



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20556

April 26, 1989

MEMORANDUM FOR Edward L. Halman, Director
Division of Contracts and Property
Administration

FROM: Hudson B. Ragan
Assistant General Counsel
for Administration
Office of the General Counsel

SUBJECT: COMMENTS ON PROPOSED NEW REGULATION ENTITLED
"NUCLEAR REGULATORY COMMISSION ACQUISITION
REGULATION (NRCAR)"

By memorandum of March 27 the Director, Office of Administration, requested counsel's review and comment on the subject regulation, which implements the Federal Acquisition Regulation for this agency. We previously provided informal comments on this proposed regulation for your staff's consideration. In addition, I ask that you consider two further recommendations, either at this time or in the initial revisions to the NRCAR.

The first recommendation concerns NRC's procedures for handling bid protests and contractor disputes. In this regard, there is attached proposed language for the NRCAR that would, if adopted, spell out NRC's policies and procedures in this area. This language can be inserted as Part 2033 of the proposed NRCAR. In addition to reflecting existing NRC practices, this proposed language would introduce two changes, as set forth below.

The first change would shift responsibility for preparing NRC's response to bid protests filed with the General Accounting Office from OA to OGC. Given the increasingly judicial nature of bid protest proceedings at GAO - which can include examination and cross-examination of agency witnesses under oath - OGC should, in my opinion, have primary responsibility in this area. Consistent with FAR Section 33.104(a)(3)(vi), the contracting officer would still submit his or her independent statement of the facts and comments.

The second change would have agency level protests decided by the Director, DCPM, rather than by the same contracting officer who made the protested award. This provides assurance that the contracting officer's award decision will be independently reviewed at a higher level.

My second recommendation concerns NRC's procedures for making competitive range determinations and source selections as now set forth in NRC Manual Appendix 5101, Subparts IV-2 and 5, to be continued as Sections 2015.608 and .611 of the NRCAR. These procedures require that NRC's Source Evaluation

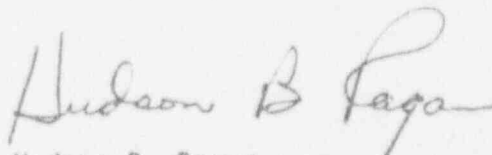
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Panels (SEPs) prepare recommended competitive range determinations and source selections for the contracting officer. This procedure, of having the SEP prepare recommended determinations, can be viewed as inconsistent with the FAR 15.609 requirement that "(t)he contracting officer shall determine the competitive range," and FAR 15.611(d) relating to source selection.

For example, in a recent decision of the General Services Board of Contracts Appeals - the protest of Orange Systems, GSBCA No. 9576-P, 1988 BDP P210 September 23, 1988, copy attached - the board concluded that "the original formal competitive range determination was not made by the contracting officer" as required by the FAR, but that she later adopted the board's determination without reservation, which corrected the initial violation. In order to avoid potential challenges in this area, NRC would be better advised to adopt procedures which limit the SEP's role to that of technical evaluation, and reserve the competitive range and source selection determinations to the contracting officer.

This is not to say that the contracting officer must make these determinations in a vacuum, without technical advice or guidance from the SEP. Rather, NRC's procedures should place the initial responsibility for making these determinations with the contracting officer, and provide for the technical office's participation in a less direct manner. This can be done a number of ways, both formally and informally, depending upon the degree of participation desired.



Hudson B. Ragan
Assistant General Counsel
for Administration
Office of the General Counsel

Attachments

PART 2033 - PROTESTS, DISPUTES AND APPEALS

Subpart 2033.1 Protests

2033.103 Protests to the Agency

(a) For purposes of this regulation, protests include written award disputes initiated by disappointed bidders under this Subpart; under FAR 33.103; or otherwise directly challenging at the agency level a decision to award, or not award, a specific NRC contract. The Director, DCPM shall decide protests filed with the NRC in as expeditious manner as possible.

(b) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In acquisitions where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation.

(c) In cases other than those covered in paragraph (b) of this section, protests shall be filed not later than ten working days after the basis of protest is known or should have been known, whichever is earlier.

(d) The agency shall not process, or shall cease processing, agency level protests that are protested outside the agency.

2033.104 Protests to GAO

(a) The Office of General Counsel shall represent the agency in protests filed with the GAO and the Assistant General Counsel for Administration shall assign a staff attorney who, in consultation with the contracting officer, shall be responsible for handling the agency's response to the protest.

(b) The contracting officer for the protested procurement shall be responsible for preparing the protest file and findings required by FAR 33.104(a)(3); for providing the notices required under FAR 33.104(a)(4); and for otherwise assisting counsel in responding to the protest.

(c) The determinations under FAR 33.104(b)(1) or FAR 33.104(c)(2) to award a contract prior to resolution of a protest, or to proceed with performance of a contract protested within ten days after award, shall be made by the Director, DCPM with the concurrence of counsel.

2033.105 Protests to the GSBCA

(a) The Office of General Counsel shall represent the agency in protests filed with the GAO and the Assistant General Counsel for Administration shall assign a staff attorney who, in consultation with the contracting officer, shall be responsible for handling the agency's response to the protest.

(b) The contracting officer shall be responsible for preparing the protest file required by FAR 33.105(b) and otherwise assisting counsel in responding to the protest.

