

**DECISION**

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

PL-II  
28999**FILE:** B-213686**DATE:** August 3, 1984**MATTER OF:** Arthur D. Little, Inc.**DIGEST:**

1. Contracting agency reasonably interpreted a proposal to encompass two categories of services, and not alternative offers to perform either one category only or both, where the proposal intermingled discussion of both categories without any representation or indication that the offeror was presenting alternative offers.
2. Meaningful discussions are held where the contracting agency sends offeror a letter requesting "clarifications" and containing questions which lead the offeror to the areas of its proposal deemed deficient, and the offeror has an opportunity to modify its proposal to correct the deficiencies.
3. Contracting agency may revise its competitive range determination, eliminating an offeror formerly considered within it, if discussions reveal that the offeror's proposal no longer has a reasonable chance of acceptance, and need not give the offeror an opportunity to submit a revised proposal.

Arthur D. Little, Inc. (ADL) protests the National Cancer Institute's rejection of its proposal to perform in vivo testing of anti-tumor drugs on mice. The proposal was submitted in response to request for proposals No. NCI-CM-37567-20, which contemplated the award of at least three cost-plus-fixed-fee contracts to firms for testing the effects of various drugs on tumor bearing and non-tumored conventional mice and on "athymic" mice (mice bearing transplanted human tumors, termed "xenografts").

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The protest is denied.

The solicitation stated that the capability to perform tests on athymic mice was not a requirement in submitting a proposal. The protester, an incumbent contractor for the performance of conventional testing only, submitted a proposal offering to perform both conventional and xenograft testing. The Institute's technical review group felt that the protester's proposal was technically unacceptable regarding xenograft testing, and, after questioning the protester on various aspects of its proposal, the Institute eliminated ADL from the competitive range.

The protester basically contends that its proposal included alternative offers to perform conventional testing plus xenograft testing or to perform conventional testing alone, and that the Institute improperly failed to evaluate its proposal for conventional testing only. The protester also argues that the Institute failed to conduct meaningful discussions and improperly excluded ADL from the competitive range without requesting ADL to submit a best and final offer. In this last regard, the protester states that the Institute eliminated ADL from the competitive range without giving appropriate consideration to ADL's lowest proposed costs.

I. The Solicitation and Background:

The purpose of the solicitation was to provide a basis for selecting at least three contractors. This number, the agency believes, would assure an adequate reserve for confirmation testing even if one contractor's performance was interrupted because of a disease outbreak in the rodent colony. Athymic mice are highly susceptible to disease and must be maintained in a germ-free environment.

Based on available funding, the Institute had determined it could contract for a level of effort equal to the performance of 100,000 "L-1210" leukemia tests, although the scope of work would include other basic tests. The Institute incorporated these requirements into paragraph F, "Level of Effort," of the solicitation which provided in pertinent part as follows:

"It is anticipated that at least three (3) incrementally funded contracts with the capability to perform both conventional and athymic testing will be awarded. All

responders must submit proposals to conduct testing at a level of 20,000 and 25,000 L1210 equivalent tests per year. Offerors may also propose at the levels of 30,000 and/or 40,000 L1210 equivalents per year. Separate cost proposals must be submitted for each test level. Capability to conduct xenograft testing is not a requirement in submitting a proposal. Contracts will be awarded for a five (5) year period with each increment being for a period of one year. However, the Government reserves the right to make awards in its best interest."

The solicitation's "TECHNICAL EVALUATION CRITERIA" section advised offerors that the technical portion of the proposal would be "the most important single consideration in the award of the contract."

The Institute received five proposals, each submitted by an incumbent contractor. The Institute understood the protester's proposal as offering to perform both conventional and xenograft testing at the 20/25 thousand L-1210 test level. After reviewing the technical review group's initial evaluation and making an initial cost evaluation, the source evaluation group recommended that all offerors, including ADL, be included in the competitive range. The technical scores and evaluated costs for all five offers at the 20/25 thousand test levels are listed below:

	<u>Technical Score</u>		<u>Evaluated Cost</u>	
	20,000 level	25,000 level	20,000 level	25,000 level
Offeror 1	840	830	\$4,355,518	\$5,030,543
Offeror 2	790	762	\$3,448,027	\$4,501,814
Offeror 3	762	790	\$3,778,100	\$3,941,086
ADL 4	565	493	\$2,511,297	\$2,905,589
Offeror 5	498	450	\$3,532,780	\$4,314,886

The minutes of the source evaluation group's meeting, in which the competitive range determination was made, states that there were numerous areas that needed to be resolved prior to the source selection, and recommended that ADL be asked to respond to 13 "questions" concerning perceived

weaknesses in their proposal. Several of the questions involved xenograft testing, the most pointed of which stated: "[t]he [technical review group] felt that your organization lacked experience with tumor xenograft systems. Please comment."

