Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Aeronautics and Space Administration-- Reconsideration and Modification of Remedy

File: B-274748.3

Date: May 5, 1997

Andrew Mohr, Esq., Cohen & White, for the protester.
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DIGEST

Although Federal Acquisition Regulation (FAR) Part 12, dealing with purchases of commercial products, permits requirements to be stated in broad functional or performance terms instead of in detailed specifications, it requires a contracting agency to describe its need for commercial items in "sufficient detail for potential offerors of commercial items to know which commercial products or services to offer," such that a solicitation is flawed where it does not include sufficient information to allow commercial vendors to understand the agency's requirements.

DECISION

The National Aeronautics and Space Administration (NASA) requests reconsideration of our decision Access Logic, Inc., B-274748; B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36, in which we sustained the protest of Access Logic, Inc. against the award of a contract to EISI, Inc., under request for offers (RFO) No. 2-36632 (CDT), issued by NASA for a 360-degree rear projection display system which will be used to simulate the outside view from an air traffic control tower. NASA also requests that we modify our recommendation that NASA terminate the contract and resolicit with an appropriate statement of the agency's needs.

We affirm the decision, but modify the recommendation.

Among other items, the RFO specified projection systems and projection screens by brand name and indicated that equal products would be considered. Instead of the brand name projection system and screens, Access Logic proposed "equal" projectors and screens. Access Logic's proposal was rejected as technically unacceptable. Among other alleged flaws, NASA's evaluators concluded that Access Logic's offer did not meet solicitation requirements for mullions, or spacers between

the projection screens, and requirements for "gain" and "half gain angle" of the projection screens. We sustained the protest because we concluded that NASA improperly found Access Logic's offer unacceptable for failing to meet requirements not set forth in the RFO.

NASA first argues that our decision was based on a factual error since we erroneously concluded that NASA evaluated proposals and defended the protest as if it concerned a brand name or equal solicitation. According to NASA, it did not evaluate proposals or defend the protest as if the solicitation called for brand name or equal items. Rather than a brand name or equal solicitation, NASA states it was always the agency's position that the solicitation was for commercial items and argues that we erroneously applied standards concerning brand name or equal solicitations, instead of the standards set forth in Part 12 of the Federal Acquisition Regulation (FAR), "Acquisition of Commercial Items." According to NASA, our decision also was based on errors of law because, instead of relying solely upon the standards set forth in Part 12 of the FAR, we erroneously relied on standards set forth in Part 15 of the FAR concerning the acquisition of noncommercial items.

The record provides no support for NASA's current position. In the first reference in the decision to the acquisition having been conducted on a "brand name or equal" basis, we stated that "the RFO specified the Electrohome Marquee 9501LC ACON brand name projection systems, or equal, and Optawave projection screens, or equal." Then, in a footnote, we stated:

> "The RFO in fact only stated that "or equal" offers would be considered for the projectors, and not the screens. Nonetheless, the solicitation included detailed technical requirements for the screens--suggesting that a brand name or equal method also was intended for the screens. More importantly, in its evaluation of proposals and its defense of this protest, NASA has treated the solicitation as a brand name or equal solicitation for both the projectors and the screens. Under these circumstances, we have reviewed the evaluation as if the RFO permitted offers of equal products for both items."

NASA specifically complains about this footnote. According to NASA, "[i]t is clear throughout the written record that NASA issued this solicitation, evaluated offers, and defended this protest under FAR Part 12 and not as a 'brand name or equal' procurement under Part 15 of the FAR." Although NASA appears to believe that the above quoted footnote demonstrates some misunderstanding on our part concerning the way the procurement was conducted, a fair reading of the decision demonstrates that our sole purpose in that footnote was to explain why NASA evaluated offers of screens other than the brand name screens listed in the RFO. In other words, our point was simply that in its evaluation of offers NASA treated this solicitation as a brand name or equal acquisition--and not as a brand name only

acquisition--because had it not done so, it would have simply rejected Access Logic's offer for failing to offer the listed brand name screens.

