



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Information Ventures, Inc.
File: B-232094
Date: November 4, 1988

DIGEST

1. Generally, an amendment relaxing solicitation's delivery schedule must be issued to an offeror no longer in the competitive range where the subject matter of the amendment is directly related to the technical reasons which prevented the offeror from competing.

2. Allegation that agency improperly relaxed the delivery schedule for the awardee without advising protester of the change is sustained where record indicates that major performance milestone requirements of the delivery schedule were relaxed, and the agency was aware that protester withdrew from the competition because of an earlier amendment to the solicitation compressing the original delivery schedule.

DECISION

Information Ventures, Inc. (IVI), protests the award of a contract to West Publishing Company under request for proposals (RFP) No. JVUSA-88-R-0003, issued by the Department of Justice (DOJ) for indexing, editing, and keying services to provide a camera-ready manuscript of the United States Attorney Manual. IVI contends that DOJ relaxed major performance milestone requirements of the delivery schedule in the RFP without notifying IVI and without formal amendment, and thereby improperly excluded IVI from the competition.

We sustain the protest.

The solicitation was issued on a firm fixed-price basis and provided that the manual would consist of approximately 3,500 pages with 9 distinct titles: Title 1, General; Title 2, Appeals; Title 3, Justice Management Division; Title 4, Civil; Title 5, Land and Natural Resources; Title 6, Tax; Title 7, Antitrust; Title 8, Civil Rights; and

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Title 9, Criminal. Each title, except for Title 9, was to be submitted to the contractor in its entirety for keying. Due to the length of Title 9, it was to be submitted to the contractor by chapter. The solicitation required the contractor to provide to DOJ in typewritten form the entire manual and to prepare all the indices. The RFP required that the first draft of each individual title and index be delivered within certain required milestones. After review by the agency, these first drafts were to be returned to the contractor for final delivery of camera-ready copies. In addition, the contractor was to furnish the manual in fully editable form on two sets of diskettes. The schedule for completion and delivery of the finished manual was 7-1/2 months.

The solicitation generally provided for award to the responsible offeror whose conforming proposal was determined to be in the best interest of the government, price and other factors considered. The solicitation listed the following specific evaluation factors: (1) ability to achieve 99.9 percent accuracy rate; (2) pertinent experience and capability; (3) management approach; and (4) quality of test samples.

Initial proposals were submitted by eight offerors, including proposals from IVI and West. The initial technical evaluation found six proposals to be technically unacceptable. The proposals of IVI and West were considered conditionally acceptable by the evaluation committee. The results of the initial evaluation for IVI and West were as follows:

<u>Offerors</u>	<u>Score</u>	<u>Price</u>
IVI	78.1	\$120,348
West	64.0	\$321,511

On February 12, 1988, clarification questions were sent to both IVI and West. Amendment No. 0002 was also forwarded to both offerors. This amendment shortened the delivery schedule from 7-1/2 months to 5-1/2 months. Amendment No. 0002 also substantially reduced the time of performance for the required milestones for submitting first drafts of titles and indices. Negotiations were scheduled for February 26, 1988, and the date for receipt of best and final offers (BAFO) was set for March 4.

By letter dated February 24, 1988, IVI submitted its response to the clarification questions. Enclosed with that letter was also IVI's response to the issuance of amendment

No. 0002. IVI stated that in view of the delayed start-up date, the compressed delivery schedule, and its available resources, it could not realistically offer to perform the contract. IVI's basic concern was with respect to the changes in the required milestones for certain tasks. IVI observed that the delivery schedule as revised by amendment No. 0002 reduced the initial turnaround times for most tasks. Specifically, IVI stated that under the revised schedule the first draft of the main index was due on the same day as the first draft of the index of Title 9 (which was the largest section) and that the new schedule allowed only a 4 to 6-week period between receipt of the agency-reviewed title indices and submission of the first draft of the main index. Thus, IVI's response indicated that it was not merely concerned with the delivery schedule with respect to the final completion of the overall project but instead believed that the "turnaround times," that is, the individual required milestones for the submission of the first draft of each individual task, were greatly reduced. IVI also stated "should DOJ be able to entertain a delivery schedule with turnaround times essentially similar to those in the original RFP, we will be happy to reopen those negotiations."