(c) The determination and finding required by FAR 33.105(d)(2) in connection with suspension hearings shall be prepared and executed by the Director, DCPM.

Subpart 2033.2 Disputes and Appeals

2033.203 Applicability

(a) Pursuant to an interagency inter-agreement between the NRC and the Department of Energy Board of Contract of Appeals (EBCA), the EBCA will hear appeals from final decisions of NRC contracting officers issued pursuant to the Contract Disputes Act. The EBCA rules appear in 10 CFR Part 1023.

2033.211 Contracting Officer's Decision

(a) Contracting officers shall alter the paragraph at FAR 33.011(a)(4)(iv) to identify the Energy Board of Contract Appeals and include its address: Webb Building, Room 1006, 4040 N. Fairfax Drive, Arlington, Virginia 22203.

2033.214 Contract Clause

(a) The contracting officer shall use the clause at FAR 52.223-1, Disputes, with its Alternate 1 where continued performance is vital to National security, the public health and welfare, critical and major agency programs, or other essential supplies or services whose timely procurement from other sources would be impracticable.

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Board of Contract Appeals

General Services Administration
Washington, D.C. 20408

September 23, 1988

Protest of	:	
ORANGE SYSTEMS	:	GSACA No. 9376-P
	:	
Solicitation No. F49642-88-RD197	:	Granted
	:	
Appearance for Protester,	:	Julia Lunceford Witcher, Esq.
Orange Systems	:	Saul, Eving, Kemick & Saul
	:	1901 L Street, N.W.
	:	Suite 700
	:	Washington, DC 20036
	:	
Appearances for Respondent,	:	Carl J. Peckinpaugh, Esq.
U.S. Department of the Air Force	:	Janice M. Bellucci, Esq.
	:	O. Kevin Vincent, Esq.
	:	Office of the General Counsel
	:	U.S. Department of the Air Force
	:	The Pentagon, Room 4D1000
	:	Washington, DC 20330-1000
	:	
Appearances for Intervenor,	:	A. Kevin Fahey, Esq.
Halifax Engineering, Incorporated	:	Jacob B. Pospan, Esq.
	:	Pospan, Ruffner & Bass
	:	209 North Patrick Street
	:	Alexandria, VA 22314

Opinion by Administrative Judge Neill

This protest was filed on July 21, 1988, by Orange Systems (Orange). It concerns the exclusion of Orange from the competitive range of a procurement undertaken by respondent, the United States Air Force. The procurement is for maintenance of certain government-owned automated data processing equipment (ADPE) in Washington, D.C. and the surrounding area. Specifically, the protester contends that the reasons given by respondent for excluding Orange from the competitive range are incorrect and that it should, therefore, be restored to the competitive range and allowed to further participate in this procurement.

Halifax Engineering, Incorporated, an offeror in this same procurement, has intervened in this protest as an intervenor of right. It has opposed the grounds of protest, contending that Orange was properly excluded from the competitive range.

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For the reasons set out in this opinion, we grant Orange's protest and revise respondent's procurement authority so as to direct respondent to restore the protester to the competitive range and proceed with the procurement in accordance with all applicable statutes and regulations.

Findings of Fact

The Solicitation

1. On March 14, 1988, the respondent issued a request for proposals (RFP), number F49642-88-R0197 (the solicitation). Protest File, Exhibit 8. The solicitation calls for the maintenance of specified government-owned ADPE located within a fifty mile radius of the Pentagon. *Id.* at C-5.

Receipt and Initial Screening of Proposals

2. Proposals were submitted on May 27, 1988. Transcript at 77. On May 31, 1988, the contracting officer met at Andrews Air Force Base with the chairman and members of the source selection evaluation board (SSEB) appointed for this procurement. At that meeting the contracting officer briefed the SSEB chairman and members on the procurement and on their responsibility for the technical evaluation of proposals. *Id.* at 75-76, 412. At that meeting, the contracting officer provided the SSEB chairman with copies of the offerors' technical proposals for evaluation. *Id.*

3. Following the meeting at Andrews Air Force Base, the SSEB made an inventory of the proposals. Transcript at 413. The board also discussed the Proposal Evaluation Guide and the initial screening checklist which it included. *Id.* The Proposal Evaluation Guide provides for an initial or first screening of a proposal to "ensure it is in compliance with and responsive to the mandatory solicitation requirements as stated in the RFP." Protest File, Exhibit 7 at 1. The initial screening checklist consists of an abbreviated copy of the statement of work for this RFP which states the mandatory requirements. The Guide states:

If a proposal does not reasonably address the essential requirements of the solicitation, or if there are any substantial technical drawbacks sufficiently beyond correction or improvement consideration, the proposal will not be considered technically acceptable. Likewise, major business deficiencies or omissions that could not reasonably be expected to be cured would be considered not acceptable.

Id. The official responsible for compiling the Proposal Evaluation Guide explained in his own words the purpose of this initial screening. He stated:

The initial screenings were to see whether the contractor had met mandatory specifications required in the technical section of the RFP, where the evaluation was more as to how they

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were going to meet it and whether what they proposed was sound methodology, whether it met our requirement and whether they had a firm understanding of our requirement.

