



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Trimble Navigation, Ltd.

File: B-271882; B-271882.2

Date: August 26, 1996

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Stan Hinton, Esq., and Paul W. Searles, Esq., Baker & Botts, for Rockwell International Corporation, an intervenor.

Vera Meza-Dombkowski, Esq., and David H. Scott, Esq., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement for a hand-held global positioning system receiver, award could not properly be made to an offeror whose proposal did not demonstrate that it satisfied the solicitation's requirement for a nondevelopmental item.

DECISION

Trimble Navigation, Ltd. protests the award of a contract to Rockwell Collins Inc., under request for proposals (RFP) No. DAAD05-96-R-9011, issued by the U.S. Army Aberdeen Proving Ground Support Activity for the Special Operations Lightweight Global Positioning System Receiver (SOLGR). Trimble protests that Rockwell's offered receiver is not a nondevelopmental item (NDI), as required by the RFP.

We sustain the protest.

The global positioning system (GPS) is a space-based navigation system that provides military users worldwide with precise three-dimensional position, velocity, and time data. The standard Department of Defense hand-held, precise positioning

service,¹ GPS receiver used by general purpose forces is the Precision Lightweight GPS Receiver (PLGR), which both Trimble and Rockwell have previously provided. U.S. Special Operations Forces, however, require enhanced performance, such as extended navigation features, multiple communications interfaces, and more rugged environmental capabilities, than is available in the PLGR. In response to this requirement, Trimble and Rockwell received separate, development contracts to develop prototypes of the SOLGR for use by Special Operations Forces. Pursuant to these contracts, Trimble and Rockwell developed separate prototypes of the SOLGR, which were delivered to the government for testing.

The RFP here was for a limited competition between Trimble and Rockwell that would lead to the selection of the firm that would continue the SOLGR program into production. Fixed-price proposals were requested for three contract line items (CLIN): CLIN 0001 sought a fixed price for one lot of manufacture and testing of twenty SOLGR first articles; CLIN 0002 sought unit pricing for an estimated quantity of 1,000 receivers; and CLIN 0003 sought pricing for one lot of specified contract data. The contractor was required to deliver first articles and to complete first article testing within 240 days after contract award.

The RFP included design and performance specifications for the SOLGR which, among other things, established stringent requirements for the size and weight of the receiver, battery performance, and environmental considerations—such as the ability to operate to depths of 33 feet. Offerors were requested to describe how they would meet each technical requirement and identify any specific requirement that may not be met. Offerors were also instructed that they may provide sample hardware "from mockups to fully functional prototypes."

The statement of work (SOW) provided that the receiver must be an NDI. In this regard, the RFP incorporated by reference the standard "Definitions" clause stated in Federal Acquisition Regulation (FAR) § 52.202-1 (FAC 90-32), which provides, in pertinent part, the following definition:

"(e) Nondevelopmental item means--

- (1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

¹Precise positioning service refers to the higher level of precision which military GPS receivers are capable of providing relative to commercial GPS receivers, which are designed for "standard positioning service."

(2) Any item described in paragraph (e)(1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(3) Any item of supply being produced that does not meet the requirements of paragraph (e)(1) or (e)(2) solely because the item is not yet in use."

Offerors were informed that award would be made on a best value basis and that technical evaluation factors were slightly more important than price. The RFP stated a number of evaluation factors that judged the design and performance of offered receivers; system weight/volume and battery life were identified as the two most important evaluation factors, being more important than the combined remainder of the evaluation factors. Offerors were informed that risk associated with achieving each system parameter would be evaluated under each evaluation factor/parameter and that offered enhancements beyond the system requirements may be provided with additional consideration. The RFP also stated that to be found acceptable, their proposals must demonstrate (1) understanding of the technical requirements and the means required to fulfill the technical requirements; (2) completeness of the offerors' analyses of each factor and subfactor; and (3) the "[f]easibility of performing all the terms and conditions of the offer within the cost proposed by the offeror."²

Trimble and Rockwell submitted proposals, including demonstration models of their proposed receivers, by the March 15, 1996, proposal closing date. In addition, each offeror made an oral presentation to the technical evaluation board (TEB). Rockwell was asked numerous questions during its oral presentation concerning its offered, redesigned receiver.³ As documented by the TEB's March 29 report,

²Trimble protests that this provision prohibited below-cost bids by requiring offerors to demonstrate the feasibility of performing the contract within the cost proposed. We disagree and find, as argued by the agency, that this provision merely informed offerors that the agency would evaluate offeror's capability and capacity to perform the contract within the fixed prices proposed. The agency states that it was confident from its evaluation of Rockwell's proposal that the awardee could successfully perform the contract at its offered price; the record does not contradict the agency's determination in this regard.

