



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Northern Light Productions

**File:** B-401182

**Date:** June 1, 2009

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William H. Butterfield, Esq., for the protester.

Sheryl L. Rakestraw, Esq., Department of the Interior, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that an agency's inclusion of data rights requirements in the solicitation's evaluation scheme precluded an agency determination that the protester's proposal was unacceptable on the basis that it took exception to those requirements is denied where the data rights requirements are a material term of a solicitation and the record shows that the protester's proposal took exception to those requirements.

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### DECISION

Northern Light Productions (NLP), of Allston, MA, protests the failure of the Department of the Interior (DOI), National Park Service (NPS) to select its proposal for award under request for proposals (RFP) No. N1143080021, for audiovisual production and services. NLP asserts that, because the agency included the data rights requirements in the RFP's evaluation scheme, NPS could not properly determine that the protester's proposal was unacceptable on the basis that it took exception to those requirements.

We deny the protest.

The RFP, which contemplated award of up to 10 fixed-price, indefinite-delivery/indefinite-quantity contracts, contained the Federal Acquisition Regulation (FAR) Rights in Data-Special Works clause, which states in part that the "Government shall have unlimited rights in all data delivered under this contract." FAR § 52.227-17(b)(1). The evaluation factors, in order of importance, were past performance (worth 40 out of 100 total available points); samples of work (30 points); personnel (20 points); and comprehensive plan (10 points). The description of the comprehensive plan evaluation factor states in full:

Evaluation will be based on the knowledge of audiovisual programs and processes, quality assurance, timeliness and effectiveness of finished products, how projects involving subcontractors are managed and your firm's capability to manage projects under this contract. Evaluation will also include your understanding of the Rights in Data clause and other licensing requirements.

RFP at M-3 (emphasis added).

The RFP also included the following provision: "Ownership of Products: All original media produced under this contract is the property of the National Park Service. The National Park Service's use of the materials provided shall not be restricted in any manner." RFP at C-4.

The protester's initial proposal made no mention of the Rights in Data clause; its final revised proposal contained the following language: "All materials will be cleared for educational and museum presentation use for the life of the programs, up to twenty years."<sup>1</sup> Agency Report (AR), Tab 11, Protester's Final Proposal Revisions at 17. The protester's proposal received 95.64 points, including seven out of ten points under the comprehensive plan factor. Nonetheless, the contracting officer (CO) found the proposal unacceptable, however, because it took exception to the Rights in Data clause and the clause regarding ownership of products, quoted above, by restricting the nature and the duration of the agency's use of the materials to be produced under the contract.

The protester argues that an offeror's understanding of the Rights in Data clause was but one portion of the comprehensive plan factor, which was worth a maximum of ten points, and that the failure of the protester's proposal to comply with that clause was properly considered in the comprehensive plan factor scoring. Having considered this aspect of the proposal under the criterion announced in the RFP, the CO's subsequent determination that the protester's proposal was unacceptable was inconsistent with the RFP, the protester asserts, given the overall high score that the proposal received. We disagree.

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<sup>1</sup> The protester asserts that the only issue with this statement is the "inadvertent inclusion" of the final four words. Comments on Agency Report at 6. However, as the agency notes, not only does the protester's proposal restrict the length of time that the agency has rights to the material, but also the uses to which the materials may be put.

In negotiated procurements, a proposal that fails to comply with the material terms<sup>2</sup> of the solicitation should be considered unacceptable and may not form the basis of award. Nordic Air, Inc., B-400540, Nov. 26, 2008, 2008 CPD ¶ 223 at 3. We will not disturb an agency's determination of the acceptability of a proposal absent a showing that the determination was unreasonable, inconsistent with the terms of the solicitation, or in violation of procurement statutes or regulation. Id. Further, when a dispute exists as to the exact meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Id. Here, it is unclear what purpose was served by the agency's inclusion of an offeror's understanding of the Rights in Data clause as one aspect of the comprehensive plan evaluation factor. But the protester's interpretation--that the agency was restricted to the comprehensive plan evaluation factor when considering a proposal's understanding of that clause--negates both the text of the clause, which is included in full in the solicitation, as well as the Ownership of Products provision in the RFP, quoted above, requiring offerors to grant to the agency unrestricted use of the materials produced under the contract. When read as a whole, then, the only reasonable interpretation of the RFP is that it requires proposals to offer the agency unrestricted data rights. Because the protester's proposal failed to do so, we see no reason to question the agency's decision to exclude it from the competition as unacceptable.

The protester argues that, because its proposal contained no explicit deviations or exceptions, under the RFP's standard "deviations and exceptions" clause,<sup>3</sup> the agency could not reasonably conclude that the proposal offered the agency less than unrestricted rights in the materials produced under the contract. The protester's proposal restricted the agency's manner and duration of use of the materials created under the contract. To say that such a statement may not be deemed a deviation from the terms of the RFP because it was not in a proposal section labeled "deviations and exceptions" is an unpersuasive attempt to elevate form over substance. The plain language of the protester's proposal clearly took exception to a material term of the RFP.

Even if its proposal had taken such an exception to the RFP, the protester argues, "this would not have afforded the government the right to find the offer 'unacceptable', under the explicit terms of the very contract clause that the NPS itself drafted." Comments on AR at 2. We disagree. The deviations and exceptions

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<sup>2</sup> "Clearly stated RFP requirements" are considered material to the needs of the government. Gear Wizzard, Inc., B-298993, Jan. 11, 2007, 2007 CPD ¶ 11 at 2.

<sup>3</sup> The RFP contained a standard "deviations and exceptions" clause which instructed offerors that exceptions would not, of themselves, automatically cause a proposal to be termed unacceptable, though a large number of exceptions might result in a proposal being rejected as unacceptable. RFP at L-7.

clause merely states that deviations from the terms of the RFP will not automatically render a proposal unacceptable, and the record in this case does not support an allegation that the protester's proposal was "automatically" deemed unacceptable. Rather, the CO determined that the protester's final proposal revisions failed to comport with a material term of the solicitation, and she therefore determined that the proposal was unacceptable.

The protest is denied.

Daniel I. Gordon  
Acting General Counsel