

# DECISION



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

Me/17  
23235

FILE: B-205417.2

DATE: September 30, 1982

MATTER OF: S.H.E. Corporation

## DIGEST:

1. Where an offeror did not submit an initial proposal in response to an RFP, its "best and final" proposal later submitted in response to an amendment requesting best and final offers is a late proposal which cannot be considered for award; an amendment establishing a closing date for best and final offers does not open the procurement to firms which did not submit initial proposals.
2. The fact that an agency may have mishandled a firm's requests for qualified source status for a procurement and a copy of the solicitation does not warrant disturbing the award under that procurement where: (1) there is no evidence that the agency deliberately delayed consideration of the requests to preclude the firm from competing for the award; (2) the competition generated for the procurement was adequate; and (3) the price obtained from the awardee was reasonable.
3. Protest allegations concerning defects apparent on the face of the RFP must be raised prior to the closing date for receipt of proposals; where protester received the RFP prior to the closing date, but did not protest alleged defects until after that closing date, those allegations are untimely.

S.H.E. Corporation protests the award of a contract to Varian of Canada, Inc. under request for proposals (RFP) No. N00104-81-R-ZD38, issued by the Navy Ships Parts Control Center for 144 ferrous ordnance locators. S.H.E. principally contends that the Navy improperly rejected its proposal as late, and that the Navy's mishandling of S.H.E.'s requests for qualified source status prevented it from submitting a competitive proposal. We deny the protest in part and dismiss it in part.

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The solicitation was issued to 13 potential offerors on October 2, 1981, and was synopsisized in the Commerce Business Daily. Participation in the acquisition was restricted to qualified sources since the locators are used in the disposal of explosive materials, and the Navy deems strict oversight of the manufacturing environment and procedures essential to minimize the danger to operators of the equipment. Amendment 0001, dated October 14, provided prospective offerors with drawings which had been omitted from the original solicitation package and clarified certain inspection requirements. Amendment 0002, dated October 27, extended the closing date for submission of initial proposals from November 2 to November 16.

Two firms submitted proposals prior to the initial closing date--Varian, the low offeror at \$12,650 per unit (and, as an alternate offer, \$14,550 per unit), and Hydro Products, which offered the units at \$26,800 each. On January 20, 1982, after evaluation of the two technical proposals had been completed, Amendment 0003 was issued to Varian and Hydro. The amendment made certain changes in the technical requirements, increased the quantity from 88 to 144 units, and set February 18 as the deadline for submission of best and final offers. Although S.H.E. had not submitted an initial proposal, it did submit what it considered a timely best and final offer. The Navy determined that since S.H.E. had not submitted an initial proposal prior to the November 16 closing date, its "best and final" offer constituted a late proposal which could not be accepted under the late proposal clause in the solicitation. Award was made to Varian, the low offeror, on March 3.

S.H.E. argues that its proposal was not late, and should have been considered for award, since it was submitted prior to the February 18 deadline for best and final offers established in Amendment 0003. S.H.E. states that it did not submit an initial proposal because it had been unsuccessful in its attempt since May 1981 to be included on the qualified source list. This attempt consisted of numerous letters to Naval installations and, apparently, several telephone

calls. None of this correspondence prompted a satisfactory response from the Navy. S.H.E. did become aware that the solicitation had been issued, as indicated by an October 23 letter requesting qualified source status, and specifically referencing the solicitation number. This letter apparently was not answered, and by letter of December 16, S.H.E. again requested qualification while expressing its frustration at the Navy's failure to answer its numerous prior letters.

By this time, S.H.E. had begun working with Hydro as a potential subcontractor. By letter dated January 22, S.H.E. cited the solicitation number in requesting copies of various specifications necessary for manufacturing the locators. The Navy inadvertently read this as a request for a copy of the solicitation and thus sent S.H.E. a copy of the RFP together with the three amendments. Upon receiving the solicitation on February 12, S.H.E. believed that it had been granted qualified source status as requested. It also reasoned that the final closing date had been extended to February 18 to afford S.H.E. and other interested firms a chance to submit offers. It therefore submitted the proposal.

