DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

23338

FILE: B-207022 DATE: October 15, 1982

MATTER OF: Skytop Plastics, Inc.

DIGEST:

1. A solicitation provision is unambiguous where the agency's interpretation is reasonable and the protester's interpretation is unreasonable because it fails to take into account the clear meaning of all the language in the provision. The fact that some other bidders state they were confused by the provision and that the agency subsequently adopted different language in a solicitation for a similar product does not establish that the provision was ambiguous where it is not shown that the provision was subject to more than one reasonable interpretation.

2. Where a solicitation provision is unambiguous and substantially clear, and should have been understood by all bidders, it cannot be said that certain bidders had an unfair advantage merely because they gleaned their understanding of the provision from an oral explanation by the contracting officer, or as a result of their submission of a value engineering change proposal related to the provision.

Skytop Plastics, Inc. protests the award of any contracts to other firms under invitation for bids (IFB) No. 5FCB-13-82-022, issued by the General Services Administration (GSA) for quantities of 15 types of plastic bags. Skytop principally contends that an amendment issued to clarify an exception to the two applicable commercial item descriptions (CID) was ambiguous. Skytop claims it was prejudiced by this ambiguity and argues that awards to other firms thus would be improper. We deny the protest.

The 15 types of plastic bags to be supplied under this solicitation were described not by a Federal Specification but by CIDs, it being the Government's intention to purchase products which had been offered for sale in the commercial marketplace. Both of the CIDs included in the solicitation stated:

> "The bags furnished under this description, shall be made of polyethylene film, of the thickness specified with a tolerance of minus 10 percent, plus unlimited." (Emphasis added.)

The type of polyethylene specified in the CIDs is known as low density polyethylene or LDPE.

According to information provided us by GSA, which has not been contradicted by the protester, the CIDs did not take into account an innovative technology whereby the plastic film is made from a blend of LDPE and low pressure low density polyethylene (LLDPE). The LLDPE-LDPE blend offers material economies in that bags of the required strength can be made from film which is less thick. In order to permit competition on the basis of bags made from blended material, the following exception to the CIDs appeared in GSA's solicitation:

> "Exception to the Commercial Item Description: A blend of low pressure low density polyethylene may be used in lieu of the low density polyethylene specified. When the LLDPE-LDPE blend is used the film thickness may be reduced by a maximum of 25 percent, provided the film meets the physical properties of the specified LDPE - thickness." (Emphasis added.)

Prior to bid opening, a prospective bidder called GSA to discuss several of the solicitation requirements. This bidder requested a clarification of the exception to the CIDs allowing the LLDPE-LDPE blend, the bidder questioning whether, with the 10 percent tolerance allowed in the CIDs, the bidders would lower the gauge (thickness) of the film by 35 percent and then argue that they had interpreted the solicitation as permitting a 35 percent tolerance.

In view of this request for clarification, the contracting officer consulted GSA's Central Office and was advised that if an LLDPE-LDPE blend was used a maximum reduction of 25 percent in the film thickness was allowed. The same tolerance (plus unlimited, minus 10 percent) would apply to the LLDPE-LDPE blend bags as to the LDPE bags described in the CIDs. For example, the Central Office told the contracting officer, if the CID requires an LDPE bag which is 4 mils thick, an LLDPE-LDPE blend bag could be up to 25 percent thinner, that is, 3 mils thick. If the plus unlimited, minus 10 percent tolerance is then applied to a thickness of 3 mils, the thickness could be further reduced by .3 mil to a total of 2.7. Therefore, a blend bag of a thickness of 2.7 mils would meet the specifications, provided it also met the physical properties of the CIDs. This clarification, together with the example, was provided by the contracting officer to the two bidders who had made telephone inquiries.

The contracting officer also issued Amendment No. 2 to the solicitation, which stated in part:

> "[THE SOLICITATION] IS AMENDED TO FURTHER CLARIFY THE EXCEPTION TO THE COMMERCIAL ITEM DESCRIPTIONS, APPLICABLE TO ALL ITEMS * * *
>
> LDPE AND LLDPE BLEND ON PLASTIC BAGS
>
> '"A MINUS TOLERANCE OF 10 PERCENT, PLUS TOLERANCE UNLIMITED PERTAINS TO ALL LOW DENSITY AND LOW LINEAR DENSITY POLYETHYLENE BAG BLENDS THAT HAVE AN ORIGINAL REDUCTION IN GAUGE THICKNESS OF 25 PERCENT.'" (Emphasis added.)

The example was not included in the amendment. No firms took exception to the amendment and 29 bids were received.

Skytop states that it examined the bids after opening and concluded from the variation in maximum guaranteed shipping weights entered by the bidders that a number of the bids were premised on supplying lighter weight bags than Skytop's. It then sought an explanation of the solicitation from GSA, after receipt of which it protested.

Skytop states that it interpreted Amendment No. 2 "to reduce the original permissible thickness tolerance variation of 25 percent to a permissible thickness tolerance variation of 10 percent." Skytop argues that its interpretation of the amendment is the only reasonable one and that bids "based on" supplying bags of thinner plastic film should be rejected as "nonresponsive." Alternatively, Skytop argues that the language of the amendment was ambiguous and that, therefore, the solicitation should be canceled and the requirement resolicited.

Preliminarily, we must consider whether this aspect of Skytop's protest is timely under our Bid Protest Procedures. 4 C.F.R. Part 21 (1982). Since alleged ambiguities involve language in the solicitation itself, they ordinarily must be protested to our Office prior to bid opening. 4 C.F.R. § 21.2(b)(1). We have recognized an exception to this rule, however, where the protester was unaware, prior to bid opening, that its interpretation of the solicitation was not the only one possible. Absent awareness of a second interpretation, the protester could not be aware of an ambiguity. See Conrac Corporation, B-205562, April 5, 1982, 82-1 CPD 309. Skytop maintains it learned of the intended meaning of the amendment only when it reviewed the other bids after bid opening. We find no clear evidence that this was not the case. Thus, since Skytop raised this basis of protest within 10 working days after bid opening, it is timely and will be considered on the merits.

A solicitation requirement is ambiguous, in a legal sense, only where it is susceptible of two or more reasonable interpretations. Polarad Electronics, Inc. B-204025, November 12, 1981, 81-2 CPD 401. The mere allegation that some requirement is ambiguous does not make it so. We have carefully examined the language of Amendment 2, and find that only GSA's interpretation of that language is reasonable.

Although Skytop repeatedly characterizes its interpretation as "reasonable" and the amendment as "ambiguous," it makes no attempt to explain the rationale behind its interpretation of the amendment, and also has not shown that GSA's interpretation was unreasonable.

We agree with GSA that Skytop's position fails to distinguish between the concepts of "thickness" and "tolerance." The thickness of an object is the smallest of its three dimensions. This was clearly delineated in the exceptions to the CIDs included in the solicitation which would describe a bag, for example, as having:

> "Dimensions 24 inches wide, 24 inches long, 0.004 inches thick." (Emphasis added.)

"Tolerance" is the range of variation permitted in maintaining a specified dimension of an item: the difference between the upper and lower limits between which a size must be held. The CIDs used in this solicitation stated that the bags "shall be made of polyethylene film, of the thickness specified with a tolerance of minus 10 percent, plus unlimited." (Emphasis added.) The exceptions to the CIDs, which permitted the use of an LLDPE-LDPE blend, stated that when such a blend is used "the film thickness may be reduced by a maximum of 25 percent" but did not expressly state what tolerances would apply. This was the subject of Amendment No. 2, which stated:

> "A MINUS TOLERANCE OF 10 PERCENT, PLUS TOLERANCE UNLIMITED PERTAINS TO ALL [LLDPE-LDPE] BAG BLENDS THAT HAVE AN ORIGINAL REDUCTION IN GAUGE THICKNESS OF 25 PERCENT." (Emphasis added.)

Skytop combines the concepts of "thickness" and "tolerance" in its protest, speaking of a "thickness tolerance variation." According to Skytop, it understood Amendment No. 2 "to reduce the permissible thickness tolerance variation of 25 percent to a permissible thickness tolerance variation of 10 percent." Beyond making this assertion, however, Skytop does not explain precisely why it came to such an understanding, which would have the practical effect of nullifying the technological advantage offered by the LLDPE-LDPE blend: that is, its interpretation would require blend bags to be subject to the same requirements as non-blend bags.

We think the amendment stated with sufficient clarity that a 10 percent tolerance would be applied to determine whether LDPE-LLDPE blend bags satisfied the reduced thickness requirement. We do not think the amendment can reasonably be read as substituting a minus tolerance percentage for a thickness reduction percentage. Since we find only one reasonable interpretation of the amendment--GSA's interpretation--it was not ambiguous.

Skytop offers as indirect evidence of an ambiguity the fact that six other bidders have stated that they found the amendment confusing, and that GSA adopted different language on this subject in a more recent solicitation for plastic sheeting. That other bidders may have found the amendment confusing is not probative evidence that it was ambiguous. (We note, in passing, that other bidders have advised us they had no difficulty understanding the amendment.) An unclear or confusing provision is ambiguous only where the confusion arises out of the existence of more than one reasonable interpretation of the provision. We already have found that Skytop's interpretation of the amendment was not reasonable since it failed to distinguish the terms "tolerance" and "thickness." The other bidders who state they were confused have not submitted any arguments or evidence which would warrant a different finding, and have offered no other reasonable interpretations to establish that the amendment was ambiguous. As for Skytop's second point, GSA's use of different language in a more recent procurement of plastic sheeting is of no consequence here. The issue

in this protest is not whether the language of the amendment could have been clearer, but again, whether that language is subject to more than one reasonable interpretation. We have found only one reasonable interpretation.

Skytop contends that one other bidder, American Transparents, had an unfair advantage in understanding the amendment since it had submitted a value engineering change proposal (VECP) suggesting a change in the required bag thickness and tolerance, and that certain other bidders were afforded a similar advantage when, at their request, the contracting officer explained the meaning of the amendment through the use of an example. This contention is without merit. As we have already concluded, the amendment was sufficiently clear and unambiguous; it apparently was fully understood by at least 22 of the 29 bidders. Thus, since the amendment should have been understood by the bidders, the fact that American may have gained its understanding as a result of its VECP in no respect constitutes an unfair advantage. Similarly, those bidders which sought an explanation from the contracting officer were not unfairly benefitted. We have specifically stated that bidders should seek clarification prior to bid opening where they find solicitation provisions confusing. See CFE Equipment Corporation, B-203082, May 29, 1981, 81-1 CPD 426; ITE Imperial Corporation, Subsidiary of Gould, Inc., B-190759, August 14, 1978, 78-2 CPD 116.

Finally, we note that Skytop's copy of GSA's report included a "Statement of Legal Position" prepared within a regional office of GSA but never adopted by GSA as its position on the protest. Skytop based portions of its comments on this document and for that reason requested that the document be included in the record: GSA objected because the document was an internal one which did not reflect the agency's position. While we see no purpose in compounding GSA's error in releasing this document to Skytop by further distributing it to other interested parties, we have examined it in view of Skytop's objections and conclude that it does not affect our view of the merits of the case and that its non-release does not prejudice the other interested parties.

The protest is denied.

Shelton J. Doolan

for Comptroller General
of the United States