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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Colt Defense, LLC

File: B-406696.2

Date: November 16, 2012

Michael A. Hordell, Esq., Michael R. Golden, Esq., Heather Kilgore Weiner, Esq., and Samuel W. Jack, Esq., Pepper Hamilton LLP, for the protester.
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Wade L. Brown, Esq., and Kandis C. Gaines, Esq., Department of the Army, for the agency.
Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO will not resolve a dispute involving interpretation of a license agreement, even where the amount of the royalty fee under the agreement bears upon evaluation factors of the current solicitation, because this involves a matter of contract administration not subject to GAO's review.

2. A price evaluation scheme included in a solicitation for weapons that accounts for technical data royalty fees that will be due if award is made to an offeror who is not the owner of the technical data is not objectionable, even though the royalty may not represent the ultimate royalty paid by the government under the terms of a technical data license agreement because the parties to the license agreement have not yet agreed upon the applicable royalty fee.

DECISION

Colt Defense, LLC, of West Hartford, Connecticut, protests the terms of request for proposals (RFP) No. W56HZV-10-R-0593, amendment No. 7, issued by the Department of the Army for standard M4 carbines and standard M4A1 carbines. The protester argues that the terms of the solicitation are inconsistent with the

Federal Acquisition Regulation (FAR) and the terms of Colt's license agreement with the Army.[1]

We dismiss the protest.

The Army's initial solicitation was issued on August 19, 2011, and anticipated the award of a fixed-price 5-year indefinite-delivery/indefinite-quantity contract. The RFP sought proposals for the production of a minimum of 10,000 carbines and a maximum of 120,000 carbines in any combination of multiple M4/M4A1 configurations. RFP at 3. The RFP advised that award would be made to the offeror whose proposal offered the best value based upon the evaluation of four factors: (1) production capability, (2) price, (3) past performance, and (4) small business participation. RFP at 88.

As relevant here, the initial solicitation notified offerors that the technical data package for the M4/M4A1 carbines includes licensed technology for which the government is obligated to pay a royalty amount pursuant to a license agreement with Colt Defense, LLC.[2] RFP at 3, 74. The RFP explained that offerors who did not own or have a license for the Colt technology would be evaluated as follows:

> M.5.2 Price Factor (Factor 2)
>
> * * * * *
>
> M.5.2.3 The royalty rate is 5%. If an offeror does not indicate that it is the owner or a licensee of the technology/technical data, its offer will be evaluated by adding an amount equal to the royalty to its proposed prices.

RFP at 88.

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[1] The license agreement is a non-public agreement between Colt and the Army, which provides for a royalty payment to Colt for use of its licensed technology.

[2] The license agreement between the Colt and the Army provides in relevant part:

> [DELETED]

M4 Carbine Addendum to Technical Data Sales and Patent License Agreement, Article VII Royalties, at 13-14. The license agreement was not included with the solicitation, but was provided to our Office under coverage of a protective order.

On April 20, 2012, the Army notified offerors that it had awarded a contract to Remington. On April 26, Colt filed a protest to our Office challenging the Army's award contending, among other things, that the Army did not apply the solicitation's 5-percent royalty adjustment to the other offerors' total evaluated prices. Instead, Colt argued, the agency improperly applied the royalty adjustment to only certain portions of the offerors' proposed prices, based on an undisclosed and independent interpretation of the license agreement that the Army did not share with offerors.

We sustained Colt's protest on this basis finding that the agency had departed from the RFP's price evaluation criteria when it created its own undisclosed formula to apply the 5-percent royalty to only those portions of the M4/M4A1 carbine which it had independently determined were proprietary to Colt. See Colt Defense, LLC, B-406696, July 24, 2012, 2012 CPD ¶ __. We recommended that the Army either reevaluate offerors' proposals in accordance with the plain meaning of the solicitation, or amend the solicitation to clearly set forth its intended criteria for the evaluation of price with regard to the 5-percent royalty. Id.

