

DOCUMENT RESUME

03309 - [A2353476]

[Protest against Refusal of Agency to Consider Two Alternative Proposals Submitted with Best and Final Offer]. B-188749. August 19, 1977. 6 pp. + 11 enclosures (11 pp.).

Decision re: American Chain & Cable Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

**Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).**

Organization Concerned: Library of Congress; Reflector Hardware Corp.

**Authority: B-180292 (1974). B-169633 (1974). B-186300 (1976).
B-184227 (1976). 55 Comp. Gen. 374. 53 Comp. Gen. 473. 54
Comp. Gen. 44. 45 Comp. Gen. 401. 45 Comp. Gen. 404. 55
Comp. Gen. 803. 55 Comp. Gen. 807.**

The protester objected to a proposed contract award because the agency refused to consider two alternative proposals submitted with the protester's best and final offer. The provisions in the solicitation with regard to the alternate proposals were ambiguous. The protester's alternate proposals should be properly evaluated to determine whether they are technically acceptable and, if so, negotiations should be reopened so that the award may be made to the lowest acceptable offeror. (Author/SC)

03309

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DECISION



Keith Gundersen
Pres
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188749

DATE: August 19, 1977

MATTER OF: American Chain & Cable Company, Inc

DIGEST:

1. RFP provision encouraging submission of alternate proposals must state in clear and unambiguous terms date and time for submission of such proposals. If provision does not state otherwise, alternate proposals may be submitted up to due date for receipt of best and final offers.
2. Language in RFP, which invited alternate proposals and, at same time, specified exact number of devices to be used in detection system, was ambiguous and did not afford both offerors same opportunity to submit alternate proposals on an equal basis.
3. Alternate proposal, if technically acceptable, which merely utilizes fewer number of devices than specified in RFP and does not change type of device to be used indicates that Government overstated its minimum needs and necessitates reopening of negotiations.
4. Proposed alternative approach consistent with one reasonable interpretation of the specifications but not with another must be considered but may not be accepted for award without giving other offeror in competitive range an opportunity to compete on same basis since it does not constitute technical breakthrough.

By telegram dated April 2, 1977, American Chain & Cable Company, Inc. (Acco), protested the proposed award of a contract to Reflector Hardware Corporation (Reflector) under request for proposals (RFP) 75-19, issued by the Procurement and Supply Division of the Library of Congress (Library). The basis of Acco's protest is that the Library refused to consider two alternative proposals which Acco submitted with its best and final offer.

RFP 75-19, issued on February 10, 1975, was for design, fabrication and installation of compact bookstacks to be used in the Law Library and Music Division which will be housed in the James Madison Memorial Building in January of 1978. The Library amended RFP 75-19 nine times. Most significant to this protest is amendment 6, issued on October 15, 1976, which stated in part:

"As a final safety feature there is to be included in each range end and as part of the control circuitry an entry detection sensor, such as a combination of an infrared emitting diode (as light source) and a silicon photodiode (as detector) or comparable electronic sensing devices, to detect the entrance of a person into an open aisle after the reset buttons have been pushed as described in the preceding paragraph. * * *

Amendment 7, dated November 16, 1976, extended the due date for receipt of best and final offers from November 22, 1976, to not later than December 1, 1976, at 2:30 p.m.

Acco and Reflector submitted proposals in response to this solicitation. Negotiations were held and both firms submitted best and final offers in accordance with the RFP and amendment 6 by December 1, 1976. At the same time Acco submitted two alternate proposals which would reduce the number of sensor devices specified in amendment 6 from 18 to 2 in alternate "A" and from 18 to zero in alternate "B". Acco submits that alternate "A" would reduce its offer by \$183,261 and alternate "B" would reduce its offer by \$228,833; thus, making it the apparent low offeror.

Acco was informed by the Library by letter dated February 11, 1977, that its best and final offer was not the lowest submitted and that the contract would be awarded to another firm. The letter also stated that Acco's alternate proposals for the sensor devices were not in conformance with amendment 6 and were, therefore, not acceptable.

Acco contends that its alternative proposals should have been considered with its best and final offer because the proposals were in conformance with section 1, paragraph 2.4 of the RFP which states:

"Alternate Proposals. A vendor may submit more than one proposal, each of which must satisfy the vendor requirements of the solicitation minimum, one of the proposals submitted must be complete. The alternate proposals may be in an abbreviated form following the same section format, but providing only those sections which differ in any way from those contained in the original proposal. If alternate proposals are submitted, such alternatives will be clearly labeled and identified on the cover page of each separate document. The reason for each alternate and its comparative benefits shall be explained. Each proposal submitted will be evaluated on its own merits."