Transcript at 89-90. In a similar vein, the RFP itself provides:

Proposal technical evaluation will be accomplished by a team of highly qualified Air Force Technical personnel. The team's primary responsibility is to review each proposal to determine if: the proposal meets all mandatory technical requirements without revision; is deficient, but can be revised to meet all mandatory technical requirements; or, is deficient and cannot be revised to meet all mandatory requirements.

Protest File, Exhibit 8 at M-3.

4. The SSEE members immediately commenced the initial screening of all proposals. The chairman had at his disposal six evaluators. He therefore established three two-person teams and distributed the proposals among them. The initial screening of proposals took approximately three days. Transcript at 413. The screening of protester's proposal took a considerable amount of time. One evaluator took approximately four and a half to six hours to screen protester's proposal. *Id.* at 408. The other evaluator assigned to the screening of protester's proposal took approximately a day and a half to complete the screening. *Id.* at 413. Their checklists contain a number of marginal notes and annotations. Protest File, Exhibit 24, Tab G.

5. The SSEE chairman testified that at the time of the initial screening of proposals, he reviewed the initial screening checklists prepared by the evaluators assigned to the screening of the protester's proposal. He also stated that he compared these checklists to protester's proposal. Transcript at 414. He stated that in screening the proposals, he was looking for four things, namely, a restatement of the mandatory requirements, a statement of compliance, a statement of how the company would accomplish the mandatory requirement and supporting examples of how this requirement is met in existing contracts. *Id.* at 415. So far as the protester's proposal is concerned, the SSEE chairman contended that "those four items were lacking in all the mandatories." *Id.* at 416. Based upon his review of the evaluators' checklists and the protester's proposal, he concluded it had major omissions and deficiencies and was so lacking in technical merit that it could not be further evaluated. *Id.* at 415-16. He communicated this information to the contracting officer and was instructed to have the evaluators prepare written statements as to why the recommendation was being made that the proposal be eliminated from the competitive range. *Id.* at 72-73, 417-18.

6. The contracting officer testified that before the SSEE chairman briefed the Source Selection Advisory Council (SSAC) on the results of the evaluation of proposals, she also reviewed in detail the initial screening

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checklists prepared by the evaluators of protester's proposal. Transcript at 66-67. She did not, however, compare them to the Orange's proposal. Id. at 70. She further explained that she reviewed the results of the initial screening of proposals, including the protester's, not from a technical perspective but to ensure that there was consistency throughout the evaluation process. Id. at 71. She accepted the conclusion that there were "major omissions and major deficiencies and serious flaws" with the protester's proposal and did not intend to substitute her judgment for that of the SSEE evaluators. Id. at 66.

7. The memorandum prepared by the first evaluator screening the protester's proposal states:

[Orange's] proposal cannot be evaluated due to non-compliance with the numerous requirements of RFP. Vendor's proposal was not in the required format plus various items were vague or simply not addressed to adequately evaluate the vendor's ability to meet all requirements as specified in section C of RFP.

Protest File, Exhibit 24, Tab G. The memorandum prepared by the second evaluator states:

[Orange], one of the offerors, . . . did not conform to the mandatory specifications as stated in Part IV Section L paragraph 20 and 25 2.a.1 of the subject solicitation. In order to have an acceptable proposal, the offeror must have met all the mandatory requirements set forth in Section C of the solicitation document. The offeror was to repeat each requirement, verbatim, in the order it was listed in the Statement of Work, section C of the solicitation document, and after each of the requirements listed, was to provide a statement with substantiating references of his ability to meet each of the requirements. Therefore, [Orange's] proposal is considered non-responsive to the . . . RFP and the SSEE is unable to evaluate their proposal.

Id. These two memorandums are dated June 2, 1988. Following their execution, no further evaluation was made of the protester's proposal. Transcript at 71-73, 407, 415, 429.

The Competitive Range Determination

8. When the technical evaluations were completed, preparations were made for a meeting of the Source Selection Advisory Council (SSAC). The SSEE chairman, the contracting officer and the contracting specialist prepared briefing charts for presentation to the SSAC. Transcript at 43, 418-19. Individual charts were prepared for those proposals which had received a complete technical evaluation but not for proposals which had only been screened but not further evaluated. Protest File, Exhibit 23. On June 17, 1988, the SSAC met to discuss the procurement. Protest File, Exhibit 22. The meeting was attended by the SSAC chairman, two other members of the council, the SSEE chairman, two other members of the SSEE, the contracting officer and the contract specialist. Id.

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9. During the meeting of the SSAC on June 17, 1988, the SSEE chairman reviewed the specially prepared briefing charts dealing with the proposals which had received a complete technical evaluation. Other proposals which the SSEE chairman had previously concluded were not susceptible of a complete evaluation were then discussed as a group. Protester's proposal was included in this group. Transcript at 95-96, 420. The SSEE chairman recommended to the SSAC that these proposals be eliminated. Protest File, Exhibit 22 at 1-2; Transcript at 420. It is unclear from the record whether protester's technical proposal was discussed in any detail at this meeting of the SSAC. The memorandum for record states only:

SSAC members then discussed the ramifications of eliminating these proposals at this time and questioned whether or not some or all proposals could be made acceptable through the negotiation/discussion process. After some discussion, there was unanimous agreement that these proposals were unacceptable and could not be made acceptable by meaningful discussions.

