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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: ECI Defense Group

File: B-400177; B-400177.2

Date: July 25, 2008

Howell Roger Riggs, Esq., Timothy P. Pittman, Esq., and Kimberly A. Ford, Esq., Dick Riggs Miller LLP, for the protester.

Elan D. Taylor, Esq., and Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Offeror's failure to acknowledge a material amendment to a request for proposals which significantly altered the government's guaranteed minimum quantity renders the proposal unacceptable.
 2. Protester is not an interested party to maintain protest challenging proposal evaluation where it did not acknowledge material amendment; protester would be ineligible for award even if protest of evaluation were sustained.
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DECISION

ECI Defense Group protests the award of a contract to Thomas Instrument under request for proposals (RFP) No. SPM4A7-07-R-1322, issued by the Defense Supply Center Richmond (DSCR), Defense Logistics Agency, for aircraft actuator screwshaft assemblies. ECI argues that the agency's evaluation of offerors' proposals was improper.

We dismiss the protest on the basis that the protester is not an interested party to challenge the award to Thomas Instrument.

The RFP, issued on August 30, 2007, contemplated the award of a fixed-price, indefinite-quantity contract for a base year and four 1-year options. The solicitation informed offerors of the agency's estimated quantity (252), guaranteed minimum quantity (63), minimum delivery order quantity (63), maximum delivery order quantity (252), and maximum quantity (504) for the base year, as well as similar estimated, minimum delivery order, maximum delivery order, and maximum

quantities for the option periods. The RFP identified two evaluation factors of equal importance: price (to be based on the solicitation's estimated quantities) and past performance. Award was to be made to the responsible offeror whose proposal was determined to represent the "best value" to the government, all factors considered. RFP at 2, 20, 24-25. Also relevant to the protest here, the RFP established a delivery schedule of 150 days after receipt of order for the first article requirement, and 200 days after first article approval for production quantities.¹ Id. at 3.

ECI submitted its proposal by the December 17 closing date. As part of its proposal, ECI both requested a waiver of the first article requirement (based upon prior approval), and stated that it would make deliveries 372 days after receipt of order. Agency Report (AR), Tab 4, ECI Proposal, Nov. 26, 2007, at 1, 5. DSCR subsequently granted ECI's first article waiver request. Id., Tab 15, DSCR Email to ECI, Jan. 17, 2008, at 1. On March 14, 2008, ECI modified its proposal by clarifying its pricing and by changing its delivery schedule to 386 days after receipt of order.² Id., Tab 9, ECI Email to DSCR, Mar. 14, 2008, at 3.

On April 22, by amendment No. 0005, the agency changed the base year's guaranteed minimum quantity from 63 to 250 assemblies (in comparison to the unchanged estimated quantity of 252 units) and established a revised closing date of April 29. The amendment also included a pricing table by which offerors could revise their prices. RFP amend. 5, at 1-2. ECI did not submit amendment No. 0005, and thereby either modify or confirm its pricing in light of the change to the base year's guaranteed minimum quantity, by the April 29 closing date. Instead, ECI signed and returned amendment No. 0005 on April 30 without modifying its pricing. AR, Tab 13, ECI amend. 5, Apr. 30, 2008.

The agency evaluated the proposals of ECI, Thomas Instrument, and a third offeror. DSCR determined that ECI was ineligible for award because the firm had failed to respond to amendment 0005 in a timely manner. AR, Tab 16, DSCR Evaluation Report, at 2. The agency also found ECI's proposal to be "non-responsive"³ for

¹ The solicitation also included a schedule for the agency test and evaluation of the contractor's first article submission. Id. at 3.

² ECI proposed tiered pricing based on the number of assemblies actually purchased by the agency.

³ While DSCR rejected ECI's proposal as "non-responsive," the record is clear that the solicitation here employed negotiated procedures pursuant to FAR Part 15. Accordingly, references to "nonresponsiveness" are inappropriate, since this concept is not applicable to negotiated procurements. See Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 6 n.12; Marshall-Putnam Soil & Water Conservation Dist., B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90 at 4-5.

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failing to comply with the RFP's delivery schedule: ECI had proposed deliveries 386 days after receipt of an order while, in light of the waiver of the first article requirement, the RFP in effect required ECI to make deliveries 200 days after receipt of an order. *Id.* DSCR concluded that Thomas Instrument's proposal represented the best value to the government. *Id.* at 5. This protest followed.

ECI protests the agency's determination that its proposal was unacceptable. Specifically, the protester argues that its proposal did in fact comply with the solicitation's delivery schedule and represented the best value to the government based on its more favorable pricing.⁴ Protest, May 20, 2008, at 2-4. Additionally, ECI protests that DSCR employed unstated evaluation criteria in its evaluation of offerors' proposals.⁵ Protest, June 30, 2008, at 2-4.

The agency argues that ECI's protest should be dismissed because ECI is not an interested party. The agency contends that ECI failed to timely acknowledge amendment No. 0005, a material amendment to the solicitation. Because ECI did not have a valid (*i.e.*, timely submitted) proposal before the agency for consideration and thus is ineligible for award even if it prevails in its protest, DSCR argues, ECI is not an interested party to pursue its protest.⁶ Agency Dismissal Request, June 11, 2008, at 1-4.

