

**DECISION**

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

**FILE:** B-216102.2; B-216102.3 **DATE:** March 28, 1985

**MATTER OF:** Advanced Structures Corporation

**DIGEST:**

1. When, in a negotiated procurement, an offeror proposes conditions that were not contemplated by the solicitation, the normal procedure is for the agency to seek clarification. The agency need not do so, however, when the conditions did not appear in the initial proposal and were not discussed, but rather appeared for the first time in a best and final offer.
2. When, in a best and final offer, an offeror attempts to condition prices on the dollar amount of delivery orders, rather than provide the fixed prices contemplated by the solicitation, it is reasonable for the contracting agency to add an amount that represents the price impact of the conditions sought to be imposed by the offeror. Protest is denied, where the offeror's price is no longer low if the condition is evaluated using the amounts suggested by the offeror.
3. A firm's ability to perform is a matter of responsibility, and GAO will not review an affirmative determination of responsibility unless the protester shows possible fraud or bad faith on the part of contracting officials or alleges that the solicitation contains definitive responsibility criteria that have been misapplied.
4. Whether a proposed awardee will perform in accord with all of the terms of a solicitation is a matter of contract administration. This is, therefore, the

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responsibility of the contracting agency and is not encompassed by GAO's bid protest function.

Advanced Structures Corporation protests the evaluation of its price by the Naval Regional Contracting Center, Philadelphia, Pennsylvania, under request for proposals (RFP) No. N00140-84-R-0054. The firm contends that it is entitled to award of a contract for the acquisition of materials necessary for ship overhaul, including honeycomb bulkhead partition material. Advanced Structures also alleges that the apparent successful offeror, Inland Marine Industries, is "nonresponsive" because it does not intend to perform in accord with the solicitation.

We dismiss the protest in part and deny the remainder.<sup>1/</sup>

This is a 3-year, indefinite-quantity contract with delivery orders to be placed as needed. The solicitation includes estimated quantities for each year of the contract and requests unit and extended prices for various line items. A single award is to be made to the lowest acceptable offeror.

The solicitation provides for delivery orders of at least \$15,000; however, the government reserves the right to place orders of lesser amounts so long as the total of such orders does not exceed \$50,000. The solicitation also establishes maximum delivery order limitations of \$200,000, \$220,000, and \$240,000, respectively, for the first, second, and third contract years and provides that the contractor is not required to honor orders aggregating more than these amounts. Additionally, the solicitation establishes an overall contract minimum of \$500,000 and maximums of \$2,350,000, \$2,500,000, and \$2,675,000, respectively, for the first, second, and third contract years.

Of the best and final offers submitted on August 16, 1984, Advanced Structures' was the lowest. Those in the competitive range were as follows:

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<sup>1/</sup> Advanced Structures further protests that the proposal of the third low offeror, Skyline Products Inc., was late and not for consideration. Since the Navy agrees with the protester, we have not considered this issue.

Advanced Structures	\$2,513,693
Inland Marine	\$2,727,979
Skyline Products	\$2,959,806
Jamestown Metal	\$4,124,169

Advanced Structures, however, did not merely submit the requested unit and extended prices. Rather, it conditioned its price upon the dollar amount of individual delivery orders to be placed under the contract:

<u>Delivery Order</u>	<u>Price Break List</u>
\$150,000 and above	See prices in solicitation schedule
\$75,000 to \$150,000	Add 10% to Delivery Order Amount
\$35,001 to \$75,000	Add 15% to Delivery Order Amount
\$15,001 to \$35,000	Add 35% to Delivery Order Amount
\$ 1 to \$15,000	Add 60% to Delivery Order Amount

The Navy had not previously discussed this matter with Advanced Structures, and no other offeror submitted prices except on a fixed-price basis for each line item. Accordingly, the Navy evaluated Advanced Structures' proposal by adding 35 percent to its quoted price. As a result, the firm's total evaluated price was \$3,393,486--no longer low.

The Navy contends that because the solicitation's minimum delivery order is \$15,000 and because most of the delivery orders issued under the previous contract for the

same requirement were for less than \$35,000, this evaluation method was appropriate. The Navy indicates that it also expects to issue relatively small delivery orders under the new contract.

After the closing date for best and final offers, Advanced Structures sought to revise its proposal by telegram dated August 23 and by letter dated August 24, 1984. In the telegram, Advanced Structures asked to change all percentages in its "Price Break List" to 10 percent. In the letter, Advanced Structures asked to delete entirely the conditions and percentages set forth in this list. The contracting officer rejected both the telegram and the letter as late modifications.

The RFP, as amended, requested offers on a fixed-price basis for each line item. The Navy clearly did not anticipate Advance Structures' proposal for price adjustments according to the amount of delivery orders. The normal procedure in a negotiated procurement when such conditions are proposed is to seek clarification from the offeror, pointing out that the RFP did not contemplate the use of a price qualification provision. See Sperry Univac, B-202813, Mar. 22, 1982, 82-1 CPD ¶ 264, aff'd on reconsideration, July 7, 1982, 82-2 CPD ¶ 27.

Here, however, the Navy was not required to reopen negotiations, since the condition did not appear in Advanced Structures' initial proposal and had not been discussed; rather, it first appeared in the firm's best and final offer. See Patty Precision Products Co., B-182861, May 8, 1975, 75-1 CPD ¶ 286.

Under these circumstances, we believe it was reasonable for the Navy to add an amount that, in its judgment, represented the price impact of the conditions that Advanced Structures sought to impose. Moreover, we find that the contracting officer properly rejected the protester's later attempts to change or delete its conditional pricing.

The protester concedes that evaluation on the basis of some additional cost was appropriate, but disagrees as to the amount. Advanced Structures contends that the 35 percent does not reflect the actual cost that the

government is likely to incur. According to the protester, the Navy's evaluation fails to consider the maximum delivery order amounts and fails to interpret correctly the Navy's past purchasing habits. In its initial protest, Advanced Structures indicated that an adjustment of not more than 9.6 percent would be appropriate, based upon application of its proposed surcharges to the orders placed during the final year of the previous contract. After receiving the Navy's report, Advanced Structures suggested other appropriate percentages, for example, it contended that the average dollar increase for all 3 years of the previous contract would have been 10.47 percent if the proposed surcharges had been in effect.

We calculate that if any of the foregoing figures were used to evaluate Advanced Structures' proposal, its price would still be higher than Inland Marine's. We therefore deny the protest on this basis.

Advanced Structures also protested initially that Inland Marine might be ineligible for award under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-40 (1982). Advanced Structures appealed the contracting officer's determination that Inland Marine qualified as a manufacturer under the act to the Department of Labor. On February 27, 1985, that Department upheld the contracting officer's determination. Thus, the contention that Inland Marine may be ineligible for award is without merit.

Finally, Advanced Structures asserts that Inland Marine's proposal is "non-responsive." The protester states that on February 12, 1985, it received supplemental information in connection with the Walsh-Healey Act appeal that reveals that Inland Marine does not intend to perform in accord with various specifications.

Although Advanced Structures characterizes this as relating to "responsiveness," the allegations actually relate to the firm's responsibility. See Alan Scott Industries et al., 63 Comp. Gen. 610 (1984), 84-2 CPD ¶ 349. This Office will not review protests of affirmative determinations of responsibility unless the protester shows possible fraud or bad faith on the part of

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contracting officials or alleges that the solicitation contains definitive responsibility criteria which have been misapplied.

Additionally, whether Inland Marine will perform the contract in accord with all of its terms is a matter of contract administration. As such, it is the responsibility of the contracting agency and is not encompassed by our bid protest function. Id. Therefore, this basis of protest is dismissed.

The remainder of the protest is denied.

for *Signature*  
Harry R. VanCleve  
General Counsel