Protest File, Exhibit 22 at 2. The second evaluator assigned to screen protester's proposal was present at the SSAC meeting on June 17. He stated that the protester's proposal was included in a brief discussion of the group of proposals which the SSEE chairman did not consider capable of in-depth evaluation. He recalls answering some questions of a general nature put to him by the chairman of the SSAC and one member regarding the possibility that these proposals could be evaluated or were capable of correction. It is his recollection, however, that these questions were not vendor specific and that the entire discussion regarding these proposals did not last more than fifteen or twenty minutes. Transcript 92-96.

10. The contracting officer for this procurement testified that the chairman of the SSAC, who, like herself, is also a contracting officer, made the competitive range determination. Upon further questioning, she attributed the decision instead to the SSAC itself but noted that the chairman of the SSAC signed the council's documentation. Transcript for July 27 hearing at 115-17. The protest file contains a memorandum for record signed by the same SSAC chairman, dated June 17, 1988, with a subject line as follows: "Competitive Range Determination, RFP F49642-88-R0197." The final paragraph of the memorandum states: "I have determined that the remaining . . . proposals met all the mandatory requirements and are within the competitive range." Protest File, Exhibit 27.

11. The SSEE member who attended the meeting of the SSAC on June 17, and who testified regarding the discussion of protester's proposal at that meeting (see finding 9 above) stated in a pretrial deposition that he believed the SSAC chairman made the determination "about what contractors would remain in the competitive range and which would be placed outside of the competitive range." Transcript at 86-87, 91, 97. At the merit hearing for this protest, this individual retracted his statement that the competitive range determination was made by the chairman of the SSAC. The retraction was said to be based upon his review of the regulations and a conversation with the contracting officer who told him she had made the determination. Id. at 111.

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12. In subsequent testimony, the contracting officer qualified her earlier statement that the determination had been made by the SSAC and documented by the council chairman in his signed determination. She contended that she was not changing her original statement that the council made the determination but insisted that she herself made the competitive range determination at the meeting of the SSAC on June 17. She explained:

And what I was trying to emphasize was that it is not a decision that I make on my own, but rather I take under the advisement of the Source Selection Advisory Council what their recommendations that are being briefed at that particular meeting. . . .

It is a group decision that is made. Certainly, there was no disagreement in this particular instance. [In a] hypothetical situation, if there would have been a disagreement as to who should be kept in and who should be kept out, then I would have made the final determination.

So, in a very simplistic way, yes, the Contracting Officer makes the determination, but not of her own accord. I guess that's what I'm trying to say.

Id. at 47-48. The contracting officer later explained on cross-examination that in stating that the determination was not made of "her own accord" she did not mean to suggest that it was not a free decision but only that it was not a unilateral decision made without consideration of the advice and recommendations of the SSAC and the SSAC. Id. at 84. As to the competitive range determination signed by the chairman of the SSAC, the contracting officer explained that it was prepared by the contract specialist for the chairman's signature although it would have been more appropriate had it been for her signature or for both her signature and that of the chairman. In any event, she stated that she considered it a "harmless document that would simply go in the file." Id. at 455-56.

Orange's Notice of Exclusion From The Competitive Range

13. On June 22, 1988, the contracting officer wrote the following in a letter to protester:

1. Thank you for your proposal submission. Your response did not comply with the requirements stated in Section L, paragraph 25 entitled "Format and Instruction for Proposal Preparation". Specifically, you did not repeat each statement of work requirement and provide a statement as to how your company would satisfy that particular requirement. Your proposal could not be evaluated and is considered unacceptable.
2. Pursuant to FAR 15.1001 you are hereby notified that your proposal is unacceptable and a revision will not be considered.
3. Your interest in this procurement has been appreciated.

Protest File, Exhibit 14.

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14. The protester understood the contracting officer's letter to mean that its proposal had not been evaluated and had been rejected preliminarily because it did not meet formatting requirements. Transcript of July 27 hearing at 22. Protester thereupon consulted with counsel and authorized counsel to contact the contracting officer and request her to reconsider her decision. Id. at 23.

15. Counsel initially contacted the contracting officer by telephone on June 30, 1988. Transcript of July 27 hearing at 118-24. At the contracting officer's request, counsel confirmed her request for reconsideration in writing. Id. at 129. The letter was delivered by courier that same day. Id. It states in part:

In your letter of 22 June 1988, you stated that because the proposal submitted by Orange Systems did not repeat each statement of work requirement, the proposal could not be evaluated. Although your statement that Orange Systems did not repeat each provision as set forth in the solicitation is correct, it is Orange Systems' position that this is a minor informality which can be easily corrected. The proposal submitted by Orange Systems is carefully indexed and structured to follow the format of the solicitation exactly. While Orange Systems recognizes the Government's concern that disorganized proposals are difficult to evaluate, the Orange Systems proposal did not fall into that category.

Protester File, Exhibit 15. Counsel's letter requested a reply by close of business on July 6, 1988. Id. at 3.

