



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bachan Aerospace Corporation
File: B-227124
Date: August 31, 1987

DIGEST

1. Where a protester fails to offer any evidence that the agency disclosed the firm's proposed price to another offeror and the agency denies the allegation, the protester's contention is mere conjecture and thus provides no basis to sustain the protest.
2. Waiver of first article testing requirement was reasonable where firm had passed first article test for the same item under an earlier contract. The fact that firm's test under the prior contract was delayed does not detract from the fact that firm passed test for same item.
3. Allegation that award was improper since awardee's price including option quantities was higher than protester's price with option quantities is without merit where, under solicitation, options were not included in the evaluation, award was made for only the basic quantity and the contract included no options and expressly stated that the terms of the solicitation relating to options were deleted.

DECISION

Bachan Aerospace Corporation protests the award of a contract to Arrow Gear Company under request for proposals (RFP) No. DAAJ09-87-R-0180, issued by the Army for 1,222 gears for the T-53 turbine engine. We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation was issued on October 27, 1986, and required offers on the basis of a first article test (item A) and without such a test (item B). The solicitation also included option quantities which, under the terms of solicitation, were not to be evaluated.

Nine proposals were submitted by the January 5, 1987, closing date. Based on a request from the using activity, contracting officials decided to shorten the required delivery schedule. On February 6, a contract specialist informed the offerors of this change by telephone and requested that offerors confirm the new schedule in writing and indicate any price change that would result from the new schedule. All offerors responded as requested. Arrow Gear reduced its prices under both items while Bachan's prices remained the same as initially submitted.

On February 23, the agency issued a written request for best and final offers (BAFO), with a closing date of March 6. The BAFOs of Arrow Gear and Bachan were priced the same as those firms' responses to the contract specialist's February 6 inquiry. Their initial and BAFOs were as follows:

	<u>Initial offer</u>	<u>BAFO</u>
Bachan	Item A (With First Article Test) \$285.00	Item A \$285.00
	Item B \$285.00	Item B \$285.00
Arrow Gear	Item A \$296.94	Item A \$285.50
	Item B \$296.45	Item B \$284.94

Since Arrow Gear's price on item B was the lowest submitted, the contracting officer asked the using activity whether first articles testing could be waived. That office recommended against waiving the requirement for any firm because of unspecified problems under previous gear contracts. The contracting officer accepted this recommendation and declined to waive the first article test requirement for Arrow Gear. Thus, the contract specialist informed Bachan on April 6 that it was the apparent low offeror.

Before the contract was awarded, however, the agency reversed its decision not to waive first article testing for Arrow Gear and awarded the contract to that firm on April 30, as the lowest priced acceptable offeror.

On May 7, contracting officials met with Bachan to respond to Bachan's inquiries concerning this and other Army acquisitions. The agency reports that at that meeting, in response to Bachan's questions about another recent procurement, an agency contract specialist stated that it is common practice for government negotiators to disclose to offerors the government's estimate in negotiated procurements. With respect to the subject solicitation, the agency reports that

contracting officials explained to Bachan that award was made to Arrow Gear since the first article testing requirement was waived based on the firm's having passed a first article test on a prior contract for the same item.

PROTEST GROUNDS

The protester objects to the award to Arrow Gear on several grounds. First, Bachan argues that in view of the agency's admitted practice of disclosing pricing information during discussions and the "narrow undercutting" of Bachan's price by Arrow Gear there is a strong indication that contracting officials informed Arrow Gear of Bachan's lower price before the submission of BAFOs. Bachan contends that this amounted to the use of an auction technique in violation of Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(3) (1986). Further, in this regard, Bachan complains that the agency did not provide for the required common cut-off date for the submission of revised offers after the February 6 discussions concerning the new delivery schedule. Bachan also complains about the agency's decision to waive the first article testing requirement for Arrow Gear and argues that Arrow Gear's offer was unbalanced and thus cannot be accepted. Finally, Bachan argues that the agency should have solicited bids rather than competitive proposals.

ANALYSIS

In response to Bachan's allegations, the contract specialist who informed Arrow Gear of the changed delivery schedule denies that he disclosed Bachan's price or any other pricing information to Arrow Gear. The protester has presented no evidence that the Army disclosed Bachan's price. There is simply nothing in the record other than the close pricing to support the protester's position and we will not find improper action by an agency based on inference or conjecture. Elekta Instruments, Inc., B-226616, Mar. 30, 1987, 87-1 CPD ¶ 365.

Further, we see no harm in the fact that the agency apparently permitted offerors different periods of time to respond to the February 6 discussions. First, BAFOs with a common cut-off date were subsequently requested on February 23. Second, if any offeror benefited because of the February 6 request for revised offers, it was the protester because the record shows that its response was received 1-day after Arrow Gear's response.

Bachan next argues that the agency's decision to waive the first article testing requirement for Arrow Gear was improper. The protester points out that delivery would be

made earlier under a contract without the testing and, according to Bachan, waiving the first article requirement because of earlier delivery is improper as it favors incumbents.

The record does not support the protester's contention that the first article testing requirement was waived solely because of the earlier delivery available without the need for the test. The record shows that the test was waived because Arrow Gear had already passed a first article test for the same item under an earlier contract. The fact that Arrow Gear's test under the prior contract was delayed does not, as the protester implies, detract from the fact that Arrow Gear has indeed passed a first article test for this item. This was a reasonable basis upon which to waive the test. See Baird Corp., B-213233, Dec. 20, 1983, 84-1 CPD ¶ 8. There is nothing wrong with the agency taking advantage of a shorter delivery schedule and a lower price on an item for which it has reasonably determined no first article test is needed. Bachan's argument that the shorter delivery schedule favored incumbents is untimely because the solicitation provided for the shorter delivery schedule where the first article test was waived and the protest was not filed until well after the closing date for submission of initial proposals. Our Bid Protest Regulations require that protests concerning alleged solicitation improprieties be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1987).1/

Bachan also argues that the award was improper since Arrow Gear's price on its option quantities was higher than its base price, so that Arrow Gear's total price, including options, was \$710,459, compared to Bachan's total price, including options, of \$696,540.

The solicitation incorporated the clause set forth in the FAR, 48 C.F.R. § 52.217-3 (1986), which states that options were not included in the evaluation. Thus, in accordance with the terms of the solicitation, option prices were not evaluated and award was made to Arrow Gear as a result of its lower price on the basic quantity. Further, the contract as awarded includes no options and expressly states that the terms of the solicitation relating to options are deleted.

Finally, for the first time in its comments on the Army's report, Bachan argues that Arrow Gear's proposal "may"

1/ The same rule applies to Bachan's untimely allegation that the agency should have solicited sealed bids rather than competitive proposals.

contain information qualifying the firm's offer and protests the Army's evaluation of the proposal. There is nothing in the record to indicate that the awardee's offer was improperly evaluated or accepted.

The protest is denied in part and dismissed in part.

for *Samuel E. Firoo*
Harry R. Van Cleve
General Counsel