Moreover, a review of NASA's report in response to the protest demonstrates that, in fact, NASA did defend the protest as an acquisition of brand name or equal items. In that report, NASA stated:

> "Because the solicitation calls for the provision of specific items by brand, FAR provisions and case law on brand name or equal specifications may provide additional guidance on the issues presented in this case. In a brand name or equal acquisition, offerors providing products equal to the name brand products specified must demonstrate through materials submitted with their offers that their products meet or exceed the solicitation's material requirements, including any listed salient characteristics."

Thus, the references in the decision to a brand name or equal solicitation were consistent with NASA's evaluation of the offers and its explanation of the procurement in its report on the protest.

NASA nonetheless argues that we failed to give due credit to the fact that the acquisition was intended to be conducted pursuant to FAR Part 12, as a commercial item acquisition, and that, in sustaining the protest, we improperly applied standards which relate to the acquisition of noncommercial items. NASA gives a lengthy explanation of its understanding of the way commercial item acquisitions are supposed to be conducted under FAR Part 12, as distinguished from acquisitions of noncommercial items. For the most part, we agree with NASA's explanation of FAR Part 12. In this respect, we agree that the purpose of FAR Part 12 is to provide the government with flexibility to acquire commercial items and that FAR Part 12 does not impose many of the solicitation and evaluation procedures required in other negotiated procurements so that the government can receive the benefit of commercial pricing. We also agree with NASA that under FAR § 12.205(a), whenever possible, contracting officers are to request existing product literature in lieu of unique technical proposals for purposes of evaluation and that FAR § 12.205(b) permits offerors to propose more than one item.[1]

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[1]We also agree with NASA that commercial item acquisitions are different from other procurements because, as distinct from procurements where the government seeks unique products or services to satisfy its particular requirements, under FAR Part 12 the government seeks products or services that are already available in the commercial marketplace. In addition, we agree with NASA that, compared to typical negotiated procurements, FAR Part 12 calls for streamlined solicitation and (continued...)

Although we largely agree with NASA's understanding of commercial item acquisitions under FAR Part 12, we part company with NASA concerning the information that agencies are required to include in solicitations for commercial items. On this point, NASA argued in its report in response to the protest, as it does in its reconsideration request, that the RFO met the requirement of FAR § 12.202(b) that the solicitation describe the agency's needs in terms of acceptable commercial products to offer and the intended use for those products. Our original decision addressed this contention. Specifically, we noted that FAR § 12.202(b) requires that "[t]he description of the agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer." Metfab Eng'g, Inc.; Mart Corp., B-265934; B-265934.2, Jan. 19, 1996, 96-1 CPD ¶ 93, at 2-3.

Under our Bid Protest Regulations, a party requesting reconsideration must show that our decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. Bid Protest Regulations, 4 C.F.R. § 21.14(a) (1997). While apparently NASA disagrees with our decision concerning the information that is required to be included in commercial item solicitations, the agency's arguments provide no basis for reversal or modification of the substantive portion of our decision. In this respect, while we recognize that a key element of efforts to increase purchases of commercial products is stating requirements in broad functional or performance terms, rather than using detailed government specifications, this preference for broad product descriptions and nondevelopmental/commercial items is consistent with, and does not relieve the contracting agency of, the obligation to specify its requirements in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a) (1994); Adventure Tech, Inc., B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202, at 4. That is, where an agency intends to acquire a commercial item, it is obligated to describe the item in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete intelligently on a relatively equal basis. Adventure Tech, Inc., supra.

Although NASA argues that we misunderstood and failed to apply FAR Part 12 in our analysis, the very provisions of FAR Part 12 cited by NASA refute the agency's position. For example, citing FAR § 12.202(b), NASA repeatedly argues that a solicitation for commercial items is only required to describe the products to be acquired and their intended use. That section provides:

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[1](...continued)
evaluation procedures that are intended to reflect commercial marketplace practices.

> "The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the product or service to be acquired and explain how the agency intends to use the product or service in terms of functions to be performed, performance requirements or essential physical characteristics."

