DECISION

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

257755

FILE: B-211429 DATE: July 19, 1983

MATTER OF: G.K.S., Inc.

DIGEST:

1. Under 10 U.S.C. § 2304(b), price must be considered in any negotiated procurement. GAO therefore views statement that "offers shall be evaluated on the basis of delivery rather than price" as a solicitation deficiency.

2. Relaxation of required delivery schedule after receipt of best and final offers constitutes a material change in requirements and, in order for offerors to compete on an equal basis, requires the procuring agency to request another round of best and finals.

3. When solicitation states that evaluation will be on basis of delivery, proposal in which offeror agrees to meet minimum schedule is not equal to one offering accelerated delivery, and price does not automatically become the determinative factor in award. To ensure that offerors are competing on equal basis, solicitation should indicate values of minimum or accelerated delivery in relation to price.

4. In GAO's opinion, no reasonable offeror, aware of statute requiring price to be considered in any negotiated procurement, would read literally an evaluation provision stating "offers shall be evaluated on the basis of delivery rather than price." In such circumstances, offeror has duty to inquire before proposing accelerated delivery at premium price.

This is a protest against award under a solicitation that was amended to state "offers shall be evaluated on the basis of delivery rather than price." The protester, G.K.S., Inc., argues that the Air Force improperly awarded

a contract to a firm that offered to meet the minimum delivery schedule set out in the solicitation, rather than accepting its own, higher priced offer for accelerated delivery.

The solicitation in question, No. F41608-83-R-9348, was issued by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas. Covering engine overhaul kits for the C-130 aircraft, it initially called for 2,073 kits to be delivered in monthly lots of 414 between February and June 1983 (in the last month, 417 kits were required). With regard to time of delivery, the solicitation stated in pertinent part:

> "Proposals offering delivery of each quantity within the * * * period specified * * * will be evaluated equally as regards to time of delivery. * * * When an offeror proposes an earlier delivery schedule, the Government reserves the right to award either in accordance with the REQUIRED schedule or in accordance with the schedule proposed by the offeror. * * *" (Emphasis in original.)

The solicitation also stated that evaluation would be in accord with paragraph 10 of Standard Form 33-A, which in turn states that award will be made to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, "price and other factors considered."

None of the five proposals submitted on January 19, 1983, met the required delivery schedule. Consequently, on February 8, 1983, the Air Force amended both the time of delivery and the evaluation for award provisions of the solicitation to seek delivery of 414 kits a month in March, April, and May and 831 in June 1983. The reference to Standard Form 33-A was deleted in its entirety and, as indicated above, a statement that "offers shall be evaluated on the basis of delivery rather than price" was substituted. According to the contracting officer, because the kits were urgently required, this amendment was intended to permit award to the offeror proposing the schedule "closest" to that specified, if none actually could meet it.

On February 17, 1983, five proposals also were received; three offered to meet the delivery schedule. The Air Force, however, revised the schedule again in its request for best and final offers by March 16, 1983, reducing the quantity to 1,942 kits to be delivered "on or before" the following dates:

April	May	June	July	August
468	368	368	369	369

This time, four offerors responded; on April 8, 1983, the Air Force awarded a fixed price contract to Pacific Sky Supply Incorporated, the lowest one agreeing to meet the revised schedule. Pacific Sky's unit price was $459.25, or $896,863.50 extended.

G.K.S.'s protest is based on its interpretation of the amended evaluation provision as a request by the Air Force for the best possible delivery schedule. G.K.S. states that it therefore obtained commitments from its suppliers for expedited delivery and, in its best and final offer, proposed the following schedule:

April	May	June
500	500	942

G.K.S. offered a unit price of $520, or $1,009,840 extended.

G.K.S. initially argued that in formulating its offer, it relied on the Air Force's specific representation that price would not be considered. The firm now concedes that the Air Force was required to consider price to some undefined extent, but asserts that in view of the amendment, delivery should have been accorded far greater weight than price.

If the Air Force intended to make award to the lowest offeror meeting the minimally acceptable delivery schedule, G.K.S. continues, under Defense Acquisition Regulation § 3-501(b)(3) (Defense Acquisition Circular 76-34,

April 27, 1982), it was required to further amend the solicitation, notifying all offerors of the relative importance of delivery and price. G.K.S. concludes that in making award to Pacific Sky, the Air Force improperly deviated from its clear and unambiguous evaluation scheme. The firm seeks our recommendation for termination of Pacific Sky's contract and a directed award to itself.

The Air Force responds that G.K.S.'s interpretation of the amendment is unreasonable and that, in any event, it could not legally have made an award without considering price.

Rather than relying on the amended evaluation provision--which the Air Force acknowledges could have been "phrased with greater precision"--the agency argues that G.K.S. should have read the solicitation as a whole, including the provision reserving the Government's right to award in accord with either the required delivery schedule or an earlier schedule. Since the unamended portion of the solicitation stated that all proposals offering delivery within the time specified would be evaluated equally, the Air Force further argues that it properly considered G.K.S.'s proposal as equal to that of other offerors agreeing to meet the minimum delivery schedule.

