GAO

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Israel Aircraft Industries, Ltd.

File: B-239211

Date: July 30, 1990

Melvin Rishe, Esq., and Alan M. Grayson, Esq., Fried, Frank, Harris, Shriver, and Jacobson, for the protester.
John P. Warren, Jr., Esq., for Minowitz Manufacturing Co., an interested party.
Vera Meza, Esq., and Capt. Rodney A. Grandon, Esq., Department of the Army, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an amendment relaxing the specifications for a national stock number item does not explicitly request competitive range offerors to submit their best and final offers (BAFOs), but contains language giving notice of a common cutoff date for receipt of revised offers, the amendment has the intent and effect of a request for BAFOs; under the circumstances in which the amendment was issued (after completion of preaward survey, where solicitation provided for award to lowest-priced, responsible offeror), protester had no reasonable basis for alleged expectation that BAFOs would not be requested until discussions were held.

DECISION

Israel Aircraft Industries, Ltd. (IAI) protests the award of a contract to Minowitz Manufacturing Co., under request for proposals (RFP) No. DAAE07-89-R-A207, issued by the Department of the Army for mine clearing blades. IAI objects that the Army acted improperly by awarding the contract without first clearly requesting best and final offers (BAFOs), thereby depriving IAI of the opportunity to revise its initial proposal. We deny the protest.

The solicitation was issued for 140 M1 mine clearing blades, which the protester previously had supplied to the Army under a sole-source contract. The RFP, which incorporated

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specifications provided by IAI at the Army's request, so that the procurement could be conducted competitively, stated that the award would be made to the lowest-priced, responsible offeror. Of the five offerors that responded to the RFP, the Army determined that four were in the competitive range and conducted preaward surveys of all four firms. After the Army had completed the preaward surveys of Minowitz and IAI, and while surveying another firm, the Army determined that certain quality assurance specifications should be relaxed, and issued amendment No. 7 to indicate the changes in specifications. Amendment No. 7, which the Army sent to each of the four offerors in the competitive range, is the subject of IAI's protest.1/

Amendment No. 7, among other things, relaxed RFP specifications by substituting American technical standards for the foreign standards originally used in the data package provided by IAI, an Israeli company. The amendment included the following preprinted language in Block 11 of Standard Form (SF) 30:

> "The . . . solicitation is amended as set forth in [the attachment]. The hour and date specified for the receipt of Offers is extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified . . . . If by virtue of this amendment you desire to change an offer already submitted, such change [must be received] prior to the opening hour and date specified." (Emphasis added.)

The attachment to the amendment, consisting of a typewritten list of modifications to the RFP, concluded with the typewritten statement,

> "Due to the lengthy evaluation period, it is requested your bid acceptance period be extended to April 20, 1990. . . . Deadline for reply to this Amendment is 9 March, 1990 at 3:00 P.M." (Emphasis added.)

1/ Amendment Nos. 1 through 6, incorporating minor changes or clarifications to the RFP, all had been issued prior to the submission of proposals.

All four offerors acknowledged the amendment; two of the four revised their initial prices as follows:

	FOB Origin	FOB Destination
Minowitz	$53,872	$54,622 (no change)
Offeror A	(none)	$62,062 (increased by $5,630)
IAI	$56,432	$58,382 (no change)
[If first article testing waived]	[$55,932]	[$57,822](no change)
Offeror B	$57,740 (lowered by $4,215)	$58,490 (lowered by $5,029)

The Army awarded the contract to Minowitz as the lowest-priced, responsible offeror.2/

IAI objects that the Army improperly failed to issue a formal request for BAFOs and thereby deprived it of the opportunity to submit its best price. The protester states that its practice, for competitive reasons, is not to propose its most favorable price until the time set for the submission of BAFOs. IAI asserts that, absent a formal request for BAFOs and in view of the fact that the agency had not yet held discussions, it had no reason to know that BAFOs were expected or required in response to amendment No. 7; consequently, IAI merely acknowledged the amendment without making the downward price revision that it intended to make when the agency called for BAFOs. IAI asserts that it was prejudiced by the agency's failure properly to request BAFOs; IAI believes the amendment significantly relaxed specifications, and states it thus would have lowered its price substantially in response to a clear BAFO request.

The Army concedes that it failed to make a formal request for BAFOs. It argues, however, that the language of amendment No. 7 was sufficient to indicate that BAFOs were being requested; particularly since it provided clear notice of a common cutoff date for the submission of revisions to initial proposals to reflect the changes made by the amendment. Consequently, according to the agency, offerors could not reasonably assume that they would be

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2/ The RFP provided for evaluation of both FOB origin and FOB destination prices; Minowitz's FOB origin price was found to be the most advantageous to the government and was the basis for the award.

given another opportunity to submit their best price. We agree with the Army.

