

DECISION

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

FILE: B-222553

DATE: June 6, 1986

MATTER OF: WEMS, Inc.

DIGEST:

1. Where solicitation states that prices for estimated quantities in option years will be evaluated, but that award will be for the base year only, and evaluation and award are in accord with these terms, protest that award was improper has no merit. Agency properly may use estimates when its exact requirements are unknown, and regulations specifically permit the use of option clauses except in certain circumstances not alleged to be present here.
2. Protest of agency's failure to include a price escalation clause in a solicitation concerns an alleged impropriety that is apparent on the face of the solicitation, and such protest, to be timely, must be filed before bid opening.

WEMS, Inc. protests the award of a contract to Texas Mil-Tronics Corp. under invitation for bids (IFB) No. DAAH01-86-B-A223, issued by the U.S. Army Missile Command, Redstone Arsenal, Alabama (MICOM). The solicitation is for signal comparator controls (repair parts) for the DRAGON weapons system.

We deny the protest in part and dismiss it in part.

The IFB, issued on January 16, 1986, solicited fixed prices, both with and without first article testing, for an estimated quantity of 490 for the first year and in various quantities for the next 4 years. The IFB stated that bids would be evaluated on the basis of the total cost for the 1,262 units that comprised the estimated requirements for the base plus option years, and that a contract for only the base year would be awarded to the bidder with the lowest total cost.

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On February 12, 1986, WEMS states, its vice president met with the contracting officer for clarification of the bid evaluation method. The contracting officer affirmed that the bids would indeed be evaluated based on total cost, including options, a method that the vice president told the contracting officer he believed was unfair.

At bid opening on February 26, 1986, Texas Mil-Tronics was the apparent low bidder.^{1/} WEMS protested to MICOM, and then to our Office, alleging that the award was improper because, unless the Army actually exercised the options and ordered all estimated quantities, Mil-Tronics would not in fact be the low bidder. WEMS again alleges that the method used by MICOM to evaluate bids was unfair, stating that it is difficult to understand how the estimates can be accurate enough to base an award decision on them, but not accurate enough to justify an award for a specific quantity. In addition, WEMS argues that the agency's notice to unsuccessful bidders indicated that the award, in the amount of \$2,637,441.18, was for both base and option year quantities and thus was not in accord with the solicitation, which indicated that the award would be for only the first article, if required, and the base year quantity of 490. Finally, WEMS argues that the solicitation should have included an economic price adjustment clause.

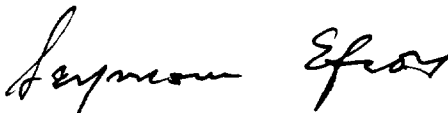
The protest is without merit. First, the use of estimated quantities for evaluation purposes is not legally objectionable here. When a procuring agency cannot predict the exact quantities that may be required, it may use estimates, since it must provide some basis for bidding even when its exact requirements are unknown. National Mediation Board--Request for Advance Decision, B-209037, Oct. 8, 1982, 82-2 CPD ¶ 323. Second, with certain exceptions that the protester does not allege are applicable here, the Federal Acquisition Regulation (FAR) specifically permits the use of option solicitation provisions and contract clauses. FAR, 48 C.F.R. § 17.202 (1984). As for award, the solicitation clearly specified that award would be made to the low, responsive bidder on the total price

^{1/} WEMS' bid on the base quantity of 490 units, \$2,047, was less than the Mil-Tronics bid on the same quantity, \$2,089.89. However, Mil-Tronics was the low bidder based on the total cost of the base year quantities plus the estimated later requirements.

for the base year quantity plus the estimated quantities for future years, but that the contract would be for only the base year quantity. Thus, the evaluation was consistent with the solicitation, and such an evaluation approach is authorized by the regulations. See FAR, 48 C.F.R. §§ 17.203, 17.206. As to the award amount, MICOM advises that the contract awarded to Mil-Tronics is for only the base quantity of 490. The contract price, MICOM states, was \$1,024,046.10. The higher figure that the protester cites appears to be Mil-Tronics' evaluated price. We deny the protest on this basis.

WEMS also alleges that it was prejudiced because the IFB did not contain an economic price adjustment clause. MICOM issued an internal policy statement on February 28, 1986, allowing the use of such clauses in contracts for repair parts where the contracting officer deems it appropriate. WEMS claims that such a clause would have allowed it to lower its bid. This protest concerns an alleged solicitation deficiency and, under our Bid Protest Regulations, should have been raised before bid opening. 4 C.F.R. § 21.2 (1985). WEMS did not do so. In any event, the policy statement was not in effect when the IFB was issued on January 16, and it did not apply retroactively.

We deny the protest in part and dismiss it in part.

for 
Harry R. Van Cleve
General Counsel