



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** General Engineering Service, Inc.

**File:** B-242618.2

**Date:** March 9, 1992

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.  
Demetria T. Carter, Esq., and Timothy Lasko, Esq., Department of the Navy, for the agency.  
Katherine I. Riback, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. The agency had the required compelling reason to request a second round of best and final offers (BAFO) where the record shows that the agency had a need to incorporate into the solicitation design changes which resulted from the failure of a prototype of the item solicited in testing after the submission of initial BAFOs.
2. Protester's assertion that its price position may have been disclosed to its competitor and that the government engaged in a prohibited auction is denied where there is no evidence of any improper governmental action, and the disclosure, if any, was made by a nongovernmental source.

### DECISION

General Engineering Service, Inc. (GESI) protests the issuance by the Department of the Navy of an amendment requesting a second round of best and final offers (BAFO), under request for proposals (RFP) No. N68335-90-R-0464 for 166 missile shipping/storage containers for the Naval Weapons Station located at Earle, New Jersey (NWS Earle). GESI contends that the changes that led to the amendment requesting the second round of BAFOs were de minimis and known to the agency long before the request was made. The protester also alleges that its price position was disclosed and that therefore the agency engaged in an improper auction by requesting the second round of BAFOs.

We deny the protest.

The RFP was issued on October 16, 1990, and according to the agency the missile container solicited was a modification of previous designs. Therefore, a prototype built to the solicitation requirements would require testing by NWS Earle to ensure it would meet the Navy's needs. Since there was an urgent need for the containers, the activity decided to conduct the procurement and the testing of the prototype concurrently.

The Navy issued a series of amendments to the solicitation which changed the solicitation evaluation criteria and specifications and extended the original closing date of December 3. The agency received initial proposals on December 28. After the issuance of another amendment and the evaluation of proposals, the agency requested BAFOs to be submitted by May 7, 1991.

The agency evaluated the initial proposals and determined that GESI was in line for award. The contracting officer requested that a preaward survey of GESI be conducted. The preaward survey was completed on June 19, and it contained a recommendation that award not be made to GESI based on the firm's poor performance under previous contracts and inadequate vendor quotes in support of the present proposal. As a result, the contracting officer determined GESI nonresponsible and referred the matter to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). On August 9, the SBA issued a COC to the protester.

According to the contracting agency, it was then advised by NWS Earle that prototype test failures had occurred and a redesign of the container would be required. On September 23, NWS Earle provided the contracting officer with the drawing changes. The user activity also stated that it estimated the total cost of the required 14 design changes to be \$466.53 per container.

The contracting officer concluded that these design changes were significant and could impact the standing of the offerors and he decided that a second request for BAFOs was necessary to notify all offerors in the competitive range of the technical changes and to provide them the opportunity to submit new BAFOs based upon the agency's altered requirements. The contracting officer requested approval to issue a second request for BAFOs from the Commanding Officer, Naval Air Engineering Center, which was granted on October 11. Amendment No. 5, issued October 18, contained the revised drawings and requested a new round of BAFOs, due on November 5. GESI filed this protest with our Office on October 25. The agency has received the new BAFOs. No award has been made pending resolution of this protest.

GESI argues that it should have received the award based upon its initial BAFO and that the Navy could have incorporated all of these minor design changes during the administration of the contract. In this regard, GESI states that the agency improperly solicited a second round of BAFOs because the cost of the design changes incorporated were de minimis and that if the agency wished to incorporate them into the solicitation it could have done so prior to the initial request for BAFOs. The protester also argues that its position as the low priced offeror after the initial round of BAFOs was disclosed during the solicitation process and that therefore the agency engaged in an improper auction when it asked for additional BAFOs. Finally, GESI states the fact that the additional round of BAFOs was requested after GESI was issued a COC by the SBA "casts considerable doubt on the Navy's actions."

The Federal Acquisition Regulation (FAR) provides that while the contracting officer generally should not reopen discussions after the receipt of BAFOs, he may do so when it is clearly in the government's interest. FAR § 15.611(c). In further amplifying this rule for Department of Defense (DOD) agencies, the DOD Federal Acquisition Regulation Supplement (DFARS) limits second requests for BAFOs to circumstances where "[u]navoidable changes in requirements or funding or other compelling reasons" require a subsequent BAFO and approval at the appropriate level above the contracting officer is obtained. DFARS § 215.611(c). Further, FAR § 15.606(a) states that when there is a change in the government requirements either before or after the receipt of proposals, an amendment to the solicitation shall be issued and the offerors are to be provided an opportunity to submit revised proposals. See Kisco Co., Inc., B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334.

Therefore, in a DOD procurement, an RFP may be revised after the receipt of initial BAFOs and an additional round of BAFOs sought if there exists a substantial or material change in the government's requirements and the appropriate official reasonably determines that the changes result in a necessary and unavoidable need for additional BAFOs. See Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276.

The first portion of GESI's protest is focused upon the materiality of the changes which spawned the second request for BAFOs. The protester argues that the agency's estimate of \$466.53 per container for the design changes is grossly exaggerated and that in fact the changes are minor in nature and are reasonably valued at around \$35.75 per container. In this regard, the protester argues that the estimate which was used as a basis for the approval of the request for an additional round of BAFOs was so poorly documented and inaccurate that it tainted the approval process.

