



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** NITCO

**File:** B-246185

**Date:** February 21, 1992

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Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for Newsom Industries, Inc., an interested party.  
Sherry Kinland Kaswell, Esq., Justin P. Patterson, Esq., and James L. Weiner, Esq., Department of the Interior, for the agency.  
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest of firm's exclusion from the competitive range is sustained where agency's technical evaluation of a drill rig offered as an equal under a brand name or equal solicitation did not focus on technical information furnished with offer, but was heavily influenced by evaluation committee's perception that offeror had not produced the exact (or closely similar) product before, yet no requirement for a standard production model was included in solicitation.

### DECISION

NITCO protests the Department of the Interior, United States Geological Survey's (USGS), elimination of NITCO's proposal from the competitive range, and the award of the contract to, Newsom Industries, Inc. under request for proposals (RFP) No. 1856, issued by the USGS Water Resources Division in Hawaii. We sustain the protest.

The solicitation was issued on a brand name or equal basis and was for a truck-mounted drilling rig with related accessories and equipment. The RFP specified the brand name product as a "Failing-Speedstar drill rig, model Star 70K, Crane Carrier truck, Fuller model RTO 14608LL truck transmission, Caterpillar 3406 B truck engine, Caterpillar model 3408 DITA power unit deck engine, Sullair two-stage, twin screw rotary air compressor, ONAN model 6DJB-3CE generator, Mission Magnum centrifugal mud pump." The

solicitation advised offerors proposing to furnish an equal product to insert a description of the offered product following each line item where such information was required, and cautioned that when doing so, offerors would be responsible for submitting all additional information necessary for the government to determine whether the product offered in fact met the salient characteristics of the brand name as listed in the solicitation. Offers were to include a clear description showing how the equipment will be modified or configured to meet specifications. The characteristics defining the agency's minimum requirements covered approximately seven pages of the RFP's Work Statement. Section M of the RFP, "Evaluation Factors for Award," listed four technical evaluation factors in descending order of importance and indicated the relative weight they would be given in the overall evaluation of the technical proposals. The first technical factor, labeled "Technical features," consisted of the following six salient characteristics, each of which was worth a maximum of 10 points:

- (i) retractable top-head drive system
- (ii) working holdback (pullback) of 70,000 lbs
- (iii) working torque of 100,000 inch-lbs.
- (iv) mast and crown block rated capacity of 100,000 lbs
- (v) deck engine rated at 500 BPH at 2100 RPM
- (vi) air compressor rated at 900 CFM and 350 PSI

The remaining technical factors were (2) Warranty terms and conditions and availability of warranty service in Hawaii (15 points); (3) Manufacturer's or Jobber's experience and reputation in the drilling industry (10 points); and (4) training, technical support and ability to respond to the needs of a customer in Hawaii (5 points).

Offerors were advised that, notwithstanding the overall technical score, a proposal might be deemed unacceptable if it failed to meet the stated minimum requirements of any one factor. Award was to be made to that offeror whose proposal, conforming to the solicitation, was determined to be most advantageous to the government, cost or price and other factors considered. In determining which proposal offered the greatest value or advantage to the government, overall price or cost to the government would be comparable in importance to overall technical merit.

Four offers were submitted in response to the RFP; of these, one was eliminated for being too incomplete to allow a meaningful evaluation. The District Chief in Honolulu appointed three hydrologists to a technical review committee, with the person who had prepared the technical portions of the RFP as chairman, to evaluate the remaining three offers, submitted by Newsom, NITCO, and Ingersoll

Rand. Newsom's offer was based on supplying the brand name product, while the others offered their own drill rigs as equal products.

The committee met on September 4, 1991, and spent approximately 5 hours evaluating and scoring the three proposals. The following day, the chairman summarized the scores and computed an average for each element in the proposal and then added these scores together to arrive at a total point score for each proposal. The committee members then reviewed the score sheets and arrived at a consensus on the evaluations. Newsom received the highest score, followed by Ingersoll Rand, and NITCO received the lowest number of technical points of the three offers.

The committee chairman prepared a technical evaluation report, describing the evaluation process and listing the scores for each proposal. The report also provided a summary narrative, concluding that the Ingersoll Rand and NITCO proposals were not technically equal to the brand name. With regard to NITCO's model SN650 drilling rig, which the protester had proposed to modify, the report noted that the brochure NITCO had submitted with its proposal, describing the rig, did not show that various required features were options that were readily available on a production model; there was no photograph or brochure of the modified model in its upgraded form; no drawings to show the proposed changes. According to the report, the committee believed the modified SN650 would essentially be a new drill rig with unknown reliability and performance characteristics, which would require testing, changes, and retesting. The report also discussed the possibility that this "essentially new" drill rig would entail higher life-cycle costs than a rig of proven reliability. The report concluded that NITCO's rig was not acceptable as an equal product.

