



Comptroller General
of the United States

35:810

Washington, D.C. 20548

Decision

Matter of: Patten Company, Inc.

File: B-253651

Date: October 12, 1993

Wayne A. Keup, Esq., Sean C.E. McDonough, Esq., and Brian A. Bannon, Esq., Dyer, Ellis, Joseph & Mills, for the protester.

Michael C. Dilts, for Switlik Parachute Company, Inc., an interested party.

Jonathan H. Kosarin, Esq., Anthony E. Marrone, Esq., Department of the Navy, for the agency.

Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to grant waiver of first article testing (FAT) requirement for protester is denied where solicitation stated that FAT evaluation factor would be added to offers where only one price was furnished and there was no indication that offer was based on FAT waiver, and protester submitted only one price in revised offer in space for price including FAT, leaving space for FAT waiver price blank.

DECISION

Patten Company, Inc. protests the award of a contract to Switlik Parachute Company, Inc. under request for proposals (RFP) No. N00383-93-R-0167, issued by the Department of the Navy for a quantity of 4,091 inflatable life rafts. Patten argues that the Navy improperly failed to waive a first article testing (FAT) requirement for Patten.

We deny the protest.

The solicitation, issued on February 1, 1993, contemplated the award of a firm, fixed-price contract for an alternate quantity of either 4,091 or 8,182 inflatable life rafts. The solicitation schedule required the submission of unit and extended prices for both quantities and also invited offerors to submit prices based on FAT waiver pursuant to clause L-1252, entitled "Alternate Offers-Waiver of First

Article Approval Requirements," which provided that FAT could be waived for offerors who previously had furnished the same or similar items. The clause further stated that:

"(s)uch offerors are also cautioned to submit two prices for the articles required herein--one that is based on compliance with the first article approval requirements and one that is based on a waiver of such requirements. Where an offeror submits only one price and fails to indicate whether it is based on compliance with the first article approval requirements or on the waiver thereof, it will be deemed to be based on compliance with the first article approval requirements. Thus, where an offeror merely requests first article waiver, and fails to clearly state that the one price he submitted is based on waiver of the first article requirements, the price will be deemed to have been based on full compliance with the first article test requirements."

Section M of the solicitation, which listed the cost of government testing as the only evaluation factor, stated that the estimated cost for FAT was \$6,000 and that this cost factor would be added, for evaluation purposes, to the price of all offers that would require FAT.

Three firms, including Patten and Switlik, submitted initial proposals by the March 2 closing date. The proposals of Patten and Switlik each contained prices for the alternate quantities of life rafts based on both compliance with the FAT requirement and waiver of FAT. In a letter dated February 26, Patten requested waiver of the FAT requirement on the basis that the firm had delivered under a previous Navy contract the same life rafts as required here; Switlik also requested a waiver of the requirement based on the firm's successful completion of FAT under a prior Navy contract for the same life rafts as required here.

The Navy determined based on an initial review that Switlik was entitled to waiver, but that Patten was not, concluding that the life rafts Patten previously had supplied were not the same as or similar to those required under the current RFP. (The Navy did not inform Switlik or Patten of these determinations at this time.) The Navy subsequently issued amendment No. 0001, which, among other things, provided a new pricing schedule and a new closing date. The new schedule required offerors to provide unit and extended prices for two line items: one for a firm quantity of 4,091 life rafts based on compliance with the FAT requirement, and a second for the same quantity without FAT.

Switlik's and Patten's revised prices in response to the amendment were as follows:

	<u>Switlik</u>	<u>Patten</u>
Unit price (with FAT)	\$187.30	\$187.00
Extended price (with FAT)	\$766,244.30	\$765,017.00
Unit price (without FAT)	\$187.20	-----
Extended price (without FAT)	\$765,835.20	-----

As indicated, Patten submitted a revised price only for the line item with FAT; it did not insert a price in the line item based on waiver of FAT. Since the Navy had determined that Patten was not eligible for waiver of FAT in any case, it added the \$6,000 FAT cost factor (as provided in RFP section M) to Patten's extended price of \$765,017, increasing its total evaluated price to \$771,017. Switlik's total evaluated price (with waiver of FAT) was \$765,835.20, so the Navy made award to Switlik on April 28.

Patten argues that it should have been granted a waiver of FAT and that the Navy's determination to the contrary was based on an incorrect conclusion that the life rafts which the firm had furnished under its prior government contracts were not the same as or similar to those required here.

Patten's argument is without merit since, notwithstanding the firm's prior performance, it was not entitled to waiver under the terms of the RFP. As indicated above, the solicitation, at clause L-1252, clearly addressed precisely the circumstances involved here: it specifically cautioned offerors to submit two prices if they wanted to be considered for FAT waiver, and stated that if an offeror furnished only one price with no indication of whether it was with or without FAT, it would be treated as being based on compliance with FAT. Patten provided only one price, in the space designated for a price with FAT. Patten left blank the space for a price with waiver of FAT, and nowhere in the offer stated that the price furnished was intended to be based on FAT waiver. Under the specific terms of clause L-1252, an offer such as Patten's was to be treated as being based on compliance with the FAT requirements. This is just what the agency did and it therefore acted properly.

Patten argues that the FAT waiver request it submitted at the time of the original proposal submission should have been sufficient to qualify the firm for FAT waiver, notwithstanding its failure to furnish a FAT waiver price in its revised offer. However, this argument ignores the plain language of clause L-1252:

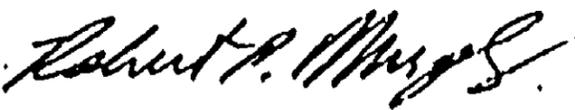
"[w]here an offeror merely requests first article waiver, and fails to clearly state that the one price he submitted is based on waiver . . . , the price will be deemed to have been based on full

compliance with the first article test requirements."

This language clearly addressed the argument Patten is making; it provided that FAT waiver would not be considered based on a mere request, without some indication that the price furnished was based on FAT waiver. The argument therefore is without merit.

Patten argues that since the agency's determination that Patten was not eligible for FAT waiver was based on its evaluation of Patten's initial prices and not its revised price, its revised price should not be dispositive of Patten's eligibility for FAT waiver. We disagree. The agency's initial determination that Patten was not entitled to FAT waiver was based on Patten's initially submitted proposal, which did include FAT waiver prices. Patten then omitted a FAT waiver price from its revised proposal and did not otherwise indicate that it still was seeking waiver. In other words, Patten revised its proposal in such a manner that it was covered by the specific terms of clause L-1252. Thus, even though the agency had evaluated Patten for FAT waiver under its initially submitted proposal, Patten was not entitled to FAT waiver, based on its revision of that proposal.

The protest is denied.


for James F. Hinchman
General Counsel