

Rebr...



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Vitro Services Corporation

File: B-233040

Date: February 9, 1989

DIGEST

1. Specification is ambiguous where protester and agency both have reasonable interpretations of the specification and both interpretations are consistent with the solicitation read as a whole.
2. Agency may have inadvertently misled protester during discussions where protester reasonably concluded that cited deficiency related to different portion of its proposal than portion intended by agency.

DECISION

Vitro Services Corporation protests the award of a contract to Device Engineering Company under request for proposals (RFP) No. N00123-88-R-0124 issued by the Department of the Navy for a firm, fixed price contract for three radar simulators with portable shelters and spare parts. Vitro argues that the Navy misled it during discussions, causing it to submit a technically nonconforming offer. Vitro asserts its offer actually conformed to its reasonable interpretation of the RFP specifications.

We sustain the protest.

The RFP provided that award would be made to the firm submitting the lowest priced technically conforming offer. The RFP specifications called for radar simulators, the major components of which were listed as an antenna assembly, radio frequency unit, isolation transformer unit, control unit, high voltage power supply unit and portable shelter. Of these major components, the specifications further provided that the radio frequency unit, isolation transformer, control unit and high voltage power supply unit together comprised the "transmitter" which was to be a complete operational unit. Each of the four transmitter components was to be housed in its own weatherproof container. The specifications for the portable shelter to house each simulator provided that the shelter was to have a

044600/137929

single weatherproof connector to provide primary power to the simulator and also provided that the shelter was to be equipped with a transformer, connected to the primary power source.

Four firms, including the protester, submitted initial offers and all were found to be within the competitive range. In its initial proposal, Vitro offered a three-container design for the "transmitter" (rather than the four container design called for by the specifications) combining the isolation transformer and control unit in a single container. Vitro's initial proposal indicated that the firm felt the three-container design was superior but also offered to comply with the specification's four-container configuration. Vitro's initial offer did not provide for a separate transformer for the portable shelter.

The agency, after proposal evaluation, solicited best and final offers (BAFOs). The request for BAFOs contained a clarification to the portable shelter specification which, in substance, stated that the portable shelter must have its own separate isolation transformer for the lighting and convenience electrical outlets in the shelter. The Navy also noted the following deficiency in Vitro's initial proposal:

"Shelter is to have its own, separated isolation transformer to convert 440 VAC 3 phase power into 115 VAC single phase power for the shelter electrical system." (Emphasis supplied.)

All firms submitted BAFOs and Vitro was the apparent low priced offeror. After the evaluation of BAFOs, the Navy concluded that Vitro's offer was technically unacceptable because Vitro failed to offer two isolation transformers--one for operation of the radar simulator and one for operation of the portable shelter's electrical system--used to convert power from a ship's power supply to lower voltage power used to operate the radar simulator and portable shelter. The next low offeror was also rejected as technically unacceptable for the identical reason--it also had failed to offer two isolation transformers. Award was made to Device as the lowest priced technically conforming offeror.

Vitro in its protest argues that it reasonably interpreted the statement that the shelter was to have its own separated transformer, together with an overall reading of the specifications, to mean that the agency was requesting the four-container configuration rather than its initially proposed three-container design (i.e., that the isolation

transformer should be "separated" from the control unit). Thus, it understood the specifications, as clarified, as requiring the transformer to be unattached and available for use with either the transmitter or shelter. In support of its argument, Vitro points out that nowhere in the solicitation does there appear a requirement for isolation transformers in its plural form. In addition, Vitro notes that none of the electrical schematics contained in the specifications depict more than one transformer. Vitro also indicates that the portion of the specification entitled "shelter power" provides that the shelter is to have a single weatherproof connector which is to supply power to "the simulator" which is elsewhere in the specifications described to include the portable shelter. Vitro, in essence, argues that it addressed the requirement for power to the simulator as an integrated system (including the portable shelter) and that this interpretation was reasonable in light of its original design and the deficiency noted in its BAFO request.

