



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Helmets Limited

File: B-246301

Date: February 28, 1992

Elizabeth A. Kaiser, Esq., and Frank M. Rapoport, Esq.,
Saul, Ewing, Remick & Saul, for the protester.
Ruth E. Ganister, Esq., Rosenthal and Ganister, for Gentex
Corporation, an interested party.
Robert G. Janes, Esq., Jonathan H. Kosarin, Esq., and
Charles J. McManus, Esq., Department of the Navy, for the
agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Where an agency permitted one offeror in a two-step sealed bid procurement to design its own fastener component on a helmet instead of proposing a helmet compatible with the sole-source fastener component--a component which was supposed to be furnished by the government--as contemplated by the step one request for proposals, and then amended the step two invitation for bids to procure the fastener component without providing the second offeror/bidder an opportunity to address the revised requirements, there is a compelling reason to cancel step two of the solicitation after receipt of bids to allow the offerors to submit revised proposals on a relatively equal basis, since there was a reasonable possibility that the second bidder, which submitted a higher bid, was prejudiced by the changes to the solicitation requirements.

2. Communication between a bidder's employee and a government engineer that was not an attempt to influence the procuring agency in connection with a federal contract is not a violation of the Byrd Amendment, 31 U.S.C. § 1352 (Supp. I 1990). In any case, since there is no evidence that appropriated funds were expended in this communication, there can be no violation of the Byrd Amendment.

3. Communication between a bidder's employee and a government engineer that does not solicit or obtain proprietary or source selection information is not a violation of the

procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988).

DECISION

011
Helmets Limited protests the cancellation of step two of a two-step sealed bid procurement¹ issued as invitation for bids (IFB) No. N62269-91-B-0219 by the Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, for helmets to be used by helicopter crewmembers. Helmets also protests that the only other bidder, Gentex Corporation, should be found ineligible to compete on this procurement because it allegedly violated the Byrd Amendment, 31 U.S.C. § 1352 (Supp. I 1990), and the procurement integrity provision of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (1988).

We deny the protest.

The Navy issued the modified step one request for proposals (RFP) No. N62269-89-R-0241 on June 1, 1989. The RFP anticipated a procurement of 5,000 helmets under the step two IFB with an option to purchase an additional 5,000 helmets. The helmets are to be used by Navy and Marine Corps helicopter crewmembers and were intended to provide protection from "projective impact, impact noise, and eye hazards."

The Navy evaluated technical proposals and samples, and awarded multiple step one contracts to all offerors submitting acceptable proposals. The helmets submitted under the step one contracts underwent extensive technical and operational testing and evaluation. The Navy conducted discussions with the offerors throughout step one and permitted offerors to modify their proposals. At the end of step one, the offerors whose proposals remained acceptable were eligible to submit a bid in step two. Step one lasted approximately 2 years as expected.

¹Two-step sealed bidding is a hybrid method of procurement that combines the benefits of sealed bids with the flexibility of negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may conduct discussions. Step two consists of a price competition conducted in accordance with sealed bid procedures, except that the competition is limited to those firms which submitted acceptable proposals under step one. Federal Acquisition Regulation (FAR) § 14.501; A.R.E. Mfg. Co., Inc., B-224086, Oct. 6, 1986, 86-2 CPD ¶ 395.

In keeping with the procurement plan to purchase helmets that would be "compatible with existing aircrew protective systems and be completely interoperable with the total helicopter system," the RFP incorporated Procurement Document (PD) No. 60248-89-2, which stated at section 3.2.1.6:

"Helmet design shall allow for attachment of bayonet receivers for securing the A/P22P-9(V) CBR [chemical, biological and radiological] Protective Assembly to the helmet assemblage. MCK-3/P attachment bayonet receivers shall be via FSCM K5524, part number 1505012."