In response to our recommendation, on September 12, the agency issued amendment No. 7 to the solicitation, which "set[] forth the methodology for the evaluation of price with regard to the 5% royalty and request[ed] a revised price proposal." RFP, Amendment No. 7, at 2. The amendment also replaced the price factor section of the RFP (quoted above) with the following:

> M.5.2 Price Factor (Factor 2)
>
> * * * * *
>
> M.5.2.4 If an offeror does not indicate that it is the owner or a licensee of the technology/technical data, its offer will be evaluated by adding an amount equal to the Total Evaluated Royalty, as calculated in Attachment 0001[3], to its Total Proposed Price. This section sets forth how the Total Evaluated Royalty is calculated.
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> M.5.2.4.1 The royalty rate is 5%. However, the royalty is only applicable to a portion of the acquisition price of CLINs 0001, 0002, 0003, 0004, 0005, and 0006 (to include all ordering periods). The Applicable Portion (%) is the percentage of the price of each weapon that is subject to a 5% royalty evaluation. The Applicable Portion (%) by CLIN is:

[3] Attachment 0001 is the Pricing Spreadsheet. The details of the royalty evaluation are set forth in RFP sections quoted above.

CLIN	Applicable Portion (%)
0001	36.22%
0002	36.02%
0003	49.41%
0004	35.82%
0005	35.62%
0006	48.90%

M.5.2.4.2 The Total Evaluated Royalty is calculated in Attachment 0001 as follows:

(Applicable Portion (%) of CLIN 0001) multiplied by (Total CLIN 0001 Price) multiplied by 5%
plus (Applicable Portion (%) of CLIN 0002) multiplied by (Total CLIN 0002 Price) multiplied by 5%
plus (Applicable Portion (%) of CLIN 0003) multiplied by (Total CLIN 0003 Price) multiplied by 5%
plus (Applicable Portion (%) of CLIN 0004) multiplied by (Total CLIN 0004 Price) multiplied by 5%
plus (Applicable Portion (%) of CLIN 0005) multiplied by (Total CLIN 0005 Price) multiplied by 5%
plus (Applicable Portion (%) of CLIN 0006) multiplied by (Total CLIN 0006 Price) multiplied by 5%

Equals Total Evaluated Royalty

Id. at 2-3. The deadline for submission of revised price proposals was set for October 9.

Colt submitted a timely agency-level protest to the Army objecting to the revised terms in RFP amendment No. 7. On September 28, the agency dismissed Colt's protest. On October 9, Colt filed this protest on the same basis with our Office.

DISCUSSION

Colt argues that the agency's royalty evaluation provisions no longer purport to include the actual royalty provided for in the license agreement and are therefore inconsistent with the requirement in Federal Acquisition Regulation (FAR) § 27.202-2(b)(1) that "[w]hen the Government is obligated to pay . . . a royalty," agencies must "[e]valuate an offeror's price by adding an amount equal to the royalty." See also FAR § 52.227-7 ("If an offeror does not indicate that it is the owner or a licensee of the patent, its offer will be evaluated by adding thereto an amount equal to the royalty"). Colt explains that because there is no agreed upon royalty between the government and Colt, the agency is not authorized to evaluate

the royalty. Colt argues that instead of using the actual royalty, as required by the FAR, the terms of the Army's amended price evaluation provide a speculative royalty amount, which the agency concedes is for evaluation purposes only, and which Colt asserts understates the true cost to the government. In effect, Colt argues that the Army cannot conduct the procurement until the parties reach an agreement as to the royalty rate. For the reasons discussed below, we do not agree with the protester.

Agencies must consider cost to the government in evaluating proposals, 10 U.S.C. § 2305(a)(3)(A)(ii) (2006), and while it is up to the agency to decide upon some appropriate and reasonable method for evaluating offerors' prices, an agency may not use an evaluation method that produces a misleading result. See Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4; AirTrakTravel, et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. Id.

As detailed in our prior decision, the Army and Colt have yet to reach an agreement based upon the terms of the license agreement as to what the actual royalty percentage should be. In fact, Colt argues that the terms of the amended solicitation are inconsistent with the terms of the license agreement because the agency's methodology for calculating the royalty is "flatly wrong." Protest at 19. On the other hand, the royalty provisions included in the solicitation reflect the Army's position on the appropriate royalty percentage due Colt.