³Although the agency describes these communications as clarifications, from our review of the record, these communications appear to be discussions, which should
(continued...)

Trimble's technical proposal received a total score of [DELETED] points of a possible [DELETED] maximum points and was determined to be "[DELETED]" to Rockwell's proposal, which received a point score of [DELETED].

The TEB found that Trimble's offered SOLGR was [DELETED] and that the prototype "[DELETED] had already passed most of the testing to qualify against the SOLGR specification." The TEB concluded that Trimble's proposal was [DELETED]. Rockwell's proposal, on the other hand, was found to be "[DELETED]." Specifically, the TEB found:

"[DELETED]."

Trimble and Rockwell offered the following fixed prices to perform the contract:

<u>CLIN</u>	<u>Trimble</u>	<u>Rockwell</u>
0001	\$(DELETED)	\$0
0002	\$(DELETED)	\$1,699,000
0003	\$(DELETED)	\$0
TOTAL	\$(DELETED)	\$1,699,000

Price proposals were evaluated for realism and reasonableness. Although limited cost information was provided with the offerors' proposals and Rockwell's proposed production unit price of \$(DELETED) per unit was [DELETED] the government's estimate of \$(DELETED) per unit, the Army concluded that each firm's proposed price was realistic and reasonable.

The technical evaluation findings were documented in evaluators' notes, consensus scoring sheets, and TEB report, which were presented to the source selection authority (SSA), along with the firms' proposals. Hearing Transcript (Tr.) at 69-70, 86-87.⁴ On April 8, the SSA met with the TEB chairman and the cost/price analyst for the procurement. The TEB chair and cost/price analyst testified that there was little discussion concerning the technical evaluation, that the SSA only asked the TEB chairman whether he could make a case for award to Trimble at that firm's higher proposed price, and that the TEB chairman responded, non-specifically and

³(...continued)

have triggered a request for best and final offers. See The Hotel San Diego, B-260971, July 7, 1995, 95-2 CPD ¶ 4.

⁴Testimony was elicited from the SSA, the cost/price analyst, and TEB chairman concerning the SSA's source selection determination, the determination that Rockwell's offered receiver was NDI, and whether discussions had been conducted only with Rockwell.

without explanation, that he could not. Tr. at 58-59, 71, 201. The SSA testified that in selecting Rockwell's offer for award he understood that Rockwell had submitted a new model which reflected a significant redesign of the firm's earlier prototype, but that he nevertheless believed that Rockwell's unit satisfied the RFP's NDI requirements. Tr. at 93-94, 96, 98. Although no written source selection decision was made, the SSA concluded that Trimble's [DELETED] higher technical score was not worth the price premium, which the SSA erroneously believed to be [DELETED] percent higher than Rockwell's price.⁵ Tr. at 115-116.

Award was made to Rockwell on April 11, and this protest followed. This matter has been stayed pending our decision on the merits.

Trimble argues that the Army could not properly accept Rockwell's proposed SOLGR, which was not an NDI, as required by the RFP. Trimble contends that, as the agency's evaluators found during the technical evaluation, the modifications Rockwell proposed to its earlier produced prototype are not "minor modifications" and therefore Rockwell's proposal was unacceptable.

The Army responds that Rockwell's proposed receiver was properly determined to be an NDI, because "NDI is a generic term," which allows the government to purchase items that may already exist and which may require some modification to satisfy the government's specification requirements. The Army and Rockwell argue that offerors were on notice that the agency would accept substantial modifications of receivers because the RFP specifications had been revised since the development of the SOLGR prototypes. In this regard, the Army notes that both Rockwell's and Trimble's prototype receivers required some redesign to satisfy the RFP requirements.

The RFP requirement for an NDI is in accord with the stated Congressional intent in the Federal Acquisition Streamlining Act of 1994 (FASA) that contracting agencies acquire, to the maximum extent practicable, commercial items or NDIs. See 10 U.S.C. § 2377(b)(1) (1994). To this end, FASA established a preference for the acquisition of commercial items or NDIs, where commercial items are not available, and defined the term NDI. 41 U.S.C. § 403(13) (1994); 10 U.S.C. § 2376. As noted above, the RFP included the standard "Definition" clause, FAR § 52.202-1, that defined NDI as including any previously developed item that does not require more than minor modification to satisfy the agency's needs. This definition is in accord with the statutory definition. Thus, to the extent that the agency believes that the term "NDI" is not clearly defined and allows the agency to buy, as NDI,

⁵Trimble's total proposed price is actually [DELETED] percent higher than Rockwell's price.

items that require more than minor modifications to meet its needs, the agency is simply mistaken.