The "A/P22P-9(V) CBR Protective Assembly" is the protective garment worn by a helicopter crewmember that shields the crewmember from exposure to CBR hazards. The MCK-3/P is a part of the A/P22P-9(V); it is a hood and nose piece that is worn under the helmet, and is connected to the oxygen mask. The hood and nose piece includes two cables with bayonet-like devices. The bayonets fit into bayonet receivers, which must fit in the helmet, thus attaching the hood and nose piece to the helmet. FSCM K5524 is the Federal Supply Code Manufacturer designation for BAJ Oxygen Systems of England. Part number 1505012 is BAJ's designation for its receiver trolley, the part that receives the hood and nose piece bayonet. BAJ's bayonet receiver assembly consists of the trolley, together with a mounting bracket, screws and a cover. BAJ was the only known source of the receiver assemblies at the time the Navy issued the RFP. Under the RFP, the A/P22P-9(V) CBR protective assemblies, including the hood and nose pieces, and the MCK-3/P attachment bayonet receivers were to be government furnished equipment.²

The amended date for receipt of technical proposals and samples was August 7, 1989. Helmets and Gentex were the only offerors. The Navy found both proposals acceptable and awarded step one contracts to both firms.

²Not all of the helmets procured would be used with the CBR protective assembly. The Navy only anticipated installing MCK-3/P receivers on helmets used by personnel under conditions likely to require use of the CBR protective assembly. This procurement would provide helmets for both Navy and Marine Corps helicopter crewmembers. The Marine Corps crewmembers were said to be more likely to be in situations calling for use of the CBR protective assembly; therefore, Marine Corps helmets were more likely to require attachment of the MCK-3/P receivers.

During the course of step one, Helmets offered a modified helmet to incorporate a receiver assembly. This modification permits attachment of the MCK-3/P bayonets to the helmet, thereby obviating the need for government-furnished bayonet receivers. Helmets's design made the receiver assembly essentially an integral part of the protester's helmet, and, according to the protester, enhanced wearer comfort by providing for a greater range of adjustment of the bayonet than did the BAJ receiver assembly. Gentex's helmets did not incorporate any of the receiver parts but permitted attachment of the government-furnished receivers as contemplated by the RFP. Upon completion of the step one contracts, the Navy deemed Helmets's and Gentex's proposals acceptable and both were eligible to bid on the step two IFB.

The step two IFB was issued on March 1, 1991. On March 17, the Navy issued amendment No. 0003 to the RFP, which added contract line item number (CLIN) 0017. CLIN 0017 stated:

"0017	[CBR] Fitting Kits for use with the A/P22P- 9(V) CBR Protective Assembly.	5,000 ea.
-------	---	-----------

Note: Delivery of item 0017 shall be the same as the delivery of item 0009."³

On April 19, a Gentex employee telephoned the primary government engineer for the project (who was not the designated procurement official) requesting information about CBR fitting kits. The engineer telefacsimiled to the Gentex employee the name and address of BAJ and listed the four part numbers comprising the BAJ fitting kit, which included the bayonet receiver trolley specified in section 3.2.1.6 of the procurement description.

Bid opening was on May 14, 1991. Helmets was the apparent low bidder at \$5,588,244. Gentex's bid was \$6,020,917.⁴ On May 17, Gentex inquired of the Navy about the huge price differential between the two bids on CLIN 0017. Gentex's bid on CLIN 0017 was \$840,000 while Helmets's bid was \$80,000. The Navy requested Helmets to verify its bid for CLIN 0017. On May 21, Helmets confirmed its bid price.

³CLIN 0009 is the helmet.

⁴Gentex's bid as submitted was \$5,690,917. Gentex offered alternate prices for CLIN 0014 Unlimited Rights in Data-- \$330,000 if the CLIN 0015 option was exercised and \$660,000 if it was not. The Navy treated the bid price as \$6,020,917 based on a price of \$660,000 for CLIN 0014.

On May 25, Gentex protested to the Navy alleging that Helmets's bid on CLIN 0017 was not for the BAJ fitting kits. Gentex argued that since BAJ was the only authorized supplier of the fitting kits, Helmets's bid was nonresponsive.

The Navy reviewed the procurement in response to Gentex's protest. It concluded that, although CLIN 0017 did not require any specific CBR fitting kit, when CLIN 0017 was considered in conjunction with the section 3.2.1.6 specification in the step one RFP calling for compatibility with the BAJ receiver trolley, CLIN 0017 could be reasonably read as requiring the BAJ fitting kit. However, during step one, the Navy evaluated and accepted Helmets's helmet with its newly designed receiver fittings, which resulted in a change to the section 3.2.1.6 specification for Helmets but not for Gentex. Therefore, on step two, the bidders did not bid on equal terms with regard to CLIN 0017 given the bidders' different approaches. Under the circumstances, the Navy decided that cancellation of the step two IFB and reopening of step one were warranted. The Navy notified the bidders of the cancellation on October 3.

