Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: RGII Technologies, Inc.--Reconsideration and Protest

File: B-278352.2; B-278352.3

Date: April 14, 1998

James K. Kearney, Esq., and Theodore W. Atkinson, Esq., Reed Smith Shaw & McClay, for the protester.
Edward V. Gregorowicz, Jr., Esq., and Frederick P. Hink, Esq., for For Your Information, Inc., an intervenor.
Kimberly A. Kegowicz, Esq., U.S. Coast Guard, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of a decision sustaining a protest of an award based on a technically unacceptable best and final offer (BAFO) and recommending award based on the only apparent technically acceptable BAFO is denied where the BAFO in question did not satisfy the stated key personnel qualification requirements, the agency had conducted discussions, on this issue, and the resulting BAFO remained unacceptable.

2. Agency may waive as a minor informality an offeror's failure to comply with a solicitation requirement for the submission of one original set and seven copies of oral presentation slides by the deadline for submission of initial proposals, where an offeror submitted seven copies of the set of slides by the deadline and the set of original slides submitted after the deadline duplicated the content of the copies previously submitted.

DECISION

RGII Technologies, Inc. requests reconsideration of our decision, For Your Information, Inc., B-278352, Dec. 15, 1997, 97-2 CPD ¶ 164, sustaining a protest by For Your Information, Inc. (FYI) of an award to RGII under request for proposals (RFP) No. DTCG23-97-R-HRM001, issued by the U.S. Coast Guard for information technology support services. RGII also protests the agency's decision, in response to our recommendation in For Your Information, Inc., supra, at 5, to terminate RGII's contract and to make award to FYI.

We deny the request for reconsideration and the protest.

The RFP contemplated the award of an indefinite-delivery, indefinite-quantity contract. Sections M.2 and M.3 of the RFP stated that award would be based on the proposal offering the greatest value to the government, as determined by an evaluation of the stated criteria for Phase I (mini-proposal and past performance survey) and the evaluation factors listed for Phase II (oral presentation slides, personnel data forms (PDF), and cost). There were 28 subfactors to be evaluated under the oral presentation factor.

Section I.12 and paragraph 4.2.1 of section L.9 of the RFP listed 10 labor categories, all designated as key personnel positions, and required offerors to submit PDFs for a stated percentage of the personnel proposed for each labor category. Pursuant to section L.8 of the RFP, the PDFs were to include the qualifications and history of education and employment for an offeror's proposed personnel. Section C.1.4 of the RFP stated the minimum qualifications for personnel proposed for each labor category. Section M.4 of the RFP stated:

> The quality and quantity of all proposed personnel must meet the stated minimum qualification in Section C.

Section H.9(a) of the RFP stated:

> The contractor agrees to assign to the contract those persons whose [PDFs] were submitted with the proposal.

After the Phase I evaluation was completed, the Coast Guard received Phase II initial proposals from five offerors, including RGII and FYI, by the August 4 due date. All of the offerors proposed personnel in their PDFs who failed to meet the RFP's minimum personnel qualifications. The agency conducted discussions on this issue and on cost, and requested best and final offers (BAFO). All five offerors submitted BAFOs.

Although all BAFOs were rated as "green/satisfactory" overall, only FYI's proposed personnel met all of the minimum qualifications; the BAFOs submitted by RGII and the other offerors proposed personnel who did not meet the minimum personnel qualifications. Even though the technical evaluation team initially recommended award to FYI or a third offeror, the source selection official ultimately noted that all proposals were rated green/satisfactory overall, and awarded the contract to RGII, the lowest-priced offeror.

FYI protested that award to our Office on a number of bases, including that RGII's proposal was technically unacceptable. We sustained that protest because RGII's proposal was technically unacceptable for failing to satisfy the minimum personnel qualifications. Since after discussions on personnel qualifications, all of the BAFOs, except FYI's, continued to have deficiencies in this respect, FYI's BAFO appeared to be the only technically acceptable offer. We thus recommended terminating the

contract to RGII and awarding the contract to FYI, if, after reviewing FYI's BAFO, the agency determined that FYI's proposal was indeed technically acceptable.

On December 24, RGII requested reconsideration of that decision. On January 9, 1998, after determining that FYI's proposal was acceptable, the Coast Guard determined to terminate the contract to RGII and to award the contract to FYI. RGII requested and received a debriefing, and then timely protested to our Office.[1]

REQUEST FOR RECONSIDERATION

RGII alleges that our decision was erroneously decided because (1) the deficiencies in the qualifications of its proposed personnel were correctable; (2) the agency had the discretion to permit such correction through substitution of personnel after award; (3) the personnel deficiencies did not render its proposal unacceptable because the PDFs were not considered part of the proposal and these deficiencies were only evaluated weaknesses; (4) our decision improperly imposed a de novo evaluation in place of the agency's evaluation; and/or (5) our recommendation should have required the agency to reopen discussions.