The agency argues that the solicitation was clear at the outset in its requirement for a second isolation transformer and was further clarified in the requests for BAFOs.^{1/} In support of its argument the agency points out that the "transmitter" schematic does not depict the isolation transformer as providing power to the portable shelter. The agency also notes that the specification for the isolation transformer states that it is for the purpose of providing power "to the transmitter" which is elsewhere described in the specification as including only the radio frequency unit, the control unit, the high voltage power supply unit and the isolation transformer unit. Finally, the Navy argues that the specifications called for the transmitter to be a "complete operational unit" which includes its own transformer unit.

^{1/} The agency argues initially that Vitro's protest is untimely. According to the Navy, Vitro's protest concerns an alleged impropriety (in particular a patently ambiguous specification) which should have been the subject of a pre-closing protest in accordance with our Bid Protest Regulation, 4 C.F.R. § 21.2(a)(1) (1988). We disagree. Where, as here, the protest is based upon a latent ambiguity, that is, the protester is unaware of a different agency interpretation of a solicitation, the protest will be considered timely if it is filed within 10 days of when the basis of protest is known. See, e.g., Niedermeyer-Martin Co., B-226623, July 8, 1987, 87-2 CPD ¶ 23.

It is a well-established principle of federal procurement law that the government's specifications in a solicitation must be sufficiently definite and free from ambiguity to permit competition on a common basis. An ambiguity exists if specifications are subject to more than one reasonable interpretation. Toxicology Testing Services, Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469. While it is not necessary for the finding of an ambiguity that the interpretation of the protesting party be the most reasonable one, the party is, nevertheless, required to show that its interpretation of the requirement in issue is reasonable. Wheeler Bros., Inc.; Defense Logistics Agency--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388. To be reasonable, an interpretation must be consistent with the solicitation, read as a whole and in a reasonable manner. Captain Hook Trading Co., B-224013, Nov. 17, 1986, 86-2 CPD ¶ 566; Martin Widerker, Engineer, B-219872 et al., Nov. 20, 1985, 85-2 CPD ¶ 571. When a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the dispute by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234.

Additionally, we have on previous occasions held that where an agency inadvertently misleads a firm during discussions, with the result that the firm may not have competed on an equal basis, the proper course of action for the agency to take is to reopen discussions with all firms. See Woodward Assoc., Inc., et al., B-216714.2 et al., Mar. 5, 1985, 85-1 CPD ¶ 274.

We think that Vitro's interpretation of the specifications, in light of the firm's initial design, was reasonable and that the firm was inadvertently misled by the Navy's BAFO request. As noted above, the solicitation does not expressly state a requirement for two transformers. In addition, the "shelter power" portion of the specifications provides that the shelter have a single weatherproof connector which is to supply power to "the simulator" which is described elsewhere as including the shelter. Thus, the protester's view, that the use of one transformer for the entire stimulator was permissible, was not unreasonable. Moreover, the wording of the proposal deficiency submitted to Vitro called for the shelter to have its own separated transformer to supply power to the shelter electrical system. In light of Vitro's initial design which had the transformer located with the control unit, we cannot say that the firm's interpretation of this noted deficiency-- that the one transformer should be physically separated from

the control unit, that is, have its own case for use with the entire stimulator including the shelter--was unreasonable. Finally, the fact that two of the four offering firms were rejected for the same reason tends to reenforce the notion that there existed a latent ambiguity in the specifications.

The protest is sustained.

Since the contract was awarded on September 15, 1988, and the protest was filed on October 4, 1988, the Navy was not required to suspend performance. 4 C.F.R. § 21.4(b). Performance has commenced and, under these circumstances corrective action, specifically, amending the specifications to reflect the two transformer requirement and request new BAFOs, is not feasible. However, we find Vitro entitled to its proposal costs and costs of pursuing its protest. 4 C.F.R. § 21.6.

Milton J. Joutan

for

Comptroller General
of the United States