While the Army and Rockwell argue, in response to the protest, that offerors were on notice from the revisions made in the SOLGR specification after the development of prototypes that the RFP contemplated that offered receivers, which reflected more than minor modifications to previously developed items, could be considered, the record does not show that the revisions in the SOLGR specification were so substantial as to indicate to offerors that the RFP contemplated a more expansive definition of NDI than that provided by the solicitation.⁶ That these revisions were not substantial is shown by the fact that Trimble's proposed SOLGR was found to be [DELETED] to its earlier prototype; the TEB chairman testified that Trimble proposed only "[DELETED]" of its prototype. Tr. at 17.

Because both Rockwell's and Trimble's SOLGR prototypes, upon which their offered receivers were based, are a "previously developed item of supply," the question for our Office is whether the modifications required in Rockwell's offered receiver could reasonably be determined to be minor such that it could be considered an NDI. We find from this record, as explained below, that the modifications proposed by Rockwell are not minor and that its offered product is not an NDI.

The determination as to whether modifications to a previously developed item of supply are minor--and thus whether the product properly fits within the definition of NDI--is within the agency's technical judgment, which we will overturn only where it is shown to be unreasonable. TRW Inc.; Systems Research and Applications Corp., B-260968.2 *et al.*, Aug. 14, 1995, 95-2 CPD ¶ 101. In considering whether a modification is in fact minor, agencies should consider both the technical complexity of the change and the degree of risk associated with it. Id.

Here, the record establishes that Rockwell proposed numerous, significant modifications to its previously developed prototype to satisfy the RFP requirements. In particular, Rockwell proposed a redesign of its prototype model to [DELETED]. Tr. at 18, 34-36, 38. That Rockwell was proposing a modified and redesigned version of its earlier prototype was recognized by the agency in its evaluation; it was primarily for this reason that Rockwell's proposal was evaluated as being [DELETED]. In this regard, the evaluators described Rockwell's offered SOLGR as being "vastly different" from Rockwell's prototype, and as being a "new" and "[DELETED]" design that posed "[DELETED]." The TEB chairman and SSA both

⁶Rockwell also suggests that the RFP did not require the offer of an NDI receiver to be compliant. This argument is belied by the RFP's unambiguous SOW language, as acknowledged by the SSA in his hearing testimony, in which the SSA confirmed that an offeror had to offer an NDI receiver to be found compliant. Tr. at 95.

testified at the hearing that Rockwell's offered receiver was "different" from and a "substantial redesign" of the earlier submitted prototype. Tr. 18, 32, 93, 98. In fact, the SSA testified that his understanding at the time of making his award decision was that Rockwell had offered "a new model which reflected a significant redesign of the prototype." Tr. at 93.

Despite the modifications and redesign evidenced in Rockwell's offered receiver, the SSA testified that he considered Rockwell's receiver to be an NDI. Tr. at 95-96. The SSA testified that he discussed with the TEB chairman and the cost/price analyst whether Rockwell's offered receiver could be considered an NDI and was assured that it could. Tr. at 98-99. Specifically, the SSA testified that after "significant, lengthy discussions" he was convinced that Rockwell's offered unit was an NDI because it represented minor modifications to the PLGR. Tr. at 99, 101. The SSA also admitted that, given his lack of technical knowledge regarding the features modified on the Rockwell unit, his judgment that the modifications to the PLGR were minor was based only upon discussions with the TEB chairman. Tr. at 104, 108. The SSA, however, was unable to provide any details of his reported discussions with the TEB chairman or the cost/price analyst and was unable to describe Rockwell's proposed modifications and redesign or why these modifications and redesign work were only minor. Tr. at 102-104, 106-108.

On the other hand, contrary to the SSA's testimony, the TEB chairman testified that there was no consideration during the evaluation as to whether Rockwell's or Trimble's offered receivers were NDIs and that there was also no discussion with the SSA concerning the Rockwell's offered unit's NDI status. Tr. at 74. The cost/price analyst also testified that he was unaware of any discussion with the SSA concerning whether Rockwell's offered receiver was a NDI. Tr. at 203, 208.