In order to obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains either errors of fact or law, or present information not previously considered which warrants reversal or modification of the decision. Eagle Transfer, Inc.--Recon., B-235348.2, Oct. 17, 1989, 89-2 CPD ¶ 360 at 2; 4 C.F.R. § 21.14(a) (1997). Repetition of arguments made during consideration of the original protest or mere disagreement with our decision does not meet this standard. Eagle Transfer, Inc.--Recon., supra. Here, RGII has provided no basis to modify or reverse our prior decision.

RGII does not dispute that a proposal which fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. See National Med. Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500, 502 (1990), 90-1 CPD ¶ 530 at 3. Instead, RGII contends that the requirement that offerors propose personnel on the PDFs that meet the minimum qualifications stated in the RFP is not a material term or condition.

As noted, section M.4 of the RFP expressly required that all proposed personnel meet the stated minimum personnel qualifications. Contrary to RGII's contention, this requirement was a material term and condition of the RFP because it affected

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[1]After FYI filed its prior protest, the agency authorized performance of the contract by RGII as being in the best interest of the government. The agency then determined that it would delay the termination of the contract to RGII and the award to FYI, pending the resolution of RGII's request for reconsideration and protest.

both the quality and price of contract performance; RGII has not produced any evidence to the contrary. Nor does RGII allege that its proposed personnel met the stated personnel qualification requirements.

RGII's allegation that the requirements are not material because the PDFs either were not "part of the proposal" or did not carry much relative weight under the stated evaluation scheme, misses the point. RGII proposed personnel who did not meet the RFP's qualification requirements, as was required by section M.4 of the RFP. Since RGII's proposed personnel failed to meet these material requirements, its BAFO was unacceptable and could not form the basis for an award, regardless of where the PDFs were located within RGII's submission or how little weight PDFs carried under the RFP's evaluation scheme.

Moreover, as discussed in our prior decision, the provisions in the contract relating to substitution of personnel are predicated upon the agency's approval of acceptable personnel named in the proposal, not upon allowing an offeror to provide acceptable personnel after award to replace unacceptable personnel named in a proposal. In any case, the fact that there is provision in the contract that allows for substitution of personnel after award does not render proper an agency award predicated upon the acceptance of a proposal premised on unacceptable personnel. As indicated in our prior decision, this acceptance constituted an agency waiver of the personnel qualification requirements for RGII, which resulted in an unfair and unequal evaluation. See Martin Marietta Corp., 69 Comp. Gen. 214, 219 (1990), 90-1 CPD ¶ 132 at 7.

Furthermore, contrary to RGII's allegations, our decision did not simply reject the agency's evaluation and selection decision to impose an award decision of our own. Instead, we reviewed the agency's evaluation and selection decision for reasonableness and consistency with the stated evaluation scheme, which is the proper standard for our Office's review of such protests. See Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. The record showed that the agency, in both its evaluation and the selection decision, acknowledged that RGII's proposal did not satisfy the qualification requirements, and the record further showed that this evaluation was reasonable and undisputed. Yet the RFP expressly stated that proposed personnel "must meet the stated minimum qualification" requirements. As stated, we found it unreasonable and inconsistent with the terms of the RFP for the agency to conclude that it could make an award based on a technically unacceptable proposal and require correction of the deficiencies after award. Thus, we did not impose our own evaluation of proposals or selection decision, but merely identified that the agency's evaluation showed that four of the five BAFOs submitted were unacceptable and that an award could be made only based on an acceptable proposal.

Lastly, RGII's request for reconsideration alleges that our recommended remedy was improper because it did not instruct the agency to reopen discussions and provide

RGII with an opportunity to correct its deficiencies. However, the agency had already conducted discussions with RGII and all other offerors on the deficiencies with their proposed personnel and provided them with an opportunity to revise their proposals.[2] The agency had no obligation to advise these offerors that such deficiencies remained in their BAFOs or to provide an additional opportunity for proposal revision. Hughes Training, Inc., B-256426.4, Jan. 26, 1995, 95-1 CPD ¶ 154 at 8. Since the agency was not required to conduct discussions with offerors whose BAFOs were technically unacceptable, our recommendation appropriately focused on consideration of the only apparently acceptable BAFO.[3] See Essex Corp., B-246536.3, June 25, 1992, 92-2 CPD ¶ 170 at 9-10, recon. denied, Wackenhut Servs., Inc.--Recon., B-246536.4, Aug. 31, 1992, 92-2 CPD ¶ 137 at 4-6.