ECI argues that its protest should not be dismissed on these grounds. The protester does not dispute that it failed to acknowledge and return amendment No. 0005 by the specified date. Rather, ECI argues that its late submission of amendment No. 0005 did not automatically mandate rejection of its proposal but instead made such action only discretionary on the agency's part (and DSCR apparently elected to further consider ECI's proposal). In support thereof, ECI points to the language of Standard

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We instead interpret the agency's evaluation as concluding that ECI's proposal was technically unacceptable for failing to comply with the RFP's delivery schedule.

⁴ Alternatively, ECI contends that the agency should have held discussions with it regarding any perceived discrepancies in its delivery schedule. Protest, May 20, 2008, at 4-5.

⁵ ECI also claimed that DSCR had failed to treat offerors equally and that the agency was biased in favor of Thomas Instrument, Protest, June 30, 2008, at 2-4, but later withdrew these grounds for protest. ECI Email to GAO, July 7, 2008.

⁶ While the award notice stated that ECI's proposal had been found unacceptable for failing to comply with the required delivery schedule, AR, Tab 18, DSCR Letter to ECI, May 12, 2008, it was not until the dismissal request was filed with our Office that the agency informed ECI that its proposal was also considered untimely for failing to acknowledge amendment No. 0005 by the specified date.

Form (SF) 30, Amendment of Solicitation/Modification of Contract, which states in relevant part that “[f]ailure of your acknowledgement to be received at the place designated for the receipt of offers prior to the hour and date specified may result in rejection of your offer.”

We find that ECI failed to timely acknowledge a material amendment and, as a result, is not an interested party to challenge the agency’s evaluation of proposals. As a general rule, an offeror’s failure to acknowledge a material amendment renders the proposal unacceptable and such proposal may not form the basis for award. Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3; International Filter Mfg. Corp., B-235049, June 21, 1989, 89-1 CPD ¶ 586 at 3. In determining whether an amendment is material, we look at the facts of each case. While no precise rule exists as to whether a change required by an amendment is more than negligible, such that failure to acknowledge the amendment renders the proposal unacceptable, an amendment is material where it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. See Skyline ULTD, Inc., B-297800.3, Aug. 22, 2006 CPD ¶ 128 at 3; Navistar Marine Instrument Corp., B-277143.2, Feb. 13, 1998, 98-1 CPD ¶ 53 at 2.

Here, amendment No. 0005 significantly altered the guaranteed minimum quantity for the base year. Instead of a guaranteed minimum quantity of 63 assemblies as contained in the original RFP, the amendment changed the minimum quantity that DSCR was required to purchase to 250 assemblies, in comparison to the unchanged estimated quantity of 252 units. As expressed in percentage terms, amendment No. 0005 changed the RFP’s guaranteed minimum quantity for the base year from 25 percent ($63 / 252 = .25$) to 99 percent ($250 / 252 = .99$) of the estimated quantity. While the evaluation of proposals remained based on offerors’ prices for the estimated quantities, offerors were able to, and did, propose different (i.e., tiered) pricing based on the number of units that the agency actually purchased. For example, ECI’s base year price for the guaranteed minimum quantity of 63 assemblies was \$[DELETED] each, while its base year price for the estimated quantity of 252 assemblies was \$[DELETED] each, a \$[DELETED] difference per unit. AR, Tab 9, ECI Email to DSCR, Mar. 14, 2008, at 3. That ECI did not actually modify its proposed pricing as a result of amendment No. 0005 does not alter the fact that DSCR’s legal obligation as a result of such amendment was significantly greater than that contained in the original solicitation, and had the potential for more than a negligible impact on offerors’ prices. See Christolow Fire Prot. Sys., B-286585, Jan. 12, 2001, 2001 CPD ¶ 13 at 3-4. Accordingly, the amendment was material in nature.⁷

⁷ We also find ECI’s reliance on the alleged discretionary language contained within amendment No. 0005 (“[f]ailure of your acknowledgement to be received . . . prior to the hour and date specified may result in rejection of your offer”) to be misplaced. The use of the word “may” on SF 30 provides offerors with notice that a failure to

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In light of this, ECI is not an interested party to challenge the agency's evaluation of proposals. In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2008); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester's proposal would be in line for award if its protest were sustained. Ridoc Enter., Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9. By contrast, a firm is not an interested party where it would be ineligible to receive award under the protested solicitation if its protest were sustained. Sterling Servs., Inc., *supra*, at 2; Acquest Dev., LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 6. Since ECI is ineligible for award for failing to timely acknowledge amendment No. 0005, the firm is not an interested party to challenge the propriety of the agency's evaluation of proposals.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

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timely acknowledge the amendment could result in rejection of their proposals, depending on the materiality of the amendment. When the amendment which an offeror fails to timely acknowledge is, as here, material in nature, however, the offeror's proposal must be rejected. Moreover, even while DSCR also found ECI's proposal to be noncompliant with the RFP's delivery schedule, the agency's contemporaneous evaluation determined ECI ineligible for award because of the offeror's failure to timely acknowledge the material amendment here.