By letter dated February 26, 1988, to IVI, DOJ affirmed the revised delivery schedule. IVI failed to attend its negotiation session for February 26, and by letter dated March 2, 1988, IVI stated that they could not commit to meeting the revised schedule. IVI did not submit a BAFO.

West was the only offeror to submit a BAFO. West's BAFO was found to be fully acceptable and negotiations with West were reopened to make further changes to the requirements. Award was made to West on July 12, 1988. The contract was awarded as a fixed-unit price requirements type contract and contained a revised delivery schedule that reduced the overall time for final completion of the manual that was established by amendment No. 0002 by approximately 2 weeks. However, the contract also substantially relaxed the delivery requirements for certain individual milestone tasks. This protest followed.

IVI's principal complaint is that the delivery schedule with respect to the individual milestones contained in the contract as awarded was substantially less restrictive than the delivery schedule for those milestones as announced in amendment No. 0002 that had precluded participation in the procurement by IVI. Therefore, according to IVI, the agency

was obligated to notify IVI of these changes and formally amend the solicitation.^{1/}

The agency responds that it was not required to notify IVI of the revised delivery schedule because the revisions were not material. The agency argues that the terms of the contract as awarded further constricted the schedule for the final completion of the overall contract beyond the constraints of amendment No. 0002, and that the nature of the changes did not indicate that IVI would have been able to participate in the competition if that firm had been notified of the changes.

The Federal Acquisition Regulation (FAR) § 15.606(a) (FAC 84-16) provides that when the government changes or relaxes its requirements, either before or after the receipt of proposals, the contracting officer shall issue a written amendment to afford all offerors an opportunity to respond to the revised requirements. See AT&T Communications, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247. The purpose of this requirement is to assure that all offerors are clearly apprised of the changed agency requirements so that they may compete on the new basis and the government may benefit from the competition by all offerors. We have held that an agency need not issue a solicitation amendment to an offeror no longer in the competitive range where the subject matter of the amendment is not directly related to the reasons the agency had for excluding the offeror from the competitive range. The MAXIMA Corp., B-222313.6, Jan. 2, 1987, 87-1 CPD ¶ 1; Amperif Corp., B-211992, Apr. 11, 1984, 84-1 CPD ¶ 409. However, it follows that if the agency knows that a potential offeror was excluded from the competitive range for a reason that no longer exists after a subsequent amendment relaxing the solicitation's terms, the offeror should be notified of the changes, especially of any relaxed requirements, since the firm, after the amendment, is potentially fully capable of fulfilling the agency's needs. We think this principle equally applies where an offeror withdraws from the competition because of a restrictive

^{1/} IVI also protests the restrictiveness of amendment No. 0002. However, any protest of changes made by the amendment or the amendment itself is required to be filed by the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Here, the next applicable date was March 4, 1988, the date for submission of BAFOs. IVI knew about the amendment but did not submit a BAFO or protest the amendment. This protest basis raised approximately 5 months later is clearly untimely. In any event, we sustain the protest on another ground.

delivery schedule which is subsequently relaxed, where the agency is aware that the firm's reason for leaving the competition was directly related to the strict delivery requirements which are later relaxed in the subsequent amendment.

In this case, we find that the delivery schedule with respect to individual milestones about which IVI complains has been greatly relaxed in the resultant contract. Notwithstanding the fact that the overall time for final completion of each task as awarded was further reduced, the record is clear that the time allowed for delivery of the initial drafts and for review and corrections of those drafts have significantly increased in the awarded contract from that allowed in amendment No. 0002. In some instances, the delivery schedule in the awarded contract was even more relaxed than the schedule set forth in the initial RFP. As demonstrated below, the delivery schedule significantly increased the time allowed for preparation of initial drafts of text over that allowed by amendment No. 0002.