Generally, in a negotiated procurement, a contracting agency must conduct written or oral discussions with all offerors whose initial proposals are in the competitive range before awarding a contract. See Federal Acquisition Regulation (FAR) § 15.610(b); see also A.T. Kearney, Inc., B-237731, Mar. 19, 1990, 90-1 CPD ¶ 305. Where, however, the contracting agency identifies no significant technical deficiencies in the proposals, discussions may be limited to an opportunity to submit revised proposals. American KAL Enters., Inc., B-232677.3, Feb. 3, 1989, 89-1 CPD ¶ 112. In that regard, contracting officers are required to issue requests for BAFOs to all offerors still remaining in the competitive range, which requests must indicate that discussions are completed, state that this is an opportunity for offerors to submit BAFOs, and set a common cutoff date and time for submission of written BAFOs. FAR § 15.611; see A.T. Kearney, Inc., B-237731, supra. Here, since it is undisputed that the Army found no technical deficiencies in the proposals of the competitive-range offerors to which it sent amendment No. 7, under the FAR, discussions could be limited to an opportunity to submit revised proposals. American KAL Enters., Inc., B-232677.3, supra. The issue, therefore, is whether amendment No. 7 reasonably provided that opportunity.

Where, as here, an amendment to a solicitation does not specifically request offerors to submit their BAFOs, language giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of a request for BAFOs. See Associated Chem. and Envtl. Servs., et al., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248; James R. Parks Co., B-186031, June 16, 1976, 76-1 CPD ¶ 384.

Amendment No. 7 advised offerors that "the hour and date specified for receipt of offers is extended to . . . " and that, "if by virtue of this amendment you desire to change an offer already submitted, such . . . change [must be received] prior to the opening hour and date specified." This language clearly constituted notice to all offerors of a common cutoff date for receipt of revised offers. See Associated Chem. and Envtl. Servs., et al., 67 Comp. Gen. 314, supra. Indeed, we previously have held that merely advising offerors of a deadline for "receipt of offers" is sufficient notice. James R. Parks Co., B-186031, supra.

IAI argues that the amendment language is standard, preprinted language that is included in every amendment that

makes changes to specifications after the receipt of initial proposals, and that the same language was included in this procurement in amendment Nos. 1 through 6, which clearly were not requests for BAFOs. Consequently, according to IAI, the use of the same standard language in amendment No. 7 should not be viewed as notice that the agency was now requesting BAFOs. We disagree.

First, amendment No. 7 included additional language which the other amendments did not, namely, "Deadline for reply to this Amendment . . . ." This reference to a deadline, unlike the standard language cited by IAI, was typewritten at the bottom of the list of modifications to the specifications. Moreover, amendment Nos. 1 through 6 made only minor changes to the solicitation, and were issued before the submission of initial proposals; they therefore clearly could not have been BAFO requests. Amendment No. 7, on the other hand, was issued after the evaluation of initial proposals had commenced and after IAI's own preaward survey had been completed. In this latter regard, we think that the conducting of a preaward survey--to determine the acceptable offerors' responsibility--reasonably should have put IAI on notice that the Army would not be holding discussions, and that the amendment therefore was a request for BAFOs. Further, it does not appear that offerors should have had any particular expectation that discussions would be held, given that the solicitation was based on a detailed specification for an item IAI previously had supplied; elaborate technical proposals thus were not required; and award was to be made to the low, technically acceptable offeror. Finally, we note that two other firms revised their prices in response to the amendment. Given these circumstances, the amendment No. 7 language reasonably should have conveyed to IAI the fact that this was a BAFO request. See American KAL Enters., Inc., B-232677.3, supra.

IAI argues that the circumstances here are similar to those in Woodward Assocs., Inc.; Monterey Technologies, Inc., B-216714; B-216714.2, Mar. 5, 1985, 85-1 CPD ¶ 274, aff'd, Woodward Assocs., Inc.--Recon., B-218348.2, Apr. 11, 1985, 85-1 ¶ 415. There, however, the agency's alleged BAFO request was by telephone, and the agency and protester disputed the information given. We found the notice inadequate because the agency had no contemporaneous record of the telephone conversation; we thus could not determine what was communicated to each of the offerors. Further, we noted that FAR § 15.611, while somewhat ambiguous as to what is required, clearly contemplates a written notification that revised offers are to be submitted, which requirement was not satisfied by a telephone call. Neither

of these circumstances is present in the case of amendment No. 7, where neither the lack of written notification nor uncertainty as to what was communicated is a factor.

The protest is denied.

Robert P. Worth

for James F. Hinchman
General Counsel