



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Ensign-Bickford Company

File: B-275423

Date: February 20, 1997

Paul J. Seidman, Esq., and Robert D. Banfield, Esq., Seidman & Associates, for the protester.

Susan Spiegelman-Boyd, Esq., Department of the Navy, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Nonreceipt of solicitation amendment provides no basis to sustain protest where agency followed established procedures for disseminating amendments.
 2. Protest of agency's addition to awardee's contract of the authorization and consent clause at Federal Acquisition Regulation § 52.227-1, allowing contractors to manufacture or use in performing the contract inventions covered by a United States patent, is denied where the protester does not allege that its quotation would have been different had the clause been included in the solicitation and accordingly there is no basis for finding that the protester was competitively prejudiced.
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DECISION

The Ensign-Bickford Company (EBCo) protests the issuance of a purchase order to Shock Tube Systems, Inc. (STS) under request for quotations (RFQ) No. NOO164-96-Q-0299, issued by the Department of the Navy for detonators. EBCo contends that the agency failed to provide it with a copy of an amendment and improperly agreed to the awardee's request to include in its contract a Federal Acquisition Regulation (FAR) provision regarding use of patents.

We deny the protest.

The agency issued the RFQ on May 2, 1996 as a 100-percent small business set-aside for six line items of detonators.¹ On June 24, the Navy amended the RFQ to

¹Contract line item numbers (CLIN) 001-003 were for dual lead detonators of 50-, 100-, and 500-foot length; CLINs 004-006 were for single lead detonators with 3.8-, 6.4-, and 9.6-second delays.

dissolve the set-aside. The Navy issued a second amendment on August 22, which is at issue in this protest. The record indicates that the purchasing agent prepared a version, which she faxed to five potential sources, adding CLINs 007-009 for three different EBCo detonators, manufactured in accordance with the protester's drawings. Because the first version incorrectly carried the number "-001," she prepared and issued a second version numbered "-002." After reviewing the amendment, the agency's requiring technical activity advised her that the phrase "brand name or equal" should have appeared after the EBCo part number. She again revised and issued the amendment. EBCo states that it never received this version.²

The agency received two responses, one from the protester and one from the eventual awardee. The awardee submitted a quote conditioned upon inclusion of the clause at FAR § 52.227-1, Authorization and Consent, which permits a contractor to manufacture or use in the contract, without liability, inventions covered by a United States patent if the specifications require their use.³ On October 1, the agency issued a purchase order for four CLINs--001, 002, 007 and 008--to STS.⁴ On October 10, the agency issued a modification adding the FAR § 52.227-1 clause. This protest by EBCo followed.

We find no basis for sustaining the protest. First, a prospective bidder bears the risk of not receiving a solicitation amendment unless the record shows that the contracting agency made a deliberate effort to exclude the firm from competing or that the agency failed to follow reasonable established procedures for distribution of amendments. Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374. There is no evidence here that the agency made any deliberate effort to prevent EBCo from competing; indeed, the agency specified the protester's brand name parts. Further, the record shows that the agency has a reasonable procedure in place to disseminate amendments to offerors and there is no evidence that the agency did not follow its procedures in transmitting the version of the amendment that EBCo did not receive.

²The purchasing agency subsequently learned that this third version, like the first, was incorrectly numbered "-001" and prepared a fourth version, with the correct number; this version was apparently not transmitted but was placed in the procurement file.

³This provision is related to 28 U.S.C. 1498(a) (1994), which provides that, if the government consents to use of a patent in performance of a contract, the patent holder's recourse is against the government, not the contractor. Diversified Technologies; Almon A. Johnson, Inc., B-236035, Nov. 6, 1989, 89-2 CPD ¶ 427.

⁴EBCo received an award for CLIN 0003; the other CLINs were canceled.

In this regard, the purchasing agent states that, when issuing an amendment, she works from the list of prospective offerors to whom the solicitation was issued, preparing a gummed label with the telephone number for each firm's facsimile machine. For each firm, she attaches a label to the amendment, submits it for transmission, and then receives the amendment back from the facsimile machine. The purchasing agent states that, to the best of her recollection, she followed this process for all offerors. In addition, agency telephone records reflect calls to the protester's facsimile machine on the date the revised version of the amendment was transmitted to the offerors. While the record provides no explanation for EBCo's nonreceipt of the amendment version in question, we cannot conclude, in light of the facts presented, that the agency does not have reasonable amendment dissemination procedures in place or that it failed to follow the procedures here. Therefore, EBCo's failure to receive the amendment does not provide a basis for sustaining the protest.

As for the agency's decision to incorporate the FAR § 52.227-1 clause into the contract. EBCo complains that the addition of the clause made it easier for the awardee to compete. We will not sustain a protest based upon a change or relaxation of a requirement for a competing vendor unless there is evidence of resulting prejudice to the protester, i.e., that the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the change. Astro-Med, Inc.--Request for Recon., B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545. EBCo does not assert that it would have changed its quotation had the agency included the FAR § 52.227-1 clause in the RFQ. Accordingly, notwithstanding what the awardee might have done had the clause not ultimately been incorporated, this record provides no basis to conclude that the protester was competitively prejudiced by what occurred here.

The protest is denied.

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