In this regard, the contracting officer's memorandum about the meeting states that ADL's proposal was judged to be adequate based on examples of its previous work, which involved conventional testing only.

After the recommended questions for each offeror were sent to the offerors and the responses returned, the source evaluation group rescored the proposals with the result that the fifth offeror's technical scores were upgraded significantly and ADL's scores were reduced to such an extent that ADL's scores were considerably lower than any other offeror. The evaluation group therefore recommended that ADL be excluded from the competitive range.

After further negotiations with each of the remaining four offerors, the Institute awarded contracts to them all.

## II. Discussion and Analysis:

### A. Whether ADL's proposal contained alternative offers

Both the protester and the contracting agency agree that the solicitation permitted offerors to propose to perform both types of testing or to perform conventional testing only. The parties disagree as to whether ADL's proposal included an offer for conventional testing only as an alternative to its offer to perform both types of testing. We do not believe that ADL's proposal reasonably can be construed as encompassing alternative offers to perform either conventional testing alone or conventional testing plus xenograft testing.

The protester attempts to contort its proposal into an offer of alternative proposals based on a statement in the offeror's cover letter that ADL would devote its best efforts towards carrying out the STATEMENT OF WORK (paragraph A of the solicitation), which the letter recited verbatim, including the requirement that the contractor

receive, maintain, and experimentally use "regular and/or athymic mice." The protester contends that the "and/or" language in the cover letter meant that ADL's proposal alternatively included an offer to perform conventional testing only or to perform both conventional and xenograft testing. Neither the protester's technical proposal, which intermingled discussions of conventional testing with discussions of xenograft testing under its major headings, nor its cost proposal contained any other representation or indication that ADL was presenting alternative offers.

One simply cannot reasonably interpret ADL's proposal to encompass alternative offers based on the offeror's merely promising to perform the work required by the solicitation and then its parroting the statement of work, including language indicating that the solicitation made some provision for offerors to select from alternative scopes of work. It was incumbent on the offeror to select from the available alternatives and to clearly identify those selected since paragraph 5 of the solicitation's General Instructions captioned, "Alternate Proposals," expressly stated, "Alternative proposals . . . shall be clearly identified." See Robinson Industries, Inc.--Request for Reconsideration, B-194157.2, March 14, 1980, 80-1 CPD ¶ 197.

We conclude the Institute properly construed ADL's proposal as an offer to perform both types of testing, and find no merit in the allegation that the Institute wrongfully failed to consider ADL's proposal as encompassing an alternative offer to perform conventional testing only.

B. Whether meaningful discussions were conducted

The Institute sent the 13 questions to ADL concerning its proposal under a cover letter which stated that certain "clarifications" were needed before a selection could be made and therefore requested ADL's responses to the questions. The protester argues that this request for clarifications was inadequate to satisfy the requirements of the Department of Health and Human Services Procurement Regulations (HHSPR) that the contracting officer or his representative "conduct written or oral discussions with all offerors within the competitive range," and "[a]dvise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy fully the Government's requirements." 41 C.F.R. § 3-3.511 (1983).

This regulation basically restates the requirement for meaningful discussions mandated by Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.805-1 (1983) which is applicable to the procurements conducted by federal civilian agencies. While the FPR itself does not delineate the nature and extent of discussions required to be conducted with all offerors in the competitive range, our Office's consistent position has been that such discussions must be meaningful, Set Corporation, B-207936, April 15, 1983, 83-1 CPD ¶ 409, and must furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the government's requirements. Decision Sciences Corporation, B-196100, May 23, 1980, 80-1 CPD ¶ 357. However, the content and extent of the discussions necessary to satisfy these requirements depend on the nature and circumstances of the procurement at hand, and are matters primarily for the exercise of the negotiator's discretion. Id.; The Farallones Institute Rural Center, B-211632, Nov. 8, 1983, 83-2 CPD ¶ 540. Our Office therefore will not question the negotiator's judgment unless it lacks a reasonable basis. The Farallones Institute Rural Center, supra.

In this regard, we have upheld the negotiator's use of a letter requesting "clarification" and containing questions which led the offeror to the areas of its proposal that the agency deemed deficient. Broomall Industries, Inc., B-193166, June 28, 1979, 79-1 CPD ¶ 467. The fact that a negotiator characterized his inquiries as requests for clarification is not dispositive of whether meaningful discussions were held. See ABT Associates, Inc., B-196365, May 27, 1980, 80-1 CPD ¶ 362; Broomall Industries, Inc., supra. Rather, the disposition of this issue hinges on resolving whether the inquiries indicated the manner in which the contracting agency deemed the proposal deficient and gave the offeror a reasonable opportunity to modify its proposal to correct the deficiencies. See Broomall Industries, supra.

We believe the Institute's questions did indicate the deficiencies in ADL's proposal and that ADL was afforded a reasonable opportunity to correct the deficiencies. In addition to expressly informing ADL that the technical review group thought ADL lacked experience with xenograft systems and requesting ADL's comments in that regard, the questionnaire included five requests for specific information concerning xenograft testing. These included a

request for a detailed description of the principal and support personnel ADL proposed to work with xenografts, for a detailed description of ADL's techniques for subrenal capsule xenograft testing, for the detailed methods of handling athymic mice and tumor xenografts, and for additional details on the facilities to hold athymic mice. We believe these questions reasonably imparted (or should have been understood to impart) that the Institute had serious doubts whether ADL possessed sufficient experience, expertise and facilities to perform xenograft testing.

Moreover, it is clear that ADL understood its opportunity to respond to the questions as an opportunity to modify its proposal, since it proposed to add an additional principal investigator, purportedly experienced with xenograft systems, in its response to the questions. We therefore believe the Institute furnished ADL sufficient information about the areas in which its proposal was deemed deficient, and afforded ADL an adequate opportunity to respond, so that the Institute complied with the requirement to conduct meaningful discussions. The aspect of the protest concerning the Institute's alleged failure to conduct discussions therefore is denied.

#### C. Exclusion from Competitive Range

Finally, ADL argues that the Institute failed to comply with the requirements of HHSR, 41 C.F.R. § 3-3.5113, that the contracting activity allow a reasonable opportunity for all offerors within the competitive range at the conclusion of discussions to submit written best and final offers. We find no merit to this contention.

A procuring agency may revise its competitive range determination after a round of discussion, eliminating from the range an offeror formerly considered to be within it, if the discussions reveal that the offeror's proposal no longer has a reasonable chance of acceptance. Pettibone Texas Corporation, B-209910, June 13, 1983, 83-1 CPD ¶ 649. The offeror submitting the unacceptable proposal need not be given an opportunity to submit a revised proposal or best and final offer. Id; Eastern Marine, Inc., B-213945, March 23, 1984, 84-1 CPD ¶ 343 at page 10.

In this regard, we point out that HHSR 41 C.F.R. § 3-3.5113, by its own terms only requires that "all offerors in the competitive range" be notified of the opportunity to submit best and final offers. Since ADL was

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not within the competitive range after the first round of discussions, there was no requirement that the Institute afford it an opportunity to submit a further revised proposal or a best and final offer. See Cotton & Company, B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451.

Finally, the determination of the competitive range is primarily a matter of the contracting agency's discretion which this Office will not question unless shown to be unreasonable. Pettibone Texas Corporation, supra. The protester has presented no evidence to show, and indeed has not even alleged, that its proposal (when properly construed as an offer to perform both conventional and xenograft testing) was unreasonably judged to be unacceptable, except to maintain that the Institute failed to give appropriate consideration to ADL's lowest proposed costs. The fact that ADL's proposed costs were lower than the other offerors' is not significant, since the solicitation's evaluation criteria emphasized technical merit and estimated costs are not controlling in selecting a contractor for a cost-reimbursement type contract. See Cotton & Company, supra. We therefore deny the aspect of the protest concerning the exclusion of ADL from the competitive range.

III. Conclusion:

The protest is denied. We note, however, we are recommending that the Secretary of Health and Human Services take appropriate action to assure that solicitations of this kind apprise offerors of the extent to which the agency desires offers of conventional testing only, and the manner in which such offers will be evaluated against offers to perform both types of testing.

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