



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Navistar Marine Instrument Corporation

File: B-277143.2

Date: February 13, 1998

Sam Z. Gdanski, Esq., for the protester.

Gary Van Osten, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected low offer for failure to acknowledge a solicitation amendment where the amendment changed the legal relationship of the parties with regard to the contractor's obligations and the government's rights pertaining to the submission and approval of a first article test plan; there is no evidence that agency did not comply with applicable regulations regarding the distribution of amendments.

DECISION

Navistar Marine Instrument Corporation protests the rejection of its proposal for failing to acknowledge an amendment, and the award of a contract to Atlas Instrument Company, under request for proposals (RFP) No. N00104-97-R-ND97, issued by the Department of the Navy, for azimuth circles.

We deny the protest.

The RFP provided for the award of a firm, fixed-price contract to the offeror submitting the proposal most advantageous to the government, price and other factors considered. The RFP referenced detailed specifications for the items, and stated that first article tests would be required for any contractor unless the contractor could show evidence of prior approval.

Three amendments to the RFP were issued. Amendments Nos. 1 and 2, issued May 8, and June 9, 1997, respectively, only extended the proposal due dates. Amendment No. 3, issued on June 16, added three clauses to the RFP, one of which concerned the obligations of the contractor relative to the first article test procedures.

The Navy received proposals from Navistar, Atlas, and three other offerors. Two offerors, including Navistar, which submitted the lowest-priced proposal of \$33,992, failed to return or otherwise acknowledge amendment No. 3.¹ The agency subsequently rejected Navistar's proposal for failing to acknowledge this amendment, and after determining that Atlas's proposal represented the best value and that Atlas was responsible, made award to that firm at its proposed price of \$44,800. This protest followed.

Navistar contends that its failure to acknowledge amendment No. 3 to the solicitation should be waived as a minor informality because the obligations set forth in the amendment were already included elsewhere in the solicitation. In support of this assertion, Navistar points out that the solicitation as issued required that the contractor perform production lot and first article testing, and required agency approval of the contractor's first article test procedures.

There is no precise rule for determining whether a change in requirements evidenced by an amendment is more than negligible, such that the failure to acknowledge the amendment renders the proposal unacceptable; rather, that determination is based on the facts of each case. Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 4. Generally, an amendment that imposes a legal obligation upon an offeror different from those imposed by the original solicitation is material, whereas an amendment that merely clarifies an existing requirement is not. See id.; Innovation Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277 at 2; Favino Mechanical Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174 at 2.

Navistar is correct that the clause set forth in amendment No. 3 required, as did the solicitation as issued, that the successful contractor submit a first article test plan or procedure to the agency for approval prior to the production of the items. However, the clause set forth in amendment No. 3, unlike the original solicitation, added that if the plan or procedure is not approved by the agency, "the contractor may be required at the option of the Government to submit a revised plan or procedure for evaluation" at no additional cost to the government, and that the agency may "require an equitable adjustment of the contract price for any extension of the [contract's] delivery schedule necessitated by resubmission of the plan or procedure." The clause further informed offerors that "the acquisition of materials or components for, or the commencement of production of the contract items (including first article samples) shall be at the sole risk of the contractor, and costs incurred on account thereof shall not be allocable to this contract . . . for the purpose of termination settlement if this contract is terminated for the convenience of the government." The clause added that the contractor's failure to submit the

¹Contrary to the protester's assertion, Atlas's proposal acknowledged amendment No. 3.

plan or procedure within the time specified by the contract, or to submit an acceptable plan, may result in the termination of the contract for default. Because, as indicated, the clause changed in a material way the legal relationship of the parties with regard to the contractor's obligations and the government's rights pertaining to the submission and approval of a first article test plan, amendment No. 3 incorporating the clause into the RFP was material.² See Favino Mechanical Constr., Ltd., *supra*.

Navistar also contends that its proposal was improperly rejected for failing to acknowledge amendment No. 3 to the solicitation because it never received a copy of the amendment.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (1994), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with fair and reasonable prices. Western Roofing Serv., 70 Comp. Gen. 323, 325 (1991), 91-1 CPD ¶ 242 at 3. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods as required by the Federal Acquisition Regulations (FAR) for the dissemination of solicitation documents, including amendments, to prospective contractors. FAR §§ 14.203-1, 14.205, 14.208, 15.403, 15.606(b) (June 1997); Western Roofing Serv., *supra*. As a general rule, a prospective contractor bears the risk of not receiving a solicitation amendment. Data Express, B-234468, May 25, 1989, 89-1 CPD ¶ 507 at 2. Consequently, a prospective contractor's nonreceipt or late receipt of a solicitation amendment, and subsequent elimination as a source from the competition, will not justify overturning a contract award, or if an award has not been made, justify the disruption of the procurement, absent evidence that the agency failed to comply with the applicable regulations governing the distribution of amendments. Western Roofing Serv., *supra*; see The Ensign-Bickford Co., B-275423, Feb. 20, 1997, 97-1 CPD ¶ 93 at 2; Irwin-Jurkewicz Corp., B-249037, Oct. 20, 1992, 92-2 CPD ¶ 257 at 3.

The agency explains that it maintains a database from which it generated the mailing labels used in distributing the solicitation and its amendments. In response to the protest, the agency has furnished a print-out from this database which

²Although the protester asserts that the amendment was not material because the amendment does not designate that it had to be signed, the amendment specifically required that offerors acknowledge it (one way that amendments can be acknowledged is by signing them). Thus, the failure to designate that the amendment had to be signed does not relieve Navistar from acknowledging the amendment. Air Photo Survey, Inc., B-228024, Nov. 3, 1987, 87-2 CPD ¶ 437 at 2; Air Servs. Co., B-204532, Sept. 22, 1981, 81-2 CPD ¶ 240.

includes the correct address for Navistar. The agency states that with regard to amendment No. 3, the cognizant agency buyer had mailing labels printed from the database for each firm listed on the mailing list for this solicitation, which included Navistar, and "placed the mailing labels along with amendment No. 3 into window envelopes, and had the envelopes hand-carried to the . . . mailroom for mailing." We find no evidence that the agency's distribution process was deficient or that it was not followed, and we therefore presume that the agency in fact sent the amendment to the protester. Irwin-Jurkewicz Corp., *supra*, at 3-4. Although the protester has argued that it did not actually receive the amendment, the risk of nonreceipt, under the circumstances, rests with the offeror. Id. at 3.

Navistar contends that the award to Atlas was improper because, according to Navistar, "they do not have the capabilities to perform on this contract" and certain personnel are "gone from the company." A determination that a bidder or offeror is capable of performing a contract is based, in large measure, on subjective judgments which generally are not readily susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may not have been met. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (1997); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177 at 2. Neither exception applies here.

Navistar states that one of its representatives "spoke to a company known as Atlas Instruments, who are using a nonconforming adhesive." Atlas's proposal does not take exception to any of the specifications set forth in the RFP, and it is therefore committed to complying with all of the RFP's requirements. Laser Diode, Inc., B-249990, Dec. 29, 1992, 93-1 CPD ¶ 18 at 5. Whether Atlas actually performs the contract in accordance with the specifications is a matter of contract administration, which is not for review by our Office. Id.

The protest is denied.

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