Finally, the Air Force contends that if G.K.S. believed the delivery schedule was inconsistent with the amended evaluation provision, it could have resolved the matter by referring to the Order of Precedence Clause, which indicated that the schedule took precedence over the general provision on evaluation for award. Alternatively, the Air Force argues that if G.K.S. believed the amended evaluation provision was ambiguous, it was required to protest before the due date for best and final offers.

In our opinion, both G.K.S. and the Air Force contributed to the misunderstanding that led to this protest. Read literally, the amended evaluation provision indicated that delivery would be the sole evaluation criterion. We view this as a solicitation deficiency, since under 10 U.S.C. § 2304(g) (1976), price must be considered in any negotiated procurement. See Grey Advertising, Inc., 55 Comp. Gen. 1111 at 1124 (1976), 76-1 CPD 325.

Whatever the Air Force intended, the amended evaluation provision would not have permitted an award to the offeror who came "closest" to meeting the delivery schedule, if none actually could meet it. Relaxation of the delivery schedule would have constituted a material change, and in order for offerors to compete on an equal basis, the Air Force would have been required to request another round of best and final offers. See Environmental Tectonics Corporation, B-209423, January 24, 1983, 83-1 CPD 81; Ford Aerospace and Communications Corporation, B-200672, December 19, 1980, 80-2 CPD 439 at 35.

Further, despite the Air Force's attempt to interpret the time of delivery provision as one that allowed it to evaluate equally offerors who agreed to meet the delivery schedule and those who offered accelerated delivery, such offerors clearly were not competing on an equal basis: some offerors obviously stressed the importance of delivery, while others offered only to meet, rather than exceed, the stated delivery requirements. In our view, in light of the solicitation language, such proposals could not be viewed as substantially equal, so that price automatically became determinative. To avoid this situation, the solicitation should have indicated to offerors the values of minimum or accelerated delivery in relation to price. See generally 52 Comp. Gen. 161 at 164 (1972) (stating that when offerors are not given any idea of the relative values of technical excellence and price, a complaint is justified if a materially superior proposal is rejected in favor of one offering a lower price).

On the other hand, no reasonable offeror, aware of the statutory requirement for consideration of price, should have read the amended evaluation provision literally. Cf. Southland Associates, B-207350, November 17, 1982, 62 Comp. Gen. ___, 82-2 CPD 451 (stating that a reasonable offeror would not have presumed that a solicitation preference for lease of space in an historic building applied regardless of price); Market Facts, Inc., B-187073, April 27, 1977, 77-1 CPD 285 (holding that, reading an entire evaluation provision, an offeror should not have been misled by a statement that award would be influenced by technical competence, growth potential, and other factors "rather than" by price). Before proposing accelerated

delivery at a premium price, we believe G.K.S. had a duty to inquire as to the meaning of the amended evaluation provision. See Avantek, Inc., 55 Comp. Gen. 735 (1976), 76-1 CPD 75; University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50. By failing to do so, G.K.S. contributed to the misunderstanding and risked rejection of its proposal as unreasonably priced--which is in effect what the Air Force did.

Although the solicitation was deficient, under the circumstances here we are not inclined to recommend termination. First, as indicated, the protester bore some responsibility for the situation in which it found itself. Second, it appears from the record that the Air Force's needs will be met by delivery according to the schedule set forth in the amended solicitation. Between January and March 1983, the record indicates, the requirement was considered urgent because a previous order for the engine repair kits had been canceled due to lack of funds. The Air Force stated at that time that unless at least 468 kits were delivered during April, work on the engine overhaul line would be stopped and the Air Logistics Center's mission would be adversely affected. A change in demand, however, resulted in the Air Logistic Center's having a 3-month supply of kits on hand, without including those covered by Pacific Sky's contract. Thus, the requirement is no longer urgent, and accelerated delivery is not required.

Third, the protester has not established that it was unfairly prejudiced here. It has not offered any evidence of what its price would have been--or established that it would have been the low offeror--if it had merely agreed to meet the minimum delivery schedule. Thus, we are unable to conclude that G.K.S. was prejudiced by the deficient evaluation provision. Moreover, the three remaining offerors agreed to meet the minimum delivery schedule set forth in the solicitation, rather than proposing accelerated delivery. We therefore find no prejudice to them in an award to the lowest offeror under the defective solicitation.

In view of these conclusions, we need not reach the question, also argued by the parties, of whether termination of Pacific Sky's contract for the convenience of the

Government would be practicable or what the costs associated with such an action would be.

Finally, we are advised that Headquarters Air Force Logistics Command is "taking action to ensure that future procurements are conducted with attention to improvement of solicitation language." We therefore do not believe any further action by our Office is required.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States