In sum, RGII's request for reconsideration does not establish the existence of errors of fact or law in, nor present new information that warrants reversal or modification of, our prior decision.

PROTEST

RGII's protest of the agency's decision to terminate RGII's contract and award to FYI alleges: (1) FYI must be disqualified from competing under this RFP because its submission of the original oral presentation slides after the initial proposal due date constituted an unacceptable late proposal; (2) FYI's proposal is technically unacceptable because it fails to meet material RFP requirements; (3) the agency's use of a color/adjectival rating scale constituted an unstated evaluation criterion; and (4) the agency did not conduct meaningful discussions with RGII.[4]

With regard to the submission of FYI's original slides, the instructions for submitting proposals at RFP section L.9, paragraph 4.3.2, stated that an offeror was

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[2]While RGII asserts that the agency did not specifically advise offerors during discussions of the consequences of a failure to propose personnel who met the qualification requirements, there was no need for it to do so, given that the RFP clearly required proposals to meet the minimum personnel qualification requirements stated in the RFP.

[3]Nevertheless, our decision did not prohibit the agency from reopening discussions if it determined such action was appropriate.

[4]RGII initially alleged that selection of FYI's BAFO for award was not in accord with the stated greatest value selection scheme. In its report responsive to the protest, the agency fully justified the decision to make award to the only offeror which submitted an acceptable proposal, FYI. Since the protester did not rebut the agency's position in its comments, we consider RGII to have abandoned this basis of protest. Akal Sec., Inc., B-261996, Nov. 16, 1995, 96-1 CPD ¶ 33 at 5 n.5.

to submit its original oral presentation slides (i.e., overhead projection transparencies) and seven copies with its offer. Paragraph 4.2.2 of section L.9 stated:

> In order to ensure the integrity of the source selection process, the offeror must use the overhead slides submitted to the Government with its offer when making its Oral Presentation, without any alteration. The technical evaluation team may review the copies of the slides prior to the presentation. The offeror may submit no other written documentation for its Oral Presentation. When evaluating the offeror's Oral Presentation, the Government will consider only those overhead slides that were actually projected and addressed by the offeror during its presentation. . . . The Government will process overhead slides and copies that are received after the deadline for the submission of offers in accordance with [Federal Acquisition Regulation (FAR) §] 52.215-10. If the slides and copies are late and are not accepted for consideration on the basis of FAR [§] 52.215-10 then the Government will consider the offeror to be ineligible for award and will not permit that offeror to make an Oral Presentation.

FYI's proposal submitted prior to the August 4 deadline included seven copies of its set of oral presentation slides, but did not include the original set of slides. On August 5, FYI submitted the original set of slides, as well as a table of contents not previously submitted with the seven copies. One other offeror submitted the copies of its slides before the deadline and the original slides after the deadline.

The agency initially informed these two offerors that their proposals would be rejected as late proposals under FAR § 52.215-10 (June 1997). However, after FYI asserted that the submission of its slides after the due date constituted a minor informality that could be waived, and that its proposal could not be considered late, the agency reversed its decision and permitted both of these offerors to continue participation in the procurement.

RGII alleges that FYI's proposal was late because FYI's submission prior to the due date must be considered only a partial proposal without the original slides. It asserts that, since the RFP stated that the agency will process slides and copies that are received after the due date in accordance with FAR § 52.215-10, FYI's late submission of its original slides required disqualification of FYI's proposal from the competition.

Offerors are responsible for submitting offers, and any modifications to them, so as to reach the government office designated in the solicitation on time. FAR § 15.412(b) (June 1997). Proposals, and modifications to them, that are received in the designated government office after the exact time specified are "late," and shall be considered only if received before award and the circumstances meet the

specific requirements of the provision at FAR § 52.215-10.[5] FAR § 15.412(c). This rule regarding late proposals also applies to proposals which are received in part prior to the deadline, but where material portions of the proposal are not received until after the deadline. See Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 4 (proposal was late and not acceptable where the technical proposal was received on time but the price proposal was late); Radar Devices, Inc., B-249118, Oct. 27, 1992, 92-2 CPD ¶ 287 at 3 (proposal sent by fax was late where, even though delivery began before the deadline, the majority of the proposal was not received prior to the deadline).

