

DECISION



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

FILE: B-221347.2; B-221347.3 **DATE:** May 13, 1986

MATTER OF: General Electrodynamics Corporation

DIGEST:

Protest of award to offeror of a noncommercial-type portable weighing scale is sustained where agency advised all offerors that the scale being procured shall be considered a commercial-type product; protester, relying on this misleading agency advice, did not offer noncommercial-type item it otherwise would have offered; and agency apparently accepted noncommercial-type product for award.

General Electrodynamics Corporation (GEC) protests the proposed award of a contract to Hardy Instruments, Inc. under request for proposals (RFP) No. F41608-85-R-3781, issued by the Department of the Air Force for portable devices to weigh military vehicles and cargo in remote areas. We sustain the protest.

GEC initially filed a protest with the Air Force, alleging that while Hardy was a scale manufacturer, the company never had made a commercially available portable scale of the type called for by the RFP. The Air Force denied this protest by letter of December 4, and GEC filed a protest with our Office three weeks later, on December 27. We dismissed the protest as untimely under our Bid Protest Regulations because it appeared to have been filed with us more than 10 working days after GEC had knowledge of the adverse decision on its Air Force protest. See 4 C.F.R. § 21.2(a)(3) (1985). GEC requested that we reconsider the dismissal, and we reinstated the protest based on a copy of the Air Force's denial letter, furnished us by GEC, which contains a date stamp showing that GEC did not receive the denial letter until December 16.

The RFP originally called for a hydraulic/mechanical weighing device. However, Hardy, one of the four offerors who responded to the solicitation at the closing date, submitted a proposal for an electronic unit, and the Air

Force determined that an electronic device would meet its requirements. The agency thus reopened the solicitation by issuing an amendment to the RFP's purchase description allowing offers of electronic weighing devices.

Upon receipt of the amendment, GEC wrote to the Air Force questioning the feasibility of using an electronic weighing device in remote areas. At approximately the same time, GEC submitted to the Air Force a list of technical questions concerning the amendment. One of GEC's questions was: "Is this device a commercial or commercial-type product?" The Air Force's response was: "This device shall be considered a commercial-type product." The Air Force furnished its response, dated October 18, to GEC and the other offerors. The Air Force responded to GEC's concern about using an electronic device in an October 17 letter, stating that such a device had been evaluated and found to be acceptable for the agency's needs, and that any device offered would have to meet the requirement for first article testing.

At the closing date for receipt of proposals in response to the amendment permitting offers on electronic weighing devices, GEC offered the same mechanical device that it had originally proposed. Upon learning that Hardy's low offer was for an electronic device, GEC filed its protest.

GEC asserts that it could have offered a low-price noncommercial-type electronic scale, and contends that the Air Force misled it regarding the type of weighing device that could be offered, by stating in response to GEC's question that the device will be considered a commercial-type product. Asserting that Hardy's offered electronic scale does not satisfy the commercial-type product requirement since it never has been sold commercially, GEC contends that it would be improper to make award to Hardy without giving GEC the same opportunity to offer a noncommercial-type scale.

Preliminarily, the Air Force contends that GEC is not an "interested party" eligible to challenge the award under our Regulations, 4 C.F.R. § 21.1(a), because GEC is the third low offeror, and thus would not be in line for the award if its protest were upheld. GEC is not merely

challenging the proposed award to Hardy, however, but is arguing that it was not afforded an opportunity to compete with Hardy on an equal basis because it was misled. Since GEC claims it can offer an electronic scale at a lower price than Hardy's, GEC does qualify as an interested party. See generally Rolen-Rolen-Roberts International, et al., B-218424, et al., Aug. 1, 1985, 85-2 C.P.D. ¶ 113.

Turning to the merits, the Air Force explains that it stated that the device would be considered a commercial-type product solely to convey the idea that the product did not have to be manufactured in accordance with a military specification but only had to meet the RFP's purchase description. In any case, the agency seems to argue, since the October 18 response to GEC's questions was not formally incorporated into the RFP by amendment, and was issued to all offerors only for informational purposes, it was not sufficient to establish a commercial-type product requirement. Consequently, the Air Force asserts that the solicitation did not require that the offered product have a commercial history, but only that the product meet the solicitation's purchase description and pass the first article tests specified in the solicitation. Neither the Air Force nor Hardy refutes GEC's contention that Hardy's scale is not a commercial-type product as defined in the FAR, and there is no commercial literature or anything else in the record indicating that it is a commercial-type product.

While we find no basis for disputing the Air Force's claimed intent in answering GEC's questions, we do find that the Air Force's intent was not clearly communicated to GEC and that, as a result, GEC appears to have been misled.

Contrary to the Air Force's position, we think its October 18 letter response to GEC's questions did have the effect of a solicitation amendment. Although it was not formally designated an amendment, the response was in writing, signed by the contracting officer, and sent to all offerors. These are the essential elements of a solicitation amendment, whether or not issued as a formal numbered amendment, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606 (1984), and the information in the response therefore was binding on all offerors. See Datapoint Corp., B-186979, May 18, 1977, 77-1 C.P.D. ¶ 348.

As for the content of the response, while an agency's intent in furnishing information to offerors is relevant in

interpreting the information, unevicenced intent will not overcome plain, unequivocal language to the contrary. Under FAR, 48 C.F.R. § 11.001, "commercial-type product" is a term of art referring to a product normally sold or traded to the general public at established prices which has been modified to meet some government-peculiar physical requirement, or otherwise is identified differently from its normal commercial counterpart. Whether or not it was the Air Force's intent to establish a commercial-type product requirement, its statement in the October 18 response that the device shall be considered a commercial-type product clearly and unequivocally advised offerors that there was just such a requirement.

The Air Force suggests in its report that the requirement for first-article testing would be inconsistent with a requirement for a commercial-type product, and that this requirement was an adequate indication that a commercial-type product in fact was not required. We do not share this view. This question is addressed in FAR, 48 C.F.R. § 9.304(c), which provides only that first article testing normally is not required in contracts for products sold in the commercial marketplace. To the extent that a commercial-type product has not been marketed, a procuring agency reasonably could determine, we believe, that the commercial history of the parent product does not provide sufficient assurances as to the reliability of the product as modified, and that only a first article test would serve this purpose. Thus, we find no basis for concluding that the first article test requirement should have put GEC on notice that, contrary to the plain language of the Air Force's October 18 response, a commercial-type product was not required.

We emphasize that it is not our purpose here to challenge the Air Force's position that it intended only to indicate that a military product was not required, not that a commercial-type product was required. We are considering only whether, under the circumstances, it was reasonable for GEC to conclude that its noncommercial-type electronic scales would not be acceptable. As there is no evidence either that GEC was aware of the Air Force's unexpressed intent in characterizing the required product as a commercial-type product, or that GEC otherwise was or should have been on notice that a commercial-type product was not required, we conclude that it was reasonable for GEC not to offer its electronic scales in response to the solicitation.

We further conclude that, given the Air Force's position that these scales could have been offered subject to mandatory first-article testing, GEC was misled by the Air Force into not offering its noncommercial-type electronic scales. Since the Air Force proposes to accept Hardy's noncommercial electronic scale for award, it is clear that the protester was not afforded an equal opportunity to compete.

The protest is sustained. By separate letter to the Acting Secretary of the Air Force, we are recommending that the Air Force clarify the RFP and reopen negotiations to afford all offerors an opportunity to offer noncommercial-type products.

for 
Comptroller General
of the United States