

*Request*



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** DH Industries  
**File:** B-232963  
**Date:** January 25, 1989

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### DIGEST

1. Allegation that contracting agency failed to provide protester with the latest revised aperture card package for the solicitation is untimely where protest was not filed prior to closing date for receipt of offers.
2. The fact that an offer may be below-cost or represent a buy-in is not a basis for rejecting the offer where the offeror is determined to be responsible.
3. Failure to promptly notify protester of award to another bidder is merely a procedural deficiency and does not affect the validity of an otherwise properly awarded contract.

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### DECISION

DH Industries (DHI) protests the award of a contract to Imperial Defense Systems under request for proposals (RFP) No. N00383-87-R-6992, issued by the Department of the Navy for aircraft towbars.

We dismiss the protest in part and deny it in part.

A data package denoted Revision F, consisting of aperture cards for several specification drawings, was included in the solicitation as originally issued. The Navy became aware, however, that a drawing might have been omitted from the data package, and thus issued amendment No. 0001 extending the closing date for receipt of initial proposals indefinitely. The Navy proceeded to revise the data package further, and then issued amendment No. 0002, which substituted a Revision G data package for the Revision F package, and set August 19, 1988, a new closing date. A DHI representative picked up the new package on July 20. By letter to the Navy dated August 9, DHI stated it had learned informally that there had been a revision to the splice tube drawings that now required a 36-inch tube; DHI noted that

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the drawing in its amendment No. 0002 package called for a 12-inch tube. In a telephone call to the contracting officer on this same date, DHI inquired as to the latest aperture card revision applicable to the RFP, but the contracting officer did not have the information immediately available.

DHI then filed a Freedom of Information Act request for the information, and also telephoned the agency's small business representative, who advised that the most current revision to the towbar specification was a Revision H (this revision consisted of a correction of a typographical error, and in fact was not incorporated in the RFP). DHI again telephoned the contracting officer, who still was unable to advise the firm which revision had been incorporated in the RFP; he did suggest, however, that DHI submit alternate offers based on the two different size splice tubes.

DHI submitted its proposal on August 19, indicating that its offer was based on the 36-inch splice tube, but also providing reduced prices to be applied if the 12-inch splice tube in fact was required. Nine offers were received. Imperial's low, acceptable offer of \$1,558 per item (\$651,244) total was based on the 36-inch splice tube. Contract No. 88-C-3063 was awarded to Imperial on September 14. On September 27, after learning of the award, representatives of DHI met with the contracting officer. DHI protested to our Office on September 30.

DHI principally contends that the contracting officer and the buyer, by repeatedly refusing to forward to it the operative revision applicable to the solicitation, prevented DHI from intelligently preparing its offer. This allegation is untimely. Under our Bid Protest Regulations, protests of alleged solicitation improprieties must be filed prior to the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Thus, if DHI believed its copy of the RFP was incomplete or deficient, or that the Navy improperly furnishing all necessary information, it was required to protest on these grounds prior to the August 19 closing date. Since DHI did not file its protest until September 30, only after learning it had not received the award, the protest is untimely and not for consideration. Caldwell Consulting Asso., B-222583.2, Dec. 4, 1986, 86-2 CPD ¶ 641. In any case, since DHI in fact submitted its proposal on the proper basis (i.e., based on the 36-inch splice tube), any failure by the Navy to provide DHI with information had no effect on the firm's chances for award; the award was made to Imperial based strictly on that offeror's low price.

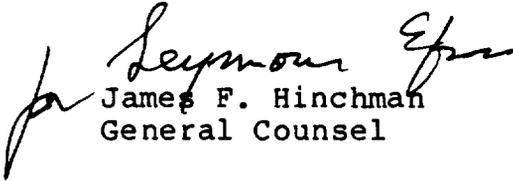
DHI next speculates that Imperial will furnish foreign end items under its contract, contrary to its Buy American Act (41 U.S.C. §§ 10a-d (1982)) certification that it would furnish domestic items; DHI apparently believes this would be improper, since no price differential was added to Imperial's price in determining the low bidder, the means of implementing the Act's preference for domestic products. This argument is without merit. The protester has presented no evidence suggesting that Imperial will not comply with the Act, and Imperial certified at Section K-1109 of its proposal that "zero percent of the proposal contract price represents foreign content or effort," and at Section K-1102 that it is a small business and that all supplies to be furnished would be manufactured or produced by a small business in the United States. Although we have held that an agency should not automatically rely on a bidder's offer of compliance with the Act where there is reason to question whether domestic material will be furnished, there simply was no evidence here that should have suggested to the Navy that Imperial would not comply with its certifications. Bryant Organization, Inc., B-228204.2, Jan. 7, 1988, 88-1 CPD ¶ 10.

DHI also argues that Imperial's award price of \$1,558 per unit does not reflect the cost of furnishing the item and thus amounts to a buy-in. As we have stated on numerous occasions, however, there is nothing improper either in a firm's proposing what may be a below-cost price to obtain a government contract (i.e., a buy-in), or in the government's accepting such an offer after determining that the firm is responsible. See, e.g., Environmental Technology Corp., B-225479.3, June 18, 1987, 87-1 CPD ¶ 610 (agency's acceptance of below-cost proposal from responsible offeror is not legally objectionable). Since the agency here necessarily determined Imperial to be responsible when it awarded the firm the contract, Imperial's alleged below-cost offer is not a basis for overturning the award.

Finally, DHI protests that it was not promptly notified of the award to Imperial. We have held, however, that such failure on the agency's part is only procedural in nature

and does not affect the validity of a contract which, as here, was otherwise properly awarded. L. L. Rowe Co., B-220973, Feb. 27, 1986, 86-1 CPD ¶ 204.

The protest is dismissed in part and denied in part.

 Seymour Egan  
James F. Hinchman  
General Counsel