



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Diverstech Co.

File: B-270840

Date: May 1, 1996

Barry Sugarman for the protester.

Maria Ventresca, Esq., Defense Logistics Agency, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation instructed offerors to submit a product demonstration model (PDM), which would represent a significant portion of the technical evaluation, and warned that agency would not evaluate a proposal that did not include a PDM, record supports the agency's determination that allowing protester to submit a PDM after the date set for receipt of initial proposals would be tantamount to the acceptance of a late proposal.
2. Protester's contention that agency should have accepted its proposal despite fact that it did not include a production demonstration model (PDM) as required by solicitation--on ground that agency allegedly had within its possession a PDM of model offered by protester, submitted by a different company in connection with a different procurement 2 years before--is without merit where solicitation clearly specified that proposals were to include PDMs and protester did not timely raise objection to that requirement.

DECISION

Diverstech Co. protests the rejection of its proposal submitted under request for proposals (RFP) No. SPO200-96-R-8006, issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC), for surgical tourniquets. Diverstech contends that it should not have been required to submit a product demonstration model (PDM) with its proposal as required by the solicitation because the agency already had a model of the product being offered by the protester from a solicitation issued 2 years previously.

We deny the protest.

On October 10, 1995, the agency issued the RFP for award of a firm, fixed-price contract to the offeror whose proposal represented the best value to the government, considering price and technical factors. Technical factors included, in descending order of importance, product assessment, the PDM, the offeror's quality assurance program, and corporate/past experience.

Instructions for the preparation of proposals advised offerors of the need and manner for submitting a PDM for evaluation and specifically advised offerors that failure to submit the PDM would result in removal of a proposal from further consideration. The solicitation further advised offerors that the agency intended to examine the PDM to verify that it met specifications and to assess the merits of overall product quality, workmanship, and aesthetics. There was no provision for waiving the PDM requirement based on prior submissions, earlier product evaluations, or prior purchases of or experience with the model being offered. The solicitation also incorporated the provisions of Federal Acquisition Regulation § 52.215-10, concerning the late submission of proposals.

Diverstech submitted a proposal on November 8, offering the Instrumed 90-700. The protester did not provide a PDM but attached a cover letter to the proposal, stating its belief that the agency already had a PDM for evaluation, as well as actual experience with the Instrumed product. By letter dated December 11, the agency advised the protester that it would no longer consider Diverstech's proposal because of the failure to submit a PDM in accordance with the solicitation. This protest followed.

Diverstech contends that the failure to submit a PDM with its proposal should be waived as a minor informality or irregularity. In addition, the protester argues that since it submitted its proposal before the initial due date, the agency should have called Diverstech to request submission of a PDM. Diverstech also argues that the agency should have waived the requirement that Diverstech submit a PDM with its proposal since the agency had a sample of the Instrumed 90-7000 from a prior solicitation.

Where a proposal omits material necessary for the evaluation, rejection is proper where the initial offer is so deficient that, in essence, no meaningful proposal was submitted, and to allow the omission to be cured after the time set for receipt of initial proposals would be inconsistent with the clause governing late proposals. Panasonic Communications & Sys. Co., B-239917, Oct. 10, 1990, 90-2 CPD ¶ 279. Here, evaluation of the PDM represented a significant portion of the technical evaluation, and the solicitation expressly warned offerors that the agency would not consider a proposal that did not include a PDM. Accordingly, rather than a minor informality or irregularity, as Diverstech asserts, the failure to submit a PDM with its proposal was a material omission, and acceptance of a PDM from Diverstech at this point would be tantamount to allowing the submission of a late proposal.

See RMS Indus., B-245539, Dec. 9, 1991, 91-2 CPD ¶ 528 (and cases cited therein). Further, the agency was under no obligation to review the proposal prior to the due date and advise Diverstech of its failure to comply with the explicit instructions for preparing proposals, since it is the responsibility of the offeror to submit an adequately written and complete technical proposal.¹ Cubic Field Servs., Inc., B-252526, June 2, 1993, 93-1 CPD ¶ 419.

Diverstech also argues that the agency already was in possession of a PDM of the model it was offering under the RFP, and thus that it was improper for the agency to reject its proposal for failing to include a PDM. Specifically, Diverstech asserts that in 1993 Instrumed provided the agency a PDM of the model Diverstech was offering under the current RFP; according to Diverstech, the PDM was furnished in support of a proposal submitted by USTC (a company for which Diverstech's president previously worked). The agency contends that it does not have the PDM to which Diverstech refers.²

We need not resolve the factual dispute between the parties since whether the agency was in possession of the PDM to which Diverstech refers is irrelevant to deciding the issue in this protest. By arguing that the agency should not have rejected its proposal for lack of a PDM because the agency was in possession of a PDM submitted by a different company in a prior competition, Diverstech in essence is arguing that the agency should have waived the requirement that Diverstech's proposal include a PDM. As noted above, the requirement that a PDM be submitted with the proposal was stated in the RFP, and there was no provision in the RFP for waiver of that requirement. Accordingly, the RFP clearly conveyed the agency's decision that it was necessary to have the PDM submitted with the

¹In the course of the protest, it developed that the agency had issued an amendment, which Diverstech did not receive, extending the due date for submission of proposals. In the absence of any argument or evidence that a longer period for submission of proposals would have allowed it to submit the PDM omitted from its actual proposal, there is no basis to conclude that Diverstech was competitively prejudiced by its failure to receive the amendment. In any event, there is no allegation or evidence that the agency deliberately attempted to exclude Diverstech from the competition, or otherwise violated applicable regulations governing the distribution of amendments. See Hospitality Inn--Downtown, B-248750.3, Oct. 28, 1992, 92-2 CPD ¶ 291. In fact, the agency points out that Diverstech itself never requested a copy of the solicitation and instead received a copy sent to another firm, United States Trading Corporation (USTC).

²Specifically, the agency contends that it returned the PDM to USTC; in response, Diverstech furnished a sworn statement from USTC's foreman denying any knowledge of the agency's having returned the PDM.

proposal, and there was no basis for any offeror, including Diverstech, to assume that a PDM submitted previously would be considered in the evaluation here. If Diverstech believed that the RFP should have provided for waiver of the requirement under the circumstances here, it should have raised the issue prior to submitting its proposal, rather than waiting until the agency rejected its proposal a month later. See section 21.2(a)(1), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(1)) (protests based upon alleged improprieties in a solicitation must be filed prior to time set for receipt of initial proposals).

The protest is denied.

Comptroller General
of the United States