



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Nomura Enterprise Inc.

**File:** B-251889.2

**Date:** May 6, 1993

Al Weed for the protester.

Vera Meza, Esq., and Larry D. Maneke, Esq., Department of the Army, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Cancellation of request for proposals after submission and evaluation of offers is proper where the agency reasonably concludes that the solicitation no longer reflects its actual minimum needs.

2. Where an agency has advised an offeror during discussions of deficiencies in its proposal and the offeror fails to correct those deficiencies, the agency is not required to conduct an additional round of discussions to provide the offeror a second opportunity to revise its proposal.

### DECISION

Nomura Enterprise Inc. protests the cancellation of request for proposals (RFP) No. DAAA08-92-R-0501 by the Department of the Army. Nomura contends that the agency did not have a reasonable basis for the cancellation.

**We deny the protest.**

Issued on February 4, 1992, the RFP is for acquisition of an integrated turnkey computer-aided process planning (CAPP) system for use in the Rock Island Arsenal manufacturing facility. The CAPP system is to integrate software, hardware, and networking. Two proposals, including Nomura's, were received by the June 29 closing date for receipt of initial proposals.

During the course of August 1992, the agency conducted three rounds of clarifications which addressed various aspects of Nomura's proposal. Then, on September 8, the agency telecopied Nomura a list of areas in which its proposal had been found noncompliant. Among the specifications that Nomura's proposal had been found not to meet were the requirements that the system allow authorized users to customize the system-supplied formats and that the system highlight or otherwise demarcate each edited field as the edit occurs. The notification further stated that Nomura's proposed software appeared to be incapable of satisfying these requirements.

Nomura's September 15 reply to the notification of noncompliance addressed each point raised by the agency. With respect to the two points detailed above, the protester indicated that some customizing was possible, but the presentation of screens was not changeable; and the proposed software would maintain a "history log" to locate changes, but would not highlight or otherwise demarcate the changes on the screen.

In an October 6 letter, the Army responded to Nomura's explanations. As to both of the points identified above, the agency stated that Nomura's proposal remained noncompliant. In light of these and other points that the October 6 letter identified as "grave deficiencies," the agency stated that it was "not optimistic that you are pursuing a course which will enable you to become compliant within a reasonable timeframe, if at all."

In an October 30 letter, Nomura requested that the agency clarify the requirement that authorized users be able to customize the system-supplied formats. The agency did so in a November 2 telecopy which also reminded Nomura that all requirements of the RFP must be satisfied.

A November 10 letter from Nomura again addressed the areas of noncompliance. With respect to the two areas identified above, the protester wrote that it was working on a solution which would allow programmers to customize formats, but it did not indicate that other authorized users would be able to do so; and a method to highlight edited fields had been "determined," but not yet "implemented," and the additional cost it would entail would be identified for the first time in the company's best and final offer.

The Army's evaluation of this response led it to write to Nomura, on December 18, 1992, that its proposal as modified was not in compliance with the RFP requirements and would not be further considered for award. The letter also advised Nomura that, in the agency's view, there was "little likelihood that your proposal can become compliant without

profound, costly and time-consuming changes." The letter set forth the agency's opinion that the Army had "exhausted every avenue of opportunity to allow your proposal to be revised so that we may find it compliant with our requirement, as evidenced by the numerous letters we have provided informing you of non-compliant areas of your proposal . . . ."

In the meantime, the agency had concluded that the other competing proposal was also noncompliant. By written notice provided to Nomura on January 5, 1993, the agency stated that the RFP was being canceled because "no offers were compliant with specifications."

At the same time that the proposal evaluation process was ongoing, the agency was reorganizing its information management directorate. The agency advises that, as a result of that reorganization, additional agency personnel are available to perform in-house part of the work covered by the RFP. Based on this development as well as changes in software and hardware technology that have occurred since the RFP was issued, the agency concluded that the RFP no longer reflected the agency's needs. That conclusion was set forth in a written determination to cancel the RFP which the contracting officer signed on January 4, 1993. The determination stated that cancellation is in the government's best interest.

The January 4 determination noted that neither proposal submitted in response to the RFP was compliant, and did not indicate whether the RFP would have been canceled if a compliant proposal had been submitted. In its agency report on the protest, the Army noted that, if the proposed software had been compliant, the agency "in all likelihood" would have simply amended the hardware and networking portions of the RFP specifications, rather than canceling the RFP entirely.

Nomura, while conceding that its proposal did not satisfy the RFP requirements prior to November 10, 1992, contends that its November 10 letter to the Army "gave full recognition to the Government's requirements and offered to satisfy them fully." The protester alleges that it "was not afforded the opportunity to explain how, in three specific instances [including the two deficiencies discussed above], previous deficiencies would be remedied . . . ." It argues that:

"[a]lthough [Nomura] did not explain in every instance how the previous deficiencies were to be overcome, the solution could have easily been

clarified. . . . [Nomura's] proposal was conforming or could have been made conforming through minor clarification . . . ."