There is no other evidence in the record suggesting that the agency meaningfully considered whether Rockwell's offered SOLGR was an NDI. None of the contemporaneous evaluation documentation mentions consideration of whether Rockwell had offered an NDI; in addition, there is no source selection documentation to establish that Rockwell's receiver was found to satisfy the RFP's NDI requirement. From this record, we conclude that, prior to Trimble's protest, there was no consideration by the agency as to whether Rockwell's offered SOLGR unit satisfied the RFP's NDI requirement.

The SSA's testimony that Rockwell's offered receiver satisfied the NDI requirement is also unpersuasive because it is based upon a comparison of Rockwell's offered receiver with Rockwell's PLGR, as opposed to its SOLGR prototype. This argument, which the SSA provided in response to Trimble's protest arguments, appears based upon the assumption that an item may be termed an NDI simply if it is constructed

of existing technology.⁷ This assumption is inconsistent with the NDI definition in FASA and the RFP, which require that the scope of modifications to already produced items of supply be considered to ascertain whether a particular product can be considered an NDI. As is suggested by the fact that the SOLGR design was the result of development contracts that sought to redesign the standard PLGR, the record is replete with evidence that the PLGR is vastly different from the SOLGR to be purchased under the RFP. The RFP's SOW described numerous features and capabilities—including, the ability to operate under water, reduced size and weight, and much larger number of programmable navigation points—required of the SOLGR, and not provided by the PLGR. The TEB chairman testified that the PLGR was a much different device than that sought by the RFP and that "moving" from the PLGR to the SOLGR required design and development work. Tr. at 24-28, 80. Given this record and the agency's failure to provide any evidence demonstrating that the modifications and redesign that would be required for the PLGR to satisfy this RFP's specifications are minor, we cannot conclude that even if Rockwell's offered SOLGR is a modified version of its PLGR, that Rockwell's unit is an NDI.

In sum, we find, based upon this record, no support for the Army's determination that Rockwell's offered receiver satisfied the RFP's NDI requirement. In fact, the only credible evidence in the record indicates that the modifications and redesign Rockwell proposed for its receiver to satisfy the RFP specification are significant and not minor. Award may not properly be made to an offeror whose proposal fails to conform to an RFP's material requirements. Mine Safety Appliances Co.; Interspiro, Inc., B-247919.5; B-247919.6, Sept. 3, 1992, 92-2 CPD ¶ 150. Here, the requirement that offered receivers qualify as NDIs is a material requirement, which the agency does not contend no longer reflects its minimum needs; the SSA affirmed in his hearing testimony that, "as far as I know," the NDI requirement was still required. Tr. at 137. Accordingly, the Army could not properly accept

⁷Although the TEB chairman testified that the NDI status of Rockwell's offered SOLGR was not considered in the TEB's evaluation of proposals, the TEB chairman offered his opinion during the hearing that Rockwell's offered receiver was an NDI. Tr. at 76, 78. This opinion, however, was based upon the TEB chairman's own definition of what constitutes an NDI; he considered as an NDI "an item that can be designed, produced using existing technologies that are—all the pieces are basically there, you're moving from an item that exists today to something you're going to have in the near future." Id. The TEB chairman's definition of what qualifies as an NDI is inconsistent with the NDI definition specified by FASA and the RFP, inasmuch as the scope of modifications made to already produced items of supply must be considered to ascertain if a particular product is an NDI. In any event, as noted above, the TEB chairman's opinion and definition of what constitutes an NDI was not provided to the SSA prior to award.

Rockwell's offer, which indicated that it would not satisfy the RFP's NDI requirement, and we sustain Trimble's protest on this basis.⁸

We recommend that the Army either terminate Rockwell's contract for the convenience of the government and make award to Trimble, or conduct discussions with Rockwell to provide Rockwell with the opportunity to offer an NDI product or demonstrate that its offered receiver satisfies the RFP's NDI requirement. If the agency chooses to open negotiations with Rockwell, discussions should also be conducted with Trimble, best and final offers received, and a new source selection decision made; if Trimble is selected for award as a result of this new source selection decision, then Rockwell's contract should be terminated and award made to Trimble. We also recommend that Trimble be reimbursed its costs of filing and pursuing the protests. 4 C.F.R. § 21.8(d)(1) (1996). Trimble should file its claim for costs with the agency within 90 calendar days of the date of this decision. 4 C.F.R. § 21.8(f)(1).

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⁸Trimble also challenged a number of other aspects of the procurement, including the agency's evaluation of Rockwell's proposal, source selection decision, and conduct of discussions only with Rockwell. We need not address these other issues given our recommendation to either make award to Trimble or reopen the competition between the two firms.