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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Peckham Vocational Industries, Inc.

File: B-257100

Date: August 26, 1994

Joseph C. Luman, Esq., for the protester.
Joel R. Feidelman, Esq., and Brian "D" Henretty, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Daun-Ray Casuals, Inc., an interested party.
Gweyn Colaberdino, Esq., Robert E. Sebold, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the proposal.

DIGEST

Protester was not reasonably misled by discussions with contracting agency on a solicitation containing mandatory options, notwithstanding that the protester alleges that the agency apprised it that its option-pricing contingency would be acceptable, where the record shows that the agency did not provide this alleged advice, which was in any case inconsistent with the solicitation's option clause.

DECISION

Peckham Vocational Industries, Inc. protests the award of a contract to Daun-Ray Casuals, Inc. under request for proposals (RFP) No. DLA100-93-R-0204, issued by the Defense Logistics Agency, Defense Personnel Support Center, for chemical protective underwear. Peckham argues that the agency improperly misled it during discussions into believing that the firm's option-pricing contingency would be acceptable.

We deny the protest.

The solicitation, issued on June 1, 1993, contemplated award of a fixed-price contract for two-piece chemical protective underwear for use by the Army. This underwear is to be fabricated, in part, from Lanx I, a material proprietary to the DuPont Champion Die Works. The basic quantity contained in the amended solicitation was 107,420 undershirts and 107,420 pairs of drawers, with mandatory options for

identical quantities of each item. Under the solicitation, award would be made to the offeror whose offer was most advantageous to the government, price, technical, quality, and other factors considered.

The RFP's section I included a clause entitled "Option for Additional Quantity," which informed the offerors that acceptance of the option provisions was mandatory. The clause also stated that offerors could propose option prices that differed from the prices for the basic requirement, and that these option prices could vary with the quantities actually ordered and the dates when ordered. Finally, the clause informed offerors that the contracting officer could exercise the option at any time by notifying the contractor no later than 60 days before the final scheduled delivery, taking into account any written adjustment to the basic delivery schedule made by the government. Under the delivery schedule in the amended solicitation, items could be delivered as late as 675 days after the date of award.

The agency received nine proposals by the November 30 extended closing date. While all offerors submitted a unit and total price for each line item, as well as a total price for all line items, Peckham's initial offer also contained pricing contingencies for both the basic and option quantities. Peckham offered three separate option-pricing scenarios.[1] The first scenario was contingent on exercise of the option in the last half of 1995 or early 1996 with all material for the option years to be purchased in 1996 so the firm could purchase the material from DuPont at 1996 prices; the continuance of progress payments; and the absence of conflict concerning material manufactured in 1996; and shelf life and surveillance date requirements produced in the option years. The second option-pricing scenario contained the same contingencies, except that in place of the first contingency, this option price was based on the exercise of the option too late to take advantage of all 1996 material prices (i.e., presumably after early 1996 such that only some material could be ordered in 1996 and the remaining material would be ordered in 1997). The third option-pricing scenario was contingent upon obtaining the material at 1997 prices. Peckham was the lowest-priced offeror under all of its scenarios, and Daun-Ray was second low; the proposals of both offerors were rated marginally acceptable overall after the initial technical evaluation.

A competitive range of eight offers was established, and discussions commenced on March 8, 1994. Amendment No. 0004,

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[1]The contingencies Peckham placed on the basic quantities are not at issue here, as they were not present in the firm's best and final offer (BAFO).

issued on March 10, allowed for the possibility of separate awards for the shirts and drawers. The agency's March 10 discussion letter to Peckham stated:

> "You are requested to review your offered price for the basic and option. You are requested . . . to remove all contingencies from your offer regarding DuPont's quote, [p]rogress [p]ayments, shelf life, and first article submission. Additionally, you are requested to submit specific dates by which the [g]overnment is required to exercise the option quantity in order to obtain the various option prices listed."

After discussions, offerors were permitted to submit separate prices for each award scenario (award of both items or award of each item separately). This time, all offerors submitted a unit and total price for each line item, along with total prices for each scenario, and Peckham was again the lowest-priced offeror under each scenario. However, Peckham's revised offer stated:

> "All contingencies . . . regarding DuPont's quote, progress payments, shelf life and first article submission are removed from the revised pricing proposal.
>
> . . . . .
>
> "Option pricing based on DuPont 1996 [m]aterial price . . . and [o]ption being exercised by November 1995 as add on to base quantity."

The revised technical evaluation did not alter the overall technical ratings of Peckham and Daun-Ray.

On March 29, the contracting specialist, Thomas Hutchinson, telephoned Peckham's deputy director, Mitchell Tomlinson, to notify him of the issuance of a letter requesting the submission of BAFOs. Mr. Hutchinson states that during that conversation, he went over the contents of the letter, including the paragraph concerning the qualification on the option price, and explained the operation of the invocation of option clause by way of example, that an award on March 31 would allow the government to exercise the option through December 1995. The agency's March 29 request for BAFOs to Peckham stated:

> "It is requested that the qualification 'Option pricing based on DuPont 1996 [m]aterial price . . . and Option being exercised by November 95' be removed or restated. Based on a 31 Mar 94 award, the Government could exercise the option as

> late as December 1995. The solicitation states that the option may be exercised at any time and from time-to-time, up to the maximum amount cited in the Schedule, by mailing notification to the contractor no later than 60 calendar days before the final scheduled delivery, taking into account any written adjustment to the basic delivery schedule made by the Government."

