

Martin/Kolaky

DECISION



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

19801

FILE:B-203870

DATE: October 19, 1981

MATTER OF: NBI, Inc.

DIGEST:

1. A protest based upon alleged solicitation improprieties is timely when filed with GAO prior to the closing date for receipt of initial proposals. Fact that protester failed to submit its request for a specification revision prior to the RFP's deadline for comments and questions does not make the protest untimely, if the protest is timely under 4 C.F.R. § 21.2(b)(1) (1981).
2. The protester's mere difference of opinion as to the agency's minimum needs is not sufficient to upset the agency's determination of those needs. Rather, the protester has the burden of affirmatively proving that decisions concerning the agency's minimum needs are clearly unreasonable.
3. The use of a product design specification is not unduly restrictive or violative of these regulations where: (1) the specification for the number of "character" lines to be displayed on word processing equipment is dictated by the agency's reasonable determination of its minimum needs; (2) the solicitation clearly stated that deviations from the specification might be considered provided the Government's needs would not be prejudiced; and (3) 20 firms responded to the solicitation.

NBI, Inc. (NBI), protests the refusal of the Department of Labor (DOL) to amend a solicitation to purchase word processing equipment on the grounds that a particular specification of the solicitation

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is restrictive and exceeds the Government's minimum needs. For the reasons which follow, NBI's protest is denied.

Background

On May 18, 1981, DOL issued request for proposals (RFP) No. L/A 81-11. Among the specifications contained in the RFP was one which required that each cathode ray tube display monitor (CRT) to be used in the proposed word processing systems be capable of simultaneously displaying at least 24 lines of characters. Another provision of the RFP stated that alternate proposals or proposals which deviated from the specifications might be submitted and considered provided that intended use and overall performance were either improved or not prejudiced. The RFP informed potential offerors that questions about the RFP's specifications would be answered if they were reduced to writing and submitted to DOL on or before May 26, 1981. Answers to each of the questions received would be provided to all of the offerors as an amendment to the RFP. According to the RFP, the closing date for submission of proposals was June 19, 1981. This was later amended to July 2, 1981.

In a letter dated June 17, 1981, DOL reported to all of the potential offerors that it had received 40 questions about the procurement. Attached to that letter was a copy of each of those questions and DOL's answers, as well as a copy of amendment No. 1 to the RFP. Questions 30 and 38 commented that the specification requiring CRT's to display 24 lines of characters exceeded the Government's needs in that 24-line CRT's are designed to communicate with remote stations. The ability to communicate with remote stations had been specifically rejected in the RFP. Therefore, it was proposed that the RFP be amended to permit 21-line CRT's instead. After considering these comments, amendment No. 1 was issued by DOL to require CRT's capable of displaying at least 21 lines of characters instead of 24 lines.

On June 18, 1981, NBI wrote to DOL to request another amendment to the RFP. NBI asked that the specification concerning CRT capabilities be revised

again to lower the lines of characters requirement from 21 lines to 14 or 16 lines. In its letter, NBI asserted that approximately one-half of the data processing systems listed in the publication "DataPro" display less than 21 lines simultaneously. Furthermore, NBI's examination of the RFP indicated no need for a 21-line CRT. NBI was subsequently informed that its request had been considered and refused for "technical reasons."

According to the Director of Management and Administration of the Office of Administrative Law Judges (the division of DOL which will use the word processing system in question), that office believed it necessary that the operator be able to observe the "spatial relationships" of the document during preparation on the CRT. This assessment of need, in combination with the office's understanding of then current industry capabilities, and the desire for adequate competition formed the basis for the initial 24-line CRT requirement. Upon review of the comments received prior to the issuance of amendment No. 1, that office agreed to reduce the lines of text requirement. Although CRT's which display 24 lines would meet the RFP's specification of 24 lines of characters, two or three of those lines would be devoted to communications information, not text. Since the communications capacity was not desired and the maximal display of lines of text (not lines of characters) was the goal of the agency, DOL felt that reduction of the requirement from 24 lines to 21 lines would be acceptable. However, NBI's request was seen to pose serious harm to the agency's perceived need to maximize text display. Therefore, it rejected the request. NBI then filed this protest--prior to the closing date for initial proposals.

Contentions of the Parties

NBI argues that the RFP violates Federal Procurement Regulations (FPR) § 1-1.307-1(c) (1964 ed. amend. 170), which requires that solicitation specifications accurately reflect the Government's needs. NBI states that the initial requirement of

24-line CRT's obviously exceeded DOL's needs in light of DOL's revision of that requirement. Moreover, NBI believes that DOL's revision of that specification demonstrates the absence of any genuine need for a CRT with a particular number of lines of display.

NBI also argues that the RFP violates FPR § 1-4.1102-10 (1964 ed. amend. 170), which requires that an RFP's selection criteria not be "equipment or vendor oriented," and FPR § 1-4.1102-16 (1964 ed. amend. 170), which requires that solicitation specifications be devoid of bias toward a "specific product or offeror." NBI maintains that by granting one vendor's request to reduce the specification to 21 lines, but denying its request to further reduce the requirement, DOL included a specific vendor's product, yet excluded NBI's own product without adequate justification. In NBI's view, the RFP is biased and unduly restrictive of competition. NBI also suggests that the RFP may have been designed to favor a preselected vendor. NBI requests that the CRT lines of display requirement be removed from the RFP, or that the entire RFP be canceled and rewritten.

