

DECISION



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

PLI

10,620

FILE: B-193166

DATE: June 28, 1979

DL60192

MATTER OF: Broomall Industries, Inc.

DIGEST:

1. Letter containing 28 technically oriented "questions, requests for clarification, and comments" constituted meaningful negotiations since letter is interpreted as communicating procuring agency's perceived concerns with offeror's proposal.
2. Determination that offeror's proposal is technically unacceptable after evaluating written response to agency's "questions, requests for clarification, and comments" on proposal is reasonably supported by record showing substantial informational deficiencies in response.
3. Where discussions held with offeror are meaningful and subsequent exclusion from competitive range after amended proposal is found technically unacceptable is reasonable, no further discussions with firm are required.
4. Record does not support contention that significant technical, warranty, and payment provisions of RFP permitting alternate approaches and specification deviations were improperly relaxed or eliminated for benefit of successful offeror after other offerors were excluded from competitive range following one round of discussions.
5. Procuring activity failed to timely submit protest report in accordance with 4 C.F.R. § 20.3(c) (1978) of Bid Protest Procedures;

005742

[Protest Involving Bid REJECTION]

therefore, recommendation is made to Secretary of Interior that appropriate action be taken to preclude delays in furnishing reports in future.

DLG 01992

AGC 00215
Broomall Industries, Inc. (Broomall), protests the rejection of its technical proposal and the award of a contract to Sci-Tex North America Corporation (Sci-Tex), under request for proposals (RFP) No. 6082, issued April 12, 1978, by the United States Geological Survey (USGS) Reston, Virginia. The procurement is for a map scanning and digitizing system which includes design, integration, delivery, installation, and maintenance. DLG 01993

Article I of the RFP enumerated the required supplies and services which included both hardware and software. Article II contained various performance and functional requirements of the desired system.

Technical and cost proposals were to be evaluated separately and independently. Seven technical evaluation criteria were listed in descending order of precedence, the most important being understanding of the RFP requirements as shown by the hardware, software, and approach proposed. The RFP contained statements permitting the submission of deviating alternate approaches "provided the intended use and overall performance are either improved or not prejudiced and are in the best interest of the Government." The RFP stated that award would be made to the "responsible offeror whose offer, conforming to the solicitation, is determined most advantageous to the Government, cost and other factors considered. * * *

A technical evaluation will be performed on each offeror's technical proposal based solely on the information furnished and not on previous knowledge or associations." Further, the Government established a credit of \$100,000 to be applied to the cost proposal of an offeror proposing the "Desirable Feature," applications software for certain listed tasks to be performed.

On May 3, 1978, a preproposal conference was held "to allow the Government to explain or clarify what was considered to be complicated requirements and specifications * * *." Three proposals were received prior to the June 5, 1978, closing date from Broomall, Optronics International and Sci-Tex. The technical proposals were submitted to a technical evaluation committee composed of seven scientifically and/or technically oriented USGS personnel. A preliminary evaluation was submitted to the contracting officer on June 28, 1978, which indicated that all three firms were considered conditionally acceptable contingent upon full and satisfactory responses to questions and clarifications generated by the technical examination.

The procuring agency
By letter dated July 3, 1978, USGS requested all offerors to review a list of questions, requests for clarification and comments, as well as amendment No. 4 to the RFP. The amendment addressed specification changes. The letter informed offerors that they could supplement and/or revise their proposals and that responses were to be submitted by July 31, 1978. The letter also stated that "Offerors of record as of that time and date will be the only offers considered in the final evaluation."

All three offerors responded and acknowledged receipt of amendment No. 4. None of the firms altered previously offered prices. The responses were submitted to the technical evaluation committee for further evaluation. On August 9, 1978, the contracting officer received the following conclusions from the evaluation committee regarding the three proposals:

"Broomall - Not acceptable
Optronics International - Marginally acceptable, at best
Sci-Tex - Acceptable"

After considering the evaluation committee's analysis of the three proposals, The contracting

protester's
officer determined that Broomall's proposal was technically unacceptable and clearly outside the competitive range, regardless of price consideration, and eliminated the firm from further consideration. Optronics was determined to be outside the competitive range based upon excessive cost. Sci-Tex was considered to be technically acceptable and, after price evaluation, the contracting officer determined that Sci-Tex had offered the most favorable prices to the Government. At this point in time, the contracting officer believed that the requirement for meaningful discussions had been satisfied and elected to negotiate only with Sci-Tex regarding contract terms, conditions, and cost. On September 27, 1978, a firm fixed-price contract in the amount of \$956,736 was awarded to Sci-Tex.

