



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20543

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October 3, 1973

Eastern Microwave Corporation
c/o Burkhardt, Arnavas and Bartl
The Jefferson Building, Suite 405
901 North Washington Street
Alexandria, Virginia 22314

Attention: Donald P. Arnavas, Esquire

Gentlemen:

Reference is made to your letter of August 17, 1973, and prior correspondence, in which you protest against the rejection of your bid under invitation for bids (IFB) No. N00019-73-B-0119, issued on April 24, 1973, by the Naval Air Systems Command (NAVAIR). For reasons stated below, your protest is denied.

Bids were requested for a quantity of 462 antenna assembly units under item 0001, for 994 antenna assembly units under item 0002, and first article testing under items 0003 and 0004. Items 0005 through 0007 are for technical data, administrative/financial and quality requirements. The IFB provides that the costs of the latter three items are to be included in the price of items 0001 and 0002. An option for 150 units is included as item 0008.

Page 4-3 of the Schedule states:

"PRICING OF OFFERS - If any particular Item is to be performed at no cost to the Government, the entry "at no cost" shall be placed in the Unit Price and the Total Price column.

"Notwithstanding any statement in paragraph 10(c) of the Solicitation Instructions and Conditions (Standard Form 33A set forth in Section C hereof) to the contrary, offers shall be submitted on the basis of furnishing all quantities called for in the Schedule."

The Schedule also advises bidders that one award will be made.

Page 4-3 of the IFB states that the price entered by the offerors for items 0003 and 0004 shall include only the costs attributable to first article approval which would not be incurred in the performance of the contract if no first article approval were required and that bidders should see the clauses entitled "First Article Approval-

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Government Testing", hereafter referred to as the first article test clause, and "Additional Information Relating to First Article Approval Clause." As a matter of information the IFB does not include the latter clause.

The first article test clause specifies the number of first article test units required and the time for delivery of such units. The clause gives the Government the right to terminate for default if the contractor does not deliver the first article for test within the time required or if the contracting officer disapproves any first article. Further, under the clause the contractor is required to bear the costs of any additional first articles if the initial first article is disapproved and the contractor is responsible for spare parts support as well as repair of first articles during the approval tests.

Under clause D-4, first article testing may be waived if the bidder has furnished supplies or services similar to those called for in the Schedule. The clause provides a space for bidders to identify the contract under which similar supplies or services had been furnished. Subparagraph (e) of the clause states that the Government's cost for first article testing is estimated at \$17,500 and that this amount will be added to those bids where first article testing is required.

Bids were opened on May 22, 1973, and the following bids were received:

<u>Bidder</u>	<u>Unit Price for</u> <u>Item 0001 & Item 0002</u>		<u>Total Price for</u> <u>Items 0003 & 0004</u>		<u>TOTAL (ex-</u> <u>cluding Item</u> <u>0003)</u>
Radiation Systems, Incorporated (RSI)	\$321.00	\$364.00	\$60,000	\$60,000	\$ 657,838.00
Eastern Microwave	\$394.30	\$381.00	(no prices indicated)		\$ 560,880.60
	\$547.70*	\$491.65*			\$ 741,733.40*
Banders Associates	\$479.06	\$398.90	\$56,580	\$120,737	\$ 795,148.00
Transco Products	\$776.00	\$714.00	(no prices indicated)		\$1,068,228.00
Systron-Donner	\$753.00	\$879.00	\$ 1,216	\$ 1,678	\$1,224,506.00

* Banders' price if the first article requirement is waived.

Your bid was not submitted on the basis of waiving the first article test requirements.

On May 25, 1973, RSI submitted a protest to our Office (B-178758) against the award of a contract to your firm contending that your bid was nonresponsive since you did not quote a price for items 0003 and 0004, or otherwise indicate that these items would be furnished without charge.

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However, Navy advised us that it agreed your bid was nonresponsive, citing B-168487, December 16, 1969. On June 25, 1973, RSI withdrew its protest and we closed our file on the matter. Thereafter, you protested to our Office. NAVAIR has advised that no award has been made as of the present time. In its report NAVAIR takes the position that your bid is nonresponsive for failing to bid on items 0003 and 0004 and B-168487, supra, is again cited in support of this view.