16. The contracting officer informed the SSEE chairman of the protester's concerns. The chairman, in turn asked the two evaluators who had performed the initial screening of protester's proposal to document specifically the reasons why they felt the protester's proposal was deficient and should be eliminated from the competitive range. Transcript at 422-23. This request resulted in a joint memorandum from the two evaluators to the SSEE chairman. The memorandum describes alleged deficiencies found in Orange's proposal. The introductory paragraph states:

1. The items following are a list of deficiencies, concerns and miscellaneous items requiring clarification from [Orange's] proposal. Note that these were found on the first screening only and it is assumed that substantially more problems would be found with the subject proposal if a complete evaluation was conducted. My impression is that [Orange's] proposal is still well outside the competitive range and a completely new proposal would need to be submitted for the vendor to fall within the competitive range. The problem still exists that the vendors [sic] proposal is not in the required format and is difficult if not totally impossible to evaluate.

Protest File, Exhibit 18.

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17. The "deficiencies, concerns and miscellaneous items" listed in the joint memorandum provided to the SSES chairman by the evaluators who screened protester's proposal are based primarily on the marginal notes and observations contained on their initial screening check lists. This is readily confirmed by comparing the contents of the memorandum to the checklists themselves. Protest File, Exhibits 18, 24 at Tab G. The joint memorandum also contains some additional observations relating to the protester's actual ability to perform any contract which might be awarded. The parties have stipulated that the latter observations are in no way relevant to the exclusion of the protester from the competitive range. Transcript at 293. We, therefore, will not describe them here. The observations culled from the screening checklists are, however, of considerable importance and are discussed below. The joint memorandum, dated July 7, 1988, was provided to the SSES chairman, who then passed it on to the contracting officer. Id. at 422.

18. On the afternoon of July 6, in an effort to garner support for Orange, a small business, a representative of the protester attempted to telephone respondent's small and disadvantaged business specialist. The specialist was unavailable at the time but was asked to return protester's call. In fact, the individual contacted by the protester had responsibilities not only for small business contracting but also had supervisory responsibilities over the contracting officer handling this procurement. Transcript of July 27 hearing at 148, 155. The contracting officer's supervisor arranged for her to participate in the call which he returned that same day to the protester. Id. at 31-31, 148-49.

19. After some preliminary remarks from her supervisor, the contracting officer took the principal role in the telephone conference of July 6 with the protester's representative. She testified that in this conversation she attempted to explain that the protester's proposal had received an initial screening by the technical team and been rejected. It therefore did not receive the thorough evaluation accorded to other proposals which passed the initial screening. She also contends that she explained the intent of the June 22 letter, namely, that because the proper format was not followed in repeating each statement of work requirement, there were many omissions. Id. at 100. The contracting officer also testified that she told the protester's representative that she "would send a letter giving additional supplemental information." Id. at 103-4.

20. A letter was provided by the contracting officer on the following day. It was addressed to counsel for the protester and references counsel's letter of June 30 and the telephone conference with protester's representative on the previous day. It states in part:

My letter, dated 22 June 1988, to Orange Systems advised that their proposal was unacceptable and therefore could not receive further consideration in the evaluation and award process. Through subsequent discussions with yourself and [protester's representative], I realize the intent of my letter was not clear as a result of overgeneralization. . . .

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To clarify my 22 June 1988 letter, Orange Systems proposal was considered outside the competitive range based on technical considerations. The proposal contained major technical deficiencies and omissions and to have considered the proposal further would have required virtually a new proposal submission. These deficiencies and omissions were presumed to be the result of not following the prescribed format as outlined in Section L.

Protest File, Exhibit 17. The letter does not provide any specific information regarding the major technical deficiencies and omissions to which it refers.

21. By letter dated July 13, 1988, to the contracting officer, Orange's president explained that her letter of July 7 had only served to confuse the protester. He wrote:

Frankly, at this point our company is quite confused. We do not know whether your panel did or did not review our proposal on the merits or whether it simply determined that the merits were not easily evaluated and rated based on formatting, and accordingly removed our offer from the competitive range. In this circumstance, Orange has been provided with no clear basis by your office to judge whether Federal and Air Force procurement rules and procedures were properly adhered to or whether Orange's proposal was fairly considered. Based on your July 7 letter, it is clear that we will not receive any information to form a basis for these judgments until we receive a debriefing by you and the panel on the specific deficiencies and omissions it found to reject our proposal as "outside the competitive range".

Protest File, Exhibit 19 at 1.

22. The contracting officer responded to Orange's letter of July 13 with a telephone call to the president of Orange on July 18. By that time she had before her what she referred to as a "technical evaluation report" which later was identified by respondent as the joint memorandum of July 7 prepared by the SSEE evaluators. See respondent's letter of July 29, 1988, to the Board and Protester's motion in opposition to requested protection, filed with the Board on July 28, 1988. Drawing from the contents of the joint memorandum of July 7, the contracting officer was able to provide Orange with some specific examples of where its proposal was considered to have major deficiencies. Transcript at 110-13. On July 21, 1988, Orange filed this protest alleging, inter alia, that the areas of deficiency outlined by the contracting officer to the president of Orange in this conversation are either addressed in the proposal or are so inconsequential as to negate the contracting officer's characterization of them as major deficiencies. Protest at 4.