Although the circumstances are somewhat unusual, the Navy acted properly in rejecting S.H.E.'s proposal as late. Proposals submitted for the first time after the initial closing date generally may not be considered for award. Basin Research Associates, B-202640, April 13, 1981, 81-1 CPD 282. To permit consideration of such proposals would be unfair to those offerors which submitted timely proposals, and thus would tend to subvert the competitive system. Id.; Phelps-Stokes Fund, B-194347, May 21, 1979, 79-1 CPD 366. Contrary to S.H.E.'s position, Amendment 0003 did not extend the initial closing date to permit S.H.E. and other new offerors to submit proposals. Rather, the amendment stated in clear

language that February 18 was the deadline for submission of best and final offers. The submission of best and final offers is the final step in the negotiation process and final offers will be accepted only from offerors which both submitted timely initial proposals and were found to be in the competitive range. Because S.H.E. did not submit an initial proposal prior to November 16 and thus was not in the competitive range, it was not eligible to submit a best and final offer. See generally Defense Acquisition Regulation § 3-805; International Automated Systems, Inc., B-205278, February 8, 1982, 82-1 CPD 110.

While it is unfortunate that S.H.E. may have been misled when it received the RFP, it reportedly was advised during a January 22 conversation with the contract negotiator that any proposal S.H.E. submitted from that time on could only be considered under the late proposal provisions in the RFP. The contracting officer states S.H.E. was again advised of this fact when it delivered its proposal on February 18. Under these circumstances, S.H.E. should not have been surprised to have its proposal rejected as late.

S.H.E. seems to believe that its proposal was rejected not because it was submitted late, but because of S.H.E.'s failure to attain qualified source status. It argues that rejection for this reason was improper since it was the Navy's mishandling of S.H.E.'s correspondence that prevented its qualification. S.H.E.'s proposal was not rejected because of its lack of qualification but, as we have discussed, because it was a late proposal. S.H.E. could not have received the award even had it been on the qualified source list since its late proposal could not be considered for award.

It is S.H.E.'s more general position that the Navy's mishandling of its qualification requests and its requests for a copy of the RFP was the cause of its inability to submit an acceptable, competitive proposal. While it does appear that S.H.E. was

prejudiced by the Navy's inaction on its requests, this fact is not fatal to the procurement. We have held that inadvertent action by an agency which precludes a potential offeror from competing on a procurement does not warrant upsetting an award where adequate competition and reasonable prices were obtained. Electro Marine Industries, Inc., B-205999, July 21, 1982, 82-2 CPD 65; Air, Inc., B-188780, September 15, 1977, 77-2 CPD 192. There is no evidence here, and S.H.E. does not allege, that the Navy deliberately or consciously delayed consideration of S.H.E.'s qualification requests so as to preclude S.H.E. from competing for this award. Since it also appears that the competition generated was adequate, albeit restricted due to the limited number of qualified sources, and that the price obtained from Varian was reasonable, we will not disturb the award. We note that S.H.E. has been included on the qualified source list for future procurements of locators and related equipment.

S.H.E. also challenges the Navy's actions under this procurement on the grounds that: (1) the award to Varian was, in effect, a sole source award since many of the drawings upon which the specifications were based were source controlled to Varian; and (2) the specification changes and increase in quantity effected by Amendment 0003 constituted a new requirement which should have been the subject of a new solicitation. These allegations are untimely. Our Bid Protest Procedures require that protests based on alleged improprieties apparent on the face of the solicitation be raised prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(b)(1). These two allegations are based solely on information which was ascertainable from the RFP itself--Amendment 0003 and the specification drawings. S.H.E. states that it received a copy of the RFP, including Amendment 0003, on February 12, so it was required to

protest any alleged defects prior to the February 18 final closing date.<sup>1</sup> S.H.E. did not do so, however, choosing instead to prepare a proposal and attempt to compete for the award. Thus, this portion of S.H.E.'s protest is untimely. See International Business Investments, Inc., B-204429, January 6, 1982, 82-1 CPD 16.

The protest is denied in part and dismissed in part.

*Harry R. Can Chene*  
Comptroller General  
of the United States

<sup>1</sup> It appears from some of S.H.E.'s submissions that S.H.E. likely had access to a copy of the RFP prior to the November 16 initial closing date. In that event, S.H.E. would have been required to file its protest regarding the de facto sole source nature of this procurement prior to November 16. Since it is unclear, however, exactly when S.H.E. first had access to the RFP, we have assumed here that S.H.E. did not see the RFP until February 12.