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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Optical Systems Technology, Inc.

File: B-292743.2

Date: November 12, 2004

Paul F. Maxin for the protester.
Catherine E. Pollack, Esq., for Litton Electro-Optical Systems, an intervenor.
Angela J. Cosentino, Esq., Department of the Navy, 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

1. Protest that agency improperly failed to conduct testing to assess accuracy of awardee's clip-on night vision devices prior to contract award is denied where solicitation did not require such testing.

2. Where request for proposals required fixed prices and delivery in accordance with a specified schedule, and protester included a pricing contingency in its proposal and did not offer to deliver in accordance with the required schedule, agency reasonably declined to consider the proposal further.

DECISION

Optical Systems Technology, Inc. (OSTI) protests the rejection of its proposal and the award of a contract for clip-on night vision devices to Litton Electro-Optical Systems under request for proposals (RFP) No. N00164-02-R-0014, issued by the Department of the Navy for miniature day/night sight development for the special operations peculiar modifications system.

We deny the protest.

The special operations peculiar modifications (SOPMOD) system is designed and intended to provide special operations force (SOF) members, who operate in a wide range of extreme conditions, with the ability to reconfigure their weapons for various mission scenarios rapidly and reliably. The goal of the miniature day/night sight (MDNS) development effort is to improve on the sighting capabilities of the current SOPMOD system through the development of new items or the adaptation of

nondevelopmental/commercial off-the-shelf items, with improvement to be measured using the currently fielded systems, where they exist, as baselines. Among the items sought under the RFP is a Clip-on Night Vision Device (CNVD).[1] The solicitation reported that the CNVD is "not currently baselined," but noted:

> A current CNVD-type system is beginning acquisition and fielding under Solicitation Number N00164-02-R-8512 (24 May 02), however this system is optimized for sniper rifle (vice M4A1 Carbine) applications. If available during the [operational testing (OT)/developmental testing (DT)] phase of this acquisition, it may be used as a baseline for comparison.

RFP, amend. 5, § 3.3.1.3. The protester notes that it is the manufacturer of the "CNVD-type system" being procured under the above-referenced solicitation.

The solicitation specified both minimum or threshold (T) requirements and desired or objective (O) requirements for the CNVD and other MDNS subsystems; in addition, it specified Key Performance Parameters (KPP) and Additional Performance Parameters (APP) pertaining to the subsystems. The solicitation described KPPs as "must-pass testing events" and provided that "[a]ny offering failing the (T) value of any of the KPPs [would] be removed from further testing and [would] not be considered for contract award." Id. § 3.1.2. The solicitation described APPs as "tradable parameters . . . used to measure effectiveness and performance," and provided that "[f]ailure to meet either (T) or (O) requirement values specified in an APP [did] not remove a submission from further testing or from consideration for contract award." Id. § 3.1.3.[2]

With regard to the CNVD, the RFP set forth KPP (T) requirements pertaining to interfaces, waterproofing, power supplies, interoperability, and weight. Id. at 7-8, 15. The RFP also identified a number of APPs applicable to the CNVD, some of which applied to other MDNS subsystems as well (e.g., improved operational test results, increased portability, improved corrosion resistance and ease of cleaning, improved endurance, improved reliability, and improved safety features), and some of which applied to the CNVD only. Id. at 8-11, 15-16. APPs applying to the CNVD only concerned size; compatibility with other optical sights; performance capability in

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[1] The solicitation also seeks improved versions of the enhanced combat optical scope, miniature night vision sight, backup iron sight, rail interface system, visible bright light, carbine visible laser, and infrared pointing, illuminating, and aiming laser.

[2] The RFP further clarified at § 3.1.4 that "KPP (O) values and APP (T) and (O) values are the equivalent of research and development goals."

identifying, recognizing, and detecting targets;[3] and the incorporation of a mechanism to predict remaining usable life.

The solicitation contemplated the award of one or more indefinite-delivery/ indefinite-quantity, fixed-price contracts for developmental test prototypes, operational test prototypes, limited user test items, and production quantities for the CNVD and each of the seven other subsystems. Award was to be made to the offerors whose proposals were determined most advantageous to the government, price and other factors considered.

