



Comptroller General

of the United States

Washington, D.C. 20548

147108

Decision

Matter of: AGEMA Infrared Systems

File: B-247976

Date: July 15, 1992

Paul F. Khoury, Esq., and Craig A. Johnson, Esq., Wiley, Rein and Fielding, for the protester.
Vera Meza, Esq., and Shawn Gallagher, Esq., Department of the Army, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's proposed noncompliant commercial equipment submitted in response to Commerce Business Daily synopsis setting forth the agency's intent to place an order under another firm's nonmandatory multiple award schedule contract.

DECISION

AGEMA Infrared Systems protests the Department of the Army's issuance of delivery order No. DAAD01-92-F-3187 to Inframetrics, Inc. for a longwave infrared imaging system under Inframetrics' nonmandatory multiple award schedule contract with the General Services Administration (GSA).

AGEMA contends that the Army did not obtain "full and open competition" for this requirement. The protester argues that the agency improperly held "discussions" with Inframetrics without holding them with AGEMA and that the Army otherwise failed to give fair consideration to the protester's "proposal" which resulted in the placement of a schedule order for an imaging system that was not the lowest overall cost alternative.

We deny the protest.

BACKGROUND

The use of GSA's nonmandatory schedule contracts to acquire Federal Information Processing (FIP) resources is governed by the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-39.803 (1992). The FIRMR permits an agency to place orders against these schedule contracts

when certain conditions are met. One condition is that the agency synopsize its intent to place an order in the Commerce Business Daily (CBD) at least 15 calendar days prior to placing the order. The notice must describe the agency's needs and invite responses from responsible vendors. 41 C.F.R. § 201-39.501-3.

Following an analysis of the responses received from nonschedule vendors, if the contracting officer determines that the responses do not meet the agency's technical requirements or that the schedule contract items still provide the lowest overall cost alternative to the government, the agency may place a schedule order. 41 C.F.R. § 201-39.803(b)(2). If, however, the analysis indicates that a nonschedule vendor's product meets the agency's needs and ordering from the schedule contract may not result in the lowest cost alternative to the government, the contracting officer may elect to issue a formal solicitation and conduct a competitive procurement for the agency's needs. Network Sys. Corp., B-243531, July 31, 1991, 91-2 CPD ¶ 117.

The CBD synopsis in this case was published on November 4, 1991, stating the Army's intent to place an order under Inframetrics' schedule contract for a longwave infrared imaging system, comprised of commercially available equipment and consisting of an electrically cooled thermal scanner, scanner control unit, video output display, all necessary interconnecting cables, transporter cart and various other "accessories." The synopsis further provided that prospective vendors could respond within 15 calendar days by submitting "complete information and sufficient technical documentation to verify compliance with the stated requirements."

On November 12, the Army received an unpriced response from AGEMA proposing to supply either its Thermovision 800 or 900 series imaging systems. The Army found that this response was technically unacceptable and notified AGEMA by telephone of the deficiencies contained in it. At AGEMA's request on November 15, the Army sent the firm a copy of the detailed specifications for the longwave infrared imaging system required by the government and covered by the schedule contract.

On November 19, AGEMA submitted a second response proposing its Thermovision 480LWB system at a price of \$62,950, together with six pages of specifications. On November 26, the Army's technical evaluator found AGEMA's second response to be technically unacceptable. At the contracting officer's request, the protester's response was subject to another technical review which was concluded on January 17, 1992. The report of the second review, which was also

unfavorable to AGEMA, stated that "(t)here are a number [of] items in the specification that the Contractor did not address at all." Three examples were listed: failure to provide an electro-optical zoom lens; failure to provide an interconnecting cable which was at least 25 feet long; and failure to provide a hard carrying case that will hold system components in foam rubber. Subsequent to the filing of this protest, the technical evaluator elaborated¹ on his findings and listed 12 specific areas--including the three areas mentioned above--in which AGEMA's second response inadequately addressed the government's specification or offered nonconforming items.

On December 6, 1991, Inframetrics submitted information to the Army describing its Model 760 system--a system which was on the GSA schedule. Inframetrics also submitted a price of \$60,386.25. The Army technical evaluator reviewed Inframetrics' submission and concluded that the firm's Model 760 met the specification but that the submission did not address all of the specification requirements.

