



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Spar Applied Systems--Declaration of Entitlement

File: B-276030.2

Date: September 12, 1997

Rodney A. Grandon, Esq., Patton Boggs, for the requestor.

Michael S. Roys, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that costs of filing and pursuing protest be reimbursed is denied, even though the agency decides to take corrective action in response to the protest, where protest that the terms of a solicitation were ambiguous was not clearly meritorious.

DECISION

Spar Applied Systems requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the terms of request for proposals (RFP) No. N65236-97-0301, issued by the Department of the Navy for a Scaled Integrated Voice Communications System (SIVCS).

We deny the request.

The RFP provided for the award of a contract for the design, fabrication, installation support, and test of a SIVCS. The SIVCS will be installed on Navy aircraft carriers and used as a prototype for the next generation of Navy integrated interior voice, video, and data communication systems. The RFP informed offerors that the statement of work (SOW) and an "attached specification . . . form the definition of the Navy's intent to procure a hardware set that addresses and improves the ever-growing problem of voice communication and information flow within and from a U.S. Navy attack carrier." The RFP added that the purpose of the SOW

is to articulate a statement of the problem the Navy is attempting to address and to define a set of parameters which define key operational needs. The attached specification has been constructed to represent one possible approach that may satisfy those needs. Within this context the Navy expects that offerors will propose alternative technological and business approaches that respond to the perception

of the Navy's needs with imagination and innovation. Multiple proposals from individual vendors are encouraged.

The RFP included the "attached specification" not as an attachment, but as a 31-page section of the SOW.

On December 12, the agency issued amendment No. 0001 to the RFP, which deleted the specification from the SOW and added it to the RFP as Exhibit A with the following notation:

This specification is not a mandatory specification for this procurement. It is included for information only, as an example of one possible way to solve the problem. Portions of this specification are referred to by the [SOW].

On January 17, 1997, the agency issued amendment No. 0003 to the RFP, which, among other things, "recognized that different vendors may propose very different designs based on differing architectures, interface details, etc.," and established a "strawman" system "in order to provide a common basis for price comparison." Specifically, amendment No. 0003 requested that "[f]or purposes of price comparison only, offerors shall submit an itemized estimate for a total of three complete systems," and provided list of components that each system was to consist of. On January 20, the agency issued amendment No. 0004 to the RFP, which modified one aspect of the RFP's "strawman system," and one aspect of the evaluation scheme.

Spar filed its protest against the terms of the RFP with our Office on January 23, 1 day prior to the January 24 closing date for receipt of initial proposals. In its protest Spar asserted:

The fundamental problem with this procurement is that the Navy has created an internally inconsistent set of "rules" which offerors are to follow in responding to the RFP. Many provisions of the RFP indicate that the technical requirement is intended to be a performance/functional specification under which offerors have wide latitude to develop solutions. Other portions of the RFP convey the opposite message, that is, that there are specific design-type features which, if not included in the offeror's proposed solution, will result in the Navy determining that the technical solution is unacceptable.

Spar provided examples of provisions in the RFP which, in its view, supported a "flexible technical approach," and others which it asserted were "mandatory design-type requirements." For example, Spar pointed out that the RFP provided that "[t]he Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most

advantageous to the Government, price and other factors considered," and complained that this provision "requires that proposals conform to the entire solicitation, without permitting exceptions for imaginative or innovative solutions that may vary from mandatory requirements scattered throughout the RFP." Spar concluded that, in its view, the "fundamental ambiguity in the RFP lies in the relationship between the Exhibit A specification, the SOW, and the evaluation methodology."

The agency explained in its report on Spar's protest that it

[had] endeavored to provide offerors with wide latitude as to how they construct their solution to the communication needs/issues raised in the SOW. However, at the same time the government set forth certain, limited, minimum parameters . . . which must be met by the proposed system(s) in order for it to operate with current communication equipment on board any naval ship. A system incapable of dealing with current communication equipment is simply not a viable option.

