

DECISION

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

61098

FILE: B-185546

DATE: July 9, 1976

98327

MATTER OF: ITT Telecommunications Division

DIGEST:

Where offeror agrees, in best and final offer, to assist procuring activity in obtaining French Government approval of telephone system installation and solicitation stated it was contractor's responsibility to obtain such approval, rejection of offer was proper as best and final offer changed relationship and obligations of parties and, therefore, varied terms and conditions of solicitation.

International Telephone and Telegraph Corporation, Telecommunications Division (ITT), has protested to our Office the rejection of its proposal under request for proposals (RFP) No. ST 75-37, issued by the Department of State and the subsequent award of a contract to Western Electric Co., Inc. (Western Electric). The RFP was for the furnishing and installation of a PABX telephone switching system at the Department of State's Chancery Building, Paris, France.

ITT submitted the lowest priced proposal, but the contracting officer determined to reject ITT's proposal because of "technical shortcomings" in two areas. While the report to our Office from the State Department on the protest repeatedly uses the term "nonresponsive" as the basis for the rejection of ITT's proposal, we assume what is meant is that the proposal was technically unacceptable. As our Office has stated on numerous occasions, the concept of responsiveness is inappropriate when used in the context of a negotiated procurement due to the inherent flexibility of negotiation which requires discussions with all offerors within the competitive range. 51 Comp. Gen. 565, 570 (1972) and Unidynamics/St. Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107.

The first area of ITT's proposal which was found unacceptable dealt with the requirement that the French Government approve the equipment furnished and installed. This requirement was added to the RFP by amendment 3 which read, in part, as follows:

"1. Equipment furnished and installed under any resulting contract must have the approval of the French PPT authorities. Contractor has the ultimate responsibility for obtaining the approval from the French authorities. The Department, however, will provide assistance if needed, in the form of; direction of contractor representatives to the proper authorities and appeal to these authorities."

On November 27, 1975, the State Department sent a telegram to all offerors which modified the above requirement as follows:

"* * * REQUIREMENT II(A) IN AMENDMENT THREE FOR FRENCH GOVERNMENT INTERCONNECT APPROVAL MODIFIED TO EXTENT THAT CONTRACTOR RESPONSIBILITY REMAINS BUT UNREASONABLE WITHHOLDING OF APPROVAL BY FRENCH GOVERNMENT BASIS ONLY FOR CONVENIENCE TERMINATION RATHER THAN DEFAULT."

ITT, in its best and final offer, stated, in regard to the above requirement:

"We agree to assist the Department of State, after receipt of award, as necessary to obtain the French Government interconnect approval. It is understood that the approval will not be withheld as long as the TSC-2 meet all the specifications for the approval."

In the notice of award letter which was sent to ITT following award to Western Electric, the contracting officer gave the following reason for rejecting ITT's proposal:

"It is also noted that in your final proposal revision of December 5 you declined acceptance of responsibility for French Government interconnect approval, offering merely assistance in this effort. My telegram of November 27 had substituted a convenience termination for the default termination

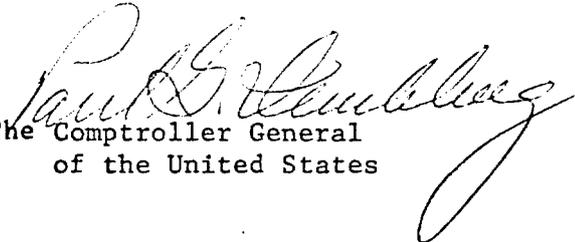
remedy applicable to this requirement but specifically stated that approval responsibility remained that of the contractor."

ITT argues that whether it assumed responsibility for the French Government approval did not affect the contractual obligations of the parties relative to the withholding of such approval and, therefore, is a distinction without a difference. If the approval was unreasonably withheld, ITT's contract was subject to a termination for convenience. If ITT failed to "meet all the specifications for the approval," it would have failed to comply with the technical specifications contained in the RFP and been subject to a default termination. Therefore, it is contended, the result remained the same whether ITT accepted responsibility or not for the interconnect approval and the ITT proposal should not have been rejected on this basis.

We disagree with ITT's position. The solicitation clearly stated that it was the responsibility of the contractor to obtain the approval of the French Government. When ITT agreed in its best and final offer to assist the State Department, it changed the relationship and obligations of the two parties as to which would be the prime mover in obtaining the approval. Under the solicitation, the State Department was only obligated to direct the contractor representatives to the proper authorities and appeal to these authorities and it was the burden of the contractor to convince the French Government that the approval should be given. Based on ITT's offer, it would be the responsibility of the State Department to obtain the approval with the assistance of ITT only "as necessary." Thus, ITT, by its best and final offer, varied the terms and conditions of the RFP. Therefore, we cannot object to the rejection of the proposal by the State Department.

Because of the above holding, it is unnecessary to consider the other basis of ITT's protest.

Accordingly, the protest is denied.


For The Comptroller General
of the United States