requiring an APCO 25 compliant MNS lacks a reasonable basis.⁵

In sum, we agree with the protester that all three of the agency's rationales fail to establish that the APCO 25 standard is reasonably necessary to meet its needs for an MNS, and we sustain the protest because the requirement is unduly restrictive of competition.

(2) 10-Kilometer Range

The protester next contends that the RFP requirement for a 10-kilometer range for the required radio transmitting and receiving station is unduly restrictive of competition because it excludes an MNS that could achieve the required coverage with multiple stations, each of which may have a range of less than 10 kilometers. The RFP requirements for radio transmission ranges are as follows:

Basis station consisting of transmitting and receiving station for a function radius of at least 10 km, consisting of antenna and supply unit with all required switch and control elements, transmitting units such as a transmitter, receiver, etc., UPS and power supply should be furnished, installed and put into operation.

RFP, Specifications for Mass Notification System, at 30.

The protester argues that the MNS transmitting and receiving station range requirement should be stated in terms of coverage for the individual installations at which an MNS will be provided. The protester contends that the agency has not demonstrated why an overlapping system of smaller transmitting and receiving stations could not achieve the same functionality as a single station with a 10-kilometer range. MadahCom argues, for example, that the station used in its own MNS provides a 5-kilometer range, but that multiple stations with overlapping ranges can be configured to achieve whatever coverage is required for an MNS at each installation. Tr. at 104:22-105:7.

The agency first argued that a 10-kilometer range "allows future integration of other sites or buildings into the base-wide MNS," and "keeps the system flexible and allows future integration of other buildings." Supplemental Agency Memorandum of Law at 5. The protester responded that its proposed MNS could achieve such coverage, if

⁵ Additionally, the agency acknowledged during the hearing that a non-APCO 25 compliant radio could allow authorized users to remotely trigger MNS alerts. Tr. 62:25-64:4. That is, there is nothing in the APCO 25 standard that makes it uniquely suitable for remote triggering of alerts, nor is there any barrier to a non-APCO 25 compliant radios doing the same.

the single-station 10-kilometer range were abandoned in favor of a more general requirement to provide coverage for the installation.

During the hearing, the agency argued that the protester's suggestion that system of multiple, overlapping stations could provide the same benefits as a single station with a 10-kilometer range was not a feasible solution, due to technical and regulatory barriers. The agency was unable, however, to fully articulate its rationale for its position during the hearing in response to questions from our Office. See Tr. at 100:1-108:8. We requested that the agency clarify its position in its post-hearing comments. See Tr. at 109:20-110:20. In its comments, however, the agency did not address its argument that technical difficulties would result from overlapping signal ranges, but instead the agency engineer provided a new justification for the 10-kilometer range that pertained to the use of the field radios:⁶

[I]f there are to be field radios that can connect to the network, a large radius gives them a great benefit. The larger radius allows the field radios to have a connection to the system from a larger area, including off-base. If an emergency occurs and someone in charge such as the provost marshal is not on base at the time, that person can still utilize the MNS directly from where he is off-base. I had to choose a distance for this, and ten kilometers is a good range. The greater the range beyond ten kilometers, the greater the cost to the Government, so I needed to balance utility with cost. Ten kilometers seemed a very cost effective range that would leave all bidders on equal footing.

Decl. of Agency Engineer at 2.

The agency engineer's statement therefore explains that the 10-kilometer range was selected as a compromise between a larger and smaller potential range. We agree with the protester that the agency's rationale does not reasonably explain why other technical solutions that could also achieve a 10-kilometer range, or could otherwise provide coverage for the actual size of an installation, fail to meet the agency's needs. In this regard, the agency has not demonstrated that alternatives, such as those raised by the protester, could not meet the agency's needs.

On this record, we believe that the agency has not demonstrated that a single transmission and receiving station with a 10-kilometer range is necessary to meet the agency's needs, and sustain the protest on this ground.

⁶ The agency engineer also noted in her declaration that the 10-kilometer range was included "for several reasons, some of which are no longer relevant." Decl. of Agency Engineer at 1.

(3) Corrective Action Regarding Other Issues

In addition to the two requirements discussed above, the protester also challenged three other solicitation provisions as unduly restrictive of competition or ambiguous: restrictions on the frequency ranges allowed for radio transmissions, requirements to provide optical radios and a wireless local area network (WLAN), and a requirement for “remote amplifiers.” During the hearing, the agency stated that it would take corrective action to address these three issues, and the agency issued a proposed amendment to the solicitation in its comments on the hearing. Based on the agency’s statement that it would take corrective action with regard to these three issues, we consider them to have been rendered academic. Since it is not our practice to consider academic questions, the protest is dismissed with regard to these three issues. Dyna-Air Eng’g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

Although we consider the merits of these issues academic, the protester has also requested that we recommend that it be reimbursed its protest costs regarding the issues. As a general rule, we recommend reimbursement of a protester’s costs incurred with respect to all issues pursued, not merely those upon which it prevails. Honeywell Tech. Solutions, Inc.-Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 3-4. In appropriate cases we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to an issue on which the protester did not prevail and which is so clearly severable as to essentially constitute a separate protest. Id. Here, although the agency agreed to take corrective action, it does not concede that any of the provisions were unduly restrictive of competition or ambiguous and thus argues, in effect, that we should treat these issues as severable for purposes of determining whether the protester should be reimbursed its protest costs.