In a memorandum to the file (dated 1 day prior to the evaluation committee's report but apparently relying on the report as its source of information), the contracting officer established a competitive range that included only Newsom's offer. In this memorandum, the contracting officer appears to have determined that all three proposals were technically acceptable, although not equal, and performed a cost-technical tradeoff analysis, since Newsom's offer was significantly higher in price than the other two (being approximately 50 percent higher than NITCO's). This analysis was based solely on comparing hypothetical life-cycle costs, and concluded that only Newsom had a reasonable chance of being selected for award.

The original contracting officer was directed to transfer responsibility for the procurement to a new contracting officer for administrative reasons. The new official also

determined that the competitive range should be restricted to Newsom alone (although this apparently was not documented until after this protest was filed).

Discussions were held with Newsom, and the contract was awarded to the firm on September 27. This protest followed on October 11. Newsom was advised of the protest and performance of the contract was suspended pending the protest's resolution.

NITCO protests that the rejection of its proposal as technically unacceptable was unreasonable because it was based on an improper technical evaluation. Specifically, the protester contends that the evaluation team applied unannounced evaluation criteria, did not have the engineering expertise necessary to compare alternate products or to understand the technical modifications proposed in NITCO's offer, and applied the evaluation criteria unevenly between offerors, favoring Newsom.

Evaluation and award in negotiated procurements are required to be made in accordance with the terms of the RFP. Envtl. Technologies Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202. In reviewing protests against allegedly improper evaluations, we examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. Such judgments by their nature are often subjective; nonetheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected. See Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. By excluding all offers except the one for the brand name product, the agency left only one proposal in the competitive range. Such determinations by contracting agencies are closely scrutinized by our Office. See Corporate Strategies, Inc., B-239219, Aug. 3, 1990, 90-2 CPD ¶ 99.

Agency officials with different roles in the procurement process have provided different explanations for why NITCO's proposal was rejected. The evaluation committee chairman, in a hearing conducted in our Office, stated that he had excluded NITCO's proposal based on its low, overall score. The original contracting officer did not find the proposal technically unacceptable, but found it generally lower in technical standing and determined that it did not have a reasonable chance of being selected for award because of his assessment of its potentially higher life-cycle costs; further, he found that any discussions would amount to technical leveling. The subsequently appointed contracting officer found that NITCO had not demonstrated compliance

with the first four salient characteristics listed under technical factor 1 in the RFP's evaluation factors for award. In preparing its post-hearing comments, the agency provided a review of NITCO's proposal prepared by an engineer employed by the Department of the Interior's Bureau of Mines. This engineer primarily questions NITCO's ability to increase the height, weight, and strength of the required mast beyond the rig's existing capability. For purposes of reviewing the agency's conduct of the evaluation to determine whether it was reasonable and consistent with the stated evaluation criteria, we will examine the evaluation committee's report and the second contracting officer's determination which appear to reflect the agency's current position that NITCO's proposal was excluded for failure to meet four salient technical features.

The first of the four technical features at issue is a requirement for a retractable tophead drive system. The brochure that NITCO submitted with its proposal for the standard SN650 model does not show this feature. In its proposal, NITCO stated that "the tophead travels on guide rails and is retractable at the top of the mast." Other portions of the proposal demonstrated how the tophead would be raised and lowered, and therefore retracted, including a description of the power source for this function.

In the evaluation score sheets, the only basis stated for rating this feature as unacceptable was "because offeror proposes to upgrade SN650 to retractable drive and SN650 does not have one," although the RFP specifically allowed offerors to propose to modify an existing rig. At the hearing, the committee chairman conceded that he didn't know "precisely what that piece of equipment [involved in making the top head retract] is," and conceded, upon examination, that the required elements of the mechanism were described in the text of NITCO's proposal and that the retractable system proposed by NITCO was the same as the one proposed by Newsom. (Tr. pp. 100-105.)