Thus, a solicitation for commercial items is required to "contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer." In addition, although such a solicitation is to "describe the product or service to be acquired and explain how the agency intends to use the product or service," under FAR § 12.202(b), where appropriate, such a description is to include "essential physical characteristics." In this case, as we explained in our original decision, and as we address further below, the solicitation did not meet these FAR Part 12 standards.[2]

NASA specifically challenges our conclusion that NASA had unreasonably determined that Access Logic's proposal took exception to the RFO requirement concerning mullions. As we explained in our original decision, the record demonstrates that the evaluators considered Access Logic's offer unacceptable because the proposed 3/4-inch mullions "would create a thick defined edge line between screens and significantly distract from images of aircraft and ground equipment moving across the screens." As we explained in our initial decision, essentially there were two problems with this evaluation. First, the RFO did not require mullions of any specific width. NASA now argues that a requirement for mullions of a specific width would have been inconsistent with FAR Part 12 because this would have forced the agency to predetermine the best method of construction. Nonetheless, NASA apparently had a predetermined idea of the appropriate width of the mullions. As we stated in our original decision:

> "it appears that NASA simply has its own view, one that would not

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[2]NASA also argues that FAR § 12.602(b) indicates that the government's evaluation of commercial products is to focus on which product best meets the government's needs. Although FAR § 12.602(b) states that "[t]echnical capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors," it also states that such subfactors are not necessary "when the solicitation adequately describes the item's intended use." Thus, a prerequisite for an appropriate evaluation of commercial items, consistent with FAR Part 12, is an adequate description of the agency's needs. Again, as we explained in our initial decision, that is the very problem here.

> be readily apparent to the commercial sector, as to the width of the mullions that it would be willing to accept. To the extent that NASA had such a specific requirement, it should have specified it in the RFO."

Second, nothing in Access Logic's offer indicated that it would not meet the only requirements in the RFO concerning the mullions: "minimum vertical mullions" and "[p]hysical separation between the screens . . . as small as possible so as to make it difficult to see the screen edge lines." We concluded that Access Logic's proposal statement that "[t]he screens will be installed as-close together as-possible, with minimal vertical mullions," was entirely consistent with the RFO requirements. NASA has provided no grounds for challenging that conclusion.

As we explained in our initial decision, NASA also rejected Access Logic's offer because the firm's proposed projection screens did not meet RFO requirements concerning gain and half gain angle. We concluded that neither the gain nor the half gain angle of Access Logic's proposed screens provided a reasonable basis for finding Access Logic's proposal unacceptable. NASA also challenges our decision in this respect.

NASA explains in its reconsideration request--as it did in response to the protest--that the planned facility is to "provide a state-of-the-art simulation of an airport control tower environment. Accordingly, the screen images of the outside view must be as realistic as possible," and "brightness of the screen images should be as consistent as possible as seen from all viewing angles." According to NASA, its market research revealed that higher gain values, which are a measure of image brightness from a frontal view, result in diminished brightness consistency when the screens are viewed from peripheral angles. As a result, NASA explains that it determined that screens with a gain of 4.0 were the most desirable considering the type of projectors and the light conditions of the viewing room and, accordingly, specified screens with a gain of 4.0.

We concluded that the agency's concerns over brightness consistency were not conveyed to offerors because the RFO did not specify a half gain angle and did not state that a 4.0 gain could not be exceeded. NASA now argues, however, that including such detail in the RFO would have been contrary to the policies and procedures of FAR Part 12 and would have required the agency to "preselect the specific screen before issuing the solicitation instead of letting offerors propose the commercial products they feel best fit the Government's need."

