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

FILE: B-216761 **DATE:** April 18, 1985

MATTER OF: Sargent Industries

DIGEST:

Where a procurement is transformed from a noncompetitive to a competitive acquisition by an agency decision to consider an "equal" product contained in an unsolicited proposal, amendment of the solicitation with notice to the original offeror is required.

Sargent Industries protests the award of a contract to CEF Industries for aircraft repair kits under request for proposals (RFP) No. F09603-84-R-0840, issued by the Warner Robins Air Logistics Center, Robins Air Force Base, Georgia. Sargent essentially contends that the Air Force improperly relaxed its requirements without any notice to Sargent and then awarded the contract to CEF based on an unsolicited proposal which did not conform to the announced purchase description. We sustain the protest.

The RFP described the repair kits as National Stock Numbers (NSNs) 1680-00-731-9669LG and 1680-00-163-6025LG, which solely referenced Sargent part numbers. Further, the RFP also specifically listed in the purchase description various Sargent part numbers comprising the kits. The procurement was negotiated under 10 U.S.C. § 2304 (a)(10) (1982) and the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.210(b)(15) (1984), because of the asserted unavailability of data with which to insure conforming items. A handwritten notation appeared on the determination and findings (D & F) stating that "rights to use data for contracting item from other sources are legally unavailable and cannot be purchased." Further, the solicitation did not provide for the qualification, consideration or evaluation of equivalent items other than the specific Sargent parts described in the purchase description. Thus, from its inception, the procurement was intended and structured as a sole-source acquisition.

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Unknown to Sargent, CEF submitted an unsolicited proposal to the Air Force for its own parts (described by CFE part numbers) which was allegedly functionally equivalent to the Sargent parts. Technical personnel of the Air Force evaluated the unsolicited proposal and found the parts acceptable. Further, without amending the solicitation or otherwise notifying Sargent, the Air Force awarded the contract to CEF. This protest followed.

Sargent argues that it was not provided the opportunity to compete on an equal basis since it also could have offered less expensive "substitute parts" had it received notification from the Air Force of its "less stringent requirements"; that since the Air Force relaxed its requirements and effectively modified its purchase description, an amendment should have been issued; that the agency improperly used proprietary Sargent drawings to evaluate and correct deficiencies in the unsolicited proposal; and that using activities may mistakenly assume in the future that defective CEF parts were manufactured by Sargent, the historical producer, and thereby cause damage to its reputation.

The agency maintains that the contract solicited was the contract awarded because, except for the part number descriptions, the items in CEF's unsolicited proposal were "equal" to the designated Sargent parts and thus the agency's requirements were not "changed." Further, the agency states that it has no obligation "to notify . . . offeror[s] that they have competition." Based on the facts of record, we disagree.

FAR, 48 C.F.R. § 15.606, provides:

> "(a) When, either before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall issue a written amendment to the solicitation . . .
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> . . . . .
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> "(c) If the proposal considered to be most advantageous to the Government . . . involves a departure from the stated

> requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements. . . ."

We think the agency failed to follow this regulation.

First, it is evident that the RFP solicited a proposal from Sargent for items manufactured only by Sargent, and we must therefore assume that Sargent's proposal was submitted in the belief that only items manufactured by Sargent would be acceptable and that the procurement was noncompetitive. Nothing in the solicitation indicated otherwise. It follows that the agency decision to consider the unsolicited proposal based upon items determined to be equal to those manufactured by Sargent operated not only to change the specification requirements but also to transform the procurement from a noncompetitive to a competitive one. Under these circumstances, we believe that the above provisions require amendment of the RFP, notice of the amendment to the supplier initially solicited, and an equitable opportunity for the supplier to amend its proposal to reflect such changes as it may consider appropriate in the light of the changes accomplished by the amendment to the RFP so that it could compete on an equal basis. See 48 Comp. Gen. 605 (1969); 47 Comp. Gen. 778 (1968). This is not a case where the intended sole-source was allegedly prejudiced solely because it was unaware of price competition from other sources and assertedly would have offered a lower price had it been advised of the competition. Rather, the protester here asserts that it also had an "equal" product available, and that it was not permitted to offer its equal product because the agency failed to advise offerors that anything but the specified parts were acceptable. We simply note that Sargent may have offered the government a better bargain on equivalent parts had it been advised of the government's true requirements. See Scanray Corp., B-215275, Sept. 17, 1984, 84-2 CPD ¶ 299. Accordingly, we sustain the protest. Since we sustain Sargent's protest on this ground, we need not consider Sargent's other asserted protest grounds.

At least partly because the agency was approximately 2 months late in filing its report on the protest, we are unable to recommend corrective action since we are advised

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that the contract is 90 percent complete from a cost standpoint. However, we think that the Air Force's acceptance of the unsolicited proposal without any notice to Sargent was unreasonable and thus arbitrary and capricious. Further, since Sargent would have been one of but two offerors under a properly conducted procurement, we find that it would have had a clear and substantial chance for award. Under the circumstances, we think that the Air Force should reimburse Sargent for its proposal preparation costs. See Systems Development Corp. and Cray Research, Inc.--Reconsideration, 63 Comp. Gen. 275 (1984), 84-1 CPD ¶ 368. Sargent should submit substantiating documentation to the Air Force to establish the amount it is entitled to recover.

The protest is sustained.

for Harry R. Van Cleve
Comptroller General
of the United States