In our view, this feature was not reasonably evaluated. Once offerors are informed of the criteria against which proposals will be evaluated, the agency must adhere to them. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. The RFP did not require the features to be included on the offeror's standard model; it required an adequate description of the product as modified or configured to meet the specifications. NITCO provided a description and there is no evidence in the record to show that this description is not technically compliant. The fact that the awardee's proposal received the maximum number of points for this feature, while apparently proposing the same mechanism, gives further evidence that it was not reasonable to find NITCO's proposal unacceptable in this area.

The second technical feature is the working holdback or pullback (the amount of force that the tophead must be able to exert when it is pulling the drill pipe up out of the hole) of 70,000 pounds. The holdback on the unmodified SN650 is 34,000 pounds. In its proposal, NITCO proposed to use heavy duty dual hydraulic cylinders combined with and working through an assembly of heavy duty roller chains, shafts and sprockets, to produce a pullback of the required 70,000 pounds. At the hearing, NITCO stated that the description of how its pull back capacity would be increased was included in several parts of its proposal, since it is dependent not only on the hydraulic cylinders but also the feed system, rotary tophead and mast. (Tr. pp. 114-120.) According to the protester, the substitution of a dual hydraulic system and related components does not represent a major engineering modification. NITCO also pointed out that its proposal represented the firm as certified by the American Society of Mechanical Engineers (ASME), and contended that this certification binds a manufacturer to certain design and safety standards and specifications, obligations that a mechanical engineer would recognize.

In the evaluation report, the proposal was rated unacceptable because the proposal contained "no evidence that NITCO has built a larger system [than the standard SN650]."

At the hearing, the chairman agreed that NITCO had listed all of the necessary components, but that the proposal lacked drawings or some other illustration of the modifications proposed. (Tr. pp. 136, 137.) Under questioning, however, he conceded that no one on the evaluation committee had the mechanical engineering background required to determine from a drawing whether a given configuration would work or not, that he would have passed any drawings to someone else to review, and that he did not discuss the written information that was submitted with any mechanical engineer. (Tr. pp. 139-142.)

We find that it was unreasonable for the agency to evaluate this area of the proposal without focusing on the descriptive information furnished by NITCO, but instead relying on an alleged lack of past experience producing a drill rig in the proposed configuration. Again, the RFP did not include a requirement that the offered rig be a standard production model nor did it establish as a prerequisite to technical acceptability a requirement for experience manufacturing either the particular drill rig described in the solicitation or a drill rig of comparable size and function. We question whether it was reasonable for the committee to reject, on technical grounds, matters that it apparently did not fully understand, without consulting experts knowledgeable in the field. Further, we also find



that Newsom's description of how it would accomplish pullback is virtually identical to that of NITCO's proposal; that is, the Newsom proposal describes the use of hydraulic cylinders and use of heavy duty cables to meet the pullback requirement.

The third feature was for a working torque of 100,000 inch-pounds. This feature was listed in the technical literature accompanying NITCO's proposal as a standard option of the SN650; the proposal also included a brochure describing the particular drive that would be supplied, showing that the size and configuration of the motor is the same for lower and higher torque motors. The evaluation report shows that points were deducted for this feature "because there is no indication that NITCO has made a rig with this torque even though the SN650 has more than 100,000 in. lbs. as options."

We find no reasonable basis for deducting evaluation points under this feature. The only basis advanced, either by the evaluation committee, the contracting officer, or at the hearing, was that NITCO had not shown in its proposal that it had built a rig with this torque before. The evaluation again did not consider whether NITCO's description was technically acceptable under the technical feature evaluation factor. We find this unreasonable and inconsistent with the RFP.

The fourth technical feature was for mast and crown block capacity of 100,000 pounds. This requirement means that the mast (the upright structure that supports the feed system and the tophead) and the crown block (the series of pulleys through which the feed systems runs, at the top of the mast) as a unit must be able to support 100,000 pounds in weight. NITCO's proposal describes its mast as "a one-piece steel electrowelded heavy duty square tubing structural mast," and states that the rated capacity of the mast and crown is 100,000 pounds. It is proposed to be designed and built in accordance with ASME and American Petroleum Institute standards, and included further description of these standards. NITCO contends that ASME specifications provide minimum standards for mechanical engineers to follow when constructing or building any structure, and that the representation of ASME certification indicates an obligation to meet stringent technical requirements, while the reference to ASME specifications indicates exactly how the structure will be built.