The agency asserted that Spar's argument that the solicitation was ambiguous was "premised on a selective look at the solicitation [and] taking material out of context." The agency asserted that the RFP, as amended and read as a whole, was simply not susceptible to two or more reasonable interpretations, and thus was not ambiguous. The agency pointed to numerous sections, statements, and provisions in the RFP which it argued clearly established the relationship between the Exhibit A specification, the SOW, and the evaluation methodology. For example, the agency pointed out that section 3.1 of the specification provided that the specification was "only one of the many possible architectural and conceptual approaches to the task," and the RFP specifically stated that section 4 of the specification was "provided as guidance only, to indicate test procedures which may be necessary to conclusively demonstrate compliance with performance requirements." The agency did note that in preparing its report it had determined that two subsections of the RFP "may raise some confusion about pricing," and that it would therefore issue an amendment to delete the two referenced subsections from the RFP.

Spar maintained in its comments on the report that it was confused as to the relationship between those sections of the RFP which, as stated in the solicitation and explained by the agency in its report, appeared to set forth "minimum parameters which must be met by the proposed system(s)" and other assertedly conflicting statements, most notably that the Exhibit A specification was for "information only, as an example of one possible way to solve the problem."

After Spar filed its comments on the agency report with our Office, the agency issued a draft amendment to the solicitation which deleted two of the RFP's

subsections concerning pricing. This draft amendment also addressed a number of other sections of the RFP, and the agency invited all firms which had submitted proposals in response to the solicitation, including Spar, to submit comments on the draft amendment. These comments were received, and the final version of the amendment was issued on April 15 as amendment No. 0005.

Our Office requested and received Spar's comments on the draft and final versions of the amendment. Consistent with our earlier representations to the parties, our Office, on April 18, issued a "Confirmation of Hearing/Conference." This notice informed the parties that a "hearing/conference" would be conducted at GAO on April 21 in connection with Spar's protest. Although the hearing/conference was convened in GAO's hearing room, and a video transcript of the proceedings was prepared, the parties and the GAO hearing official agreed that the matter would initially proceed using alternative dispute resolution (ADR) techniques, with the proceedings reverting to a formal hearing should the attempt at ADR fail. Because the parties were able to resolve the protest to their mutual satisfaction through the use of ADR techniques, with the agency agreeing to amend the RFP to address the protester's concerns, a formal hearing was not convened and Spar's protest was dismissed by our Office as academic on April 22.

Spar requests that we recommend that it be reimbursed the reasonable cost of filing and pursuing its protest, including reasonable attorneys' fees.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (1994). 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) (1997). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5; LB&M Assocs., Inc.--Entitlement to Costs, B-256053.4, Oct. 12, 1994, 94-2 CPD ¶ 135 at 4. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. A protest is "clearly meritorious" when a reasonable agency inquiry into the protester's allegations would show facts

disclosing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3; Tuscon Mobilephone, Inc.--Request for Entitlement, 73 Comp. Gen. 71, 73 (1994), 94-1 CPD ¶ 12 at 4. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Network Software Assocs., Inc.--Entitlement to Costs, B-250030.4, Jan. 15, 1993, 93-1 CPD ¶ 46 at 3.

Here, we find that Spar's protest does not provide a basis for recommending that it be reimbursed for the costs of filing and pursuing its protest. Spar advances one interpretation of the solicitation--that it did not "clearly differentiate between the mandatory elements the offerors had to satisfy in their proposal and the permissive or desirable elements the Navy preferred," and was thus ambiguous. The agency advances another--that the solicitation, read as a whole, provided offerors with wide latitude as to how to construct their respective solutions to the communication needs/issues raised in the SOW, while clearly setting forth certain limited, minimum parameters that the proposed systems must meet in order for the systems to operate with the Navy's current communication equipment.

Which party's position was correct was not readily apparent, and reaching a conclusion in that regard would have required substantial further analysis, as indicated, in part, by our Office's scheduling of a hearing/conference to complete and clarify the protest record.¹ As such, determining the propriety of the contested RFP provisions was, in our view, and contrary to the respective positions of the agency and protester, a close question. Spar's protest was therefore not clearly meritorious and does not warrant a recommendation that Spar be reimbursed the costs of filing and pursuing its protest.

The request that we recommend the reimbursement of costs is denied.

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¹As indicated previously, a formal hearing was not held as the parties were able to resolve the protest to their mutual satisfaction through the use of ADR techniques.