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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-214468

DATE: July 23, 1984

MATTER OF: Lanier Business Products of Western Maryland, Inc.

DIGEST:

1. In brand name or equal solicitations, the overriding consideration in determining the equality or similarity of an offered product to the named product for purposes of acceptability is whether the "equal" product performs the needed function in a like manner and with the desired results.
2. Where a best and final offer is found technically unacceptable, it cannot be considered for award even though it proposes a lower price.
3. A showing of bad faith requires irrefutable proof that contracting officials had the specific and malicious intent to injure the protesting firm.

Lanier Business Products of Western Maryland, Inc. protests the award of a contract to NBI, Inc. under request for proposals (RFP) No. DAMD17-83-R-0047, issued by the United States Army Medical Research Institute for Infectious Disease (USAMRIID), Fort Detrick, Maryland. The procurement is for the acquisition of a word processing system. Lanier complains that the Army acted improperly in rejecting the firm's technical proposal as unacceptable. We deny the protest.

Background

The RFP was issued on September 16, 1983 on a brand name or equal basis, with NBI equipment specified as the named product. Section C of the solicitation set forth salient characteristics of the NBI equipment that word processing systems offered as "equals" were required to meet, the most crucial of which was the requirement that the offered system's Master Control Unit (MCU) have a minimum hard disk storage (memory) of 120 megabytes (Mb) and be accessible by all component work stations.

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Only NBI and Lanier submitted initial proposals in response to the solicitation by the October 14 closing date. Upon evaluation, no deficiencies were noted in NBI's proposal, and the firm accordingly was not asked to furnish additional information or clarifications, but rather only to review the proposal before submitting its best and final price. Although USAMRIID determined that Lanier's proposal was within the competitive range, the agency noted certain weaknesses in the proposal, principally the storage capacity of Lanier's MCU, and asked the firm to address them upon submission of its best and final offer. These deficiencies were pointed out to Lanier in a letter from the agency dated December 16, and then again at a conference with the firm on December 22. The firm submitted its best and final offer on January 4, 1984.

The agency rejected Lanier's best and final offer as technically unacceptable, without further discussions, for the major reason that the firm's MCU did not have a 120 Mb storage capacity as required by the RFP. Lanier's system distributed hard disk storage among its MCU and the different work stations, for a total system hard disk storage capacity of 207.15 Mb. However, the MCU itself had only a 100 Mb capacity, of which only 64 Mb was actually user-available because the remaining 36 Mb was occupied by system software. USAMRIID accordingly awarded the contract to NBI.

Protest and Analysis

Lanier complains that the agency's rejection of its best and final offer as technically unacceptable without further discussions was improper because the firm's system is the functional equivalent of the NBI system, and points out that its proposed price was substantially lower. Lanier contends that although its MCU might not have had a 120 Mb capacity in itself, as required by the solicitation, its offered system actually exceeded the requirement and was therefore superior because a greater total amount of hard disk storage was distributed among the MCU and the various work stations (171.15 Mb, considering the 36 Mb used for system software that was unavailable for hard disk storage). Lanier implies that the agency's action was a bad-faith effort to limit the competition to NBI. As evidence of this, Lanier points out that the RFP was written around the NBI system, and accordingly argues that only NBI could offer an acceptable proposal. Lanier believes that bad faith also is evidenced by the fact that the agency issued a purchase

order to NBI for 6 work stations on a 1-year lease agreement on October 7, 1983, which was 1 week prior to the closing date for receipt of initial proposals. The firm argues that if USAMRIID had been sincere in its effort to seek competition, it would not have acquired NBI equipment under a lease before the results of the negotiated procurement had been obtained. Finally, Lanier asserts that NBI's own proposal did not conform to a certain RFP requirement.

The propriety of USAMRIID's action in rejecting Lanier's best and final offer is dependent upon whether the agency's evaluation was reasonable and, if so, whether the agency was required to conduct further discussions before rejecting the offer. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, Dec. 23, 1982, 82-2 CPD ¶ 571. We find nothing legally objectionable in either regard.

Determinations of the government's minimum needs and the best methods of accommodating those needs are primarily the responsibility of the contracting agency. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD ¶ 539. The agency's procuring officials generally are in the best position to know the government's actual needs, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. Frequency Electronics, Inc., B-204483, April 5, 1982, 82-1 CPD ¶ 303. In that regard, while agencies generally must obtain the maximum competition practicable, there are instances when fulfillment of those needs may result in the imposition of some restriction on competition. Williams & Lane, Inc., B-210940, Aug. 29, 1983, 83-2 CPD ¶ 269.

In this matter, the agency states that its prime objective was to acquire a word processing system with a large amount of central hard disk storage on the MCU, given the large volume of files that must be readily accessible by all of USAMRIID's component divisions. By way of illustration, the agency points out that under Lanier's proposed system which, as already indicated, distributes hard disk storage among the MCU and the various work stations, if a file required by USAMRIID's Medical Division resided on hard disks located in the Virology Division, then the file would not be readily

accessible if the Virology work station were not turned on and thus user-available. In USAMRIID's view, Lanier's system was unacceptable because the firm's distributed storage methodology was an entirely different format from the agency's requirement for a large amount of central storage on the MCU available to all work stations, since Lanier's MCU only had 64 Mb of hard disk storage, some 53 percent of that required by the RFP.

