

29317

DECISION



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

FILE: B-214749

DATE: September 17, 1984

MATTER OF: Avitech Inc.

DIGEST:

1. An agency need not issue an amendment to reflect a change in its delivery requirements when all offerors are notified of the change in the agency's request for best and final offers, and an offer that does not comply with those delivery requirements is properly rejected.
2. A protest alleging solicitation defects must be filed independently prior to the appropriate bid opening or proposal closing date, and cannot be filed with a bid or included in a proposal.

Avitech Inc. protests the award of a contract for a hydraulic flushing system to Kenett Corp. under request for proposals (RFP) No. N00406-84-R-1823, issued by the Department of the Navy. Avitech complains that the solicitation's delivery schedule was unrealistic and therefore unduly restrictive of competition, and further asserts that the award to Kenett on the basis of that firm's earlier proposed delivery was improper. We deny the protest in part and dismiss it in part.

The RFP was issued on October 25, 1983, with November 15 as the closing date for receipt of initial proposals. Paragraph F102 of the RFP stated that there was no required delivery date but that the government desired delivery within 30 days after the effective date of the contract. A space was provided for offerors to insert their proposed delivery schedules; Kenett proposed a 90-day delivery whereas Avitech proposed one of 180 days. By Amendment 0001, the closing date was extended to November 29. Prior to that date, Avitech protested to the contracting officer that the solicitation's brand name or equal requirement was unduly restrictive of competition. The Navy agreed with Avitech's position and accordingly issued Amendment 0002 which deleted the requirement and extended the closing date to December 13. The Navy then

issued Amendment 0003 which, among other things, further extended the closing date to December 29 and also added the following statement to section M of the RFP: "Offers will be evaluated on the basis of price/best delivery to the Government." Kenett and Avitech were the only firms submitting initial proposals, with Avitech offering the lower price.

On January 6, 1984, the Navy telexed both firms, requesting best and final offers by January 13. The Navy's communication to Avitech sought certain clarifications and asked the firm to confirm its offered price. Additionally, the telex stated that Avitech's proposed 180-day delivery was unacceptable and that:

"THE GOVERNMENT DESIRES DELIVERY WITHIN 60 DAYS. . . BUT WILL BE REQUIRED NO LATER THAN 100 DAYS. AWARD MAY BE MADE ON THE BASIS OF BEST DELIVERY."

Avitech submitted its best and final offer as requested on January 12. However, the offer also contained a paragraph stating the firm's position that the 60- to 100-day delivery schedule was impossible "unless this item is earmarked to a particular product that has already been fabricated." (This was an apparent reference to the Kenett system.) The paragraph also stated Avitech's belief that the solicitation had made no mention that award would be made on the basis of best delivery, and since Avitech viewed its 180-day delivery as "realistic under the circumstances", the firm warned that, "we will protest any award made that is based upon delivery only."

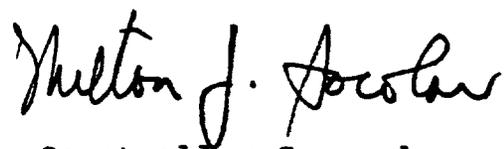
On March 19, Avitech learned that award had been made to Kenett and, believing it to have been made solely on the basis of the firm's better delivery, filed a protest with this Office on March 23.

Avitech suggests the Navy's failure to issue an amendment imposing the delivery schedule was improper and that in any event the request for a best and final offer "did not make delivery a mandatory basis for award." We disagree. The clear language of the request for best and final offers advised offerors that a delivery schedule exceeding 100 days was not acceptable. We think that a formal amendment to the solicitation to the same effect

was not necessary, since the offerors were informed of the agency's delivery requirements during the course of negotiation, that is, through the request for best and final offers. See Drexel Heritage Furnishings, Inc., B-213169, Dec. 14, 1983, 83-2 CPD ¶ 686. Since Avitech was aware of the agency's delivery requirement and since Avitech's 180-day delivery schedule exceeded the delivery schedule requirement, its offer was properly rejected on that basis. This portion of the protest is therefore denied.

If Avitech believed that the 60- to 100-day delivery period was unrealistic and unduly restrictive of competition because only Kenett could meet it, it was incumbent upon the firm to raise the issue by protesting to the Navy or this Office prior to the January 13 closing date for receipt of best and final offers. Our Bid Protest Procedures provide that in the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2 (b)(1) (1984). It is well settled that a protest alleging solicitation defects must be filed independently prior to the appropriate bid opening or proposal closing date, and cannot be filed with a bid or included in a proposal. Electronic Space Systems Corporation, B-213130, Jan. 23, 1984, 84-1 CPD ¶ 99. Since Avitech did not timely protest the delivery issue prior to January 13, the next closing date following the incorporation of that factor in the solicitation, the protest is untimely on the delivery issue. This portion of the protest is dismissed.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States