However, even where not all of the information which a solicitation requires is submitted prior to the deadline, the proposal may not be considered late if the information received by the deadline is sufficient to constitute a complete proposal, such that the offeror submitting the proposal did not obtain an unfair competitive advantage. See Abt Assocs. Inc., 66 Comp. Gen. 460, 462-63 (1987), 87-1 CPD ¶ 513 at 2-3 (where a solicitation required the submission of multiple copies of a proposal, the submission of fewer copies by the deadline was not a late proposal because, even absent the copies, the content of the proposal was complete); see also Wetlands Research Assocs., Inc., 71 Comp. Gen. 289, 292 n.7 (1992), 92-1 CPD ¶ 251 at 5 n.7 (timely submitted proposal which omitted a required photograph and drawing was not late where the proposal otherwise demonstrated the offeror's corresponding technical ability). Under such circumstances, the failure to submit all requested information is a waivable informality or irregularity. Abt Assocs. Inc., supra, 87-1 CPD ¶ 513 at 3.

We believe that FYI's submission on August 4 constituted a sufficiently complete proposal because, though missing the original set of slides, it contained seven sets of copies of those slides. Any one set of these copies included all of the information which was to be evaluated under the corresponding oral presentation criterion. Thus, none of the content of FYI's offer was missing from its submission on August 4. Since there is no question that FYI's August 4 submission was received by the agency prior to the deadline, the proposal is not a late proposal and is not subject to rejection as late. Id.

We also find that FYI's original set of slides was properly accepted by the agency, though received after the due date. The RFP's instruction that the provision at FAR § 52.215-10 would be applied to the submission of the slides was a condition which

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[5]The circumstances that permit acceptance of a proposal or modification received after the due date generally concern a submission that is timely sent, but received late due either to delays in specified mail services or to mishandling by the government, or one that is submitted late and is the only proposal received. FAR § 52.215-10. None of the exceptions stated in FAR § 52.215-10 for accepting a late proposal apply here.

the RFP imposed on offerors in addition to the late proposal rule applicable by regulation to the submission of the entire proposal. Such conditions may be imposed on offerors to the extent the conditions reflect actual and reasonable needs of the agency; however, bids and proposals that deviate from such solicitation conditions need not be rejected in every case, particularly where the deviation is a matter of form and not substance. Abt Assocs., Inc., supra, 87-1 CPD ¶ 513 at 2.[6]

The agency states that the purpose of the condition that offerors submit all slides with their proposals was to allow the evaluators to review the content of an oral presentation prior to the presentation, and to prevent revision of an offeror's oral presentation subsequent to the initial proposal due date. A total deviation from this submission condition, e.g., an offeror's failure to submit at least one complete set of slides, would mean that the content of the oral presentation could not be reviewed prior to the presentation and the agency could not determine whether any revisions to that content were made after the proposal due date. However, where seven sets of an offeror's slides are submitted by the due date, as here, the purpose of the condition is satisfied. We thus believe that an offeror's failure to submit one additional set of slides (whether the original or a copy) by the proposal due date is a deviation that is a matter of form, which may be waived.

While FYI's original slides submitted after the submission due date included a table of contents (i.e., 6 slides out of a total of 138), this deviation was also one of form rather than substance. The table of contents did not identify any new information; it merely stated the title of each slide and the corresponding slide number; otherwise, the original slides were identical to the copies. Moreover, FYI did not use the table of contents in its oral presentation and, consistent with the instructions at RFP section L.9, the agency did not consider the table of contents in its evaluation because it was not used in the oral presentation.

Although RGII alleges that it was unfairly prejudiced by the waiver of the condition for submitting all slides, it has not produced any evidence of such prejudice, except to argue that, by not disqualifying FYI, the agency prevented RGII from receiving the award. However, unfair competitive prejudice from a waiver or relaxation of the terms and conditions of the RFP for one offeror exists only where the protester would have been able to alter its proposal to its competitive advantage, were it given a similar opportunity. See Container Prods. Corp., B-255883, Apr. 13, 1994, 94-1 CPD ¶ 255 at 4. Since the waiver here resulted only in the acceptance of a duplicate of the information previously submitted, and thus the contents of the

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[6]RGII alleges that Abt Assocs., Inc. is not applicable to this RFP condition because that decision predates the provision at FAR § 52.215-10. This allegation is incorrect. FAR § 52.215-10 (1985), which has not changed in any material way in regard to the issues here, was specifically cited in Abt Assocs., Inc., supra, at 2.

timely submission could not change, the waiver resulted in no competitive prejudice.

