



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Marquette Electronics, Inc.

File: B-262016.2; B-262016.3

Date: February 15, 1996

Jonathan O. Levine, Esq., and Mitchell W. Quick, Esq., Michael, Best & Friedrich, for the protester.

William Weisberg, Esq., and William T. Welch, Esq., Barton, Mountain & Tolle, for Hewlett-Packard Company, an intervenor.

Nicholas P. Retson, Esq., and Michael J. O'Farrell, Jr., Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the awardee's proposal does not meet the solicitation's technical requirements is denied where agency found that awardee's proposal evidenced compliance with the specifications and the protester has not shown that agency's conclusion was unreasonable.

DECISION

Marquette Electronics, Inc. protests the Department of the Army's award of a contract to Hewlett-Packard Company (HP) under request for proposals (RFP) No. DADA15-94-R-0068, which was issued by the Walter Reed Army Medical Center for a patient monitoring and clinical information system with turnkey installation. Marquette alleges that the source selection was flawed by various improprieties and argues that these improprieties, taken together, demonstrate bad faith on the agency's part.

We deny the protest.

The RFP, issued in December 1994, contemplated the award of a firm, fixed-price contract for delivery and installation of equipment, with six 1-year options for systems maintenance. The equipment included a patient monitoring system, which consists basically of monitors that obtain physiological data such as heart rate, blood pressure, etc. from the patient, and a clinical information system (CIS), which is a computer-based system for the storage, retrieval, display, and archiving of patient data. The CIS would include more than 500 user display terminals and data acquisition from more than 249 patient monitoring devices, covering every significant clinical unit in the medical center. The RFP specified that all

requirements must be met with off-the-shelf, commercially available equipment that was in current production at the time proposals were submitted. The RFP cautioned that any equipment that had to be developed to meet the requirements of the specification would be considered unacceptable.

The RFP contained more than 100 pages of detailed specifications and required offerors to respond to each one. Offerors were advised to follow the proposal format provided in the RFP and to show how they intended to comply with the technical specifications. As initially issued, the RFP listed the following evaluation factors, in descending order of importance: technical, price, management, and support, and stated that award would be made to the acceptable offeror whose evaluated price might not be the lowest, but whose offer was determined sufficiently more advantageous than the lowest priced offeror so as to justify payment of an additional amount. In addition, the RFP stated that a successful pre-award demonstration must be accomplished before an offeror could be considered technically acceptable.

The agency received four initial proposals, including two separate proposals from Marquette. After evaluating the proposals, the agency conducted written discussions with the three firms, and instructed offerors to submit revised proposals. When the technical evaluation panel (TEP) evaluated the revised proposals, it determined that neither of Marquette's proposals was technically acceptable, and the contracting officer excluded them from the competitive range. Marquette protested the rejection of its proposals, and the contracting officer agreed to settle the protest by admitting the protester to the competition.

The agency amended the RFP to change the basis of award to "low-priced, technically acceptable offeror" and deleted a number of technical specifications as well as the requirement for a pre-award operational capability demonstration. Offerors were instructed to submit best and final offers (BAFO) based on the amended RFP. BAFOs were evaluated, and HP's offer was determined to be the only proposal that met all of the government's specifications. In addition, HP offered the lowest price. Accordingly, HP was selected for award. This protest followed.

Marquette first protests the amendments changing the basis of award, deleting certain specifications, and deleting the requirement for an operational demonstration, arguing essentially that the timing of these changes--and the fact that the deleted specifications were ones that HP apparently could not meet--demonstrate bad faith on the agency's part. We dismiss these portions of the protest as untimely filed, since they are based on alleged improprieties in the solicitation, as amended, but were not filed before the due date for submission of BAFOs. Alleged improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation must be protested not later than the

next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1995). See Perkin-Elmer Corp., B-250869, Dec. 10, 1992, 92-2 CPD ¶ 404. Marquette's post-award protest of these matters is therefore untimely and will not be considered.

Marquette protests that the Army's determination that HP's proposal complied with all minimum technical requirements, including the requirement that only commercially available products be offered, was unreasonable and arbitrary. The protester lists 19 examples of CIS specifications that it alleges HP cannot meet.

As one example, Marquette cites a particular specification labeled "Terminal emulation/CHCS interface," and alleges that HP's offer is noncompliant because "HP has no CHCS interface at any [Department of Defense] site. Additionally, they have no CHCS terminal emulation." However, Marquette's suggestion that the specification requires a current interface is a mischaracterization. The specification at issue states in pertinent part that

"Each workstation on the network shall be capable of serving as a common terminal to the Composite HealthCare System (CHCS) The contractor will negotiate with the CHCS vendor to acquire the CHCS to CIS interface." (Emphasis supplied.)

Since the specification only requires that the workstations be capable of performing in a particular capacity and that the contractor negotiate with the CHCS vendor to acquire the interface between the systems, there was no requirement to have the interface either at the time of opening or at time of award; the wording of the specification makes it clear that the interface can be arranged later. For the specification at issue here, HP stated unequivocally that its approach met the requirement, and identified the equipment being offered and described the type of emulation that equipment would support.