It is true that the record does not contain a detailed rationale for the agency's cost estimate of each of the changes. While there is a significant difference between the agency's estimate of the cost of the changes, \$466,53, and the protester's estimate, \$35,75, the difference between the prices offered in the initial BAFOs from the two lowest offerors is considerably less than the agency's estimate of the cost of the changes. Therefore, given the imprecise nature of estimates of the cost of the implementation of design changes which have only been performed once on a prototype, we think that even if the agency's estimate was high, it was reasonable for the agency to conclude that the changes could well have an impact upon the close standing of the two low offerors. Further, it is undisputed that some test failures occurred in the prototype design as incorporated into the original solicitation and that 14 separate design changes were needed in order for the containers to meet the agency's minimum needs.

Under these circumstances, where the protester does not argue that the design changes are unnecessary from a technical standpoint for the production of a successful container,<sup>1</sup> and where the two lowest prices are sufficiently close that minor changes in the cost of production could well impact the relative standing of the offerors, we are not prepared to conclude that the 14 specification changes are not material in the context of this solicitation. See Pettinato Associated Contractors and Engr, Inc., B-246106, Feb. 19, 1992, 92-1 CPD ¶ \_\_\_\_; Kisco Co., Inc., supra.

Next, GESI challenges the timing of the agency's incorporation of the changes into the solicitation. The protester argues that the agency "knew about these changes" more than 1 month prior to its request for initial BAFOs and yet it failed to incorporate them until GESI was in line for award based upon its initial BAFO.

The protester draws its conclusion that the agency "knew" of the changes by the end of March 1991, from a time sheet included in the agency protest report which sets forth the time consumed in making some of the actual changes to the prototype, which were eventually incorporated into the solicitation. Beside each of the listed changes on the sheet is the date that the manufacturing of each change

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<sup>1</sup>The protester points out that the agency terms the changes "minor." The agency used the term "minor" in the sense that they would not impact upon the ability of the current offerors to manufacture the containers. Neither the agency nor the protester states that the impact of the design changes on the performance of the container is minor.

either began or was completed. The latest date that manufacturing either began or was completed on a change that was eventually incorporated into the solicitation is March 13, 1991.

The contracting officer states that he was first advised of the prototype testing failures and the need for design changes "on or about" August 15, well after the initial BAFOs had been submitted. Further, a memorandum from the activity in charge of the technical aspects of the container submitted to the contracting officer on September 23, indicates that the altered prototype design and the reduction of those changes to the actual drawings that could be used in the competitive procurement were not accomplished until after each of the separate changes was first physically performed on a prototype and then tested. Further, while the time sheet cited by the protester shows that 7 of the design changes had been manufactured on the prototype by March, it does not show that by March the agency had developed the package of the 14 design changes which it believed would remedy the prototype test failures.

While it is unfortunate that the agency was not able to draft the amendment and incorporate it into the solicitation until after the initial BAFOs had been received, the record does not support the protester's conclusion that the agency could have issued the amendment prior to the receipt of initial BAFOs. Instead, we think that the record indicates that timing of the amendment was due primarily to the agency's decision at the outset of the procurement to develop and test the prototype while simultaneously conducting the procurement and to the problems, which not surprisingly, developed as the result of this somewhat risky strategy, rather than due to any abuse of the solicitation process or violation of the regulations applicable to multiple BAFOs. See HLJ Mgmt. Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375.

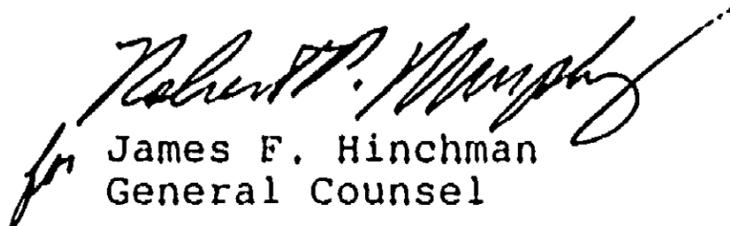
Further, the protester contends that the agency engaged in a prohibited auction under the circumstances here, because the significant length of time between the first and second round of BAFOs, combined with the COC process, which included contact with a supplier to more than one offeror, provided the other offerors with a clear indication of GESI's price standing.

We do not agree. Prohibited auction techniques essentially consist of government personnel indicating one offeror's price to another during negotiation, thereby promoting direct price bidding between offerors. FAR § 15.610(e)(2); R.T. Nelson Painting Servs., Inc., B-227953, Oct. 16, 1987, 87-2 CPD ¶ 368. The record includes a statement by the contracting specialist that no prices were disclosed, except

to the SBA in connection with the COC proceeding, after the receipt of initial BAFOs. While a common supplier may have been contacted during the preaward survey or the COC application, that in itself did not necessarily mean that GESI was the low offeror, only that it was at least one of those in line for award. In any event, the disclosure, if any, was made by a nongovernmental source. The agency's action in reopening the competition under the circumstances did not constitute an auction. Id.

Finally, we see nothing in the record to support GESI's theory that the second round BAFOs was solicited as a ruse to avoid making award to the protester. While we agree that this was not a model procurement, in the absence of some specific evidence in the record which supports the protester's view, we will not infer that the agency acted in bad faith. Western States Mgmt. Servs., Inc., B-231545.3, Mar. 27, 1989, 89-1 CPD ¶ 307.

The protest is denied.

  
for James F. Hinchman  
General Counsel