The agency's evaluation score sheets indicate that the proposal was found unacceptable because of "no indication that NITCO has ever manufactured a rig with this capacity of crown and block;" "propose upgrade of rig/mast having unknown capacity;" and "points deducted for reasons stated

above" [apparently referring to concerns about NITCO's ability to upgrade its standard model]. At the hearing, the committee chairman made it clear that the references to the ASME certification and the specifications incorporated by reference into NITCO's proposal were not considered. Indeed, the chairman stated that he was not familiar with ASME, did not check with any engineers or others with technical backgrounds to ascertain the significance of the ASME references, and based his evaluation of this feature on NITCO's perceived lack of experience in constructing a mast and crown block with this rating. (Tr. pp. 144-146.)

We find that the evaluation of this factor was as unreasonable as the other factors, discussed above. There simply was no requirement under the RFP's stated evaluation criteria that the drill rig be a standard production model or that the offeror have produced the exact drill before. While there may have been legitimate concern regarding the feasibility of building a mast with the required capabilities, the evaluation record does not establish a basis for finding NITCO's proposal unacceptable based on the information provided.

Throughout the various documents and testimony submitted by the agency in support of its evaluation, a great deal of concern is expressed regarding NITCO's experience building the type of drill rig required here, and NITCO's current ability to deliver the required rig as evidenced by its experience. The agency report includes several comments to the effect that a drill rig must operate as a unit and that compliance is not demonstrated by showing that each individual component in the rig meets the specifications. We are not prepared to say that these were not valid concerns or that the information the evaluation committee apparently sought was not relevant information that should have been considered as part of the evaluation. However, under the RFP evaluation scheme, these concerns were not included as considerations under the technical features evaluation factor, which called for evaluation of how the proposed product, as described, met the salient characteristics. The finding of technical unacceptability on that basis was improper. Any evaluation of the offerors' experience reasonably should have been confined to "technical factor nr. 3" (manufacturer's experience and reputation in the drilling industry), for which a total of 10 points had been allotted. Further, the RFP included, under Inspection and Acceptance, a "Demonstration of Satisfactory Operation" clause, requiring that the contractor demonstrate the actual operation of all elements of its proposed equipment to establish that the equipment is fully operational, that the drill rig and accessories function together as one complete operating unit, and that



the equipment will meet all operating specifications. Thus, the RFP, as issued, appeared to address the concerns about the ability of the drill to function properly as a post-award contract inspection and acceptance issue, not as a proposal evaluation factor.

In addition, the record reasonably shows that in the drilling industry, a standard product rarely meets the user's drilling conditions and thus substitution of components and other engineering modifications are often required to meet the user's drilling needs. At the hearing held in connection with this protest, NITCO's counsel pointed out several ways in which Newsom had also proposed to modify its standard model to meet the specifications, notwithstanding the fact that Newsom was offering the brand name product. Under these circumstances--where the brand name product itself is not an unmodified, standard production model, and where there is no evidence that the exact item required under the RFP has ever been produced before, we find it unreasonable for the agency to weigh so heavily the question of whether an offeror has previously manufactured a product being offered as an alternate.

Where only one proposal is left in the competitive range, inclusion of the proposal in the competitive range and discussions are in order if there is a close question of acceptability, if there is an opportunity for significant cost savings, if the inadequacies of the solicitation contributed to the technical deficiency of the proposal, or if an informational deficiency could be reasonably corrected by relatively limited discussions. See Corporate Strategies, Inc., B-239219, supra. Here, we think all of the above factors dictate further consideration of NITCO's proposal. NITCO's proposal was not properly evaluated and may have been technically compliant, it provided an opportunity for significant cost savings, it appears that the alleged technical deficiency resulted from the agency's failure to properly communicate its requirements and require evidence of the firm's experience with modifying a standard product and making it perform to user's needs, and the agency's concerns as to NITCO's capability to satisfactorily modify its product could have been resolved with more information through discussions.

We sustain the protest.

We recommend that the Department of the Interior review the RFP and determine whether it should be amended to better state its requirements and technical criteria or reevaluate all proposals as submitted based on the established evaluation criteria, appointing evaluation officials with the appropriate technical expertise. If the

deficiencies noted in NITCO's proposal are, upon review, considered minor and/or susceptible to correction, the agency should include NITCO in the competitive range and conduct discussions with all offerors so included. In either case, if Newsom is not found to be in line for award, Interior should terminate its contract with Newsom and make a new award to the firm in line for award.

We also find that NITCO is entitled to the costs of filing and pursuing this protest, including attorneys' fees, 4 C.F.R. § 21.6(d)(1) (1991). NITCO should submit its claim for such costs directly to the agency.

The protest is sustained.

*for Milton L. Acosta*  
Comptroller General  
of the United States