In brand name or equal procurements, the overriding consideration in determining the equality or similarity of another commercial product to the named product for purposes of acceptability is whether its performance capabilities can be reasonably equated to the brand name product referenced, that is, whether the "equal" product offered can do the same job in a like manner and with the desired results. 45 Comp. Gen. 462 (1966).

Here, we cannot conclude that the 120 Mb minimum MCU storage capacity was an unreasonable feature to impose on offered systems. The agency has, in our view, established a reasonable basis for that requirement since accessibility to a large volume of files was of paramount concern, and USAMRIID was apprehensive that such accessibility might be jeopardized in using a distributed storage methodology such as that proposed by Lanier. Essentially, what underlies this protest is a dispute between differing philosophies of data management, and we cannot conclude that the agency's preference for a methodology different from Lanier's is unjustified. In any event, if Lanier felt that the agency's use of a brand name or equal solicitation was unduly restrictive of competition, in that Lanier's proposed system used a much different storage configuration than the NBI system, it was incumbent upon the firm to protest the issue at least by the closing date for receipt of best and final offers, that is, by January 4, 1984. Since Lanier did not raise the matter until it furnished this Office its May 7 comments on the agency's administrative report, the issue is clearly untimely under our Bid Protest Procedures and need not be considered further. See 4 C.F.R. § 21.2(b)(1) (1984).

We thus find nothing unreasonable in USAMRIID's evaluation of Lanier's best and final offer as technically unacceptable, given the unchallenged MCU minimum storage requirement. Lanier was provided the opportunity to revise its initial proposal so as to address the deficiencies noted as the result of the agency's

evaluation, especially that relating to MCU storage capacity. Rather than submitting a best and final offer that conformed, Lanier continued to propose its own distributed storage configuration, even though the firm essentially was on notice that it would not be acceptable to USAMRIID. No offeror should expect to be considered for award based on a best and final offer that does not clearly reflect that the firm's approach will meet the agency's needs as expressed in the solicitation. See The Management and Technical Services Company, a subsidiary of General Electric Company, supra.

Moreover, although agencies generally are required to discuss proposal deficiencies with offerors in the competitive range, which USAMRIID did here, further discussions are not required after the submission of best and final offers. Thus, the agency had no legal duty at that point to reopen the competition to permit Lanier another chance to demonstrate the merits of its approach. See Centennial Systems, Inc., B-201853.2, April 16, 1982, 82-1 CPD ¶ 350.

On the issue that Lanier's proposed price was substantially lower than NBI's, we have held that such a lower proposed price is not controlling in the awardee selection process since a proposal that has reasonably been found unacceptable cannot be considered for award. See Jekyll Towing & Marine Services Corp., B-200313, July 23, 1981, 81-2 CPD ¶ 57.

Lanier also contends that USAMRIID's decision to issue a purchase order to NBI for 6 work stations on a 1-year lease agreement prior to the agency's receipt of initial proposals evidences the agency's bad-faith effort to limit the competition in NBI's favor. We do not agree.

A showing of bad faith requires irrefutable proof that contracting officials had the specific and malicious intent to injure the protesting firm. See Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25. Here, the record establishes that USAMRIID decided in August of 1983, 1 month prior to issuing the RFP, to obtain an additional 6 work stations under lease in an effort to alleviate its information-processing backlog. It was felt that the word processing system to be procured under the subject RFP would not be in place for another 6 months, and the agency had an immediate need for more equipment. USAMRIID states that it therefore issued a purchase order to NBI against the

firm's existing General Services Administration contract after considering the equipment available from other firms, including Lanier. According to USAMRIID, the NBI equipment was to be removed if NBI was not the successful offeror under the negotiated procurement.

While Lanier points out that the lease with NBI was for a much longer period, 1 year, than that deemed necessary to meet the agency's immediate need for a short-term solution, in our view the lease in question had no material impact upon competition under the RFP. We see nothing to indicate that Lanier's proposal was unfairly evaluated in an effort to make sure that the contract award would go to NBI, merely because the latter already had certain of its equipment in place. We cannot conclude that the lease agreement, per se, gave NBI an undue competitive advantage, and Lanier clearly has not met its burden of proving that the agency entered into the lease for the specific purpose of assuring NBI's receipt of the subsequent contract award.

Lastly, Lanier asserts that NBI's proposal does not conform to the RFP's requirement that the offered MCU have 25 input/output ports (essentially, electrical connections for the transmission of data) in order to support the 13 work stations and 12 printers being acquired. Lanier states that NBI's MCU only has 24 such ports.

In response, the agency points out that the solicitation did not mandate that the offered MCU have 25 ports; rather, the NBI unit specified as the brand name product was described as having 24 ports. The agency relates that although there are a total of 25 port items (13 work stations and 12 printers), there are only 9 mandatory port items (those which must be plugged into the MCU) and 16 optional items (those which may, but need not, be plugged in), so that all 25 devices need not be plugged in at the same time. Therefore, according to USAMRIID, NBI's 24-port MCU is acceptable.

We find no reason to dispute the agency's position in this regard. In any event, it was clear from the RFP that the NBI system specified as the named product featured only a 24-port MCU.

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The protest is denied.

for *Milton J. Fowler*
Comptroller General
of the United States