Broomall filed a protest with our Office on October 11, 1978, and the next day, USGS held a debriefing with the firm. Broomall submitted details of its protest in a letter dated November 16, 1978, raising numerous questions concerning the award action.

Protest
Broomall contends that the July 3, 1978, letter which contained "questions, requests for clarification, and comments" failed to apprise it of the specific nature and scope of the alleged proposal deficiencies, and therefore the USGS failed to hold meaningful discussions. To support this, Broomall points to the USGS evaluation of its responses to the July 3 letter prepared after award which expressed in detail the magnitude of USGS's concern with the deficiencies in the proposal. Broomall states that it would have answered the questions in the manner befitting their seriousness, except the questions did not refer to "deficiencies," "weaknesses" or indicate "noncompliance" with the RFP requirements but only speaks of "clarifications" which indicates only minor matters requiring some elaboration.

Federal Procurement Regulations (FPR) § 1-3.804 (1964 ed. amend. 153) provides that "Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price

to be paid." There is no fixed, inflexible rule regarding the requirement for discussions; the content and extent of discussions necessary to satisfy the meaningful discussions" requirement is a matter of judgment primarily for determination by procuring officials and will not be disturbed by our Office unless the judgment is arbitrary or without a reasonable basis: See Telex Computer Products, Inc., B-190794, July 31, 1978, 78-2 CPD 78; Washington School of Psychiatry B-189702, March 7, 1978, 78-1 CPD 176; Systems Engineering Associates Corporation, B-187601, February 24, 1977, 77-1 CPD 137. We have held that requests for clarification or amplification or other statements made during discussions which lead offerors into areas of their proposals that are unclear are sufficient to alert offerors to deficiencies in their proposals. Serv-Air, Inc., B-189884, September 25, 1978, 78-2 CPD 223; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404.

Should have The July 3 letter contained 28 technically oriented questions and requests for clarification and comment prepared by the technical evaluation committee in an effort to further explore the technical proposal submitted by Broomall. In our view the letter, although it did not specifically refer to the matters raised as, for example, "deficiencies," adequately led Broomall to the areas where USGS believed its proposal was deficient. We fail to see how Broomall could perceive the tenor of the letter to express a need for elaboration of only minor matters rather than proposal deficiencies, weaknesses or noncompliance. As evidence of this from a general standpoint, the letter requested numerous details on how Broomall's proposed system will comply with several key specification requirements.

More specifically, several questions address the problem of color calibration of Broomall's proposed scanner system and request a detailed response. Despite this, Broomall did not respond in detail or at all other than to refer back to its proposal

which, at best, is uncertain on the matter. Another example concerns the question pertaining to the proposed use of a glass hold-down plate on Broomall's scanner which states:

"Please discuss in detail the function(s), size and material of the transparent cover plates offered with the scanner and recorder; and also please discuss the influence of their presence on scanning/recording and operator safety in terms of problems caused and advantages provided by them."

We believe that this question reasonably identifies the following broad problem areas:

1. What effect do the plates have on operation of the scanner/recorder?
2. What optical interference or problems might result from their use?
3. What is their impact on operator safety?

Broomall's response reflected only its own conclusions on the efficiency of its cover plates and doesn't address the problem areas with sufficient detail to permit independent evaluation. Also, other direct questions were simply not answered.

In our view Broomall, in reading the questions set forth in the July 3 letter, should have realized that the questions were indications of proposal uncertainties and therefore replied, in detail, as requested. If Broomall did not understand what the agency was asking or why, it could have called the contracting officer and asked for further explanation as the July 3 letter invited Broomall to do. The RFP required detailed responses, as follows:

"Offerors shall address each paragraph of the specifications in the same order in which they appear in Annex 1, indicating therein how the offeror proposes to satisfy the Government's requirement. This will insure that offerors have fully indicated their responsiveness to the Government's requirement. Failure to furnish all and complete information requested may cause an offeror to be considered nonresponsive."

Also, the RFP contained a section on "Technical Discussion of Approaches" establishing the basic informational requirements for proposals in their discussions of technical problems. This paragraph called for offerors to provide a statement of the problem, an evaluation of alternative solutions, and a comprehensive explanation of the selected solution. With regard to this last requirement, the paragraph requires that proposals provide a:

"Complete detailed statement of solution, including preliminary design layout, sketches, and other information indicating configuration; and functions of components as applicable."

Based on the above, we believe that by pointing out omissions in Broomall's proposal and requesting that they be addressed, the written discussions were meaningful. See Systems Consultants Inc., B-187745, August 29, 1977, 77-2 CPD 153.