We need not determine whether these three issues are severable from the issues as to which we sustain the protest, discussed above, because we believe that the protester’s challenges to the three issues here are clearly meritorious and would each have provided an independent basis to sustain the protest, had the agency not taken corrective action. In this regard, our Bid Protest Regulations provide that, where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(e) (2006). Our Office will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest, that is, where a reasonable agency inquiry into the protester’s allegations would reveal facts showing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. As discussed below, we believe that

the protester's allegations clearly identified flaws or ambiguities in the solicitation, and the agency failed to take prompt corrective action.⁷

(a) Frequency range

The protester first argued that the RFP prohibited the use of certain radio frequencies that MadahCom intends to use in its MNS, namely those in the 2.4 GHz range. The RFP explained the radio frequencies restrictions as follows:

2. An infrastructure shall be set up which enables wireless networking between the central control stations in the Emergency Operations Center (EOC) of the individual buildings, the outdoor loudspeaker system and the central control stations (EOC Office, MP stations or Fire Department). The radio network shall be operated preferably with the approved radio frequency authorized in the host nation and facility. If the frequency band is not available for the respected facility another charge-free frequency shall be used. Only frequencies shall be used that are released by the respective frequency coordinator and provided free-of-charge by the national regulatory authority.

3. If in exceptional cases no usable frequency is available, frequencies in the 2.4 GHz range and in the 5 GHz range may be used, these ranges are released for general use IAW [in accordance with] international standards. This would correspond to the wireless LAN standard IAW 802.11.

RFP, Specifications for Mass Notification System, at 14-15.

⁷ The protester also argues that it should be reimbursed its costs associated with its February 17, 2006 protest. MadahCom advised our Office on March 14, 2006 that it was withdrawing that protest based on an agreement with the agency regarding corrective action. The agency subsequently issued an amendment to the solicitation on March 30, 2006. We do not believe that this time frame represents an undue delay in implementing corrective action that warrants the reimbursement of protest costs. Additionally, the current protest does not clearly relate back to issues raised in the February 17 protest. With regard to the current protest of the APCO 25 standard, the prior protest challenged the Motorola-based specifications and trunking requirements. The protester now contends that the agency's deletion of the Motorola and trunking specifications, while retaining the APCO 25 requirement, resulted in incomplete and non-meaningful corrective action because APCO 25 is synonymous with the other two specifications. The protester, however, did not specifically challenge the APCO 25 requirement in its February 17 protest, nor did it argue that the Motorola-or-equal and trunking requirements were synonymous with the APCO 25 standard. Under these circumstances, we do not recommend that the protester be reimbursed the costs of its February 17 protest.

The protester argues that the plain language of the solicitation must be interpreted to state that: (1) the radio network shall operate with a host-nation-approved frequency, (2) if that frequency is not available, another charge-free frequency shall be used, and (3) if in “exceptional cases” no usable frequency is available, then a 2.4 or 5 GHz frequency may be used. Under this interpretation, a 2.5 or 5 GHz frequency may not be used unless other frequencies are unavailable.

The agency argues that the protester misreads the RFP, and that offerors are allowed to use the 2.5 or 5 GHz frequencies. The agency also states that, even if the RFP “was not worded as well as it should have been,” the agency did not intend to limit use of these frequencies to only “exceptional cases” where other frequencies are not available. Supplemental Agency Memorandum of Law at 4. During the hearing, the agency stated that it would revise the solicitation to better reflect the agency’s understanding of the frequency requirements. The agency’s proposed amendment to the RFP clarifies the provision, as follows:

2. An infrastructure shall be set up which enables wireless networking between the central control stations in the Emergency Operations Center (EOC) of the individual buildings, the outdoor loudspeaker system and the central control stations (EOC Office, MP stations or Fire Department). The radio network shall be operated with an approved radio frequency authorized in the host nation and city. If the frequency band is not available for the respected facility another charge-free frequency shall be used. Only frequencies shall be used that are free-of-charge.

3. Frequencies in the 2.4 GHz range and in the 5 GHz range may be used, these ranges are released for general use IAW international standards. This would correspond to the wireless LAN standard IAW 802.11.

Agency Hearing Comments, exh. 8, Proposed Amended Specifications for Mass Notification System (emphasis added to denote changes).

We agree with the protester that the plain language of the RFP was, at best, ambiguous to the extent that a reasonable offer could conclude that the RFP did not permit use of the 2.4 GHz range except in “extraordinary circumstances.” See C. Lawrence Constr. Co., Inc., B-290709, Sept. 20, 2002, 2002 CPD ¶ 165. Additionally, the agency’s explanations prior to the protest and prior to the hearing did not clearly resolve this issue. On this record, we believe that the protester’s challenge to this requirement was clearly meritorious.