The solicitation provided for a three-phase evaluation process: Phase 1 was to result in the selection of the proposal(s) that would move on to phase 2; phase 2 was to consist of developmental testing; and phase 3 was to consist of operational testing, followed by final source selection. Phase 1, step 1 was to consist of a preliminary review of proposals to determine whether go/no go criteria (i.e., KPP thresholds) had been satisfied; phase 1, step 2, to be conducted after an oral presentation/ demonstration by each offeror, was to consist of an evaluation of proposals on the basis of the following factors and subfactors: (1) technical/user assessment (go/no go criteria (i.e., KPP thresholds); APPs and KPP objectives; suitability/effectiveness; and (2) contracting and management (past performance, schedule, subcontracting, price). RFP, addend. 3, at 1-2.[4] The RFP provided that at phase 1, step 2, compliance with KPP thresholds (other than weight) was to be determined by analysis of the technical proposals and product sample review, while at phase 2, compliance with KPP thresholds was to be determined via prototype testing. Id. at 5.

Proposals were due by May 7, 2003. RFP, amend. 5. Five different contractors submitted a total of nine different proposals for the CNVD. Oral presentations/demonstrations were conducted on June 5, 2003. Over the course of the next year, the agency conducted discussions and requested final proposal revisions, which were due on June 15, 2004. On August 3, the agency awarded two

[3] Desired performance capability for CNVDs using image intensification technology was defined as follows:

CAPABILITY	STARLIGHT	¼ MOON
IDENTIFICATION	80 m (T)/150 m (O)	150 m (T)/200 m (O)
RECOGNITION	120 m (T)/200 m (O)	200 m (T)/250 m (O)
DETECTION	165 m (T)/300 m (O)	250 m (T)/325 m (O)

Id. at 15-16.

[4] Because OSTI's protest concerns the agency's phase 1 evaluation, this decision does not include detail regarding the phase 2 and phase 3 evaluation factors.

contracts, one to Litton Electro-Optical Systems and one to Insight Technology, Inc. The product offered by Litton uses image intensification technology, which is the same technology used by OSTI's product, while the product offered by Insight uses the different technology of thermal imagery.[5]

By letter dated August 5, the Navy notified OSTI that its offer had not resulted in an award because its proposal was not considered to be the best value to the government. The letter explained that the evaluated price of OSTI's proposal was substantially higher than the evaluated price of the contract awarded for image intensified CNVDs; that the proposal contained a pricing contingency that precluded award of a fixed-price contract as contemplated by the solicitation; and that the protester's proposed delivery schedule did not meet the solicitation's required delivery schedule. After requesting and receiving a debriefing that essentially reiterated the above information, OSTI protested its non-selection and the award to Litton to our Office.[6]

OSTI argues that the Navy improperly failed to conduct testing to assess the accuracy of Litton's units prior to awarding it a contract. The protester maintains that the agency evaluators could not reasonably have determined Litton's proposal to be of greater value than its own without first establishing that the Litton units were as accurate as its own baseline system. The protester further argues that its pricing contingency and deviation from the required delivery schedule were the product of its understanding that the Navy was seeking an improved CNVD, and that it would have offered a lesser quality system without the pricing contingency and delivery schedule deviation if it had been apprised that the Navy was willing to consider systems that were not an improvement over the baseline CNVD.

In support of its first argument, OSTI contends that § 3.1 of the solicitation sets forth a "fundamental accuracy" requirement for the CNVD by requiring that "all MDNS subsystems (of which CNVD is one) must allow the operator to better and more accurately fire on enemy targets." Protest at 6. OSTI argues that the operator will be able "to better and more accurately fire" on enemy targets only if the CNVD introduces no inaccuracy into the existing aiming system; thus, the protester contends, a "strict literal interpretation" of the requirement for more accurate firing is that the CNVD be perfectly accurate. Protest at 6. According to the protester, a perfectly accurate CNVD is one that is designed and manufactured in a manner that

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[5] The RFP recognized both image intensification and thermal imagery as existing night vision technologies, noting that image intensification was used primarily to identify targets and was the most likely technology to be used by the SOF operator to aim and shoot at night, whereas thermal imagery was normally used both day and night for detection of targets at long ranges.

[6] OSTI did not protest the award to Insight Technology.

precludes the shifting of internal components "[b]ecause movements of critical components within the CNVD on the order of 0.0001 inches can cause a noticeable aiming error." Id. at 5. OSTI further argues that, when read together, § 1.2 of the RFP, which provides that improvement in sighting capabilities will be measured using the currently fielded systems as baselines, and § 3.3.1.3, which provides that "[i]f available during the OT/DT phase of this acquisition, [the CNVD-type system acquired under solicitation No. N00164-02-R-8512] may be used as a baseline for comparison," impose a requirement that "the performance of the CNVD, including accuracy, must necessarily be at least as good as the baseline [unit acquired under solicitation No. N00164-02-R-8512]." Id.