While we agree that some of the questions could have more specifically pointed out USGS problems, particularly with respect to the glass hold-down plate, we believe that, taken as a whole, enough relevant agency perceptions of deficiencies were imparted to Broomall by the July 3 letter. Moreover, we have no reason to dispute the agency's underlying concern that unfair Government assistance would have existed if more detail was provided.

The next issue for consideration is whether USGS acted reasonably in determining Broomall to be outside the competitive range after evaluating its revised proposal.

The determination of whether a proposal is in the competitive range, particularly with respect to procurements such as this of equipment of a highly technical nature, is primarily a matter of administrative discretion and ordinarily will be accepted by this Office, absent a clear showing of unreasonableness. See RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. For a technical evaluation to be deemed unreasonable, it must clearly appear from the record that there was no rational basis for the evaluation. Joanell Laboratories, Incorporated, 56 Comp. Gen. 291 (1977), 77-1 CPD 51.

The contracting officer reports that after reviewing Broomall's responses to the questions and the technical evaluation committee's memorandum of August 9, 1978, a determination was made that Broomall's proposal, having no reasonable chance of being selected, was outside the competitive range. The technical evaluation team made the following findings regarding Broomall's proposal:

"This proposal is judged by the team to be not acceptable. The proposal is considered non-compliant in several areas, and the vendor's responses to the questions that were addressed to these areas in order to provide an opportunity to improve compliance were evasive, non-responsive, and unsatisfactory. The team is now of the opinion that to allow this offeror additional opportunity to fully and satisfactorily answer all technical questions pertaining to this proposal would constitute an all but total rewrite by the offeror of his proposal to the prejudice of the Government and other offerors. The team is most concerned

over significant noncompliance in the areas of specified interactive raster editing and color analysis and coding software and hardware capability, and in the ability of the system offered to perform as specified with a thick plate of glass or other material superimposed between the source/output graphic and the reading/recording heads of the system proposed. In addition, the team believes that the extremely restrictive covenants that this offeror proposes to place upon the Government's use of the system software offered would also be detrimental to the best interests of USGS."

The technical evaluation committee was of the opinion that to conduct further discussion would have required an unfair degree of Government assistance.

Upon our examination of the material regarding the evaluation of Broomall's technical proposal, we are of the view that the contracting officer had a reasonable basis for rejecting its proposal as technically unacceptable and determining the firm to be outside the competitive range. We cannot disagree with the agency's conclusions that Broomall's revised proposal failed to address several significant areas with sufficient specificity or detail to meet the RFP's informational requirements in order to permit independent evaluation. Merely referring back to the original proposal for instance, was clearly not an adequate response in some cases. See, for example, our discussion of Broomall's responses above.

- Contrary to Broomall's contention, the USGS did not improperly downgrade Broomall's technical proposal based on dissatisfaction with the "Desirable Feature" which it offered. According to the contracting officer, under the provisions of the RFP, a credit value of \$100,000 was assigned to the "Desirable Feature" for cost evaluation, not as a "bonus credit" but as an

equalizing mechanism so that a contractor capable of providing the desirable feature would offer it without concern that such an offering would unfavorably bias the competitiveness of their price. The contracting officer further states that although the evaluation committee examined the "Desirable Feature" offered by Broomall and questioned it during the written discussions, it was not used as a basis for the protester's elimination from the competitive range. Questions were asked about the "Desirable Feature" being offered to determine what Broomall was offering and if "credit" could be properly given for purposes of any price analysis.

Having concluded that the discussions with Broomall were meaningful and that the firm's elimination from the competition was reasonable, we reject the protester's contention that the conduct of a second round of negotiations with Sci-Tex without conducting further discussions with Broomall violated FPR § 1-3.805-1(b) (1964 ed. amend. 153) which provides all offerors an equitable opportunity to compete. Since Broomall's proposal was unacceptable and outside the competitive range, there was no need for any further discussions with the firm. See Operation Research, Inc., 53 Comp. Gen. 593 (1974), 74-1 CPD 70; 52 Comp. Gen. 198 (1972). The negotiations were held with Sci-Tex after the July 31, 1978, cutoff date, but only after Broomall was determined to be outside the competitive range. In fact, further discussions might very well have been subject to criticism on the basis that the Government was improperly permitting Broomall to upgrade or explain its proposal after having been given a reasonable opportunity to do so. See Serv-Air, Inc., supra; Telex Computer Products, supra.

Broomall also contends that USGS violated FPR § 1-3.805-1(d) (1964 ed. amend. 153) by relaxing or eliminating certain requirements of the RFP without affording Broomall an opportunity to compete against the reduced requirements by the reopening of negotiations. As a result of preaward negotiations with Sci-Tex alone during August and September of 1978,

it is alleged that significant technical requirements were affected, that the Government accepted reduced warranty coverage from that originally called for in the RFP, and that the Government agreed to a partial payment method different from that set forth in the RFP.

FPR § 1-3.805-1(d) provides, in pertinent part:

"When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor.

Our review of the record does not support Broomall's position.

Regarding Broomall's contention that the USGS relaxed its magnetic tape unit requirement for Sci-Tex, the record discloses that Sci-Tex offered a single-density 1600 bpi magnetic tape unit, which was not a relaxation of the RFP requirements, but was in compliance with the RFP, as revised by amendment No. 4, issued prior to Broomall's elimination from the competitive range.

As for the other technical changes, as noted above, the RFP permitted the submission of alternate technical approaches and certain deviations from stated requirements. In the context of this flexibility permitted offerors, we have no basis to object to the other technical discussions with Sci-Tex particularly because we do not find any substantial impact on the procurement and Sci-Tex alone remained in the competitive range.

More specifically, article II, section C.1.7 of the RFP required a vacuum hold-down for the scanner. Broomall contends that Sci-Tex took exception to that requirement in stating:

"The Raster-Scanner will be equipped with a vacuum hold-down mechanism. However, during scanning of transparencies, a white base material should be placed beneath the transparency to provide a reflective surface. If the base material is other than of a porous type, the effectiveness of the vacuum hold-down may be lost."
(Emphasis added.)

Sci-Tex states that it merely alerted USGS to the fact that when transparencies were scanned, it would be advisable to use a white base material, and that this base material should be porous in order to ensure maximum efficacy of the vacuum hold-down. The USGS considered this to be a minor exception and acceptable to the Government. We agree with Sci-Tex. We note initially that Sci-Tex did offer to provide a vacuum hold-down and we are of the view that the additional information furnished by Sci-Tex was merely an effort to identify a potential problem and pose its solution in accordance with the terms of the RFP. Despite Broomall's suggestion to the contrary, we think this minor deviation by Sci-Tex is distinguishable from Broomall's own failure to recognize the potential problems with its use of a glass hold-down plate and provide either solutions or identify why problems did not exist, particularly where the USGS highlighted the matter.

Article II, section C.3.8, of the RFP required that the recorder "include capability for pin registration of prepunched photographic recording materials." Our examination of Sci-Tex's proposal discloses that the firm offered a raster data recorder-printer with pin registration, as required in the RFP, but

also offered a more desirable alternative at a reduced cost--the use of a registration marking system--with little impact on the procurement from price or other standpoints.

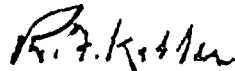
With regard to the change in the length of the warranty from 180 to 90 days, we do not agree with Broomall's contention that this change necessitated the issuance of an amendment to the RFP. Neither did USGS's agreement to make partial payments to Sci-Tex of up to \$200,000 require the issuance of an amendment. Broomall had properly been excluded from the competitive range prior to negotiating the warranty and partial payment changes with Sci-Tex and neither change was related to the cause of Broomall's rejection. Our Office has held that where an offeror is not in the competitive range, and the changes negotiated with the successful offeror are not directly related to the cause for the unsuccessful offeror's rejection, an amendment to the solicitation is not required. See Iroquois Research Institute, 55 Comp. Gen. 789 (1976), 76-1 CPD 123. Since Broomall's proposal was technically unacceptable, any reduction in price it might have been able to offer because of the above changes would have had no effect on the selection if negotiations were reopened.

~~Broomall's contention that the procuring activity failed to adequately enforce the mandatory provisions of the Buy-American Act, 41 U.S.C. § 10a-d (1976), is without merit.~~ The contracting officer states that a price comparison was not required because Sci-Tex was the only offeror remaining in the competitive range but calculates that Sci-Tex's price is clearly more favorable even if the Buy American Act differential had been applied. Broomall never rebutted the above.

Broomall's protest is denied.

In conclusion, we agree that the delay in obtaining the Department of Interior's report appears to be unreasonable. Our Bid Protest Procedures call 4 C.F.R. § 20.3(c) (1978), for Government agencies to submit

complete reports on protests "as expeditiously as possible (generally within 25 working days)." The report on this protest was not submitted here until March 5, 1979, which is approximately 70 working days after Broomall submitted the details of its protest in a letter of November 16, 1978. If Broomall's protest had been sustained by our Office, the possibility of obtaining effective relief would have been diminished by the delay in submitting the report. The importance of promptly submitting the report is especially important where, as in this case the protest is filed after award of a contract. See Serv-Air, Inc., supra. In the circumstances we are, by letter of today to the Secretary of the Interior, recommending that appropriate action be taken in order to assure that such delays do not occur in the future.


Acting Comptroller General
of the United States