Marquette's only response to the discussion of this issue in the agency report is to argue that "[t]his is a major requirement of the contract which HP cannot and will not be able to comply with." Marquette characterizes the contracting officer's acceptance of HP's commitment to comply after award as an attempt "to rationalize this problem away," and protests that this demonstrates the agency's failure to apply evaluation criteria equally to competing proposals. Marquette notes that in contrast to its acceptance of HP's promise to negotiate the required interface, the agency found Marquette's proposal noncompliant when it stated that it would comply with certain specifications by the development of a particular piece of software or equipment after award.

We find no evidence of unequal treatment in the record. First, Marquette's response to the particular specification at issue here was that its subcontractor "will work

with the CHCS vendor to establish the appropriate interfaces"--in other words, giving the same type of assurance of future compliance as HP's proposal. The record shows that both firms' proposals were considered compliant for this specification, since the specification required no more than a commitment to establish the interface at a later time.

Marquette's proposal was considered noncompliant in areas where current compliance was required. For each of the examples Marquette cites, Marquette conceded the noncompliance during discussions, but asserted that the noncompliance would be corrected by software that was scheduled for release at a later time. For example, the agency was concerned with the apparent inability of the protester's neonatal monitoring systems to recognize and score apneas (*i.e.*, temporary instances of suspension of breathing) in neonates. Marquette listed equipment in its proposal that could "detect, alarm, and store information in memory for apnea events," with no mention of the equipment's ability to meet the requirement for scoring these events. When this was cited as a technical concern during discussions, Marquette's written response identified a software release that would include apnea "trending (scoring)", and stated that it would be available in the first quarter of 1996. In light of the RFP's express requirement that no developmental items be offered, we think the agency's refusal to accept this offer of future compliance (promising software that was not currently in production) is consistent with the terms of the RFP and does not demonstrate unequal treatment in the evaluation.

None of Marquette's other allegations concerning HP's technical proposal provide any basis for concluding that the agency improperly found the awardee's product acceptable. For example, while Marquette alleges that HP's CIS does not meet a requirement for an overview screen to be configurable to allow multiple real-time waveforms via split screen, HP's proposal states that it meets this requirement and identifies the component that is being offered. Another protested specification involves user system security levels; Marquette alleges that HP's CIS was not certified in a particular way; however, the record shows that the RFP did not require such certification, and that HP's equipment and approach satisfied the security requirements. As another example, Marquette cites an interfacing requirement under which the CIS was to conform to industry standard protocols. The record shows that one of the listed standards has not been fully defined; HP acknowledged this, noted that it would be impossible to assert full compliance with an undefined standard, and stated that it plans to comply when the standard has been defined.

In a negotiated procurement, the procuring agency has primary responsibility for evaluating technical information supplied by an offeror and determining the acceptability of the offeror's proposal, and our Office will not disturb the agency's finding of technical acceptability unless it is shown to be unreasonable. Alpha

Technical Servs., Inc., B-250878; B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104. In reviewing an agency's evaluation, we will not reevaluate proposals but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Simms Indus., Inc., B-252827.2, Oct. 4, 1993, 93-2 CPD ¶ 206.

We find nothing unreasonable here. The contracting officer's statement, the TEP's pre-award Memorandum for Record and review of the technical comments in Marquette's protest, and HP's submissions as an interested party all support the technical acceptability of HP's proposal. Although all of these documents--as well as HP's proposal--were provided to Marquette's counsel under a protective order, Marquette did not respond to this information in any specific way, other than to assert in a conclusory statement that it had "identified nineteen (19) different specifications which it continues to believe--based on the documents disclosed under protective order (Vol. II)--HP cannot comply with." In short, Marquette has provided nothing to rebut the evaluation record or cause us to question the reasonableness of the evaluation and determination of technical acceptability.

There remain several allegations that Marquette raised in its protest, but did not address in its comments in any way: that the contracting officer failed to make a determination that the awarded price satisfied the solicitation's requirement for balanced pricing; that the agency failed to enforce a requirement for promoting small business and small disadvantaged business subcontracting; and that HP could not execute one of the certifications required by the solicitation. The agency responded to these issues in its agency report, but Marquette, in its comments filed on that report, did not rebut the agency's position on these matters. Therefore, we view these issues as abandoned. See Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

Finally, there remains the general allegation that the protest issues, taken together, evince a pattern of bad faith on the agency's part, culminating in the HP award. However, a finding of bad faith requires evidence that contracting officials intended to injure the protester. See Oliver Prods. Co., B-245762.2, *supra*. While the protester has speculated as to the contracting officer's motivation--for example, alleging that his determination of HP's responsibility was motivated by price alone--Marquette has not provided any evidence to support its allegation with specific evidence of wrongdoing. In view of our finding that the agency reasonably determined HP's proposal to be technically acceptable, this allegation provides no basis for overturning the award to HP.

The protest is denied.

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