Deficiencies In Protester's Proposal

23. The protester admits that it failed to comply with the requirement in section L of the solicitation to repeat verbatim the mandatory requirements of section C before addressing that requirement in

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its proposal. Transcript at 190-92. However, although this made review of the proposal somewhat more difficult, both evaluators testified that they did not consider this to be a major deficiency. Id. at 283, 389. The contracting officer likewise assured the protester both in her telephone conversation of June 6 and her letter of July 7, that it was eliminated from further consideration not because of its failure to follow the prescribed format but because of the major omissions and deficiencies which presumably resulted from this failure to follow the required format. See Findings 19, 20. While the protester undoubtedly ran a risk in failing to repeat verbatim the mandatory requirements of section C before addressing them in its proposal, nevertheless this error did not render the proposal unintelligible. In this case we find Orange's technical proposal to be well structured and to follow in an easily intelligible fashion the actual format of section C of the solicitation. Protest File, Exhibit 12, Tabs B and C; Transcript 155-84, 458-89.

24. The joint memorandum of July 7 prepared by the evaluators who screened Orange's proposal states that Orange failed to address certain mandatory requirements. The actual requirements in question and the documentation and testimony offered by the protester to disprove the contentions of the evaluators are subject to in camera treatment since they involve procurement sensitive information. However, after reviewing the pertinent sections of protester's proposal and hearing the testimony of protester's coordinator for federal marketing, we find that those mandatory requirements of the RFP which the SSEE evaluators in their memorandum of July 7 said were not addressed were, in fact, addressed by Orange in its proposal. Protest File, Exhibit 12, Tabs B and C; Transcript 155-84, 458-89.

25. Similarly, having heard the extensive testimony of the two SSEE evaluators regarding the entries made on their initial screening checklists and regarding the specific alleged deficiencies described in their joint memorandum of July 7, 1988, we find that none of these observations or concerns precluded the SSEE from continuing with the further evaluation of the protester's proposal after its initial screening. Certain perceived weaknesses in the proposal may affect the ranking of protester's proposal vis-a-vis other proposals. However, we do not find that these alleged deficiencies, taken either individually or cumulatively, are of sufficient magnitude as to render further evaluation impossible. Transcript at 128-47, 232-83, 293-358, 361-90, 395-408.

26. In testifying regarding the contents of their screening checklist and their memorandum of July 7, the SSEE evaluators responsible for screening protester's proposal expressed concern several times regarding the adequacy of the protester's understanding of certain mandatory requirements or the ambiguity of certain provisions in the proposal which address these requirements. Transcript 310, 242, 313-15, 318, 367-68, 374-24, 371, 147, 139-40, 263-64, 334-38, 343-47. However, the protester in its proposal clearly manifests an intent to comply with all requirements, terms, and conditions of the RFP. It states:

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Orange Systems has reviewed all terms and conditions set forth specifically in the STATEMENT OF WORK (Section C) and is fully agreeable to all provisions contained therein. All such terms and conditions and definitions are hereby incorporated into Orange's TECHNICAL PROPOSAL. Also all provisions in Section B - M of Solicitation and all Exhibits are hereby incorporated into this TECHNICAL PROPOSAL.

Protest File, Exhibit 12, Tab C at 14-15.

27. There are in this procurement other proposals which have been successfully screened which manifest a similar intent to comply with the provisions of the RFP. Where certain provisions in these proposals have been found to be vague, ambiguous or otherwise deficient, the respondent has issued clarification requests or deficiency reports. Protest File, Exhibit 26. The "clarification request" is defined by one of respondent's witnesses as a request for clarification when "we do not have a firm understanding of what the contractor is stating in response to a section in his proposal." A "deficiency report" is issued "when a contractor either omitted something or responded to it incorrectly." Transcript at 305.

Discussion

The Author Of The Competitive Range Determination

It is the contention of the protester that the competitive range determination which led to the exclusion of protester was not made by the contracting officer. We agree that the original formal determination of June 17, 1988, was not made by the contracting officer.

Regulation expressly provides: "The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b))." Federal Acquisition Regulation (FAR) 15.609(a), 48 CFR 15.609(a) (1987). File documentation and early testimony of the contracting officer and of a key member of the SSAC all tend to confirm the fact that the original formal competitive range determination was not made by the contracting officer. Findings 10, 11. The same SSAC member later reversed his position and the contracting officer attempted to explain her earlier testimony. Findings 11, 12. We find this later testimony, however, self-serving and lacking the credibility which we attach to the earlier and more spontaneous statements. For this reason we conclude that the original formal competitive range determination was made on June 17, 1988, by the SSAC chairman and that, therefore, the above mentioned FAR requirement was not met initially. We further conclude that at that time, the contracting officer considered that the competitive range determination was the responsibility either of the chairman of the SSAC or the SSAC itself.

It is clear, however, from the testimony of the contracting officer, when read as a whole, that she concurred in the original competitive range determination of June 17, 1988, and later, when challenged on the matter

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during the course of this protest, adopted the determination, without qualification, as her own decision. Finding 12. This in effect corrects, albeit belatedly, the initial violation and prompts us to review the determination itself for compliance with statute and regulation.

The Basis Of Orange's Rejection From The Competitive Range

The SSEE chairman recommended to the SSAC that Orange's proposal be rejected from the competitive range. Finding 9. He and the two evaluators who had screened Orange's proposal had concluded that it could not be evaluated beyond the screening stage. Findings 5, 7. The record, however, shows considerable confusion regarding the reason why protester's proposal was not considered capable of further evaluation after its initial screening.

