

**DECISION**

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

20841

FILE: B-210764

DATE: November 29, 1983

MATTER OF: Marketing International, Inc.

**DIGEST:**

Solicitation is defective where Navy's post-award notice to field activities suggests that Navy did not intend bidders for magazine subscriptions contract to base their bids on the furnishing of scientific, technical, and medical publications. However, under circumstances, GAO must conclude that bidders computed their bids based on supplying at least some of these publications. Therefore, the solicitation was defective and the requirement should have been resolicited.

Marketing International, Inc. (Marketing), protests the award of a 1-year, indefinite quantity contract for "commercial periodical" subscriptions to Avanti Enterprises, Inc. (Avanti), under invitation for bids (IFB) No. N00140-82-B-C292, issued by the Naval Regional Contracting Center (NRCC), Philadelphia, Pennsylvania.

We sustain the protest, although on a basis different from that raised by the protester.

The IFB was issued on August 11, 1982, with bid opening set for September 10, 1982. Bidders were required to bid on an "estimated expenditure of \$600,000 (at Publishers' List prices)." The bidders' prices for the required magazines were to be expressed as a percentage "discount of the publisher's list price in effect at the time the subscription is accepted by the publisher." The IFB also contained a "quarterly recap" of subscription orders placed during the period from April 1 through June 30, 1982, for informational purposes to give prospective bidders an indication of the "general trend of ordering." Included in this recap were reports of subscriptions to the "American Journal of Surgery," the "Annals of Surgery" and the "Journal of Clinical Pharmacology."

02-1237

On August 23, 1982, the Navy issued amendment No. 0001, which corrected an error in the August 11 IFB. The original sentence read: "The contractor will place all orders to the publishers direct with the." The corrected sentence read:

"The Contractor will place all orders to the publishers direct with the publisher unless the publisher requires that the subscription be placed through an intermediate agency."

Five bids were received. Marketing was found to be the apparent low bidder; however, Marketing's bid was rejected because it failed to acknowledge the amendment. On November 29, 1982, the Navy awarded the contract to Avanti, the second low bidder, and also issued "NRCC Philadelphia Notice 4200" (Notice 4200), dated November 29, 1982, which, among other things, precluded field activities from ordering "technical, scientific, and medical" publications under the contract. The Navy sent Marketing notice of the rejection on November 30.

Marketing contends the rejection was improper because the amendment allegedly has no effect on the price, quantity, or quality of the contract. Marketing supports its argument by noting that the Navy characterizes the amendment as the correction of a typographical error to assure that the contractor placed orders directly with the publisher.

The Navy contests the timeliness of this ground of protest. But we need not discuss the timeliness issue and Marketing's allegation that Notice 4200 constituted an impermissible modification of the contract since we conclude that the IFB was defective and that the proper remedy would not have been an award under the subject IFB but, rather, a resolicitation of the requirement.

Marketing argues that the IFB's quarterly recap showed that many technical and scientific publications were ordered; therefore, bidders should have reasonably bid on the basis that a majority of the publications to be ordered would be of a technical and scientific nature. These technical and scientific publications, Marketing further argues, are of low profitability compared with general interest publications. As stated by Marketing:

". . . [there are] high profit margins associated with general interest magazines. In comparison, the profits on technical magazines are negligible. Accordingly, if the

expectation is for a high level of general interest magazines, the [bidder's] discount can be higher and the overall bid price lower."

In Marketing's view, that bidders understood the Navy's requirement to be, in the main, for technical and scientific publications, is shown in the range of bidding discounts offered (1.8 percent to 5.5 percent), which, allegedly, are in line with the low profit margins associated with technical and scientific publications. By contrast, Marketing's discount on a prior year's contract for general interest magazines was 20 percent.

The Navy reports this contract is the eighth in a series of annual consolidated contracts for commercial periodicals. The Navy insists that these contracts were never intended to cover "technical, scientific, trade, reference, or other limited circulation publications." To support this position, the Navy notes that, unlike the present IFB, the prior contract specifically excluded "technical, scientific, medical and trade" publications. The Navy also states that there was "no intention that the contract . . . would be expanded to include the Navy's vast requirements for [specialty] publications." Since Marketing has been the contractor for the past 3 years, the Navy argues there is no basis for believing that it bid with these publications in mind.

Moreover, the Navy reports there is no basis for suggesting that the Avanti contract is significantly more profitable. The difference between the current contract and the prior contract is that the current contract provides for a 5-percent discount on the total contract value at the publisher's list price while the prior contract provided a 14-percent discount for 98 publications listed specifically in the contract, a 20-percent discount for general interest publications, and a 0-percent discount for specialty publications. The Navy indicates that the actual discount received on the prior contract for 8 months was 6.6 percent. Therefore, the Navy says that there is no basis to conclude that the Avanti contract is markedly less advantageous.

The Navy is correct in stating that the prior contracts specifically excluded technical and scientific publications. Marketing argues, however, that the "vast majority of publications ordered [under the prior contract] fell [in] the specialty category (see Quarterly Report, April-June 1982, Orders Numbers 2155-3388.)" Although the Navy

apparently denies Marketing's allegation that limited circulation publications were ordered, the Navy has not specifically replied to Marketing's allegation regarding these orders. At least some of these publications (for example, the three medical publications, noted above) seem to be in the specialty category. Consequently, we must conclude that bidders bid discounts for the subject IFB based on supplying at least some scientific, technical and medical publications. But Notice 4200 suggests that the Navy, in fact, did not intend that bidders should so base their bids. Therefore, we conclude that the IFB was defective and that the requirement should have been resolicited.

Although the Navy has submitted the actual, average discount from the prior contract in an effort to demonstrate that the Navy is achieving the same savings under this contract, this argument is irrelevant. The orders under the prior contract and the IFB's quarterly recap upon which bidders' discounts were based apparently included scientific, technical and medical publications. Therefore, similar discounts could be expected.

Although it is impracticable to recommend that the contract be resolicited because it is nearly completed, by letter of today, we are advising the Secretary of the Navy of our conclusions.

*Milton J. Auer*  
for Comptroller General  
of the United States