



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: NITCO
File: B-246185.3
Date: September 17, 1992

Timothy J. Williams, Esq., Arter & Hadden, for the protester.
Jon C. Newsom for Newsom Industries, an interested party.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, 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

1. Protest that amended request for proposals for drill rigs unduly restricts competition because it allegedly is "written around" a competitor's drill rig is denied where the agency establishes that the amendment's standard for evaluating the reliability of a drill rig's design (requiring that the rig has been built four times and that each of the four rigs has been in use for 5 years), which the protester cannot meet, is reasonably related to the agency's actual minimum needs.
2. In protest against amended specifications, filed prior to closing date for receipt of amended proposals and prior to any evaluation of offers, protester's arguments about its competitor's ability to meet the agency's requirements are dismissed as premature.

DECISION

NITCO protests the Department of the Interior, United States Geological Survey's (USGS), amendment of request for proposals (RFP) No. 1856, which was issued by the USGS Water Resources Division in Hawaii. The amendment was issued in response to our Office's recommendation in NITCO, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212, aff'd, Newsom Indus.--Recon., B-246185.2, Apr. 24, 1992, 92-1 CPD ¶ 392, an earlier protest by NITCO. The protester contends that the amendment, which revises the product description/specifications and evaluation factors for award, is improper because it unduly restricts competition and because it

revises the RFP's specifications in a manner that does not reflect the government's actual needs. We deny the protest in part and dismiss it in part.

The solicitation was originally issued in July 1991, on a brand name or equal basis for a "Failing-Speedstar drill rig, model Star 70K, Crane Carrier truck" with related accessories and equipment. NITCO submitted a proposal offering a modified version of its SN650 drill rig as an equal product. When NITCO's proposal was eliminated from the competitive range and Newsom Industries, Inc.'s offer based on furnishing the brand name product was selected for award, NITCO filed a protest with our Office, challenging the agency's technical evaluation of proposals. See NITCO, supra. We sustained the protest on the basis that the agency's evaluation of NITCO's proposal was improper because it did not focus on the technical information that was furnished with the offer, but was instead heavily influenced by unstated evaluation criteria. Specifically, we found that the RFP did not require that the drill rig be a standard production model (or otherwise indicate that offers would be evaluated on this basis); yet the evaluation committee repeatedly withheld technical points when scoring NITCO's proposal based on its belief that NITCO was offering a drill rig that the firm had not previously manufactured. We recommended that the agency review the RFP and determine whether it should be amended to state its requirements and technical evaluation criteria more accurately or, alternatively, that the agency reevaluate all proposals as submitted based on the established evaluation criteria, appointing evaluation officials with the appropriate technical expertise. The agency elected to amend the RFP, and it is this amendment that NITCO now challenges.

The amendment states that the agency's purpose in amending the RFP is to indicate the government's requirement for a drill rig which is a standard production model. The amendment defines standard production or model as "a current commercial product of a manufacturer described by its brand name, make, model number, catalog designation or other description by which it is regularly offered for sale to the public in the commercial market place." The amendment makes specific changes in section B (the schedule), section C (the description or work statement), and section M (evaluation factors for award), which NITCO argues render the RFP unduly restrictive of competition.

In section B, the RFP originally contained a Brand Name or Equal clause that required an offeror wishing to supply an equal product to insert a description of the offered product following each line item where such information is required.

As amended, the RFP instead requires the offeror to "provide specifications for the offered product and verification that it is a standard production model."

In section C, the RFP originally listed the following six salient characteristics of the brand name or equal drill rig:

- (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

As amended, the RFP specifies in section C that the drill rig, to be considered equivalent, must be a standard production model, built to specifications meeting or exceeding the first four of these characteristics, and "must be engineered to function with" components meeting or exceeding the last two salient characteristics. The amendment thus separates the required characteristics into items that must actually have been part of a standard production model and items with which the standard model must function.