The first evaluator stated in her memorandum of June 2, that the proposal could not be evaluated due to non-compliance with numerous requirements of the RFP. Finding 7. The memorandum notes that the proposal was not in the required format and that various items were not addressed or inadequately addressed. Presumably, therefore, it is a result of all these deficiencies that the proposal could not be evaluated.

The second evaluator stated in his memorandum that the protester failed to repeat verbatim the requirements of the statement of work and provide a statement with references regarding its ability to meet these requirements. The evaluator concluded: "Therefore, . . . the SSEE is unable to evaluate their proposal." Id. This memorandum is puzzling. It purportedly was written after the second evaluator had completed his analysis of Orange's proposal. It was to set out his reasons supporting the recommendation to eliminate Orange from the competitive range. Finding 5. Although this evaluator's screening checklist contained several other alleged deficiencies, they are not mentioned in the memorandum at all as reasons why the proposal could not be evaluated.

The chairman of the SSEE who claimed to have reviewed personally the screening checklists of both evaluators as well as Orange's proposal, concluded that the proposal could not be evaluated because of major omissions and deficiencies and because it was so lacking in technical merit. Id.

Whatever the various reasons were for concluding that Orange's proposal could not be further evaluated, the chairman of the SSEE and his two evaluators responsible for screening the Orange proposal were in agreement that it could not be further evaluated. That conclusion was passed on to the contracting officer at an early juncture. The record shows that shortly thereafter and before the SSEE formally briefed the SSAC on the results of its review of proposals, the contracting officer reviewed the screening checklists. However, this review was prompted by procedural concerns. The contracting officer in accepting the conclusion that Orange's proposal could not be further evaluated, relied upon the technical expertise of the SSEE and accepted the conclusion without question. Finding 6.

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Nothing in the record indicates that the SSAC was any more demanding of information from the SSEB than the contracting officer was so far as the alleged inadequacy of the protester's proposal was concerned. The brief discussion of the SSEB's recommendation to eliminate Orange's proposal during the meeting of the SSAC was of a general nature and not specific with regard to any of the proposals which the SSEB chairman was recommending for elimination. Finding 9. Indeed, no briefing chart on Orange's proposal had even been prepared. Finding 8.

The confusion as to why protester's proposal was not capable of further evaluation after its initial screening continued after the competitive range determination made on July 17, 1988. In explaining why Orange was rejected from the competitive range, the contracting officer's letter of June 22 reflects the rationale of the second evaluator's memorandum, namely, the proposal could not be evaluated because of Orange's failure to repeat each statement of work requirement and provide a statement of how it would be satisfied. Finding 13. Understandably this prompted an inquiry from protester and its counsel. Findings 14, 15, 16. An effort was made to clarify matters with a subsequent letter and two telephone calls. Findings 19, 20, 22. In providing these clarifications, respondent abandoned the position taken by the second evaluator in his memorandum of June 2 and repeated in the contracting officer's letter of June 22. The reason given for why Orange's proposal could not be further evaluated after initial screening was now alleged "major technical deficiencies and omissions" which presumably were the "result of not following the prescribed format as outlined in section L." *Id.*

We do not view this refinement or clarification of respondent's position as constituting a radical change in respondent's position on the matter of why the SSEB recommended or the SSAC agreed to the elimination of Orange from further consideration. We hold that the basis for the rejection of Orange was that its proposal could not be evaluated beyond the initial screening phase. This was the conclusion of the SSEB and the recommendation of its chairman which was accepted by the SSAC and concurred in and eventually adopted by the contracting officer herself during this protest. It is the "bottom line" in the letters sent to the protester by the contracting officer on June 22 and July 7. It is this basis which we now examine for purposes of determining its accuracy and validity.

Was Orange's Proposal Capable Of Further Evaluation?

On the matter of whether Orange's proposal could be further evaluated after screening, the record shows a slow retreat by the two evaluators responsible for the screening. Their memorandums of June 2 unequivocally state that the proposal could not be evaluated. Finding 7. Their joint memorandum dated July 7 and written to document their reasons for recommending the elimination of protester from the competitive range falls short of the original conclusion. It states "The problem still exists that the vendors [sic] proposal is not in the required format and is difficult if not totally impossible to evaluate." Finding 16. Since the alleged near

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impossibility to evaluate is mentioned in the same sentence as the problem of compliance with the required format, we assume that the alleged difficulty with evaluation is attributable to Orange's failure to follow the required format. As we have already noted, however, respondent's protest is based on that contention. Finding 19, 20, 22. Furthermore, we have found as fact that respondent's own witnesses did not consider protester's failure to follow the required format as a major deficiency in the proposal. Finding 23. On the other hand, if it is respondent's contention that the alleged near impossibility to evaluate is attributable to the other deficiencies mentioned by the evaluators in their memorandum of July 7 and not to the formatting issue, one still cannot avoid noting that the unconditional impossibility to evaluate found in the memorandum of June 2 has been downgraded to a near impossibility in the joint memorandum of July 7.