With regard to the determination of the actual royalty amount, GAO will not resolve a dispute involving interpretation of a license agreement, even where the amount of the royalty fee bears upon evaluation factors of the current solicitation. See SCM Corp., Kleinschmidt Div. Kleinschmidt Inc., B-186235, Aug 10, 1976, 76-2 CPD ¶ 147 at 3. In this regard, the license agreement here includes a disputes clause, which governs the resolution of disputes under the license agreement, and provides for their consideration by the contracting officer and for appeals to the cognizant board of contract appeals or the Court of Federal Claims. M4 Carbine Addendum to Technical Data Sales and Patent License Agreement, Article XII Incorporated Regulations, at 16. We regard such disputes as matters of contract administration not subject to our bid protest jurisdiction, but within the discretion of the contracting agency and for review by the cognizant board of contract appeals or the Court of Federal Claims. 4 C.F.R. § 21.5(a) (2012); Hawker Eternacell, Inc., B-283586, Nov. 23, 1999, 99-2 CPD ¶ 96 at 3.

Colt states that it does not ask GAO to resolve the ongoing dispute between the protester and agency concerning the correct interpretation of the license agreement and the royalties to be paid to Colt. Protester's Response to GAO Concerning Jurisdiction (Nov. 2, 2012) at 2. Instead, Colt argues that the agency is prohibited

from issuing a solicitation that does not set forth an "agreed upon" royalty amount. Id.

In the present case, because the parties agree that some royalty is due Colt, and because the amount of the royalty undeniably represents a cost to the government, we think the agency acted within the reasonable exercise of its discretion in accounting for this royalty in the price evaluation in order to more reasonably determine which proposal represents the lowest cost to the Government. See Hughes Aircraft Co., B-226955, July 15, 1987, 87-2 CPD ¶ 48 at 3 (agency required to evaluate patent and technical data royalty fees as part of the cost evaluation where the terms of a licensing agreement--entered into by an agency and the owner of technical data--requires a specific royalty fee be paid by the agency if a contract requiring the use of technical data is awarded to a firm other than the owner of the data); SCM Corp., KleinSchmidt Div. Kleinschmidt Inc., supra (even where there is a dispute over the amount of the royalty due under a license agreement between the government and a contractor that cannot be resolved by GAO, GAO will not object to the agency's use of a reasonable evaluation formula in a competitive solicitation to account for royalties that the government believes will be due the license holder as a result of an award).

Contrary to Colt's arguments, nothing in FAR § 27.202-2 precludes the use of an evaluation factor based on the potential royalty liability under a license agreement for the use of technical data. In this regard, we note that FAR § 27.202-2 only applies to patent royalties and the present situation involves royalties on the use of technical data. We also note that there is no similar provision in FAR Subpart 27.4, Rights in Data and Copyrights, which addresses in any way the evaluation of royalties for the use of technical data.[4] Moreover, even if this provision were applicable, we do not regard FAR § 27.202-2 as precluding the evaluation of a royalty where the amount of the royalty has not yet been determined. Instead, this regulation only provides that when a royalty amount is "agreed upon," it must be evaluated.

[4] We recognize that our decision in Hughes Aircraft Co., supra, referenced FAR § 27.202-2 in requiring the evaluation of royalties on both patents and technical data in a situation where there was government liability for both. In Hughes, we found no reason to distinguish between patent and technical data royalty fees for evaluation purposes since both represented costs to the government and should be similarly evaluated when assessing the costs of proposals from other than the owner of the patent and technical data rights. In reaching this determination in Hughes, we did not state that the requirements of FAR § 27.202 were applicable to technical data royalties, but only that the FAR's silence regarding the evaluation of technical data royalties did not preclude their evaluation. Hughes Aircraft, Co., supra.

In general, our Office has held that agencies should provide some reasonable means for the evaluation of cost or price in a solicitation where there is uncertainty as to the actual costs to be incurred by the government. For example, in cases where there is uncertainty regarding the amount of certain costs that will be incurred under a fixed-price contract containing multiple line items, we have found the agency still can include some reasonable basis for comparing the relative costs of each proposal, for example, where no estimate for various types of services is reasonably available, a hypothetical or notional task, so long as it does not produce misleading results. See Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 11; High-Point Schaer, B-242616, B-242616.2, May 28, 1991, 91-1 CPD ¶ 509 at 6-8.

Here, we find no basis to sustain the protest. There is no dispute that the government will incur a royalty cost if award is made to an offeror other than Colt. Thus, as discussed above, we think the agency can properly account for this cost in determining the relative prices under this RFP, despite any remaining uncertainty as to the exact amount to be paid to Colt under the license agreement.

The protest is dismissed.

Lynn H. Gibson
General Counsel