It is your position that the second paragraph of the "PRICING OF OFFERS" provision, quoted above, establishes that the IFB was soliciting aggregate bids since it requests bids on the basis of furnishing "all quantities" called for in the solicitation. From this premise you argue that since award will be made on an aggregate basis and you submitted a total price, the omission of the words "at no cost" in your bid for items 0003 and 0004 is a minor informality which should be waived under Armed Services Procurement Regulation (ASPR) 2-405. In this regard, you have quoted excerpts from B-175243, June 16, 1972 and B-161012, June 13, 1967. You have also cited B-176425, October 18, 1972. You further argue that your bid is acceptable based on the test set forth in 48 Comp. Gen. 357 (B-164868, November 22, 1968), since you have not attempted to impose any extraneous conditions on your obligation to comply with the requirements of the solicitation.

We do not find that the language in the second paragraph of the "PRICING OF OFFERS" clause has the legal effect you ascribe to it. That paragraph merely puts bidders on notice that clause 10(c) of the Instructions and Conditions of the solicitation, which permits bids on and reserves the right to the Government to award less than the total quantity, is not applicable to this procurement. This provision, together with the statement that award will be made to one bidder, makes it clear that a bid for less than the total quantity is not acceptable. The first paragraph of the "PRICING OF OFFERS" clause, as well as the language in the Schedule instructing bidders on the costs to be included in the first article test items, make it clear that a price or the words "at no cost" was required for each item.

With respect to the cases cited by you, two of the cases do not involve situations where a bidder omitted a price for an item, but concern the omission of other types of information requested by the IFB--the number of feet per pound for each item offered (B-175243, supra), and the guaranteed shipping weight (48 Comp. Gen. 357, supra). Therefore, they are not analogous to the situation where, as here and in B-168487, supra, the omission involves the bidder's promise to "furnish any or all items upon which prices are offered* * *". Furthermore, in those cases the bidder's obligation was clearly

demonstrated from information found elsewhere in the bid and, therefore, the omission was treated as immaterial.

The other two cases you cite did concern situations where a price for an item was omitted. However, the omissions were treated as immaterial since the bidder's obligation to furnish the items was clearly established in other portions of the bid. In B-161012, supra, the bidder offered a delivery schedule for the item for which no price had been quoted. In B-176425, supra, the bidder submitted a total price for each item, including items 2 and 3, but did not include a unit price for these two items. The unit price for these items was easily ascertainable by a simple mathematical calculation based on information in the bid.

In the case cited by the Navy and NSI the low bidder failed to state a price for the data item listed in the schedule. It was contended that the bid was nevertheless responsive because the invitation included a Contract Data Requirements List and the bidder submitted a total price for all the requirements of the invitation, which provided that "award will be made only to one offeror for all units" of the various items and that "offers, therefore, must be on the basis of furnishing (1) all units." In rejecting this argument, we pointed out that the pricing columns in the data requirements list and the space opposite the data item in the bid schedule were blank and concluded:

"Under the terms of the offer, the bidder agrees 'to furnish any or all items upon which prices are offered, at the price set opposite each item.' Since Dynalee failed to submit a price for item 4 or otherwise indicate in the schedule an intention to furnish the data, there is serious doubt that it is obligated to supply the required data at its bid price."

However, you contend that the cited case is distinguishable from the instant case because the data items called for there were merely a by-product of the hardware being procured, whereas the "precise and specific language" of the first article testing clause "implements Items 0003 and 0004 and imposes a number of crucial obligations on the contractor that are basic to satisfactory performance* * *". Therefore, you contend by execution of the bid Eastern evidenced its intent to be bound by the first article requirement at its aggregate bid price of \$560,880.60.

We do not believe this is a valid distinction because, as in the cited case, the IFB provides that the bidder agrees "to furnish any or all items upon which prices are offered, at the price set opposite each item." Since the spaces opposite items 0003 and 0004

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were blank and your bid did not otherwise indicate your intention to be bound by the first article requirements at the price bid or "at no cost", we believe there is serious doubt that you would be obligated to comply with the requirement to furnish 30 test units each for items 0001 and 0002 at your bid price. B-168487, supra.

You have also argued that the amount involved for testing is insignificant since one other bidder besides you did not quote any price for the first article test items and the combined price of another bidder for the first article test items was less than \$3,000.

The short answer to this contention is that since first article approval requirements are material, the failure to bid on them requires rejection of the bid as nonresponsive. See B-178456, July 24, 1973.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States