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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178085

June 19, 1973

Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036

Attention: Lowell J. Bradford, Esquire
Thomas J. Keller, Esquire

Gentlemen:

By letter dated February 23, 1973, you¹ protested on behalf of Televiso Electronics (Televiso) the proposed award of a contract to Reaction Instruments (Reaction) under invitation for bids No. WA5M-3-7075B1, issued by the Federal Aviation Administration (FAA) on November 21, 1972.

The solicitation calls for various quantities of localized mechanical modulators. Amendment No. 1 to the solicitation requires that the contractor "Furnish spare parts for Item 1 pursuant to Article XIII, 'Provisioning of Spare Parts' of the Schedule" and stipulates that the "Bidder shall not quote a price for this item. An estimated price will be established by the Government at the time of award. Firm prices(s) [sic] will be established later pursuant to ARTICLE XIII."

Article XIII which is also part of the amendment provides as follows:

ARTICLE XIII, PROVISIONING OF SPARE PARTS:

The contractor agrees to furnish F.O.B. Origin, appropriate spare parts and assemblies by the provisioning method of procurement after a provisioning conference which at the option of the Government, will be held at the contractor's plant, or at some other point specified by the Contracting Officer. Said provisioning conference shall be held not later than thirty (30) days after approval of the replaceable parts list(s) by the Government. The contractor shall also make available to the Government representatives at the provisioning conference at least one copy

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of each assembly and detail drawing for each component part or assembly included in the equipment being provisioned. General spare components such as standard resistors, capacitors and MIL and JAN components that are readily available from commercial sources as standard items will not be considered in the provisioning. After the provisioning conference, the Contracting Officer in his sole discretion may procure all, part or none of such spare parts. In the event the Contracting Officer decides to procure all or part of such spare parts, fair and reasonable prices and terms of delivery therefor shall be established by agreement between the contract[or] and the Contracting Officer. Such agreement shall be set forth in an amendment to the contract, which amendment shall also incorporate the approved list(s) of spare parts. In the event of failure to agree as aforesaid, the Contracting Officer shall determine fair and reasonable prices and terms of delivery for such spare parts and the contractor shall be bound thereby, subject to the contractor's right of appeal in accordance with the clause of the contract entitled "Disputes."

The amendment then cautions bidders that "FAILURE TO ACKNOWLEDGE RECEIPT OF THIS AMENDMENT WILL RESULT IN REJECTION OF YOUR BID AS NON-RESPONSIVE."

Bids were opened on December 21, 1972. Reaction was the apparent low bidder, and Televiso was the second low bidder. Reaction failed to acknowledge receipt of amendment No. 1, and the protester contends that Reaction's bid should be rejected as a result.

The FAA concludes, however, that amendment No. 1 has no impact upon price, quality, quantity or delivery, and therefore, failure to acknowledge its receipt may be waived as a minor informality or irregularity pursuant to Federal Procurement Regulations 1-2.405, which provides in pertinent part:

A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. * * * Examples of minor informalities or irregularities include:

* * * * *

(d) Failure of a bidder to acknowledge receipt of an amendment to an invitation for bids, but only if:

* * * * *

(2) The amendment involves only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price, quantity, quality, or delivery of the item bid upon.

You contend that the amendment has the "effect of altering the legal relationship between the parties," and, therefore, "it must be deemed material and nonacknowledgement cannot * * * be waived." We have reviewed the cases cited by you and the applicable documents and it is our conclusion that amendment No. 1 does not impose on a contractor any additional obligations not legally enforceable under the original solicitation. We find that other provisions of the solicitation, and FAA specifications incorporated therein, give the Government the same rights as it would possess under amendment No. 1. Specifically, item 3 of the original solicitation provides:

Spare Parts Peculiar for use with Item 1 in accordance with attached Specification FAA-G-1375 dated 1 May 1962 and Issue No. 3, FAA Parts Peculiar Replacement Table, dated 15 September 1967:

There then follows a list of the quantities and prices of spare parts which the contractor is obligated to furnish. Amendment No. 1 gives the contracting officer the right to purchase additional quantities of these spare parts. However, paragraph 3.5 of specification FAA-G-1375 gives the Government a similar right. It states:

Obligation to furnish additional parts-peculiar. - In addition to the spare parts-peculiar which the contractor is required to furnish under this specification FAA-G-1375 and the application of "FAA Parts-Peculiar Replacement Table", the contractor assumes the obligation to furnish additional spare parts-peculiar at fair and reasonable prices. The contracting officer will determine the quantity of such additional spare parts-peculiar, if any, required and same shall be incorporated in the contract by an appropriate contract modification. The unit price to be paid by the Government for each spare part-peculiar shall be fair and reasonable. In the event the Government and the contractor are unable to reach a mutual agreement

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as to the unit price or prices to be paid for such spare parts-peculiar the contracting officer will establish the interim price or prices to be paid and issue a change order therefor and the dispute as to price or prices shall be considered a question of fact and be determined in accordance with Clause 12 "Disputes" of the "General Provisions", Standard Form 32.

In view of this provision, it is our conclusion that amendment No. 1 did not materially affect price, quality, quantity or delivery nor did it materially alter the legal relationship between the parties. Therefore, failure to acknowledge receipt of the amendment may be waived, and your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States