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Acco also submits that the following sentence in amendment 6 invites the submission of alternate proposals by the offerors: "* * * The * * * [offeror] may propose whatever device seems to achieve the desired purpose * * *"

It is the position of the Library that the provision in the RFP dealing with alternate proposals was no longer operative once best and final offers were submitted and, therefore, Acco's two alternates were treated as late proposals. The contracting officer states that alternate proposals should have been submitted during negotiations because they require discussion and it would not be "equitable" to evaluate Acco's alternates once best and final offers had been submitted because Reflector submitted its offer in total conformance with the RFP and amendment 6. The Library believes that its specification with regard to the required number of sensor devices was clearly stated. In this connection, the contracting officer advises that it was not the intent of amendment 6 to permit a change in the number of devices used, but that it was merely intended to permit a change in the type of device utilized to achieve the stated purpose. Underlying this statement is the assumption that "vendor requirements" are equivalent to the Government's requirements as stated in the amendment.

A fundamental principle of Federal procurement law dictates that solicitations be drafted in clear and unambiguous terms. DPF Incorporated, B-180292, September 12, 1974, 74-2 CPD 159. An offeror should not have to guess the due date and time for the submission of its proposals. Nowhere does the RFP issued by the Library state that alternate proposals must be submitted prior to the due date for receipt of best and final offers. If this were indeed a requirement, the RFP should have stated this in clear and unambiguous terms. Because of the deficiency of the RFP in this respect, we cannot conclude that Acco's proposals were submitted late and were, therefore, properly rejected.

Further, we agree with Acco that section 1, paragraph 2.4, encourages offers to submit alternate proposals. This paragraph requires that the vendor satisfy the "vendor requirements of the solicitation minimum," which, in effect, requires only that the offeror meet his own requirement of the solicitation minimum. When read in conjunction with amendment 6, an offeror is given the opportunity to submit an alternate proposal which would achieve the stated purpose of the sensor devices without equaling the number of sensor devices specified in the amendment. This is indicated by the wording in amendment 6 which states:

"* * * The bidder may propose whatever device seems to achieve the desired purpose, but the current state of the art in electronic detection devices appears to offer an addition to the control circuitry that is practicable for this bookstack installation (where alignment of aisle ends may not be perfect or consistent) and is reliable for long-term service."

Thus, Acco's determination that its vendor requirements consist of fewer sensor devices than stated in the RFP seems to be sufficient to have its alternate proposals considered by the Library.

While the intent of amendment 6 may well be as the contracting officer indicates, we believe that the language utilized to effectuate this intent was not clear, and reasonably lent itself to the interpretation adopted by Acco. At the same time, this ambiguous language may have prevented Reflector from submitting a proposal based upon less than the specified number of sensors. As we said in 45 Comp. Gen. 401, 404 (1966):

"* * * It is axiomatic that there can be no effective competition unless bidders are competing on a common basis, and that there can be no intelligent bidding for a contract unless all bidders know what the contract requirements will be * * *."

In view of the ambiguity, it appears that the two offerors may not have had an opportunity to submit proposals and have them considered on an equal basis. See B-169633, May 6, 1971.

Therefore, we recommend that Acco's alternate proposals be evaluated by the Library in order to ascertain whether they are technically acceptable. Should the outcome of such a determination be in the affirmative, negotiations should be reopened so that both firms will have the opportunity to submit offers based on the same requirements. We make this recommendation because if Acco's alternates are acceptable, it would appear that amendment 6 overstated the minimum needs of the Library in that the number of sensor devices necessary would be much lower than the number specified therein. We have consistently held that when there is a change in an agency's stated needs, or when one agency decides it is willing to deviate from the stated needs, all offerors must be informed of the revised needs, usually through amendment of the solicitation, and given an opportunity to submit a proposal on the basis of the revised requirements. Union Carbide Corporation, 55 Comp. Gen. 803, 807 (1976), 76-1 CPD 134.

While we have consistently recognized that an agency has a broad range of discretion in making a determination of its minimum needs, Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232, we also require that such determinations be the product of informed and critical judgments. American Telephone and Telegraph Company, B-186300, September 7, 1976, 76-2 CPD 221; Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14. In situations where a contracting agency admits that its specification requirements overstated its minimum needs, we have held that the specifications are unduly restrictive of competition and thereby defective by precluding free and full competition. Engineered Handling Systems, Litton Unit Handling Systems, B-184227, March 9, 1976, 76-1 CPD 163.

It appears that the Library's statement of its minimum needs may not be the product of an informed and critical judgment. This is especially true in light of the Library's refusal to evaluate the alternate proposals submitted by Acco. Yet, in the opinion of the contracting officer, the use of "far fewer sensing devices" may achieve "the same degree of safety and efficiency of functioning" as the number of devices specified in amendment 6. This seems to be an admission by the contracting officer that the Library may have overstated its minimum needs.

Acco argues that it should be awarded the contract upon a technical evaluation of its alternate proposals without giving Reflector an opportunity to submit a proposal on the same basis. Acco contends that it should be "rewarded for its engineering ingenuity" rather than being forced to compete with the other firm benefitting from its effort.