At the conclusion of the letter, a handwritten notation asked Peckham to "please extend the acceptance time of your offer until 08 April 1994."

On March 30, Mr. Hutchinson spoke by telephone with both Mr. Tomlinson and Peckham's marketing director, Karen Jury. Mr. Hutchinson states that they discussed the deficiencies in the clauses that had been submitted by Peckham, and that he again used his example to explain why any finite date in the option-pricing contingency would not be acceptable.

Peckham's BAFO price, including options, for both items was $29,137,675, and Daun-Ray's was $32,548,260.[2] The proposals of both offerors were rated marginally acceptable overall. However, in its BAFO, Peckham restated its option qualification as follows:

> "[Peckham's] qualification 'Option pricing on DuPont 1996 material price . . . and option being exercised by November 1995' is hereby restated. The new qualification reads - Option pricing based on DuPont 1996 material price . . . and option being exercised by the end of December 1995."

The agency found this qualification of the option clause was inconsistent with terms of that clause and the delivery schedule and Peckham's proposal therefore could not be considered for award, notwithstanding its low price. Award was made to Daun-Ray on April 14, and this protest followed. Performance of the contract has been suspended pending resolution of this protest.

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[2]The separate prices were as follows:

	Shirts	Drawers	Total
Peckham	$16,350,398	$16,088,293	$32,438,691
Daun-Ray	17,831,720	16,757,520	34,589,240

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132; Sonshine Enters., B-246268, Feb. 26, 1992, 92-1 CPD ¶ 232; Sea Containers Am., Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45. Mandatory option provisions are material terms of a solicitation. See Environmental Health Research & Testing, Inc., B-246601, Mar. 10, 1992, 92-1 CPD ¶ 274; UpSide Down Prods., B-243308, July 17, 1991, 91-2 CPD ¶ 66; Areawide Servs., Inc., B-240134.4, Sept. 4, 1990, 90-2 CPD ¶ 182.

Here, the protester's proposal was explicitly contingent on the government's exercising the option by the end of December 1995. The RFP's basic delivery schedule provided for final delivery within 675 days after award. Since award was made on April 14, 1994, the basic delivery schedule allowed for exercise of the option as late as December 20, 1995. However, the option clause also provides for the possibility that this basic delivery schedule could be revised and, thus, that the option could be exercised after December 1995. As a result, the protester's contingency concerning its option pricing took exception to a material term, rendering it unacceptable.

Peckham does not dispute the materiality of the option provision, but argues that the agency misled it during discussions into believing that its last stated option-pricing contingency was acceptable. Peckham contends that while the agency's March 10 discussion letter clearly asked the firm to remove all contingencies from its offer regarding DuPont's quote, progress payments, shelf-life and first article submissions--which it did--the letter did not mention Peckham's qualifications concerning the option as a contingency that the government could not accept. Instead, the agency asked Peckham to submit specific dates by which the government would be required to exercise the option. Peckham asserts that it complied with this request by submitting a revised proposal that required the option to be exercised by November 1995. Peckham further contends that the March 29 request for BAFOs basically repeated these instructions regarding the option contingency, in asking that the option cutoff of November 1995 be removed or restated, as, based on a March 31, 1994, award, the government could exercise the option as late as December 1995. Peckham asserts that it complied with this request by restating its option date to the end of December 1995.

In a negotiated procurement, contracting agencies are required to conduct meaningful discussions, advising offerors whose proposals are in the competitive range of

weaknesses, excesses, or deficiencies in their proposals and affording them an opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation § 15.610; ITT Federal Servs. Corp., B-250096, Jan. 5, 1993, 93-1 CPD ¶ 6; W.M. Schlosser Co., Inc., B-247579.2, July 8, 1992, 92-2 CPD ¶ 8. However, an agency may not inadvertently mislead an offeror, through the framing of discussion questions, into responding in a manner that does not address the agency's concerns. E.L. Hamm & Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156; Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424.

We agree that the written discussion letters could have been clearer, but we do not think Peckham could reasonably believe that its limitation on the government's exercise of the option of no later than December 1995 was acceptable under the RFP or pursuant to the discussion letters.

First, as to the March 10 letter, the agency states that its request that Peckham submit "specific dates by which the government would be required to exercise the option" was made in accordance with the option clause. As discussed above, that clause allowed offerors to submit option prices that differed from the prices for the basic requirement, and stated that these option prices could depend upon the dates when the options were ordered. Since Peckham's initial offer did not provide specific dates for its option-pricing contingencies, but, instead, vague references such as "early 1996," Peckham was asked to provide these specific dates in the March 10 letter. We agree with the agency that it is simply unreasonable for Peckham to have assumed, as it assertedly did, that this request was intended to elicit a finite date after which the option could not be exercised.

Second, the option clause contained in the solicitation clearly entitles the contracting officer to exercise the option by notifying the contractor no later than 60 calendar days before the final scheduled delivery, "taking into account any written adjustment to the basic delivery schedule made by the government." Despite the clarity of this language, Peckham's revised proposal, if accepted, foreclosed the government's right to exercise the option past November 1995, even though the government had otherwise reserved to itself the right to extend the basic delivery schedule. As a result, the March 29 request for BAFOs asked Peckham to remove or restate its option-pricing contingency because, if award were made on March 31, the day after BAFOs were received, the government could exercise the option as late as December 1995; the March 29 letter also quoted the pertinent section of the option clause, which made it apparent that the option clause's allowance of an extended delivery schedule left open the possibility that the option

might be exercised after December 1995. The handwritten notation at the end of the letter, asking Peckham to extend its acceptance period to April 8, 1994, also indicates that award might not be made until well after March 31, thereby effectively extending the period during which the government could exercise the option beyond the example of December 1995 stated in the discussion letter. Thus, we think that a reading of all of the language in the discussion letter, including the request for an extended proposal acceptance period, should reasonably have alerted the protester to the possibility that the option might be exercised in January 1996, or even later if the basic contract delivery schedule were extended, such that the contingency that the option pricing was only effective if exercised by December 1995 would be unacceptable. See General Research Corp., B-253866.2, Dec. 17, 1993, 93-2 CPD ¶ 325.

While the protester argues that the option clause is not clear, we note that in testimony given during a hearing before this Office (discussed further below), Ms. Jury, who was responsible for preparing the firm's proposal, could not be certain whether she had read the clause prior to receipt of the March 29 letter. Hearing Transcript (Tr.) at 93, 108-111. Further, when asked how the March 29 letter's reference to December 1995 could be reconciled with the language in the option clause, she stated that she "did not even look at that option clause or even consider that clause or that information," because both she and Mr. Tomlinson were "zeroing in" on whether they should remove the option-pricing contingency or restate it. Tr. at 98-99. Offerors are required to read and be familiar with the terms of solicitations for federal government contracts. See Peak Inc., 71 Comp. Gen. 190 (1992), 92-1 CPD ¶ 124.

Peckham also asserts that during the above-discussed telephone conversations with the contracting specialist, its representatives were told that the option-pricing contingency contained in the firm's BAFO was acceptable. As a result, Peckham argues that it was misled into submitting such a contingency. The contracting specialist denies that he made any such statements.

The conflict concerning what was said in these telephone conversations was a subject of the hearing, at which there was conflicting testimony as to whether Mr. Hutchinson told Peckham's representatives that its option-pricing contingency would be acceptable. Mr. Hutchinson testified that Peckham's representatives never asked him if December 1995 would be acceptable, and that he never told them that it would be acceptable. Tr. at 29-33, 52. Peckham's representatives testified that they did specifically ask him this question, and that he did tell

them that the option-pricing contingency would be acceptable. Tr. at 95, 113, 117-118, 128.

The record shows that Mr. Hutchinson, in both discussion letters and in his telephone conversations, led Peckham into the deficient areas of its proposal, and specifically referred the firm to the relevant passage from the option clause. His testimony at the hearing--that he did not advise Peckham's representatives that its option contingency was acceptable--was credible. On the other hand, while we have no basis to doubt Peckham's representatives' testimony that their impression of the telephone conversations was that Mr. Hutchinson indicated that the contingency would be acceptable, both Mr. Tomlinson's and Ms. Jury's testimony clearly showed a lack of understanding of the option clause and of the federal procurement process generally. As a result, we think it likely that their understanding of Mr. Hutchinson's comments during the telephone conversations at issue was impaired by their failure to fully understand the terms of the option clause. Based on the record, we conclude that DLA did not mislead Peckham during these discussions.

Moreover, even if DLA had advised Peckham that its option-pricing contingency would be acceptable, we find that Peckham's reliance on such advice would have been misplaced and unreasonable. 12th & L Sts. Ltd. Partnership, B-247941.3, Oct. 9, 1992, 92-2 CPD ¶ 233; see generally Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16; Capstone Corp., B-247902, July 9, 1992, 92-2 CPD ¶ 12. This is so because, as discussed above, the RFP's option clause clearly put offerors on notice of the possibility that option items could be ordered beyond December 1995, and the alleged DLA advice would constitute a material deviation from the clause without an appropriate amendment to the RFP.

While the protester argues that DLA had a duty to expressly advise Peckham that it could not propose a finite date after which the government could not exercise the option, we think that the agency imparted enough information to the offeror to afford it a fair and reasonable opportunity to identify and correct this deficiency in its proposal, particularly given that a fair reading of the option clause and the delivery schedule would have made apparent that the

contingencies proposed by Peckham were unacceptable. See Satellite Transmission Sys., Inc., 70 Comp. Gen. 624 (1991), 91-2 CPD ¶ 60; Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel