



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** National Customer Engineering

**File:** B-254950

**Date:** January 27, 1994

Thomas N. Jones for the protester.  
Ronald E. Cone and Liova D. Juarez, Esq., Department of Energy, for the agency.  
Susan K. McAuliffe, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest that agency improperly failed to provide answers to protester's pre-proposal questions submitted shortly before the time set for the receipt of initial proposals is denied where agency reasonably determined insufficient time existed for a reply to reach all prospective offerors before submission of their offers and there was no apparent need to issue further clarifications.

## DECISION

National Customer Engineering (NCE) protests the terms of request for proposals (RFP) No. DE-RP65-93-WA11094, issued by the Department of Energy (DOE) Western Area Power Administration, Golden, Colorado, for computer maintenance services. NCE contends that the agency unreasonably failed to answer 34 pre-proposal questions submitted by the protester which were dated and received 2 and 3 days prior to the scheduled closing time for the receipt of initial proposals. Although NCE recognizes that it submitted these questions more than 2 weeks after the solicitation's cut-off date for timely requests for clarification, the firm contends that its questions were substantive and thus the agency had an obligation to provide answers to them prior to receiving proposals. NCE generally contends that these questions show that the RFP contains ambiguous, restrictive and inappropriate terms.

We deny the protest.

The RFP was issued on August 16, 1993, and provided a closing time for the receipt of proposals of 3 p.m., local time (in Colorado), on September 16. The RFP asked for

proposals to provide computer hardware preventive and remedial maintenance services (including the provision of personnel, facilities, equipment, material, and supplies) for a 1-year base contract period and 2 option years. The RFP contemplated the award of a firm, fixed-price contract to the responsible offeror whose offer, conforming to the solicitation, was determined to be most advantageous to the government: price and other factors considered. Section M of the RFP provided the following evaluation factors for award:

- (1) technical (including the firm's experience in maintaining similar hardware, technical approach, personnel, and corporate resources);
- (2) price; and
- (3) business management (including organizational strength and capabilities)

The cover letter to the RFP advised all offerors that any pre-proposal questions regarding the solicitation should be submitted in writing not later than August 30. The protester submitted a series of questions to the agency on August 27 requesting, among other items, that the procurement be limited to the agency's computer hardware requirements and not include software requirements, that the procurement be set aside for small businesses, and that the provisions regarding continuity of services (i.e., involving smooth transition between the current and successor contractors and the use of incumbent personnel) and the Department of Labor (DOL) wage determination be removed from the RFP. By letter of September 3, DOE amended the solicitation to remove the contested software provisions and denied NCE's other requests for amendment to the agency's stated requirements--the agency explained that it lacked a reasonable expectation of sufficient small business participation to support a set-aside determination; continuity of services was a significant concern since a break in service would cause serious problems; and the DOL wage determination was included in the RFP due to concerns that the acquisition did not clearly fall within any exception to regulatory requirements for its inclusion.

NCE states that it received the agency's response to its questions on September 10, after which it reviewed the solicitation in greater detail, and submitted 18 additional pre-proposal questions on September 13 and 14. On September 15, the contracting officer determined that further clarification was not warranted since the protester's additional questions were not submitted in a timely fashion as provided in the RFP or in sufficient time to allow for a reply to reach all prospective offerors

before the submission of their offers. The contracting officer determined that the protester's requests could otherwise be resolved during discussions with the offerors. NCE was informed that the September 16 closing date would not be extended. On September 16, NCE submitted nine additional questions to the contracting officer requesting clarification and amendment to the RFP. NCE filed its protest with our Office on September 16, less than 1 hour prior to the scheduled closing time. Offers were received as scheduled; three firms, including NCE, submitted timely offers.

In its protest, NCE provides no evidence to challenge the agency's determination that insufficient time existed for a reply to its supplemental clarification request to be prepared by the agency and received by all prospective offerors before the original date for submission of offers. The firm instead argues that the agency had a duty to meaningfully respond to the protester's questions prior to calling for the submission of offers. NCE generally contends that a "lack of acquisition planning" resulted in a flawed solicitation and insufficient time for the agency to respond to the protester's requests for clarification and amend the RFP.<sup>1</sup>

DOE contends that it was not required to answer the numerous technical questions and disagreements regarding the terms of the solicitation received from the protester shortly before the scheduled closing time for the receipt of proposals. DOE states that it answered NCE's initial pre-proposal questions (which were timely submitted prior to the RFP's cut-off date for such inquiries) in detail and that the firm had adequate opportunity to timely request additional information prior to submission of its offer. After reviewing the protester's additional pre-proposal questions, the agency concluded that, in most instances, the protester was simply expressing its disagreement with the RFP requirements and its desired changes. The agency contends

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<sup>1</sup>NCE also protests the contracting officer's determination (based on not receiving any expression of interest in the procurement from small businesses other than the protester) that since there was no reasonable expectation of receiving proposals from at least two small businesses, the procurement was not set aside for small businesses. The protester provides no evidence to show the contracting officer's determination was unreasonable; without more, the record before us does not demonstrate that the contracting officer was obligated to investigate further any possibility of small business participation in the procurement that might or might not support a set-aside determination as desired by the protester.

that the specifications were adequately written and the solicitation contains sufficiently detailed information for offerors to submit proposals on an intelligent basis.

Federal Acquisition Regulation (FAR) § 52.215-14, incorporated by reference in the RFP, requires any prospective offeror desiring explanation or interpretation of the solicitation to request it in writing "soon enough to allow a reply to reach all prospective offerors before the submission of their offers." We think the contracting officer here reasonably determined that insufficient time existed for the agency to prepare responses to the protester's September 13, 14, and 16 submissions (totaling 27 additional pre-proposal questions about the RFP's technical specifications and requirements) to reach all prospective offerors--more than a dozen firms--prior to the scheduled September 16 closing time for the receipt of proposals.

We are not persuaded by the protester's statements that its subsequent clarification questions should be considered timely (although submitted more than 2 weeks after the date provided in the RFP) simply because the firm was not sure it could or would compete for the requirement until it received, on September 10, the agency's response to its first set of clarification questions removing the software requirements from the RFP and thus had not reviewed the RFP in great detail until after September 10. The protester, for instance, does not explain why the firm failed to contact the agency regarding the status of its August 27 requests for clarification and amendment to the RFP despite its knowledge of the impending closing date. The protester's decision, in exercising its business judgment, not to review the RFP's requirements in detail or initiate preparation of its proposal until its receipt of the agency's response to its earlier questions does not provide a reasonable basis to require the agency to respond to the firm's numerous additional clarification requests submitted only 2 and 3 days prior to closing and on the actual closing date.

The contracting officer reviewed the protester's untimely requests to determine their seriousness and submitted them for legal review before determining that further clarification to the RFP was not required. We have reviewed the protester's questions, as discussed below, and agree that the offerors had sufficient information to prepare proposals on an intelligent basis, and that the RFP was not otherwise flawed. Accordingly, the contracting officer acted reasonably in proceeding with the scheduled closing

time for the receipt of proposals, Le Prix Elec. Distribs., Ltd., B-213188, May 14, 1984, 84-1 CPD ¶ 520.<sup>2</sup>

As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. RMS Indus., B-247465; B-247467, June 10, 1992, 92-1 CPD ¶ 506. The mere allegation that a solicitation is ambiguous or restrictive does not make it so. Snyder Corp., B-233939, Mar. 16, 1989, 89-1 CPD ¶ 282. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. A&C Bldg. and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451. An agency may offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710. As risk exists in any contract, offerors are expected to use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. See Custom Envtl. Serv., Inc., 70 Comp. Gen. 184 (1991), 91-1 CPD ¶ 38.

Our examination of the protester's requests for clarification demonstrates that the firm's complaints generally fall into several different categories. Although we have reviewed all of NCE's challenges, we discuss below examples of the types of requests and assertions made by the firm.

Several of the protester's contentions concern provisions of the RFP regarding the parties' respective responsibilities under the contract. Read as a whole, we think the RFP reasonably details the challenged requirements. For instance, NCE requests that the agency state that no agency personnel or third party will perform maintenance services during the course of the contract. The RFP, however, does provide that no such repairs will be made by agency personnel without the contractor's permission. Third party repairs do not appear to be contemplated by the RFP; moreover, we see no reason why an offeror could not, in any

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<sup>2</sup>Although the protester attributes the agency's "unwillingness to provide meaningful answers [to a] lack of acquisition planning," the record does not support NCE's general contention that DOE allowed insufficient time to properly conduct the procurement; the protester provides no persuasive evidence to show that insufficient planning caused the agency's lack of time to respond to the protester's additional questions.

event, factor any such possibility into the formulation of its proposal.

Regarding the protester's challenge to the adequacy of certain definitions in the RFP,<sup>1</sup> we believe that, read as a whole, the RFP provides sufficient direction for a contractor, such as NCE, with claimed substantial experience in similar service contracts, to properly allow for an element of risk in formulating its proposal on an as needed basis, giving consideration to possible variations in stated time schedules and the criticality of parts as provided in the RFP.

Several of the protester's other requests for clarification or amendment to the solicitation concern its belief that since the agency does not or cannot provide certain information proprietary to the original equipment manufacturer, and since the incumbent contractor will not make the information (e.g., certain revision records regarding the agency's equipment) available to the protester, the RFP's terms are unduly restrictive of competition. This alone, however, generally does not cause the RFP to fail as restrictive of competition since certain firms may in fact enjoy a competitive advantage over other offerors by virtue of their incumbency or their own particular circumstances, such as sole access to proprietary information, see Mid-Atlantic Serv. & Supply Corp., B-218416, July 25, 1985, 85-2 CPD ¶ 86, or first hand knowledge of site conditions which may affect the cost of performance, see, e.g., J & J Maintenance, Inc., B-244366, Oct. 15, 1991, 91-2 CPD ¶ 333; Automated Informational Retrieval Sys., Inc., B-193931, June 19, 1979, 79-1 CPD ¶ 438. The protester has not shown that any claimed competitive advantage enjoyed by the incumbent contractor is the result of a preference or unfair action by the government or that it could not meet the challenged requirement in a manner found acceptable by the agency.

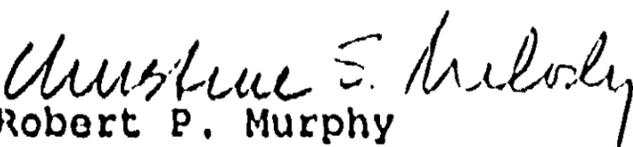
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<sup>1</sup>For example, NCE would like the agency to expand its list of examples of what repair parts are considered critical hardware; provide all possible variations to the principal period of maintenance as defined in the RFP; delete all references binding the contractor to perform services on an as needed or mutually agreed upon basis; change language requiring "every effort" to "reasonable effort"; and provide every possible security requirement at the facilities to be serviced so that the contractor can meet the RFP's requirement for compliance with all security procedures--even though the RFP stated that "[b]asically, this consists of a sign in/sign out log [for contractor personnel] with notation of the nature of their work."

NCE also contends that the RFP's continuity of services clause is unduly restrictive if the clause was not in prior contracts for these services.<sup>4</sup> The protester fails to rebut, however, the reasonableness of the agency's requirement based upon the advantages cited by DOE in assuring a smooth phase-in and phase-out period of services between the contractor and its successor without a break in service and in possibly utilizing incumbent personnel for the successor's contract for these services.

The determination of the needs of the government and the method of fulfilling those needs is primarily the responsibility of the contracting agency. We will not question the agency's determination unless it is shown to be unreasonable. Tracor Jitco, Inc., supra. Based on our review of the record in this case, we think that the contested requirements reasonably relate to the agency's need for quality maintenance services of its existing equipment and thus we see no basis to object to the specifications the protester challenges. Similarly, we think that the solicitation reasonably provides the information needed for potential competitors to be able to compete intelligently and on a relatively equal basis. The risk of performance of the current contract for commercially available services is, we think, sufficiently within the realm of normal business experience that asking contractors to estimate and account for it is not unreasonable. The fact that offerors may respond differently in calculating their prices for the provision of the services required here is a matter of business judgment and does not preclude fair competition. See American Maid Maintenance, 67 Comp. Gen. 3 (1987), 87-2 CPD ¶ 326.

The protest is denied.

*for*   
Robert P. Murphy  
Acting General Counsel

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<sup>4</sup>Contrary to the protester's complaint that DOE acted improperly in suggesting that NCE contact the General Services Administration (which had procured the services for DOE in the past) for a copy of past contracts not in DOE's possession, the record provides no reason to question the propriety of the agency's response.