

DECISION



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

FILE: B-214445

DATE: July 9, 1984

MATTER OF: Omnitek Incorporated

DIGEST:

Allegation that a firm fraudulently received an order under a multiple award Federal Supply Schedule contract, on the basis that the firm does not actually have the item listed on the schedule, is denied, since the protester has not met its burden to present affirmative evidence to support the allegation.

Omnitek Incorporated protests the Department of the Navy's issuance of a delivery order to Microcom Corporation for telemetry systems for which both firms have nonmandatory Federal Supply Schedule (FSS) contracts under the multiple award schedule program of the General Services Administration (GSA).

We deny the protest.

Microcom offered the lowest price for the systems in response to request for quotations (RFQ) No. N0429A-84-Q-0113, issued by the Naval Air Station (Pacific Missile Test Center), Point Mugu, California, for Omnitek model No. SMT-S0-12-7 systems or equal. Microcom's price was based on a purportedly equal system, the Microcom model T-60-1 telemetry system. The company's FSS contract listed no such system, but did contain a model T-60 at a price higher than Omnitek's listed price for the brand name model. Microcom explained that the suffix "-1" was its own control number for the purpose of designating certain temperature parameters required by the RFQ, and that it actually was only offering its T-60 system at a reduced price.

The protester initially complained about the fact that Microcom quoted a lower price than listed in Microcom's FSS contract for the T-60, and alleged that Microcom fabricated the T-60-1 designation in order to do so without abrogating

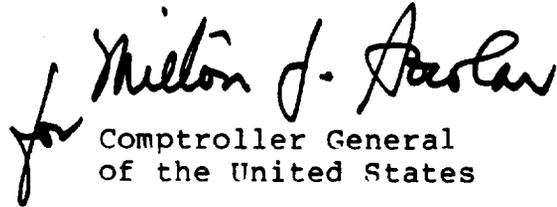
the FSS contract. The protester abandoned this line of argument after learning that an FSS contractor may offer to reduce its listed prices at any time and by any method, without prior notice to or approval from GSA. See Synergetics International, Inc., B-213018, Feb. 23, 1984, 84-1 CPD ¶ 232; A.B. Dick Company, B-211981, Feb. 1, 1984, 84-1 CPD ¶ 135. In this regard, the administration of FSS contracts, which includes insuring that a firm notifies GSA of any price reduction within 10 days after the effective date (or else be subject to termination of the contract for default), and that the user or procuring agency notifies GSA within 10 days after it issues a purchase order to an FSS contractor at a reduced price, is the responsibility of GSA, not this Office. Synergetics International, Inc., supra.

We understand the protester's current position to be that Microcom's FSS contract in fact lists a nonexistent system. The protester does not deny that Microcom's proposed T-60-1 system will meet the Navy's needs (indeed, the Navy reviewed descriptive literature for the equipment and determined its needs would be met), but basically alleges that Microcom committed fraud in offering a nonexistent system to the Navy. Omnitek argues that FSS contracts are not intended to permit a contractor like Microcom to determine, on a case-by-case basis, whether it can assemble a system that would be profitable at the price listed in the schedule and call the system a T-60 or a T-60-1.

The protester, however, has not submitted any affirmative evidence of any material misrepresentations by Microcom. The protester only has submitted evidence that Microcom had ascribed the T-60 designation to transmitting sets, as opposed to telemetry systems, in the 1970s, thus implying that Microcom never had a T-60 telemetry system. While such evidence may indicate that Microcom did not have a T-60 telemetry system in the 1970s, the evidence is not relevant to whether Microcom's quotation was based on the same T-60 system as listed in its FSS contract, since Microcom only obtained an FSS contract for a T-60 telemetry system beginning in 1981, as the protester itself points out. The allegation that Microcom has acted fraudulently in securing this delivery order therefore is unsupported. In this regard, the burden is on the protester to present evidence establishing its case, and unsupported allegations do not meet this burden. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121.

Moreover, to the extent that the protester's allegation concerns conduct that is criminal in nature--for example, 18 U.S.C. § 1001 (1982) imposes criminal penalties for knowingly making false statements to the government--such matters are outside the scope of our bid protest function and should be referred to the Department of Justice. SETAC, Inc., supra.

The protest is denied.

 Milton J. Asstler
Comptroller General
of the United States