We do not agree with this contention. A review of our cases involving technical transgression indicates that where offerors submit unique technical approaches in response to a solicitation, the contracting agencies are not required to notify other offerors of their waiver of specification requirements and are not required to permit other offerors an opportunity to submit revised proposals. Baganoff Associates, Incorporated, 54 Comp. Gen. 44 (1974), 74-2 CPD 56. However, the rule applies only where a technical breakthrough obviates the need for something called for by the specifications without in any way compromising the end result. In this case, amendment 6 could reasonably be, and apparently was, interpreted by Reflector to require 18 sensor devices even though flexibility as to the type of sensor was permitted. On the other hand, Acco considered that any number of sensors could be offered so long as the result was a system which could "detect the entrance of a person into an open aisle" after the reset buttons had been pushed. The alternates appear to derive from a different but reasonable reading of the specification rather than a technological

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breakthrough. Since they do represent a reasonable interpretation of the specification, they may not be ignored; on the other hand since they do not constitute a technological breakthrough they may not be accepted without giving Reflector an opportunity to propose on the same basis.

Accordingly, Acco's alternate proposals should be properly evaluated to determine whether they are technically acceptable and, if so, negotiations should be reopened so that award may be made to the lowest acceptable offeror.

Deputy


Comptroller General
of the United States



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

Lee E. Gundersen
Percy

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Charles H. Percy
United States Senate

Dear Senator Percy:

Reference is made to your letter dated June 16, 1977, on behalf of Spacemaster Corporation, Melrose Park, Illinois, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Lee E. Gundersen
Deputy Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20540

Ruth G. Langford
Permanente

IN REPLY
REFER TO: B-188749

August 19, 1977

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Dear Mr. Speaker:

Reference is made to your letter dated June 2, 1977,
concerning the protest filed by American Chain & Cable Company,
Inc., under request for proposals No. 75-19, issued by the
Library of Congress.

Enclosed for your information is a copy of our decision
of today concerning the matter.

Sincerely yours,

Deputy

[Signature]
Comptroller General
of the United States

Enclosure



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

Keith G. Giden
Proctor

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Charles McC. Mathias, Jr.
United States Senate

Dear Senator Mathias:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

[Signature]
Deputy Comptroller General
of the United States

Enclosure



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

With Goodloe E. Byron
Page 2

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Goodloe E. Byron
House of Representatives

Dear Mr. Byron:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Phyllis K. Hill
Comptroller General
Deputy of the United States

Enclosure



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

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Adlai E. Stevenson
United States Senate

Dear Senator Stevenson:

Reference is made to your letter dated June 16, 1977, on behalf of Spacemaster Corporation, Melrose Park, Illinois, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Deputy 
Comptroller General
of the United States

Enclosure



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

Keith Henderson
Line 2

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Ralph S. Regula
House of Representatives

Dear Mr. Regula:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

[Signature]
Deputy Comptroller General
of the United States

Enclosure



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

Keith Gustafson
Per I

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Edward M. Kennedy
United States Senate

Dear Senator Kennedy:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Robert M. ...
Deputy Comptroller General
of the United States

Enclosure



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

Keith Gudenberg
Per. I

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable Paul E. Tsongas
House of Representatives

Dear Mr. Tsongas:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Deputy

[Signature]
Comptroller General
of the United States

Enclosure



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

Ruth Gundersen
Page I

IN REPLY REFER TO: B-188749

August 19, 1977

The Honorable Paul S. Sarbanes
United States Senate

Dear Senator Sarbanes:

Reference is made to your letter dated June 2, 1977, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Deputy

[Signature]
Comptroller General
of the United States

Enclosure



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

Keith G. Anderson
Proc I

IN REPLY
REFER TO: B-188749

August 19, 1977

The Honorable Edward W. Brooke
United States Senate

Dear Senator Brooke:

Reference is made to your letter dated April 19, 1977, on behalf of the Andrew Wilson Company of Lawrence, Massachusetts, concerning the protest filed by American Chain & Cable Company, Inc., under request for proposals No. 75-19, issued by the Library of Congress.

Enclosed for your information is a copy of our decision of today concerning the matter.

Sincerely yours,

Pratt
Deputy Comptroller General
of the United States

Enclosure



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

Ruth Gordon
Per I

IN REPLY
REFER TO:

B-188749

August 19, 1977

The Honorable John G. Lorenz
Deputy Librarian of Congress

Dear Mr. Lorenz:

Enclosed is a copy of our decision of today concerning the protest filed by American Chain & Cable Company, Inc. (Acco), under request for proposals No. 75-19, issued by the Library of Congress.

Your attention is directed to our recommendation that Acco's alternate proposals be evaluated to determine whether they are technically acceptable and, if so, that negotiations be reopened. Please advise us of the action taken pursuant to our recommendation.

Sincerely yours,

[Signature]
Deputy Comptroller General
of the United States

Enclosure