Helmets protested the cancellation to our Office on October 17. Helmets argues that the Navy did not have a compelling reason to cancel the IFB after bid opening.

There must be a compelling reason for a contracting agency to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. FAR § 14.404-1(a)(1); Aero Innovations Ltd., B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332 (involving a second step IFB). Generally, cancellation after bid opening is appropriate when there is a reasonable possibility that some bidders would be prejudiced by an award under the IFB. United States Elevator Corp., B-225625, April 13, 1987, 87-1 CPD ¶ 401; see also General Projection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308. Here, the Navy concluded that Gentex was prejudiced by the Navy's unequal treatment of the bidders because the Navy relaxed section 3.2.1.6 only for Helmets and then added the acquisition of the CBR fitting kits to the procurement after technical proposals for step one of the acquisition had been submitted and approved.

The prejudicial situation did not result from an improper relaxation of section 3.2.1.6 for Helmets in step one. Initially, when the Navy intended to purchase the helmets without CBR fitting kits, its concern was that helmets procured must be compatible with its CBR protective assembly. The only way this compatibility was contemplated at the time was by attaching the BAJ bayonet receiver trolleys onto the helmets. Since BAJ was the only known

source for the trolleys, section 3.2.1.6 was included to ensure that the BAJ receiver trolleys could be attached to the helmets, and thus maintain compatibility with the CBR protective assembly. However, while step one procedures require that proposals comply with the basic or essential requirements of the specifications, compliance with all details of the specifications is not required. 53 Comp. Gen. 47, 49 (1973). Thus, even though Helmets's proposal appears not to literally comply with section 3.2.1.6, the Navy properly accepted Helmets's design because the proposal satisfied the RFP's essential requirement of compatibility with the CBR protective assembly. Id.

The prejudicially unequal treatment of the bidders did not occur until the Navy elected to add the CBR fitting kits to the IFB, an addition that was not contemplated by the RFP.⁵ Although CLIN 0017 did not specify a particular manufacturer's fitting kit, both bidders had to interpret this requirement consistent with their helmet designs. Specifically, even though the fitting kits were not part of the RFP but were to be government furnished, Gentex was required to comply with section 3.2.1.6 in bidding on CLIN 0017 in step two. Since this section provided for attachment of the CBR protective assembly to the helmet by the BAJ receiver trolley, Gentex reasonably interpreted CLIN 0017 to require BAJ fitting kits. Conversely, but unknown to Gentex, Helmets was not subject to section 3.2.1.6 because of its integrated design. Helmets reasonably interpreted CLIN 0017 as permitting it to bid its newly designed CBR fitting kit. Although Helmets's bid was low, Gentex's bid would have been low if CLIN 0017 had not been included in the IFB. Thus, the extreme difference in price between BAJ's fitting kit and Helmets's fitting kit essentially determined the low bidder.

Before CLIN 0017 was added, the specifications contemplated helmets that would permit use of the CBR protective assembly without alteration of the protective assembly. As discussed above, relaxation of section 3.2.1.6 for Helmets prior to the addition of CLIN 0017 did not alter this essential requirement of the procurement. However, once CLIN 0017 was added, there was a basic change to the procurement. That is, when CLIN 0017 is considered together with section 3.2.1.6, the effect is that Gentex was required to bid on and provide 5,000 BAJ fitting kits in addition to its approved helmets, while Helmets could basically bid its

⁵This addition clearly represented a legitimate government requirement. Also, it was reasonable to purchase the kits in conjunction with the helmets to assure total compatibility and because Helmets's helmet design already basically incorporated the kits.

approved helmets without the BAJ fitting kits. Under these circumstances, the Navy's relaxation of section 3.2.1.6 for Helmets during step one, together with the addition of CLIN 0017 to step two after final technical proposals had been approved, constituted a basic change in the specification requirements. See 53 Comp. Gen. 47, supra (agency acceptance of an integrated ladder assembly in a step one proposal and step two bid for a tower when the specifications contemplated an independent ladder assembly was a basic change in the specification requirements).

A proposal that represents a basic change in the procuring agency's specification requirements can only be accepted if the agency informs the other offerors of the change and affords them an opportunity to submit revised proposals based on the changed requirements. Id. at 49-51. This reflects the fundamental federal procurement principle that all offerors must be treated fairly and equally so as to promote full and open competition. E.C. Campbell, Inc., B-205533, July 8, 1982, 82-2 CPD ¶ 34.

The Navy did not inform Gentex of the basic change to the procurement at an appropriate time during step one when Gentex could have evaluated the effect of the change on the competitive positioning of its proposal and address these changes. There is a reasonable possibility that Gentex suffered prejudice from not being notified of this basic change. In this regard, not only does Gentex assert that it was prejudiced, but the record reasonably supports its assertion. Specifically, BAJ quoted Gentex a price for its fitting kit of \$148 each for 5,000 kits. This a substantial amount compared to the average price of \$518⁶ per Gentex helmet without the fitting kits. It is not only reasonable but likely that a competitive offeror would take steps to reduce the impact of the costs of such an expensive component, available only from a single source, if it were aware that this component was part of the acquisition. For example, Gentex may have offered a helmet design integrating the fitting kit as did Helmets, developed its own fitting kit, or found another approved source for the fitting kits during the 2-year step one process.

Therefore, we find that the Navy's decision to cancel the step two IFB to give Gentex and Helmets an opportunity to compete on a relatively equal basis under step one is proper because there is a reasonable possibility that Gentex was prejudiced by the unequal bidding positions of the bidders. 53 Comp. Gen. 47, supra; see United States Elevator Corp., supra.

⁶Gentex's bid of \$5,180,917 without CLIN 0017 divided by 10,000, the total number of helmets bid at that price.

Helmets also argues that Gentex should be ineligible to compete on this procurement because the communication between the Gentex representative and the Navy engineer violated the Byrd Amendment and the OFPP Act.

The Byrd Amendment generally prohibits a contractor receiving appropriated funds from using those funds to pay any person for "influencing or attempting to influence" an agency employee in connection with the award of a federal contract. The record does not support the assertion that Gentex's phone conversation regarding the BAJ fitting kit and BAJ's address with the government engineer influenced or was an attempt to influence the award of the contract.⁷ This conversation neither had an impact on the Navy's review of responsiveness of the bids submitted, nor did it provide the Navy with a basis for canceling the IFB. Moreover, contrary to Helmets's unsubstantiated allegation, there is no indication that appropriated funds were used to pay the Gentex employee's salary for his telephone call on this fixed-price competition. Finally, even assuming the phone call was intended to influence the award, it was not a payment to a person to influence a contract that was required to be disclosed in Gentex's step two bid, since the communication to the agency was by a "regularly employed" Gentex employee. See Construcciones Aeronautics S.A., B-244717; B-244717.2, Nov. 14, 1991, 71 Comp. Gen. ____, 91-2 CPD ¶ 461. Thus, there is no merit to Helmets's contention that a Byrd Amendment violation occurred.

Nor did this communication between the Gentex representative and the government engineer violate the OFPP Act. That Act states in pertinent part:

"(a) Prohibited conduct by competing contractors

During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly

⁷There is no indication that Gentex was aware of Helmets's design integrating the necessary receiver assemblies when it submitted its bid. Thus, Helmets's hypothesis that this conversation was a Machiavellian attempt by Gentex to persuade the Navy that CLIN 0017 required only BAJ fitting kits, and thus was intended ultimately to influence the award of the contract by setting the stage for the agency to reject Helmets's bid as nonresponsive, is both far-fetched and illogical.

"(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement." 41 U.S.C. § 423(a) (3).

Proprietary information is defined as:

"(A) information contained in [a] bid or proposal;
(B) cost or pricing data; or
(C) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer."
41 U.S.C. § 423(n) (6).

Source selection information is defined as:

"[I]nformation determined by the head of the agency or contracting officer to be information--
(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and
(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure." 41 U.S.C. § 423(n) (7).

The information requested and provided during the phone conversation was BAJ's address and the part numbers comprising BAJ's CBR fitting kit. This communication sought clarification of the information given in section 3.2.1.6 in light of CLIN 0017. We do not think this conversation can reasonably be construed as soliciting or obtaining information regarding Helmets's bid or proposal, cost or pricing data, or any other information submitted by Helmets. Nor can this information, regarding matters that were identified in the solicitation and concerned items that previously were to be government furnished, be considered source selection information, since the disclosure of this information did not in any way jeopardize the integrity of the procurement. Thus, there is no evidence of any violation of the OFPP Act.

The protest is denied.


for James F. Hinchman
General Counsel