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DECISION



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

FILE: B-202317

DATE: June 17, 1981

MATTER OF: California Microwave, Inc.

DIGEST:

1. Protest against alleged improprieties in solicitation (use of existing software; approval for use of existing software and alleged lack of producer price index definition) apparent prior to closing date for receipt of proposals (December 15, 1980) must, pursuant to our Bid Protest Procedures, 4 C.F.R. part 20 (1980), be filed prior to that date. Protest filed with agency in late February and with our Office on March 3, 1981, is untimely and will not be considered on merits.
2. Protester's position that when RFP includes economic price adjustment clause agency must apply regional producer price index to proposed option prices in evaluating proposals since ranking of prices will be affected is without merit because clause contemplated application of national index to price of any option quantities ordered, not to prices proposed for option quantities in evaluating proposals.

California Microwave, Inc. (CMI), protests the award of a contract to Bendix Corporation (Bendix) under request for proposals (RFP) No. F33657-80-R-0378, issued by the Department of the Air Force (Air Force). Essentially, the RFP, utilizing the four-step process (Defense Acquisition Regulation § 4-107 (DAC # 76-18, March 1979)), solicited proposals for the design and development of the AGM-65 Maverick Missile Multipurpose Test Set, with an option for the production of 90 to 240 additional sets.

[Protest of Air Force Contract Award]

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CMI protested to the Air Force, by letter dated February 20, 1981, and to our Office, by telex received on March 3, 1981, in regards to the offering of existing software and the authorization for use of the software; the application of the producer price index; and the significance of CMI's elimination of the need for a Government-furnished computer system and resultant program cost reduction. CMI supplemented its protest after determining that the Air Force's March 13 response did not resolve the protest. CMI essentially contends that the Air Force's response is in conflict with the RFP.

More specifically, CMI first focuses on the Statement of Work (SD65-39-2), paragraph No. C1041G, which provides in pertinent part:

"C1041G Software. The contractor shall design and develop computer programs for test, support, and control software. Existing software shall be used when available and suitable. The SPO shall approve the use of existing software. * * *"

CMI believes that the proposed use of existing software automatically gives the proposer a higher technical evaluation than those who do not use or, for that matter, do not have existing software. In addition, it appears that CMI believes that since this is a four-step procurement, the approval for the use of existing software should be given prior to the selection of the offeror for negotiation of a definitive contract and subsequent contract award. CMI states that to do otherwise would give an undue competitive advantage to the selected offeror.

Our Bid Protest Procedures, 4 C.F.R. part 20 (1980), require that protests against alleged improprieties in a solicitation which were apparent prior to the closing date for receipt of proposals be filed prior to that date. Paragraph No. C1041G did authorize the use of existing software and did provide, without mentioning when, that approval of such use would be made by the System Procurement Office (SPO). The closing date for receipt of technical proposals was December 15, 1980, and CMI's protest was not filed

with the Air Force until late February and with our Office until March 3, 1981, after notice that Bendix was the apparent successful offeror. Consequently, this aspect of CMI's protest is untimely and is dismissed.

CMI's second contention questions whether the Air Force's evaluation conformed to the RFP, section "M" - Evaluation Factors for Award. CMI points to section "M," paragraph 3.C(2), as amended November 4, 1980, which provides in pertinent part:

* * * In evaluating the proposals, the Government must consider the total cost of the program, including the projected price for the production options and any other adjustments to assure the comparability of cost/price proposals
* * * Option prices will be evaluated by adding the projected price for the maximum option quantity to the total price for the basic contractual effort. * * *

It is CMI's position that when a solicitation includes an economic price adjustment clause, as here, coupled with the above evaluation provision, the agency must apply the regional producer price index called for in the economic price adjustment clause to the proposed option prices, since the ranking of those prices would be affected by the application of the adjustment figure. CMI contends, and the Air Force confirms, that the economic price adjustment index set forth in the RFP, section "H," Special Provisions, was not used in the evaluation.

The Air Force position is that the application of the index was not necessary since it would not affect the ranking of the proposed option prices. The Air Force points out, contrary to the protester's argument, that a regional price index was for application, the economic price adjustment clause contemplated a national index and this was also indicated in the draft RFP which the protester received. Since a national index was to be used, it is the Air Force position that it would affect all offerors equally.

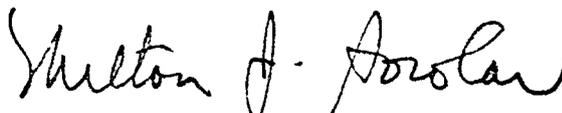
The Wholesale Price Index for Industrial Commodities referred to in section "H" of the RFP is a part of the larger Producer Price Index. Both indexes are published every month by the Bureau of Labor Statistics (BLS) and are found in BLS publication, "Producer Prices and Price Indexes." In addition, the Industrial Commodities portion is not broken down by regions. We have been informally advised by BLS that a regional breakdown of the Industrial Commodities Index would serve no useful purpose since the statistical samples utilized are based on prices from manufacturers which BLS states charge the same price regardless of region.

Since the Industrial Commodities Index is not broken down by regions, we agree with the Air Force's position that its application would not have affected the evaluation of the Bendix and CMI proposals. Further, we see nothing in the RFP which called for application of the price adjustment index when evaluating the projected option prices.

In addition, CMI also protests that the RFP did not contain a definition of the economic price adjustment index referred to in the clause. CMI's apparent argument concerning the lack of the producer price index definition is untimely. As noted above, protests against alleged improprieties in a solicitation, apparent prior to the closing date for receipt of proposals, must be filed prior to that date, which was not done here.

CMI's last concern is whether the Air Force fully recognized the significant total program cost reduction resulting from CMI's elimination of the need for a Government-furnished computer system. In response to this aspect of CMI's protest, the Air Force states, and the record confirms, that the reduction was fully recognized.

Accordingly, CMI's protest is dismissed in part and denied in part.



Acting Comptroller General
of the United States