As the evaluators testified in detail regarding their screening of protester's proposal, it became increasingly apparent that they had themselves carried their analysis beyond the screening process and were already engaged in further evaluation of the proposal. Both spent considerable time on their analysis. Finding 4. Their recorded comments and their testimony regarding these comments--especially where they considered the proposal in need of clarification--show a concern not just with the mandatory requirements themselves but with the degree of effectiveness with which Orange was supposed to have met them. This exceeds what the screening process involved. Finding 3. It is itself the start of a more substantive evaluation.

The record does not support a conclusion that the deficiencies found by the evaluators were sufficiently beyond correction or improvement or otherwise not readily curable. Because these deficiencies are still procurement sensitive, we have not discussed them in any detail in our findings of fact. We have, however, determined that nothing which the evaluators have said or written regarding the protester's proposal convinces us that it was impossible to proceed with an evaluation of Orange's proposal after the initial screening. Finding 25. Indeed, their understanding of the proposal, the time spent by them reviewing the proposal, and several of their thoughtful comments regarding its contents convince us that they carried their analysis beyond the screening process. We cannot, therefore, accept their conclusion that Orange's proposal could not be evaluated beyond the screening stage.

It may well be that without further clarification, the de facto evaluation begun by the evaluators on certain aspects of Orange's proposal could not proceed further. However, it must be recognized that in these instances, respondent's review of Orange's proposal had already advanced beyond mere screening. We have found that vendors whose proposals were successfully screened in this procurement and who agreed to comply with the terms and conditions of the solicitation, were offered the opportunity to respond to clarification requests and deficiency reports when provisions in their proposals required clarifications or evidenced omissions or errors. Finding 27. We see no reason why Orange should not be afforded a similar opportunity since the SSEE evaluators have demonstrated that the proposal is in fact capable of evaluation beyond the screening stage.

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Notwithstanding the testimony of his two evaluators and their shift in position as evidenced in their memorandums of June 7 and July 7, the chairman of the SSEB remained of the firm conviction that the protester's proposal could not be evaluated because of major omissions and deficiencies and because it was of such inferior technical merit. We disagree with this conclusion.

The SSEB chairman testified that in screening proposals, he was looking for four things, namely, a restatement of the mandatory requirements, a statement of compliance, a statement of how the company would accomplish the mandatory requirement and supporting examples of how this requirement is met in existing contracts. He contended that in Orange's proposal these four items were lacking in all the mandates. Finding 5. The protester admits that the restatement of the mandatory requirements was omitted from its proposal. However, respondent's own witnesses state that this deficiency was not a reason for the protester being excluded from the competitive range. Finding 23.

As to the other three elements mentioned by the SSEB chairman as essential to a successful screening, we do not agree that they were missing in their entirety from Orange's proposal. We have found as fact that Orange did address all the mandatory requirements and also that Orange provided evidence of an intent to abide by all terms and conditions of the solicitation. Findings 24, 26. We, therefore, reject as incorrect the SSEB chairman's contention that Orange's proposal was deficient to the degree alleged. Similarly, we reject his conclusion, based as it is on this alleged defect, that Orange's proposal could not be further evaluated.

In short, we find that the contention of the SSEB chairman and his two evaluators that Orange's proposal could not be evaluated beyond its initial screening is unsupported in the light of facts proven in this protest. Furthermore, respondent has failed to show us a valid basis for rejecting the protester at this early juncture in the evaluation process.

The solicitation, respondent's Proposal Evaluation Guide, and the testimony of the official who compiled this internal guidance all confirm that the initial screening process was intended to determine if an offeror had addressed the mandatory requirements of the RFP and, in the event mistakes were detected, to determine if the proposals were beyond correction. Finding 3. In stopping the evaluation of Orange's proposal at the screening phase on the mistaken assumption that the proposal could not be further evaluated, respondent acted contrary to the solicitation provision and its own internal guidance regarding this phase of the evaluation process. This constitutes a violation of the statutory requirement that competitive proposals be evaluated based solely on the factors specified in the solicitation. 10 U.S.C. § 2305(b)(1) (Supp. III 1985). Similarly, it violates the regulation reflecting this statutory requirement, namely, FAR 15.608(a), 48 CFR 15.608(a) (1987).

We have previously held that we will not disturb a contracting officer's determination that a vendor should be removed from the competitive range if that determination is reasonable. Phoenix Associates, Inc., GSBCA

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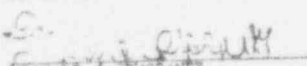
Nos. 9190-P, 9251-P, 88-1 BCA ¶ 20,455; Control Data Corp., GSDCA No. 8880-P, 87-2 BCA ¶ 19,815. In this case the protester has proven that the basis for the elimination of the protester from the competitive range is not simply unreasonable but wrong. For this reason we are directing the contracting officer to restore the protester to the competitive range, seek clarifications and conduct discussions as required, and otherwise proceed with the evaluation of Orange's proposal.

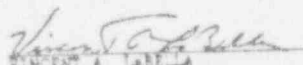
Decision

The protest is granted. Respondent is directed to restore the protester to the competitive range and proceed with the procurement in accordance with applicable statutes and regulations. We revise respondent's procurement authority accordingly. Our order suspending that authority, issued orally on July 26, 1988, and confirmed in writing on July 27, 1988, is hereby revoked.


EDWIN E. NEILL
Administrative Judge

We concur:


LEONARD J. BUCHANAN
Chief Administrative Judge


VINCENT A. LATTI
Administrative Judge