DOL argues that the protest is untimely and otherwise without merit. According to DOL, the protest is untimely because NBI failed to submit its request for a revision of the specification prior to the RFP's deadline for comments and questions. DOL also argues that the requirement of 21-line CRT's is fully justified and that reducing the requirement to 14 or 16 lines will significantly reduce the usefulness of the CRT's. DOL notes that 20 firms submitted proposals in response to the RFP. In DOL's opinion, NBI's claim that the RFP is unduly restrictive of competition is amply rebutted by this fact.

GAO Analysis

We disagree with DOL's suggestion that the protest is untimely. The protester alleges that a specification of the RFP is in violation of applicable regulations. In order to be timely,

protests based on alleged improprieties which are apparent on the face of the solicitation must be received by GAO prior to the closing date for the receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1981). Since NBI's protest was received by GAO on June 30, 1981, and the amended closing date for submission of proposals was July 2, 1981, the protest is timely.

We have repeatedly held that the determination of the Government's minimum needs, the method of accommodating them, and the technical judgments upon which those determinations are based are all primarily within the discretion and responsibility of the contracting officials who are most familiar with the conditions under which the products and services have been used in the past and will be used in the future. Our Office will not question agency decisions concerning those matters unless they are shown to be clearly unreasonable. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset agency determinations. The protester has the burden of affirmatively proving its case. See, for example, Science Applications, Inc., B-197099, May 20, 1980, 80-1 CPD 348; Galion Manufacturing Division, B-188259, B-189039, September 26, 1977, 77-2 CPD 224.

In our opinion, NBI has not adequately proved that the specifications do not accurately reflect DOL's needs. DOL states that it believes it important for its operators to be able to observe the "spatial relationships" of documents which are being prepared on its word processors. We understand this to mean that DOL wishes to be able to see how the document will appear before it is printed. In this regard, we note that a CRT capable of simultaneously displaying 21 or 24 lines will display approximately one-half of an 8-1/2 by 11-inch page. It follows that a 14- or 16-line CRT will display significantly less of the page with the result that it will be more difficult for the operator to visualize the finished page. Therefore, DOL's requirement seems reasonable. NBI, on the

other hand, offers only its own general opinion as to the importance of this requirement. Nor are we persuaded by NBI's argument that the revision of the specification serves to demonstrate DOL's arbitrariness. On the contrary, NBI's protest letter lends confirmation and support to DOL's revision of the requirement down to 21 lines. NBI agrees with DOL that, in general, 24-line CRT's are intended to provide communications with remote stations--a feature which the RFP specifically rejected. For this reason, no advantage is gained by DOL requiring 24-line CRT's, but increased competition could be gained by revising the specification to permit 21-line CRT's, with no harm to the purpose or practical result of the specification, as originally drafted.

NBI's suggestion that a particular, preselected vendor was favored by the original specification (or its revision) is unsupported by any factual basis. Contrary to NBI's claim that the revision was granted at the request of a single vendor, DOL's report of the questions and answers which prompted amendment No. 1 clearly suggests inquiries on the topic by two vendors, not one. Furthermore, the fact that 20 firms made proposals to DOL casts doubt upon NBI's claim that competition was unduly restricted. Although NBI claims that under the above FPR regulations the specification was "equipment or vendor oriented" and favored a "specific product or offeror," we conclude from the plain meaning of the quoted phrases that those regulations address specifications which are designed in such a way that only one particular vendor or product can meet the requirements. Since 20 firms have submitted proposals, DOL infers that this is not the case. Although that fact does not conclusively decide this issue, NBI has not offered any proof to the contrary. Instead, NBI merely claims that by using the revised specification, DOL has allowed some vendors to participate, but not others, thereby restricting competition. It is axiomatic that setting any particularized specification in a Government procurement will restrict competition. Had DOL granted NBI's request to further revise the

RFP, competition would be restricted since vendors who offer CRT's of less than 14 lines would still be inhibited by the specification as revised for NBI. It is only an unreasonable restriction of competition which must be avoided. See, for example, Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437. Moreover, the RFP expressly permitted NBI and the other offerors to propose CRT's which display less than 21 lines. As pointed out above, the RFP clearly states that proposals which deviated from the specifications might be submitted and considered, provided the offeror could demonstrate that the Government's needs were not prejudiced. We upheld a similar solicitation provision in Bristol Bluewater Boats, Inc., B-188713, July 1, 1977, 77-2 CPD 4.

Therefore, in the absence of any proof to the contrary, since the requirement appears reasonably derived, deviations were permitted when justified, and 20 firms have submitted proposals, we do not find the RFP to be unreasonably restrictive. The protest is denied.

for Milton J. Fowler
Comptroller General
of the United States