

DECISION

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

FILE: B-211048

DATE: April 24, 1984

MATTER OF: Scan-Optics, Inc.

DIGEST:

1. Where protest is initially timely filed and subsequently supplemented, within 10 working days of protester's receipt of information under the Freedom of Information Act, the protest as supplemented is timely.
2. Agency properly reopened negotiations and later closed them with second round of best and final offers after receiving protest alleging that offeror in the competitive range was not in compliance with mandatory RFP requirement.
3. Although RFP provision warns that offers failing to meet mandatory requirements of RFP will be considered nonresponsive, such provision does not authorize automatic rejection of offer which is reasonably susceptible of being made acceptable through discussions.
4. Where RFP required offerors to demonstrate the current availability of equipment being used in system, offeror who demonstrates current availability of individual pieces of equipment, but does not simultaneously demonstrate availability of entire system, has met the requirement and is properly within the competitive range.
5. GAO does not review allegations of awardee's lack of financial capability absent showing of fraud or bad faith by contracting agency.
6. Allegation that awardee's equipment failed to meet mandatory RFP accuracy requirement is speculative where agency denies allegation

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and there is no evidence affirmatively establishing protester's position.

7. Offeror's insertion of clause indicating that certain information in proposal is subject to change is permissible where the contracting agency requested the information for informational purposes and not for purpose of ascertaining offeror's compliance with mandatory solicitation provisions.

Scan-Optics, Inc. (SOp), protests the Department of Agriculture's (Agriculture) award of a contract for two optical character recognition page reader/scanner (scanner) systems with microfilm capability to Scan-Data Corporation (SD), under request for proposals (RFP) No. 00-82-R-48.

SOp protests: (1) Agriculture's request for a "revised bid"; (2) SD's compliance with the equipment current availability requirement; (3) SD's financial responsibility; (4) SD's compliance with the document reading accuracy requirement; (5) SD's submission of a conditional offer in derogation of the major component technical description requirement; and (6) SD's submission of an allegedly ambiguous proposal. SOp believes that it was prejudiced by Agriculture's allowing SD to propose against relaxed mandatory RFP requirements. SOp raised arguments 1 through 3 in its initial protest and subsequently supplemented its protest with arguments 4 through 6.

We deny the protest in part and dismiss the protest in part.

Agriculture urges us to dismiss arguments 4 through 6 as untimely because these issues do not independently satisfy our timeliness requirements. Agriculture notes that SOp's initial protest "appears to have been predicated upon a full and complete knowledge of its competitor's products and capabilities" and that it was not until almost 5 months after its initial protest that SOp raised arguments 4 through 6, also based on knowledge of SD's product. In the alternative, Agriculture urges dismissal on the basis of SOp's admission that it received the information upon which arguments 4 through 6 are founded on July 8, 1983, and did not file with GAO until July 22, 1983.

We find SOP's protest involving arguments 4 through 6 is timely. Although it is clear that SOP had extensive knowledge of SD and its capabilities, there is no showing in this record that SOP knew the details of the scanner systems which SD actually proposed until SOP was furnished with a copy of the SD contract including SD's proposal, on July 8, 1983, under the Freedom of Information Act. We note that Agriculture's initial report on the protest, even though issued after award of the contract to SD, did not include a copy of the SD proposal. Our Bid Protest Procedures require that protests be filed with our Office within 10 working days of the time the protester becomes aware of the bases of the protest. 4 C.F.R. § 21.2(b)(2) (1983); See Stroh Corporation, B-209470, February 8, 1983, 83-1 CPD 143. Since SOP filed on July 22, 1983, the 10th working day after July 8, we find SOP's protest timely.

1. Revised Bid

We read SOP's objection to Agriculture's request for a "revised bid" as an objection to Agriculture's call for a second round of best and final offers following its earlier reopening of negotiations. Although we have held that, after negotiations and best and final offers, negotiations should not be reopened unless it is clearly in the best interests of the government, ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301, we have also upheld agency decisions to request a second round of best and final offers if a valid reason exists for doing so. Crown Point Coachworks and R&D Composite Structures; North American Racing Company, B-208694; B-208694.2, September 29, 1983, 83-2 CPD 386. Agriculture reports that following SOP's initial protest to Agriculture, alleging that SD could not possibly be in compliance with the mandatory requirements of the RFP, it decided to reopen negotiations with both vendors in order to obtain additional technical clarifications from both SD and SOP. This period of negotiation was closed with the protested request for best and final offers. We find nothing improper in this. This ground of protest is denied.