The distinction between the agency's standard for meeting the first four requirements and its standard for the latter two is further emphasized in section M, which lists the evaluation factors for award. This section lists four technical evaluation factors in descending order of importance and indicates the relative weight they would be given in the overall evaluation of the technical proposals. The first technical factor, labeled "Technical features," consisted in the original RFP of the six salient characteristics discussed above. As amended, section M specifies that the drill rig must be a standard production model that has been built to specifications meeting the first four of the characteristics "four times, each rig having been used for water well drilling over a period of not less than [5] years." It then establishes a point system, indicating that a maximum of 240 points can be earned for this evaluation factor, based on 60 available points for each standard production model rig operated for 5 years, subject to a deduction of 10 points for each year of operation less than 5 for each rig. It also establishes a "pass/fail" technical standard for each of the four. For example, a rig with less than 70,000 pounds working hold-back fails the requirement for a rig with 70,000 pounds working hold-back and no evaluation points are awarded for that salient characteristic.

The remaining two salient characteristics are listed separately (and thus are not subject to the standard of having been built four times and operated for 5 years), as "[s]alient characteristics of major components." The amendment repeats the requirement (from section C) that the offered standard production model rig be engineered to function with components meeting or exceeding certain performance characteristics, which are identified as pass/fail standards.

NITCO argues that by requiring a "standard production model," the agency is essentially restricting the competition to Newsom (or other dealers for the George E. Failing Company, the manufacturer of the rig). The protester asserts that the amended specifications are overly restrictive and have been "carefully crafted for the dual purposes of eliminating NITCO from the competition for this contract, and ensuring the [g]overnment purchase a Failing-Speedstar Model 70-K rig without having to seriously consider rigs supplied by other manufacturers." NITCO contends that by grouping the first four salient characteristics together and requiring that they meet the 4-time, 5-year standard established in the amendment, but allowing the substitution of the major components that are listed separately from that standard, the agency is simply tailoring its requirements to match Newsom's product (and, at the same time, to exclude NITCO and all other competitors).

The Competition in Contracting Act of 1984 requires that agencies specify their needs and solicit offers in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A)(i) (1988), and include restrictive solicitation provisions only to the extent necessary, 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester challenges a specification as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are reasonably related to the agency's minimum needs. RMS Indus., B-247233; B-247234, May 1, 1992, 92-1 CPD ¶ 412; see Bombardier, Inc., Canadair, Challenger Div., B-243977; B-244560, Aug. 30, 1991, 91-2 CPD ¶ 224. Specifications that are based upon a particular product are not necessarily improper in and of themselves; an assertion that a specification was "written around" design features of a particular product will not provide a valid basis for protest if the record establishes that the specification is reasonably related to the agency's minimum needs. Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7.

Thus, the threshold issue is whether the amended requirements reasonably reflect the agency's actual minimum needs. In its report responding to this protest, USGS emphasizes its need for a drill rig and related equipment with a record

of proven, reliable performance, based on the project's location in Hawaii. The agency repeatedly stresses the difficulties inherent in the remote location as well as the particular characteristics of the geology and climate involved. The agency reasons that a newly designed, prototype rig would have greater potential for engineering and mechanical problems than a rig that has already been tested through regular use, and that any such problems could cause delays because of the project's location. The agency points out that because the project is in Hawaii, even telephone and facsimile communication with the mainland United States can be difficult, since there is a 2- to 3-hour time difference between Hawaii and the West Coast. Even greater problems are encountered in transporting heavy equipment, replacement parts, etc., since air shipment is expensive and transport by ship extremely slow. The agency also stresses that because Hawaii has experienced drought conditions this year, the state's interest in avoiding any unnecessary delays in locating water adds to the government's usual interest in avoiding costs associated with lost man-hours and downtime of equipment. Due to the size and complexity of drilling equipment, USGS argues that field testing and "debugging" a new model drill rig is a lengthy and expensive process, and that the current project prevents requirements that are too urgent to accommodate such delays. The agency also explains that while it requires the relative stability or reliability of a standard production model, it can satisfy the particular needs dictated by the drilling conditions of this project by choosing among the standard options for alternative components that are offered with the standard model designated in the RFP.