Although NASA complains that our decision would compel the agency to preselect a particular screen, the record demonstrates that, in fact, the agency had specific ideas of what its needs were for a screen but simply failed to convey that information to prospective offerors. In this respect, NASA argued in response to

the protest--as it does now--that "the screen images of the outside view must be as realistic as possible," and "brightness of the screen images should be as consistent as possible as seen from all viewing angles." However, that information was not in the RFO. Nor did the RFO specify a half gain angle which, as we explained in our original decision, "would be the obvious way to indicate a concern with the quality of peripheral images." Thus, as we explained, the RFO simply did not convey "to vendors in the commercial marketplace that high half gain angles were mandatory," or in any other way inform prospective offerors of the importance the agency placed on realistic peripheral images.

We recognize that NASA has attempted to make use of the simplified procedures available under FAR Part 12 for the acquisition of commercial items. We also recognize that a key element of efforts to increase purchases of commercial products is to state requirements in broad functional or performance terms, rather than using detailed specifications. Adventure Tech, Inc., supra, at 3. Nonetheless, as we explained above, FAR Part 12--on which NASA relies--obligates a contracting agency to describe its need for commercial items in "sufficient detail for potential offerors of commercial items to know which commercial products or services to offer." FAR § 12.202(b). In other words, FAR Part 12 does not relieve the agency of the obligation to specify its requirements in a manner designed to achieve full and open competition. Here, the competition was flawed because NASA failed to meet these obligations since the RFO did not include sufficient information for commercial vendors to understand NASA's requirements.[3]

Finally, NASA has requested that we modify the corrective action recommended in our original decision. We noted that although the projectors and screens and related equipment had been delivered to NASA before the contract was suspended, the equipment had not yet been installed. As a result, we recommended that NASA terminate the contract and resolicit with an appropriate statement of the agency's needs. NASA now explains that it intends to terminate the contract but retain the projectors and screens that have been received and paid for by the agency.

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[3]NASA argues that our decision was in error "with respect to each reason NASA found [Access Logic's proposal] not to be the best commercial fit to its needs." As we noted in our decision sustaining the protest, in addition to rejecting the offer for not meeting requirements relating to the mullions and half gain angle, NASA found Access Logic's offer technically unacceptable because agency evaluators concluded that the projectors proposed by the firm failed to meet an RFO requirement for automatic convergence and because the offer did not list the firm's key personnel or design and engineering staff. In sustaining the protest, we concluded that neither of these two latter alleged flaws in Access Logic's offer provided a basis for finding that offer unacceptable. NASA has not challenged our decision concerning the automatic convergence issue or the staffing issue.

NASA explains that the screens, which cost $353,685, cannot be returned because they were custom-made and are not part of the manufacturer's inventory. According to NASA, each of the screens was cut from the same large glass sheet or lot so that each screen would have the same consistency. As a result, NASA explains, these screens cannot be used with other screens without affecting the consistency of the overall image. For these reasons, NASA reports, the manufacturer has indicated that it will not accept return of the screens. NASA also reports that it has paid $201,404 for seven of the projectors which it received in good condition (the other five were returned as damaged). NASA also reports that it would have to pay $40,280.80 for a restocking charge and the remaining $161,123.20 would only be received as a credit for future purchases, not as cash. According to NASA, since it would not likely be able to take advantage of the credit, it could not recover the $201,404 already disbursed for the projectors. Thus, NASA argues that if required to terminate the contract and return both the projectors and screens, it would incur a $555,089 cost ($353,685 for the screens, plus $201,404 for the seven projectors) which is approximately 72 percent of the contract value. NASA indicates that it will conduct a recompetition for the remainder of the requirement, including installation and integration of the equipment.

Under the circumstances, and based on our review of the record, we modify our recommendation. It is not practicable to return the projectors and screens that have already been delivered and paid for. We now recommend that NASA retain the projectors and screens that were delivered and paid for under the contract and recompete the remainder of the requirement encompassed by the awarded contract, including installation and integration of the equipment. In addition, we recommend that Access Logic be reimbursed the costs of preparing its offer, as well as its costs of responding to the agency's request that we modify the recommendation. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) and (2). Access Logic's certified claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1). Access Logic remains entitled to the costs associated with pursuing its initial protest to our Office.

The prior decision is affirmed; the recommendation is modified.

Comptroller General
of the United States