2. Current Availability

SOP argues that SD failed to demonstrate the current availability of equipment similar to the equipment that SD proposed to furnish. Specifically, SOP alleges that SD's

proposed systems contain a microfilming unit "not installed, in any market," and that foreign references may have been given in order to mislead Agriculture evaluators. SOP further alleges that SD's system was still being developed and could not be referenced with actual commercially available products. The applicable RFP provision reads:

"Availability - At the time of the submission of the proposal to the Government, the proposed equipment must consist of announced, off-the-shelf, commercially available products capable of satisfying the specific requirements as stated in Section C.

"With the submission of the bid, the vendor will demonstrate the current availability of the proposed equipment by providing a name, address, phone number, and contact point of three operating commercial or Government sites that have similar scanning and microfilming equipment in operation."

SOP's argument is couched in terms of the nonresponsiveness of SD's offer. Normally, in negotiated procurements, proposals are not rejected for nonresponsiveness, as are bids in formally advertised procurements. Instead, proposals are evaluated and discussions are held with offerors whose proposals are found to be within the competitive range. Proposals are rejected either when they are found to be no longer within the competitive range or when, after discussions, submission of best and final offers and final evaluation, a proposal is not selected for award. Riggins & Williamson Machine Company Incorporated; ENSEC Service Corporation, 54 Comp. Gen. 783, 789 (1975), 75-1 CPD 168. We have held, however, that where RFP's contain warnings such as the warning here ("Proposals which fail to meet all mandatory requirements will be considered non-responsive to this RFP and will not be considered for selection"), the warning should be taken to mean that the terms and conditions designated mandatory "were intended to be material requirements, and that a proposal failing to conform to them would be unacceptable." Computer Machinery Corporation, 55 Comp. Gen. 1151, 1154 (1976), 76-1 CPD 358. It does not follow, however, that an agency should automatically reject an offeror's proposal in the same manner that it would reject a nonresponsive bid. It is a fundamental

purpose of negotiated procurements to determine whether deficient proposals are reasonably susceptible of being made acceptable through discussions. This determination is a matter of administrative discretion which we will not disturb unless it is arbitrary or unreasonable. Moreover, we do not conduct de novo reviews of technical proposals in order to independently determine either their acceptability or their relative merit. Our review is limited to ascertaining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

Agriculture reports that SOP's assertion is factually incorrect. SD proposed two types of equipment for its system: (1) the scanner and (2) the microfilm unit which is manufactured by a third party. SD's initial proposal referenced locations using its scanners; however, none of the scanners had the microfilm units attached to them. When Agriculture asked about the microfilm equipment, SD provided references where that equipment was in use on similar but not identical scanner equipment.

The determination of what will satisfy the government's needs, particularly when equipment is highly technical, is primarily within the discretion of the procuring agency and will not be questioned by our Office without a clear showing that the determination is unreasonable. Digital Equipment Corporation, B-181336, September 13, 1974, 74-2 CPD 167.

In our view, SD met the requirement of demonstrating the current availability of both types of equipment and it is immaterial that in establishing the availability of the microfilming equipment the referenced microfilm equipment was not attached to scanner equipment identical to that which SD proposed. It is clear that the RFP contemplated that diverse pieces of equipment would be integrated into the proposed systems. For example, the RFP required offerors to describe "the technical characteristics of each major component of the proposed equipment configuration, including a schematic showing each machine proposed and the interconnections between devices, controllers, CPU's, etc." In our opinion, the offerors were not required to demonstrate that the entire system was currently available in the proposed configuration, but only that the individual components were currently available. SD did this. Accordingly, this ground of protest is denied.

3. Responsibility

With regard to SOp's questioning of SD's financial responsibility, Agriculture investigated the allegation and concluded that SD had the financial capability to perform the contract as a result of large investments in SD by another major corporation and by virtue of the fact that SD was performing satisfactorily on a General Services Administration, Federal Supply Schedule, contract. We do not review allegations concerning affirmative determinations of responsibility absent a showing that the contracting agency acted fraudulently or in bad faith. Educational Technology & Services, Inc., B-211231, April 22, 1983, 83-1 CPD 449. Since neither fraud nor bad faith is alleged, this ground of protest is dismissed.

4. Accuracy Requirement

The RFP requires that the scanners furnished be able to read government time and attendance records with a specified percentage accuracy. SOp argues that specifications furnished with SD's proposal show that SD's equipment cannot meet the accuracy requirement for uncontrolled handprinting. The SD specification gives figures for three situations: (1) where the documents read consist of good quality type; (2) where documents consist of controlled handprinting; and (3) where the documents consist of uncontrolled handprinting. The SD specifications for the first two situations meet the RFP accuracy requirement while the specifications for uncontrolled handprinting do not. Agriculture reports that its time and attendance records are considered to be controlled handprint ((2) above) and, for this reason, SD's specifications meet the RFP requirement. Further, Agriculture reports that SD's live task demonstration, prior to award, established that its system met the controlled handprinting accuracy requirement. It is SOp's responsibility to present sufficient evidence to affirmatively establish its position and, absent such probative evidence, SOp has failed to meet its burden of proof that the records consist of uncontrolled handprinting and its allegations are assumed to be speculative. American Marine Decking Systems, B-203748, July 8, 1981, 81-2 CPD 23. Since SOp has not presented evidence overcoming Agriculture's denial of its allegation, this ground of protest is denied.

5. Conditional Offer

SOp argues that SD made a conditional offer when it inserted the following clause in appendix "A" (system statistics appendix) of its proposal:

". . . Note: All statistics contained in this section are subject to change and will be updated in the next revision of the manual."

SOp finds the clause a clear violation of the RFP's major component technical description requirement, the modular compatibility between systems requirement, and the requirement that offerors provide information regarding the space and utility needs of their respective systems.

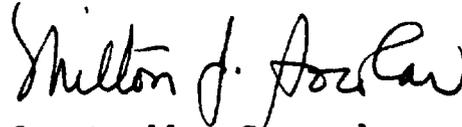
On the other hand, Agriculture takes the position that the clause was in a section of SD's proposal treating electrical and environmental conditions necessary to support SD's scanner system and that the RFP contained no requirements concerning either electrical or environmental conditions under which the scanner systems would have to operate.

We find Agriculture's position reasonable. The record shows that SD presented a clear technical description of all of the major components of the proposal system. There is no indication that changes in SD's scanner electrical and environmental support needs would necessarily affect the modular compatibility of SD's two scanner systems. Neither is there any indication that SD intended by insertion of the clause to reserve the right to tender performance in the form of two incompatible systems. It is important to note that SD's response concerned an informational portion of the RFP which sought information concerning the kind of site the government would need if it elected to purchase SD's proposed system. A proposal may only be excluded from the competitive range for "informational" deficiencies which are so material that major revisions would be required to make it acceptable. See PRC Computer Center, Inc.; On-Line Systems, Inc.; Remote Computing Corporation; Optimum Systems, Inc., 55 Comp. Gen. 60, 69 (1975), 75-2 CPD 35. We see no basis on this record for excluding SD from the competitive range; consequently, this ground of protest is denied.

6. Ambiguous Offer Requiring Clarification

On the basis of the above arguments, concerning SD's scanner accuracy and conditional statement of electrical and environmental support requirements, SOP contends that SD's offer was ambiguous and that Agriculture should have sought clarification. However, in view of our finding that SD's scanner had the required accuracy and that the statement of electrical and environmental support requirements was informational in nature, we see no merit in this argument. It therefore is denied.

Accordingly, since we find no evidence that SD was allowed to propose against less stringent standards than SOP was required to propose against, the protest is denied.



Acting Comptroller General
of the United States