Regarding the evaluation standard requiring that the offeror have built the rig four times and that each rig must have been in operation for a period of 5 years, USGS argues that this standard was designed to measure standardized design and reliability of performance. Its basis for requiring that the rig have been built four times was that this was the minimum number believed necessary to demonstrate the requisite level of proven design. In our view, the agency has shown a reasonable basis for this requirement. Given the discussions in the record indicating that drill rigs are used in a wide variety of applications, with differing conditions and terrain, it seems reasonable to us that with this type of equipment in particular, the more times a drill rig of a particular design has been produced and used, the more probable it becomes that the rig is of a reliable (and perhaps adaptable) design. The record shows that the drill rig named in the RFP, the Star 70K, was first built as a prototype that was not sold. USGS argues that only after procedures for normal maintenance and repairs have been established--usually by working with the prototype and then by refinements to the subsequent early models--can the

design be considered "standard." In these circumstances, we find the standard of four drill rigs to be a reasonable measure of the success of the design. Our conclusion in this matter is based in part on the fact that this requirement is not expressed in the evaluation scheme as an absolute prerequisite to technical acceptability, since it is stated in conjunction with a sliding-scale or point system. The evaluation standard, as amended, advises offerors that this technical feature is to be evaluated on the basis of allowing a maximum of 60 points for each standard production model rig that has been built (subject to deduction of points for not meeting the 5-year use requirement). In our view, it is reasonable to establish an evaluation method that awards full credit for an offer meeting the requirement for reliability to a firm offering a rig that has been built four times, while allowing less credit for rigs that have been produced fewer times.

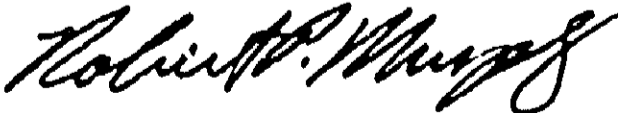
Our conclusion regarding the requirement that the offered drill rig have been in operation for 5 years is similar. The agency states that this standard is based on the agency's expectation that the project for which the rig is being procured would last approximately 5 years. We find that this requirement is reasonably related to USGS' need for a drill rig that can be expected to perform reliably for the duration of the project, and provides a reasonable way of measuring that reliability while allowing partial credit for rigs that have been in operation for a shorter period of time. While NITCO argues that this past-performance requirement does not necessarily ensure that the offered rig will perform as reliably or that spare parts will necessarily be available as they were for past rigs, we find the agency's expectation that this requirement will increase its chances of obtaining a reliable rig to be reasonable. This portion of the protest is denied.

Regarding NITCO's argument that by separating the six original salient characteristics into one group of four that must be present on a rig meeting the 4-times-built, 5-years-in-use standard and one group of two characteristics for which the rig merely has to meet the standard of having "been engineered" to function with, USGS was tailoring its requirement to accommodate the Star 70K rig, we find no basis for objection. The mere fact that a specification is based on a particular product is not objectionable, as long as the specification is reasonably related to the agency's needs. See Infection Control and Prevention Analysts, Inc., supra. The record shows that no firm has ever produced the exact model designated in the original RFP, with precisely the components that were specified--not even the so-called name brand product has been manufactured to exactly these specifications. Here, the agency is not specifying a particular engine or compressor. It believes it can still

satisfy its needs for a reliable, proven rig by obtaining these two components from other manufacturers, provided the rig is engineered to function with the components the agency needs. To the extent NITCO is protesting that USGS should not have relaxed the standard for these two components because it was accommodating Newsom to do so, it is protesting that the specifications should be made more restrictive, a matter which we will not review. Our Office's role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. Petchem Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228. Moreover, since NITCO concedes that it cannot meet the standard established for the first four salient characteristics as written, and we have found that this standard is reasonably related to the agency's needs, we need not consider NITCO's additional challenges to the specifications. See Bombardier, Canadair, Challenger Div., supra.

NITCO's protest includes other arguments. NITCO points out that even Failing, as the manufacturer of the named product, would have to make certain modifications and substitutions of parts in order for its "standard commercial product" to comply with the requirements of the RFP; as we recognized in the initial protest decision, there is no evidence that a standard production model that exactly matches the specifications has ever been built. Thus, NITCO argues, because of the nature of the drilling industry, which usually requires that a drill rig be modified to meet the user's specific needs, no offeror can meet the RFP's general requirement for a standard production model. We find that the question of whether any offeror can, in fact, meet the RFP's terms is one that relates to the eventual evaluation of proposals, and is prematurely raised at this point. Various arguments of this type--regarding, for example, how many drill rigs Newsom has produced, whether Newsom itself (as opposed to manufacturing firms with which it has merged) has ever actually produced any of these rigs, whether Newsom intends to provide (or any other offeror is capable of providing) a drill rig that meets the definition of "standard production model"--fall into this category and are dismissed as prematurely raised.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel