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**Comptroller General
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**United States General Accounting Office
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Decision

Matter of: American Fuel Cell & Coated Fabrics Company

File: B-293001; B-293020

Date: January 12, 2004

Robert A. Klimek, Esq., Klimek, Kolodney & Casale, for the protester.
Cyrus E. Phillips, IV, Esq., for Engineered Fabrics Corporation, an intervenor.
Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably found protester's proposal unacceptable because it failed to meet the agency's delivery schedule requirements, which were clearly identified during the course of discussions with protester.

DECISION

American Fuel Cell & Coated Fabrics Company (AMFUEL) protests the Defense Logistics Agency's (DLA) award of two contracts to Engineered Fabrics Corporation (EFC) under request for proposals (RFP) Nos. SP0475-03-R-3379 and SP0475-03-R-3377 for aircraft fuel tanks (for brevity's sake, we refer to the solicitations in this decision by the last four digits of each). AMFUEL argues that the awards were improper because they were made on the basis of an unstated evaluation factor.

We deny the protests.

Solicitation No. 3379, issued on May 7, 2003, and No. 3377, issued on May 9, provided for the award of fixed-price, indefinite-quantity contracts for a base period of 1 year with four 1-year options. The solicitations were for the supply of aircraft fuel tanks, National Stock Number (NSN) 1560-00-981-6138 and NSN 1560-00-739-8342, respectively. Solicitation No. 3379 listed an overall minimum quantity of 69 tanks, a minimum of 14 tanks per delivery order, and a maximum quantity per delivery order of 97, and indicated that the tanks were to be delivered not less than 274 days after the placement of a delivery order. RFP at 2, 6. Solicitation No. 3377 listed an overall minimum quantity of 59 tanks, a minimum of 11 tanks per delivery order, and a

maximum quantity per delivery order of 81, and indicated that the tanks were to be delivered not less than 86 days after the placement of a delivery order. RFP at 2, 8.

Award under each solicitation was to be made to the offeror whose proposal conformed to the terms and conditions of the solicitation and represented the “best value” to the government. The best value determination was to be based on a comparative assessment of “prices, past performance, and the other evaluation factors identified elsewhere in this solicitation.” RFP § M10G. “Delivery schedule and current inventory status” was listed as a factor that “may be considered in the trade-off process” for purposes of making a final award decision. RFP § M10G.

Two offerors, AMFUEL and EFC, submitted proposals by the amended closing date and both offerors’ proposals took exception to the solicitation’s delivery requirements. With regard to solicitation No. 3379, AMFUEL offered to deliver two tanks per month starting 150 days after receiving each delivery order. AMFUEL’s Proposal at 6. EFC offered a phased delivery of 12 units per month starting 84 days after receiving each delivery order. EFC’s Proposal at 6. With regard to solicitation No. 3377, AMFUEL offered to deliver two tanks per month starting 90 days after receiving each delivery order. EFC offered a phased delivery of 11 tanks per month starting 84 days after receiving each delivery order.

The contracting officer reconsidered delivery requirements for both solicitations. As to solicitation No. 3379, the contracting officer determined that phased delivery of seven tanks per month beginning 90 days after receipt of a delivery order would accomplish delivery in the time required, and that she would enter into discussions with AMFUEL regarding a delivery schedule that would meet the government’s revised requirements. Because EFC’s proposed delivery schedule met the government’s revised requirements, the contracting officer indicated that, with regard to delivery schedule, EFC would simply be advised during discussions that its phased delivery schedule was acceptable. AR, Tab G, Pre-Negotiation Briefing Memorandum, Aug. 8, 2003, at 4.

Subsequently, the contracting officer sent AMFUEL a letter indicating that negotiations were opened regarding solicitation No. 3379 and in the letter stated:

AMFUEL’s proposed phased delivery schedule does not meet the requirements of the government as stipulated in the solicitation. The following phased delivery schedule is considered acceptable:

- a. Phased delivery of 7 units per month beginning 90 days after receipt of order.

AR, Tab H, Letter to AMFUEL, Aug. 22, 2003.

Responding to the agency's letter in what it termed a "counter-offer," AMFUEL revised its prices and stated that it could "commit to delivery of 3-4 units per month 150 days after receipt of award." AR, Tab I, AMFUEL's Letter to Agency, Aug. 26, 2003. AMFUEL subsequently committed to delivery of four tanks per month. See AR, Tab J, E-mail Message from AMFUEL, Sept. 5, 2003.

The contracting officer also reevaluated the government's delivery requirement for solicitation No. 3377 and determined that there was a need to revise the requirement "to reflect a realistic schedule for phased deliveries." AR, Tab F, Pre-Negotiation Briefing Memorandum, Aug. 21, 2003, at 4. The new requirement was identified as "a phased delivery starting no later than 120 days after receipt of order with final delivery within 360 days of order." Id. Because EFC's proposed phased delivery schedule satisfied the revised requirement, the contracting officer determined that negotiations with EFC concerning its delivery schedule were not necessary; negotiations with AMFUEL, however, were deemed necessary because AMFUEL's proposed delivery schedule did not satisfy the revised requirement.

As a consequence, the agency sent AMFUEL a letter notifying it that negotiations were opened regarding solicitation No. 3377 and stating:

The government has revised the delivery requirement to a phased delivery starting no later than 120 days after receipt of order with final delivery of the maximum order quantity for the base contract period (81 each) within 360 days. AMFUEL's proposed phased delivery schedule does not meet the government's original or revised delivery requirements. The following phased delivery schedule is considered acceptable:

- a. Phased delivery of 8 tanks per month starting 90 days after receipt of the order.

AR, Tab G, Letter to AMFUEL, Aug. 26, 2003.

AMFUEL responded to this letter with its "counter-offer," in which it revised its prices and indicated that it would commit to a delivery schedule of three to four tanks per month starting 120 days after receipt of award. AR, Tab H, AMFUEL's Letter to Agency, Aug. 28, 2003. As with solicitation No. 3379, AMFUEL subsequently committed to delivery of four tanks per month. AR, Tab I, E-mail Message from AMFUEL, Sept. 5, 2003.

In making its award determinations under the subject solicitations, the agency considered AMFUEL's revised delivery schedules for each solicitation, but determined that they were still unacceptable because they did not meet the government's revised delivery requirements. As a result, the agency made award to EFC, which offered satisfactory delivery schedules, notwithstanding the fact that

EFC's prices were higher than those offered by AMFUEL. In its notices of award, the agency informed AMFUEL that its delivery schedules did not satisfy the government's requirements.

The protester argues that the awards to EFC were improper because the agency introduced an unstated evaluation factor, delivery schedule, when it evaluated proposals. According to AMFUEL, pursuant to the terms of the solicitations, award was to be made based on a comparative assessment of price and past performance only.

The express language in the solicitations at issue does not support protester's assertion that delivery schedule was an unstated evaluation criterion. As set out above, section M10G in both solicitations clearly provided that "delivery schedule and current inventory status" was a factor that could be considered in the agency's best value trade-off process.

The protester also challenges the agency's conclusion that AMFUEL's proposals were unacceptable because they failed to meet the government's minimum delivery schedule requirements. AMFUEL argues that, to the extent the agency intended to impose delivery requirements in the letters sent to AMFUEL after receipt of initial proposals, those requirements were not part of the solicitations because the agency never issued formal amendments incorporating them into the solicitations.¹

Because AMFUEL was clearly put on notice during discussions that its proposed delivery schedules were unacceptable, and because the agency informed AMFUEL, also during discussions, of what delivery schedules the agency would find acceptable, we think that formal amendments to the same effect were not necessary.

¹ In its initial protests, AMFUEL asserted that the solicitations as originally issued did not contain a required delivery schedule because they merely stated that delivery of the specified quantities was to occur in "no less than" a certain number of days (274 under RFP No. 3379 and 84 days under RFP No. 3379). According to AMFUEL, this phrase indicated only that any delivery after either 274 or 84 days would be acceptable, and did not specify a minimum required delivery schedule. The record shows that the agency in fact intended the days specified to be, in effect, the latest dates by which deliveries could be made, *i.e.*, that deliveries could be made not "later" than, rather than not "less" than, the specified number of days. As the protester points out, the language in the solicitations is at best unclear, since on its face it suggests that the agency is merely specifying the earliest, rather than the latest, date by which deliveries are to be made. The interpretation of this language is not dispositive of the protest, however, since, as discussed above, the agency changed its delivery requirements after receipt of initial proposals, as reflected in the letters sent to AMFUEL.

See Avitech, Inc., B-214749, Sept. 17, 1984, 84-2 CPD ¶ 297 at 2-3.² While AMFUEL characterizes the delivery schedules identified by the agency during discussions as merely negotiating positions, the discussions letters clearly advised that the specified delivery schedules were minimum requirements. It simply was not reasonable for AMFUEL to assume that it could submit what it characterized as counter-offers, which again did not comply with the delivery schedules that the agency clearly identified as acceptable, without risking that its proposals would be regarded as unacceptable. Delivery is a material term of a solicitation and award generally cannot be made on the basis of a proposal that takes exception to a required delivery schedule. Logitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ 16 at 3-4, recon. denied, B-238773.2, Nov. 19, 1990, 90-2 CPD ¶ 401. Because AMFUEL's revised proposals failed to include delivery schedules that satisfied the government's minimum requirements, the agency properly found AMFUEL's proposals unacceptable.

The protests are denied.

Anthony H. Gamboa
General Counsel

² In support of its assertion that the agency was required to amend the solicitation in order to revise the delivery schedule requirement, AMFUEL cites our decision in Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59. AMFUEL's reliance on Symetrics, however, is misplaced because in Symetrics, unlike the subject case, the government did not disclose its revised requirements during discussions.