By letter dated December 19, the Army requested clarification from Inframetrics, and the firm confirmed that its Model 760 met the specific requirements outlined in the specification and the firm stated that it had inadvertently omitted the telescopic lens from material provided to the Army and indicated a revised schedule price for the entire system, including the telescopic lens, of \$66,571.25. On February 25, after the agency had concluded that AGEMA did not have a system which met its needs, an order was placed under Inframetrics' schedule contract.

PROTEST

AGEMA contends that the Army's December 19 letter to Inframetrics and its response constituted "discussions" and argues that since the Army conducted discussions with Inframetrics it had a corresponding duty under Federal Acquisition Regulation (FAR) § 15.610 to conduct discussions

¹This post-protest analysis was provided to AGEMA as part of the agency's initial report in this matter. While the protester contends that the analysis raises no significant issues regarding the acceptability of its proposed system and asserts that the analysis is "often simply wrong," AGEMA only rebuts one part of the analysis--i.e., paragraph "b," which finds that the protester did not meet the detectable temperature specification. AGEMA does not respond to any of the other negative findings of the technical evaluator.

with it concerning the technical deficiencies found in its November 19 response to the CBD synopsis.

AGEMA also disputes the findings of the agency's technical evaluator with respect to its November 19 response to the CBD synopsis.

ANALYSIS

The agency was not conducting a competitive procurement but was instead testing the FIP market to determine whether it was proper to place an order under an existing nonmandatory schedule contract in accordance with 41 C.F.R. § 201-39.803-1. By its terms, the synopsis was not a solicitation intended to lead to a contract award; rather, as indicated above, it was a FIRMR-prescribed market testing device intended to provide the Army with a basis for determining whether technically compliant imaging systems could be supplied by nonschedule vendors, such as AGEMA, at an overall lower cost than the system available from Inframetrics under its "authorized GSA schedule." Racal-Milgo, B-225681, May 5, 1987, 87-1 CPD ¶ 472. The agency was required to conduct a formal competitive procurement only if it determined, as a result of the market test, that nonscheduled vendors could supply items at competitive prices which met the government's stated needs.

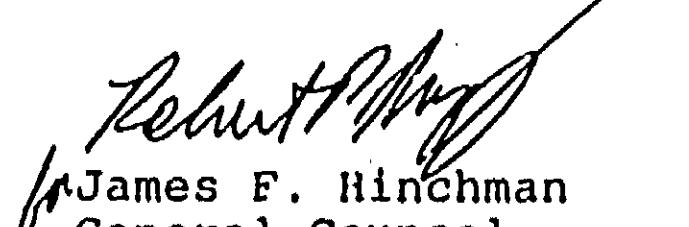
Here, the record shows that the Army notified AGEMA that its first response to the CBD/synopsis was technically deficient and provided the firm with an opportunity to respond. AGEMA's November 19 response was found to have at least three deficiencies with respect to those specifications: a failure to offer an electro-optical zoom lens; a failure to offer a connecting cable of at least 25 feet; and a failure to offer a hard carrying case. AGEMA does not dispute that the agency requires these features to meet its minimum needs; rather, the protester argues that they were all "evidently" a part of the standard features of the system described in its second response to the CBD synopsis. We have reviewed the materials submitted by AGEMA on November 19 and find no reference to an electro-optical zoom lens or a hard carrying case; further, to the extent that the materials contain references to connecting cables, they mention lengths which are all less than 25 feet.

The agency has since identified many other reasons for its rejection of its protester's second response to the CBD synopsis and as noted above, AGEMA was provided an opportunity to address these findings in its comments in the agency report. For example, the agency found that the proposed AGEMA commercial system exceeded the mandatory outside dimensions set forth in the specifications for both of the major system components: the scanner and the scanner

control unit, AGEMA has not disputed this conclusion, nor has it argued that it could change the dimensions of its commercially-available Thermovision 480LWB imaging system. In fact, of the 12 technical deficiencies listed in post-protest report of the technical evaluator, AGEMA offered a substantive rebuttal to only one item involving detectable temperature ranges.

The record shows that AGEMA offered commercial equipment which did not meet the agency's stated need in some fundamental respects. For example, the major components of AGEMA'S 480 LWB system were simply too large. Notwithstanding AGEMA's arguments concerning the agency's alleged unequal treatment of it and the awardee there is nothing in the record which indicates that further discussions would have changed the basic noncompliant nature of the protester's system. We, therefore, have no basis upon which to object to the agency's rejection of the protester's submission.

The protest is denied.



James F. Hinchman

General Counsel