RGII next alleges that FYI's proposal is technically unacceptable because it did not satisfy five material requirements of the solicitation. These alleged material requirements relate to 5 of the 28 total subfactors of the oral presentation, which is the most important evaluation factor. FYI's BAFO received "yellow/marginal" ratings under these five subcriteria.[7] RFP section M.6 defined a "yellow/marginal" rating as:

> Fails to meet the minimum requirements; has one or more deficiencies, but they are correctable without major revisions.

The agency states that, in response to the recommendation made in our prior decision, it reviewed FYI's proposal and found no deficiencies. Rather, the "yellow" ratings were given as a result of evaluated weaknesses in the content of FYI's oral presentation under the five identified subfactors. The agency reviewed FYI's BAFO, and determined and documented that FYI's BAFO complied with all material terms and conditions of the RFP, particularly with respect to the five subfactors in question, such that FYI's BAFO was technically acceptable.

The protester has identified no requirements related to the five subfactors which were not satisfied by FYI's BAFO. Although the agency's report on this protest specifically and reasonably addressed the acceptability of FYI's proposal considering the weaknesses noted under each subfactor, the protester's comments on the report merely express RGII's general disagreement with the agency's decision to determine FYI's proposal acceptable, notwithstanding the "yellow" ratings.

For example, one of the five subfactors was:

> c6. Demonstrate your company's corporate knowledge, experience, and ability to develop job aids and user guides for office automation [OA] applications.

The agency evaluation assigned a yellow rating to FYI's oral presentation under this subfactor because the presentation did not cover the development of user guides for OA applications. The agency provided the following rationale to explain why this did not represent a failure to comply with material terms and conditions of the RFP:

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[7]These "yellow" ratings were the basis for our recommending in our decision on FYI's protest that the agency review FYI's proposal to determine its acceptability before making award to FYI.

> FYI received a blue [superior rating] in subfactor c1 providing OA support for [Technical] Exhibit One OA applications. They also discussed the fact that they have knowledge supporting the required OA applications. In addition, FYI also indicated that they have experience developing job aids and user guides. Although FYI did not identify that they had developed user guides for the OA application in Technical Exhibit One, this is not material due to the combination of FYI's stated ability to support the OA applications and their stated experience developing job aids and user guides.

Our review of the RFP revealed that, while offerors were required to demonstrate their corporate experience in developing job aids and user guides for OA applications, the RFP set no minimum requirement in this area other than at section C.1.4.8, which stated that experience in developing user guides was a personnel qualification requirement for the training specialist. It is undisputed that the person FYI proposed for the training specialist position met this requirement. Other work requirements stated in section C required the contractor to prepare user guides, and FYI's BAFO did not take exception to these requirements.

As indicated, RGII did not specifically respond to the agency's documented reasons for finding FYI's proposal acceptable, but merely generally disagreed with the agency's decision in this regard. On this record, we find that the agency reasonably determined FYI's proposal was acceptable.

RGII's allegation that the color/adjectival ratings employed by the agency were unstated evaluation factors has no merit. Essentially, RGII alleges that its proposal was deemed technically unacceptable, both by our decision on FYI's protest and subsequently by the agency, because RGII's proposal received "red/unsatisfactory" ratings under several subfactors, including the evaluation of personnel under the PDF factor. In fact, RGII's BAFO was technically unacceptable because it failed to meet the mandatory personnel qualifications requirements, not merely because the proposal received a "red" rating. It is well established that ratings, be they numerical, color or adjectival, are merely guides for intelligent decision-making in the procurement process. Grey Advertising, Inc., 55 Comp. Gen. 1111, 1118 (1976), 76-1 CPD ¶ 325 at 9. Here, the ratings reflected proposal strengths, weaknesses, and deficiencies identified by the evaluators to assist in the decision-making process; they were not themselves evaluation factors. See Israel Aircraft Indus., Ltd., MATA Helicopters Div., B-274389 et al., Dec. 6, 1996, 97-1 CPD ¶ 41 at 7.

RGII finally alleges that it did not receive discussions on areas of its proposal, other than proposed personnel, which the agency had evaluated as weak or deficient, and thus RGII did not receive meaningful discussions. Since the agency did conduct discussions with RGII identifying the deficiencies in its initial proposal regarding its proposed personnel, and since RGII's subsequent BAFO remained technically unacceptable on that basis, RGII's BAFO was ineligible for award, regardless of any

other evaluated weaknesses or deficiencies. Since meaningful discussions were conducted on a deficiency which ultimately rendered RGII's BAFO technically unacceptable, we need not address the other allegations concerning discussions.

The request for reconsideration and the protest are denied.

Comptroller General
of the United States