	<u>Title</u>	<u>Initial draft to agency</u>	<u>Final draft to contractor</u>	<u>Index to agency</u>
RFP	1	77 (days)	107	121
Amend. 0002		31	45	61
Contract		75	82	75
RFP	2-8	62	103	119
Amend. 0002		61	75	91
Contract		75	82	75
RFP	9	77	107	121
Amend. 0002		31	61	75
Contract		91	98	91
RFP	Main Index			167
Amend. 0002				75
Contract				106

For example, as indicated above, the time allowed for submission of the first draft of Title 9, the largest part of the manual (comprising more than 50 percent of the manual text and the most labor intensive), was extended from 31 days in amendment No. 0002 to 91 days in the contract as awarded. This is 14 days more than was allowed by the original RFP. DOJ argues that the awarded contract increased the time for final delivery of the completed Title 9 by approximately

16 days and believes this change was not material in view of the fact that the overall delivery schedule was constricted beyond the constraints imposed by amendment No. 0002. DOJ fails to address the fact that the protester was clearly concerned, in its February 24 letter, about the milestones with respect to submission of the individual drafts, agency review, and contractor's revised submissions, for all of which the time has been greatly relaxed.

Moreover, when DOJ issued amendment No. 0002, compressing the delivery schedule, it had only two proposals within the competitive range. In response to the issuance of amendment No. 0002, IVI indicated to DOJ that it could not continue competing because of the revised schedule. Specifically, IVI expressly stated that its basic concern was with the individual tasks (particularly Title 9) milestones. We believe that the agency's failure to issue a formal amendment with respect to the revised delivery requirement had a material effect on the competition. The issuance of amendment No. 0002, which compressed the delivery schedule for the individual milestones, resulted in the withdrawal from the competition of the proposal that was rated the highest technically with the lowest price. This left only one offeror, West, in the competitive range. Continued negotiations with West resulted in improvement in its technical rating, but with no reduction in its price.

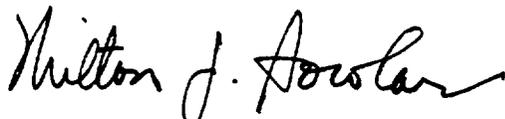
The record is clear that the contract as finally awarded does make significant changes to those very portions of the delivery schedule that concerned IVI. In this case, the record shows that the delivery schedule as altered by amendment No. 0002 was material to the protester's decision to withdraw from the competition. Further, the agency was aware of the protester's specific concerns. Therefore, the agency should have concluded that any changes to that schedule which relaxed the restraints imposed by amendment No. 0002 could have resulted in IVI's continued participation in the procurement and would therefore enhance competition in the best interest of the government.

The Competition in Contracting Act (CICA), 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986), mandates that contracting agencies obtain full and open competition. Here, we find that DOJ acted improperly in changing its requirements without amending the solicitation and furnishing the protester a copy. We find that under these circumstances, DOJ's actions prevented a responsible source with the highest technical rating and lowest price from competing. We sustain the protest on this ground.

The appropriate remedy where an agency unreasonably excludes an offeror from competing by failing to issue a formal amendment would ordinarily be for the agency to do so and request BAFOs. That remedy is not practical here since IVI filed its protest with our Office more than 10 days after contract award, and contract performance was not suspended. See 4 C.F.R. § 21.6(b). West has been performing under the contract since July 1988. With less than a month and a half remaining in contract performance, we do not think that reopening the competition or disturbing the award is feasible here.

As no other corrective action is appropriate, we find that the protester is entitled to recover its proposal preparation costs. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. We also find IVI entitled to recover the costs of filing and pursuing the protest, including any reasonable attorneys' fees. IVI should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.



Acting Comptroller General
of the United States