(b) Optical Radio and Wireless Local Area Network

The protester next argued that the RFP did not contain adequate information regarding two types of equipment, an optical radio and a wireless local area network (WLAN). See RFP, Specifications for Mass Notification System, at 33-34. The protester contended that while the RFP provided detailed requirements for each type of equipment, it failed to explain how each was intended to be used or incorporated into an MNS during contract performance.

In response to questions posed by MadahCom prior to the protest, the agency generally restated the definition for an optical radio and WLAN, but did not explain how they were to be used in an MNS. See RFP amend. 1, at 5-6. In its report on the protest, the agency argued that the requirements were clearly stated in the RFP and responses to questions in Amendment 1 to the RFP. Memorandum of Law at 6-7. In its supplemental report on the protest, however, the agency for the first time clarified that “W-LAN, optical radio . . . are not specifically listed as necessary items. . . . They do not need to be used; the contractor is to decide what items are needed at each location.” Supplemental Agency Memorandum of Law at 5. During the hearing, the agency affirmed that the optical radio and WLAN were optional elements that could be proposed by offerors. Tr. at 111:7-112:3.

The agency’s proposed amendment to the RFP clarifies the requirements regarding the optical radio and WLAN, as follows: “When required by the contractor’s scope and in accordance with MNS requirements listed in previous sections, the specifications for specific items in this section will be complied with.” Agency Hearing Comments, exh. 8, Proposed Amended Specifications for Mass Notification System. Thus, the requirements now clearly state that offerors must provide an optical radio or WLAN that complies with the specifications only in the event that the offeror’s proposed MNS relies on such equipment.

We agree with the protester that the RFP was unclear prior to the agency’s corrective action as to whether offerors were required to propose these two types of equipment. For example, the description of the WLAN stated that “[t]he system shall be set up as [a] point-to-point and point-to-multipoint system.” RFP, Specifications for Mass Notification System, at 32. The responses by the agency in Amendment 1 to the RFP were similarly unclear in that they referred to the RFP requirements but did not also explain the agency’s subsequent position that the two types of equipment were not required, but rather were optional approaches. We therefore agree with the protester that a reasonable offeror could conclude that the RFP did not clearly explain how these types of equipment would be used under the requirements. See C. Lawrence Constr., supra. Additionally, the agency’s explanations prior to the hearing did not clearly resolve this issue. On this record, we believe that the protester’s challenge to these requirements was clearly meritorious.

(c) Remote Amplifiers

The protester finally argued that the solicitation's requirement that offerors provide "remote amplifiers" for speakers that broadcast MNS messages was unduly restrictive of competition, and not justified as compared to other types of equipment, such as internal amplifiers, which MadahCom uses in its MNS. Protest at 23. The RFP stated that offerors were required to "provide remote amplifiers, as required, for the MNS." RFP, Specifications for Mass Notification System, at 9. MadahCom submitted the following questions to the agency following the issuance of the revised RFP on March 30, 2006, which the agency addressed in amendment 1 to the RFP on April 25, 2006:

Question: What is the purpose of the "Remote Amplifiers?"

Answer: See Specifications bullet 3 of Section 1.9 for the purpose of Remote Amplifiers.

Question: Would a system be acceptable if it can provide the necessary coverage throughout the covered areas and do so with intelligible sound but without needing "Remote Amplifiers."

Answer: No. A remote amplifier is requested.

RFP amend. 1, at 4.

In its agency report, the Corps stated that the RFP reasonably explained that offerors must propose "an amplifier that must operate away from the main unit." Memorandum of Law at 8. During the hearing, however, the agency engineer responsible for drafting the MNS specifications clarified that the term "remote" had been used as the result of a mistranslation from German to English, and that the intended term was a "backup" amplifier. See Tr. at 84:22-85:22. In its proposed amendment to the solicitation, the agency deletes the requirement for "remote" amplifiers, and clarifies that offerors are required to provide independent amplifiers that are "redundant." Agency's Hearing Comments, exh. 8, Proposed Amended Specifications for Mass Notification System. We thus believe that the protester's challenge to this requirement was clearly meritorious.

In sum, because the clarification of these three issues was first made during the hearing, after the filing of the protest, the production of the agency report and supplemental agency report, two rounds of comments by the protester, and discussion of the merits of the issues during the hearing, we believe that the agency did not take prompt corrective action. We conclude that the challenges raised to these three solicitation provisions were clearly meritorious and we recommend that the protester be reimbursed its reasonable protest costs for all three of the issues discussed above.

RECOMMENDATION

We recommend that the agency amend the solicitation to delete the APCO 25 compliance requirements and the 10-kilometer range requirement. We further recommend that the agency reimburse the protester the reasonable costs of pursuing its protest regarding the APCO 25 and 10-kilometer range issues, and the three areas for which the agency has taken corrective action discussed above. The protester's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel