Decision

Matter of: Intermagnetics General Corporation

File: B-286596

Date: January 19, 2001

Leo Blecher for the protester.
Michael Colvin, Department of Health and Human Services, for the agency.
Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated proposals on the basis of two unannounced criteria is denied where, although the first criterion was not specifically set forth in the solicitation, protester was on notice of it from discussions, and the protester failed to rebut the agency's position that the second criterion, a relaxed specification, was immaterial and not prejudicial to the firm.

2. Protest that agency improperly selected higher-priced proposal for award is denied where solicitation provided for award on a best value basis and agency reasonably concluded that the technical superiority of awardee's proposal warranted payment of its higher price.

DECISION

Intermagnetics General Corporation (IGC) protests the award of a contract to Oxford Instruments America, Inc. under solicitation No. NHLBI-PS-2000-631, issued by the National Institutes of Health (NIH), Department of Health and Human Services, for a 1.5 tesla (T) magnet and/or a gradient coil and its integrated shim coils, known as the gradient shim assembly, to be installed in the magnet. These components are part of a Magnetic Resonance Imaging (MRI) scanner for cardiac studies in large animal models.[1] The protester challenges the evaluation of proposals and award to a higher-priced offeror.

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[1] The magnet is a large, thick-walled cylinder approximately two meters long and two meters in diameter, with an opening of approximately 60 centimeters through which the research subject is passed. The gradient and shim coils are assembled in the

(continued...)

We deny the protest.

BACKGROUND

The solicitation, as amended, requested fixed-price, commercial item proposals for delivery and installation of either (1) both the MRI magnet and the gradient/shim assembly, or (2) the MRI magnet or the gradient shim assembly. The solicitation provided for award "to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered." Solicitation at 7. It also included technical performance specifications, identified as "minimum qualification criteria," Solicitation at 7-10, and offerors were required to "include all information which documents and/or supports the qualification criteria" and were "reminded that award will be made to the offeror whose proposal meets or exceeds the qualification criteria." Id. at 7, 10.

The minimum qualification criteria for the magnet included the requirements that a "40 cm inner-diameter gradient coil and its integrated room temperature shim coils will be installed in this magnet," and the "magnet manufacturer should consult with the gradient manufacturer regarding the exact dimension of the magnet bore space [i.e., the space where the gradient shim assembly would be installed], and requirements on the gradient/room-temperature shim assembly for proper mounting in the magnet." Solicitation at 7.[2] The minimum qualification criteria for the gradient/shim assembly included the requirements that the "gradient coil should have a 40 cm diameter or larger inner clear bore," the "gradient coil and its integrated room-temperature shim coils should be mounted permanently in a commercial whole-body 1.5T magnet of 900mm or larger bore size and approximately 1.7m length," and "[y]our company should contact the magnet manufacturer for exact dimensions of the available magnet bore space, and should mount the gradient/shim assembly into the magnet according to the proper method recommended by the magnet manufacturer." Solicitation at 8.[3]

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shape of a smaller cylinder that fits closely inside the magnet and provides a means of controlling the electrical field and dissipating the large amounts of heat that build up. Agency Report (AR) at 1.

[2] Correspondingly, the statement of work (SOW) provided that the contractor for the magnet "shall . . . coordinate with the contractor responsible for the gradient and shim coils to accomplish proper installation of the gradient/shim assembly in the magnet." SOW para. II.B. at 22.

[3] Correspondingly, the SOW required that the contractor for the gradient and shim coils "shall . . . [i]n consultation with the magnet manufacturer, rigidly mount the gradient/shim assembly into the magnet." SOW para. II.B. at 22.

The agency received four offers. IGC offered the magnet alone, while Oxford offered both the magnet and the gradient/shim assembly. (The other offers are not relevant here.) IGC's and Oxford's offered magnets were evaluated as acceptable; all of the offered gradient shim assemblies, including Oxford's, were evaluated as unacceptable. The agency conducted written and oral discussions and requested revised and best and final offers (BAFO). IGC's BAFO price of $240,000 for the magnet was low, and Oxford's price of $289,278 for its magnet was second low.

Since none of the offered gradient shim assemblies met the specifications, the agency became concerned with the installation compatibility of a third party's gradient shim assembly into the offered magnets, as well as performance and cost risks in matching the gradient shim assembly to the magnet. Recommendation for Award at 2; see also Postaward Debriefing of IGC, Oct. 5, 2000, at 1. Thus, during discussions the agency asked IGC "whether there exists a Gradient System that readily goes into the IGC Magnet and meets the Gradient System specifications of the solicitation." Contracting Officer's (CO's) Statement at 11, 14, and 16. IGC did not identify a gradient shim assembly that was compatible with its offered magnet. Rather, IGC responded that "they [could] install a Gradient System for the cost of $40,000 to $50,000, but the Gradient System [would] not meet the NIH specifications due to the bore size and gradient strength." CO's Statement at 16; Recommendation for Award, Sept. 27, 2000, at 2. The agency also posed the following written questions to IGC: (1) "The proposal did not answer Criterion five (5) of the Solicitation with regard to facilitating the installation of third party gradient/shim assembly into the magnet" and (2) "Is offeror willing to work with the gradient coil manufacturer to facilitate the installation of the gradient/shim system into the magnet?" Request for IGC Revised Proposal, Sept. 20, 2000, at 2. In response, in its revised proposal, IGC stated, "We are willing to work with gradient manufacturers to facilitate installation of the gradient shim system into the magnet on a cost plus basis[;] [a]s you know, depending on the gradient selected, it may be necessary to develop and weld on gradient interfaces[;] [t]his can be done at IGC for an additional cost to be determined at a later date." IGC Revised Proposal, Sept. 22, 2000, at 2. Thereafter, in its BAFO, IGC stated that it "will work with the gradient supplier regarding the requirements of the gradient/room temperature shim assembly for proper mounting in the magnet[;] [a]ny minor modifications (brackets, etc.) to the magnet required to mount the gradient will be supplied within the price quoted . . . ; [o]nly in the event that major modifications are required would [IGC] request a change in scope with associated cost reimbursement." IGC BAFO, Sept. 25, 2000, at 2.

In contrast, during discussions Oxford did identify a third party gradient shim assembly previously installed in its magnet in a commercially available MRI scanner, that was compatible in "all aspects of installation" with its offered magnet (including "physical dimensions, weight distribution, mounting points and rigidity"), and that met most of the solicitation specifications for the gradient shim assembly. Recommendation for Award, Sept. 27, 2000, at 2. In this regard, when the agency asked Oxford if it would "be willing to propose a gradient system that meets the

gradient strength and slew rate specifications" (which Oxford's own proposed gradient shim assembly did not meet), Oxford responded in its revised proposal that "[a]n alternative to the proposed Gradient Set would be to employ Siemens [Corporation] Sonata gradients, which if purchased directly from Siemens could be integrated with the Oxford Instruments Magnet System." Request for Oxford Revised Proposal, Sept. 20, 2000, at 2; Oxford Revised Proposal, Sept. 22, 2000, at 2. Oxford further explained that the magnet it proposed "was supplied to Siemens as part of the Sonata MRI system, and therefore [was] fully compatible with the Sonata Gradient System," but that Oxford could not supply the Siemens Sonata--it would have to be purchased directly from Siemens. CO's Statement at 14.

In evaluating the proposals, NIH determined that IGC's failure to identify a gradient shim assembly compatible with its offered magnet presented a significant risk of incompatible installation and resulting increased costs in matching the two items. IGC Postaward Debriefing, Oct. 5, 2000, at 1; Final Technical Evaluation Report, Sept. 26, 2000, at 7. According to the agency, "if major parameters of the Gradient System such as length, weight and diameter need to be changed to fit into the Magnet, then the Gradient System will need to be redesigned and restructured." CO's Statement at 21. The agency considered IGC's revised proposal statement that it was willing to facilitate the installation of other vendors' gradient systems, and the fact that the magnet was fixed-priced, insufficient to outweigh its concern that "significant technical risks [exist] in installing a large bore high performance gradient system into a superconducting large bore magnet without prior design considerations," due to the "heavy weight of such gradient coils and the high vibrational forces associated with higher performance large gradients, and inductive [i.e., electrical] couplings between the gradient coils and the magnet [as here]." IGC Postaward Debriefing Oct. 5, 2000, at 1-2; Final Technical Evaluation Report at 7. In this regard, the agency believed that, without prior design considerations for matching the magnet with the gradient coils, "technical problems may degrade the performance of both the magnet and the gradient system" and "major changes to the magnet or the gradient coils to integrate the two" may be required. Final Technical Evaluation Report at 7; Postaward Debriefing Letter to IGC at 1-2.[4] Further, the agency considered IGC's BAFO to present a price contingency that heightened the cost risk to the agency, since there was no estimated cost cap for the referenced modifications that might be required to match the magnet with the gradient shim

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[4] The agency explains that, in order to prevent mechanical vibration and resulting degraded performance, "it is crucial to mount the Gradient Coil Assembly securely on the weight bearing points of the Magnet," which "means that the size and shape of the Gradient Coil Assembly and the weight bearing points of the Magnet should be designed to match," since "[s]uch a match prevents damage to the Magnet and is therefore part of the 'proper installation' described in the solicitation." CO's Statement at 10.

assembly. AR at 2-3; CO's Statement at 24. The agency determined that these risks presented by the protester's proposal outweighed its lower offered price.

In contrast, NIH evaluated Oxford's offered magnet as technically superior based on the "proven compatibility" of the magnet with Siemens's Sonata gradient shim assembly, which the agency considered "the highest performance gradient/shim system . . . commercially available, [that] meets most of the requirements in [the] solicitation." Recommendation for Award at 1-2. Specifically, the agency determined that Oxford's offered magnet "removed all technical risks and the potential costs associated with gradient/magnet integration, including the mechanical issues and electrical coupling issues" that IGC's proposal did not resolve. CO's Statement at 15; see also Final Technical Evaluation Report at 5. The agency recognized that the Sonata's gradient strength did not meet the solicitation's specification to produce 6 Gauss(G)/centimeter in all three orthogonal directions simultaneously, but considered this a "minor change" in "the gradient system performance [that] can be 'worked around' [by] (re-orienting the MRI subject so that the strongest gradient axis is aligned as desired)." Agency Supplemental Statement, Dec. 12, 2000, at 1, attach.; see also Solicitation at 9.[5] Based on these considerations, the agency determined that the technical superiority of Oxford's offered magnet was "advantageous to the government when balanced with the risk of ill-matched Magnet and Gradient/Shim Systems," justified the firm's price premium, and presented the best value to the government. CO's Statement at 24-25; Contract Recommendation. The agency made award to the firm and this protest ensued.

UNDISCLOSED AWARD CRITERION

IGC primarily argues that the agency improperly made award on the basis of an undisclosed criterion--proven installation compatibility of a third party's gradient shim assembly with the offered magnet, including consideration of the areas of mechanical vibrations and inductive coupling. IGC complains that the specific issues of mechanical vibrations and inductive coupling were never raised with the firm, and that if they had been they could "have been quickly put to rest." Protest at 3. In any event, the protester maintains that it "explicitly stated [in its BAFO] that

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[5] The agency noted that the Sonata's gradient system is specified at 7 G/cm, but "the fact that it cannot produce the highest gradient field in three orthogonal axes simultaneously is not a major problem for the research protocols, as the scans usually require a high gradient field along a single axis, and this axis can be chosen to approximately align with one of the directions where the gradient system produces its maximum field." CO's Statement, attach. Further, according to the agency, "[i]n rare cases when this cannot be accomplished, the price is a slightly longer scan time." Id. Based on these considerations, the agency judged the gradient strength specification "flexible" and considered the Sonata gradient system to "overall . . . meet the need of the research protocols." Id.

its price of $240,000 included working with the gradient manufacturer to insure proper installation in the magnet," that it "clearly understood its obligation to quote on a magnet that would work with a gradient assembly of the performance specified in the solicitation including the related issues of mechanical vibrations and inductive coupling," and that its "consideration of these issues had already been included in [its] price." Protest at 2, 3.

The determination of the relative merits of proposals is primarily a matter of agency discretion, which we will not disturb unless it is shown to be without a reasonable basis or inconsistent with the stated evaluation criteria and applicable statutes and regulations. Madico, Inc., B-280003, Aug. 12, 1998, 98-2 CPD ¶ 42 at 3. Agencies properly may evaluate proposals on the basis of considerations brought to offerors' attention during discussions. See TESCO, B-271756, June 26, 1996, 96-1 CPD ¶ 284 at 3.

The evaluation here was unobjectionable. While installation compatibility of the magnet with a third party's gradient shim assembly was not specifically required in the solicitation, the need for such compatibility should have been clear from the discussion questions. In particular, the question "whether there exists a Gradient System that readily goes into IGC's Magnet and meets the Gradient System specifications of the solicitation" clearly put the protester on notice that the agency was assessing its proposal in light of this consideration, and IGC's response to the agency's questions shows that the firm was fully aware of the issue. In addition, the solicitation's best value award clause made it clear that a comparative evaluation would be conducted; there thus was nothing improper in the agency's rating of Oxford's proven installation compatibility superior to IGC's unproven installation compatibility.

Further, while IGC claims that the specific installation issues of mechanical vibrations and inductive coupling were not brought to its attention, it does not dispute the agency's position that these are technical considerations encompassed by the requirement for a "proper mounting" of the gradient shim assembly into the magnet. Indeed, as noted above, IGC asserts that it was aware of these issues, and that it included consideration of them in its price (although there is no indication of this in the firm's offer). Protest at 2-4. While IGC asserts that, if these installation issues had been specifically raised it could have "put the matter to rest," it gives no indication of how it would have done so. This is problematic in light of the uncertainty raised in its offer concerning referenced modifications necessary to install the gradient shim assembly into the magnet. IGC BAFO at 2. The evaluation thus was not rendered unreasonable by the agency's reliance on its vibration and inductive coupling concerns in downgrading IGC's offer.

COST RISK

IGC contends that the agency's concerns over increased costs for installing a third party's gradient shim assembly into its offered magnet were unfounded, since its

BAFO merely stated its right under the standard changes clause in the resulting contract for a price adjustment "for changes in scope, such as the concerns identified by IGC." Comments, attach. 1. We disagree. IGC's offer was for a fixed price, and its BAFO both clearly stated that only minor installation modifications were included in its price, and raised the possibility that major modifications could be necessary at an additional price. IGC's BAFO provided no certainty as to what installation modifications would be necessary and no assurance that major modifications, with their resulting increased cost, would not be necessary. Given this uncertainty as to the type of modifications that would be required, or some limit on the potential increased cost to the government, the agency reasonably determined that the protester's offer presented a risk of increased cost.[6]

RELAXED REQUIREMENT

IGC objects that accepting Oxford's offered third party gradient shim assembly with a gradient strength lower than that specified in the solicitation was improper. IGC argues that, because the "NIH specifications [for gradient strength] obviously cannot currently be met by the commercial market," the reduced requirement for the gradient should have been communicated to all offerors, and that it was prejudiced by not being allowed the opportunity to offer on the "changed specification requirements." Comments at 3, attach., at 1-2. NIH responds that the relaxation of the requirement was not material, since it would not affect the "size requirement or . . . the absolute power of the system," and would not compromise "the ability of the system to perform the required research." Agency Supplemental Statement at 1. The agency asserts, moreover, that IGC was not prejudiced by the relaxation of the requirement, because there is no showing that it could have revised its proposal had it been informed of the relaxation. Id. at 2.

IGC does not dispute the agency's position regarding the materiality of the relaxed requirement, and we find nothing in the record that brings that position into question. In any event, we agree with the agency that there is no evidence that IGC was prejudiced by the agency's failure to inform IGC of the relaxation. In this regard, prejudice is an essential element of every viable protest, and our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

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[6] While the cost uncertainty of IGC's proposal was heightened by its BAFO response, we note that this uncertainty already was present based on the discussions with the firm and in the firm's revised offer, as described and quoted above.

Although IGC contends, in supplemental comments requested by our Office on this issue, that "the revised gradient specification changes the evaluation of compatibility," gradient strength was not an issue in the downgrading of its offer, and IGC does not identify a reduced strength gradient shim assembly without installation compatibility problems that it would have identified had it known of the relaxed requirement. Protester's Supplemental Comments at 1. IGC cites Philips Medical Systems' Explorer model as being "similar" to the Sonata, and notes that it has "tested with Intermagnetics' . . . MRI magnets of the type offered to NIH," but does not address the question of whether the Explorer has proven commercial installation compatibility with its offered magnet; again, this installation compatibility issue was the principal basis for the agency's finding Oxford's offer superior to IGC's. Id. Under these circumstances, we find that IGC was not competitively prejudiced by the relaxation of the gradient strength requirement.

PRICE/TECHNICAL TRADEOFF

IGC maintains that the award to Oxford at a higher price is not supported by "any value of 'technical advantage' on a product that is essentially a commercial type item or on the basis of some perceived risk of cost." Protest at 4. However, as discussed above, the agency's evaluation of Oxford's proposal as superior to IGC's based on Oxford's proven installation compatibility and lower cost risk was reasonable. Given that technical considerations carried the same weight as price under the terms of the solicitation, and that the agency's cost risk concern reasonably could be viewed as mitigating IGC's cost advantage, there simply is no basis to question the agency's conclusion that Oxford's technical superiority outweighed IGC's lower price.[7] See J&J Maintenance, Inc., B-284708.2, B-284708.3, June 5, 2000 CPD ¶ 106 at 3 (in making price/technical tradeoffs, an agency has the discretion to make an award to a higher-rated offeror at a higher price where it reasonably determines that the cost premium involved is justified considering the superiority of the selected proposal).

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

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[7] Since the solicitation did not indicate the relative weights of technical and price factors, it must be presumed that they were of equal weight. Ideal Elec. Sec. Co., Inc., B-283398, Nov. 10, 1999, 99-2 CPD ¶ 87 at 2 n.1. While the contracting officer states in response to the protest that "[b]ased on the order of importance of the evaluation factors for award[,] technical factors are of paramount consideration," there is no indication in the contemporaneous record that technical factors were accorded greater weight in the award decision. CO's Statement at 25; see Summary of Negotiations, Sept. 27, 2000, and Recommendation for Award, Sept. 27, 2000.