We do not think that § 3.1, which provides as follows, can reasonably be read as defining an accuracy requirement for the CNVD:

> Product Definition and Configuration: MDNS Development includes the development of new items or the adaptation of NDI/COTS items to provide miniaturized day and night small arms sighting capabilities to SOF operators. MDNS sub-systems, when mounted on the M4A1 Carbine (and possibly other SOF small arms) will allow SOF operators to better and more rapidly acquire, identify, and accurately fire on enemy targets in combat at ranges from 2 to 800 meters. A secondary mission of these MDNS subsystems is to provide better target observation, illumination, and marking. Most of the developments and improvements described below are based on current aiming devices in the SOF and SOPMOD inventories.

The paragraph is a general introduction that summarizes the purpose and goals of the MDNS development effort. The mandatory features of the CNVD are set forth in subsequent sections of the RFP as KPP threshold requirements, and none of these KPP (T) requirements pertains to accuracy. To the extent that the protester believes that the RFP should have included such requirements, it should have objected to the solicitation's terms prior to the time set for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2004).[7]

[7] We also find it noteworthy that the protester essentially concedes that its CNVD does not meet the perfect accuracy standard that it claims the solicitation requires. In this regard, OSTI asserts that it designed its CNVD to meet the accuracy standard established in its prior contract, i.e., "less [than] 1 MOA [Minute of Angle] error at STP [Standard Pressure and Temperature]"; the protester also asserts, however, that "[a]n error of 1 MOA corresponds to a miss distance of approximately nine (9) inches at 800 meters, a substantial error when operating against human targets." Protest at 6.

Regarding OSTI's argument that §§ 1.2 and 3.3.1.3 of the RFP, when read together, impose a requirement that "the performance of the CNVD, including accuracy, must necessarily be at least as good as the baseline [unit acquired under solicitation No. N00164-02-R-8512]," § 3.3.1.3 explicitly provided that the CNVD was "not currently baselined." While the section did go on to provide that acquisition and fielding of a "CNVD-type system" optimized for the sniper rifle was underway and might be used as a baseline "if available under the OT/DT phase of the acquisition," it is clear from the foregoing language that even if the agency ultimately determined to use the protester's system as a baseline for measuring improvement, it would not do so until phases 2 and 3 of the evaluation. Accordingly, § 3.3.1.3 does not support the protester's argument that the solicitation required the agency to use its product as a baseline for comparison during phase 1 of the evaluation.

We turn then to the protester's argument that it included a pricing contingency in its proposal and deviated from the required delivery schedule based on its understanding that the Navy was seeking an improved CNVD, and that it would have offered a lesser quality system without the pricing contingency and delivery schedule deviation if it had been apprised that the Navy was willing to consider systems that were not an improvement over its "baseline" CNVD.[8] While the protester contends that "[i]n order to exceed the performance of the Baseline unit, OSTI was required to incorporate an expensive high-performance image intensifier into its device whose cost and delivery could not be guaranteed by the manufacturer," the solicitation did not require the protester to incorporate the particular tube in question into its product. The protester elected to do so itself. Moreover, even assuming for the sake of argument that the RFP had required this particular tube and that the supplier of the tube would not guarantee its price, this did not require the protester to pass any risk of a price increase on to the government. Solicitations frequently require offerors to bear pricing risks, and the bottom line is that where an RFP requires fixed prices and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. Georgetown University--Recon., B-249365.3, June 7, 1993, 93-1 CPD ¶ 434 at 5. Similarly, award generally cannot be made on the basis of a proposal that takes exception to a required delivery schedule. American Fuel Cell & Coated Fabrics Co., B-293020, Jan. 12, 2004, 2004 CPD ¶ 13 at 5.

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[8] The specific wording of the pricing contingency was as follows:

> All pricing for [offered] units is contingent upon the availability of, and pricing for, image intensifier tube manufactured by a third party vendor . . . . To the extent that [the third party vendor] increases its pricing beyond that contained in this quotation, OSTI reserves the right to increase its [offered] price on a matching dollar for dollar basis without further mark-up.

Attachment 2 to Protester's Revised Proposal.

In conclusion, we think that the agency acted consistently with the terms of the solicitation in selecting Litton's proposal, and in not selecting OSTI's proposal, for award.

The protest is denied.

Anthony H. Gamboa
General Counsel