In addition, Nomura contends that the Army acted in bad faith in determining that the RFP no longer reflected the agency's needs. While not disputing the impact of changes in the software and hardware technology, the protester disputes as "questionable" the agency's contention that it can now perform part of the work in-house. The protester also sees as evidence of bad faith the disclosure that the internal review which eventually led to the decision to cancel began before the RFP was issued. In Nomura's view, the decision to issue the RFP at a time when the agency was reviewing its needs caused Nomura to expend resources needlessly and requires that Nomura be reimbursed for its proposal preparation costs.

All proposals received in response to a request for proposals may be rejected if the agency determines that cancellation is clearly in the government's interest. Federal Acquisition Regulation (FAR) § 15.608(b)(4). In a negotiated procurement such as here, the contracting agency need only demonstrate a reasonable basis to cancel a solicitation, even after receipt of proposals, as opposed to the "cogent and compelling" reason required to cancel an invitation for bids where sealed bids have been opened. See Xactex Corp., B-247139, May 5, 1992, 92-1 CPD ¶ 423.

Accordingly, the question is whether the Army had a reasonable basis to cancel the RFP. Nomura has not challenged the agency's contention that changes in hardware and software technology have caused the RFP to fail to describe the agency's actual minimum needs. Cancellation of a solicitation is proper where an agency determines that the solicitation does not accurately describe those needs. Admiral Towing and Barge Co., B-245600; B-245602, Jan. 16, 1992, 92-1 CPD ¶ 83. Although the protester finds "questionable" the agency's ability to perform any of the work in-house, that skepticism does not constitute a basis for our Office to conclude that the agency's determination lacks a reasonable basis. In any event, we do not review, except in circumstances not relevant here, an agency's decision to cancel a solicitation in order to perform services in-house, because such decisions are a matter of executive branch policy, which is not within our bid protest function. RAI, Inc., B-231889, July 13, 1988, 88-2 CPD ¶ 48.

In addition, we find nothing objectionable to the Army's continuing with the procurement while a review of the agency's needs was underway. It does not appear that the review was focused on this procurement, and Nomura has not

suggested that the agency had any basis to expect that the review would lead it to conclude that the RFP did not accurately set forth its needs. Once that conclusion was reached, cancellation of the RFP was proper, as explained above.

While Nomura alleges that the cancellation was made in bad faith, it offers no evidence to support that allegation. Government officials are presumed to act in good faith and, therefore, for our Office to conclude that an agency acted in bad faith, the record must establish that contracting officials intended to injure the protester. SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ \_\_\_\_\_. Based on our review of the record, there is nothing which suggests that any such intent existed here.

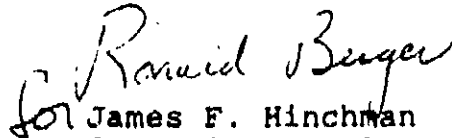
Because the record indicates that the noncompliance of the proposals submitted also played a role in the agency's decision to cancel the RFP, we will consider Nomura's allegation that the agency lacked a basis to conclude that the protester's proposal did not comply with the RFP requirements. Nomura bases this allegation on the agency's failure to provide the company with an additional opportunity to explain how it would have remedied the deficiencies in its proposal.

Nomura's contention amounts to an allegation that the Army failed to conduct meaningful discussions. In order for discussions in a negotiated procurement to be meaningful, contracting officials must advise offerors whose proposals are in the competitive range of deficiencies in their proposals and provide the offerors a reasonable opportunity to revise their proposals to satisfy the government's requirements. FAR § 15.610(b). However, where the agency has advised an offeror of deficiencies and given the offeror an opportunity to revise its proposal, but the agency's review of the revised proposal indicates that the deficiencies remain, the agency has no obligation to conduct further discussions or to provide the offeror a second opportunity to revise its proposal. CompuServe Data Sys. Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374.

Here, we find that the Army conducted meaningful discussions. The September 8 telecopy advised Nomura of the deficiencies in the company's proposal, including the two detailed above. Nomura's September 15 reply to the notification of noncompliance essentially conceded that the protester's proposal was deficient in those areas, without attempting to correct the deficiencies. At that point, the Army had satisfied the requirement for meaningful discussions, and it could have properly eliminated Nomura's proposal from consideration.

The Army, however, provided Nomura another opportunity to correct the deficiencies. The agency's October 6 letter explicitly informed the protester that the deficiencies remained in the proposal. Instead of revising its proposal to satisfy the RFP requirements in the deficient areas, Nomura merely informed the agency that, as to the issues of customizing fields and highlighting edited information, the company was working on a compliant solution.<sup>1</sup> In these circumstances, we find that the discussions conducted satisfied the requirements of FAR S 15.610, and the Army was not required to go back to Nomura yet again in order to inquire how the company intended to cure the deficiencies. Accordingly, the agency's determination that Nomura's proposal was unacceptable was reasonable.

The protest is denied.

  
for James F. Hinchman  
General Counsel

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<sup>1</sup>The agency correctly points out that Nomura's November 10 letter did not indicate that the company intended to provide a solution allowing all authorized users to customize formats, as the RFP required; instead, the letter stated merely that the company was working on a solution which would allow programmers to do so. As to this point, therefore, the protester's November 10 letter did not state that the protester ever intended to satisfy the RFP requirement.