

*Sklarew*



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Logitek, Inc.

**File:** B-238773

**Date:** July 6, 1990

Alan M. Lestz, Esq., Witte, Lestz & Hogan, P.C., for the protester.

Charles J. Roedersheimer, Esq., and Mark S. Boyll, Esq., Defense Logistics Agency, for the agency.

Christina Sklarew, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Contracting agency may not relax delivery terms contemporaneous with contract award; where the government relaxes a material solicitation requirement, it must permit all competitive range offerors an opportunity to respond to the revised requirements.

2. Contracting agency may not award a contract on the basis of initial offers where agency engaged in discussions with one offeror by permitting the offeror to make a significant modification to its initial delivery terms.

## DECISION

Logitek, Inc. protests the Defense Logistics Agency's (DLA's) award of a contract to DARE Electronics, Inc. for 50 power-monitor type electromagnetic relays under request for proposals (RFP) No. DLA900-89-R-0833. Logitek contends that the agency improperly relaxed a material delivery term when the award was made and improperly engaged in discussions only with DARE. We sustain the protest.<sup>1/</sup>

<sup>1/</sup> In its initial protest, Logitek also contended that the agency improperly found DARE's offer of an alternate product to be technically acceptable. In the report on Logitek's protest, the agency responded in detail concerning Logitek's allegation, and Logitek, in commenting on the report, did not attempt to rebut the agency's response. We therefore deem this issue abandoned. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

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The RFP, issued on March 29, 1989, described the relay by its national stock number and listed an approved Logitek part number. The RFP contained a "Products Offered" clause allowing offerors to propose alternate products. The RFP contained variable quantity ranges of up to 100 relays and included a delivery schedule requiring the contractor to supply 26 relays within 150 days "after date of the contract," with any balance to be delivered at a rate of 20 each every 30 days thereafter.<sup>2/</sup>

At the time the RFP was issued, Logitek was the sole approved source for this item and for other very similar items. The DLA technical division with responsibility for developing additional sources of supply when there is inadequate competition had previously contacted DARE in connection with another solicitation and had given the firm Logitek's commercial catalog data for one of the similar Logitek approved parts. DARE responded with a reverse engineering effort and developed its own alternate part, which was eventually tested and approved.

Logitek and DARE submitted the only proposals in response to the RFP. Logitek offered its approved part at a unit price of \$1,712 for a quantity of 50 relays, and DARE offered \$1,499. Both offers expired in June 1989. DARE's offer included data indicating that its alternate part conformed with Logitek's catalog data. The agency approved DARE's alternate part in December 1989. The contracting officer found DARE's offer low and in conformance with the RFP and decided to award the contract to DARE on the basis of initial offers. He therefore requested that DARE revive and extend its offer. DARE did so.

As stated above, the RFP required delivery of 26 relays within 150 days "after date of the contract," with any balance to be delivered at a rate of 20 each every 30 days thereafter. DARE's initial offer had complied with this requirement. However, a few days before the contract was awarded, DARE submitted a modification to its offer, proposing delivery of 26 pieces within "150 days ARO" (after receipt of order), with the balance at the rate of 25 pieces every 30 days thereafter. The agency accepted the new delivery terms, incorporating the modification when it awarded the contract to DARE.

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<sup>2/</sup> The agency awarded the contract for a quantity of 50 relays.

Logitek contends that the award to DARE was improper because it was based on a delivery schedule of 150 days ARO, rather than the 150 days after the date of the award that was required in the RFP. The protester argues that the relaxation of the delivery schedule resulted in an award based on requirements other than as stated in the solicitation. Logitek requests therefore that the award be terminated and the procurement be reopened, affording both offerors the opportunity to submit best and final offers (BAFOs).<sup>3/</sup>

The parties do not dispute that the delivery term "ARO" or "after receipt of order" means "after receipt of notice of contract award." See Railway Specialties Corp., B-212535, Oct. 31, 1983, 83-2 CPD ¶ 519. In this regard, the RFP here specifically stated that the government would evaluate an offer that proposed delivery based on the contractor's receipt of the contract or notice of award by adding 5 days for delivery of the award document through the ordinary mails. This RFP provision was consistent with Federal Acquisition Regulation (FAR) § 12.103(e) which requires an agency, when the required delivery schedule in an invitation for bids is based on the date of the contract, to evaluate bids offering ARO delivery dates by adding 5 days for the delivery of the notice of the award through ordinary mails. See AMP Inc., B-230120, Feb. 17, 1988, 88-1 CPD ¶ 163. We therefore find that DARE, under the specific terms of the RFP, unilaterally added 5 days to the delivery schedule in its offer when it replaced the term "after date of the contract," with the term "ARO." In other words, the contract as awarded permitted DARE a maximum delivery term of 155 days after the award date, instead of the 150 days required under the RFP. We do not think that the agency should have awarded the contract to DARE based on its modified proposal.

Award must be based on the requirements stated in the solicitation, Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96, and an agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. Marisco, Ltd., B-235773, June 26, 1989, 89-2 CPD ¶ 8. Delivery is considered to be a material term of a solicitation, and award generally cannot be made on the basis of a proposal

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<sup>3/</sup> Logitek only discovered the modified delivery terms in the awarded contract upon receiving the agency report in response to its initial protest which was based on other grounds. Logitek then submitted this additional basis of protest.

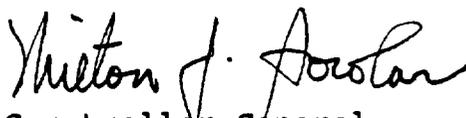
that takes exception to a required delivery schedule. Id. Here, the RFP explicitly required delivery of the first 26 items within 150 days, and DARE was unilaterally permitted to offer 155 days. We therefore conclude that DARE's modified offer should not have been found acceptable under the terms of the RFP and that the agency relaxed a material solicitation requirement by awarding to DARE on the basis of its modified offer. We think this is the case, even though, as the agency states, the total quantity would be delivered earlier than provided for in the RFP.

The agency's primary argument in support of its award to DARE is that Logitek was not prejudiced by the acceptance of DARE's modified delivery schedule. We disagree.

Under applicable regulations, contract award may not be made on the basis of initial offers received if discussions are held with any offeror. FAR § 15.610(a)(3) (FAC 84-16). Here, DARE's submission of and the agency's acceptance of revised delivery terms represented discussions with DARE because it resulted in a material modification to DARE's proposal. The agency's acceptance of the modification also indicates the agency's willingness to accept a delivery schedule different from that stated in the RFP; this should have been communicated to all offerors, who then should have been given the opportunity to submit a BAFO. See Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604.

We find that the appropriate course of action to remedy this situation is for DLA to now amend the RFP's delivery schedule to state the agency's actual needs and request BAFOs from both offerors. If, on the basis of these BAFOs, Logistic is in line for award, DARE's contract should be terminated for the convenience of the government. We also find that Logitek is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

The protest is sustained.

*for*   
Comptroller General  
of the United States