



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Sun Microsystems Federal, Inc.
File: B-254497.2; B-254497.3
Date: May 20, 1994

James F. Worrall, Esq., Thomas J. Madden, Esq., Fernand A. Lavalley, Esq., and Carla D. Craft, Esq., Venable, Baetjer, Howard & Civiletti, for the protester. William Weisberg, Esq., and William T. Welch, Esq., Barton, Mountain & Tolle, for Hewlett-Packard Company; William A. Roberts III, Esq., Jerone C. Cecelic, Esq., and Lee P. Curtis, Esq., Howrey & Simon, for Silicon Graphics, Inc.; Drew A. Harker, Esq., Hadrian R. Katz, Esq., Michael E. Lackey, Esq., and Steven S. Diamond, Esq., Arnold & Porter, for Digital Equipment Corporation; and Thomas L. McGovern III, Esq., Hogan & Hartson, for International Business Machines Corporation, interested parties. Michael H. Horrom, Esq., Department of Defense, Maryland Procurement Office, for the agency. C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Awardee's protest of decision to reopen competition, based on an amended solicitation, is untimely where filed 7 months after agency suspends award and requests revised proposals; in any event, where protester does not respond to argument in agency report that initial award was not made on a basis most advantageous to the government, General Accounting Office will not object to agency's taking corrective action appropriate to remedy the impropriety, in view of agencies' broad discretion to take corrective action in such circumstances.
2. Firm whose proposal was included in the competitive range is not an interested party to protest agency's decision to modify solicitation instead of canceling it and issuing a new solicitation.
3. Where agency decided to suspend award and reopen the competition based on an amended solicitation, protest by initial awardee that it was competitively prejudiced by release of information on its prior offer is denied where

changes in the agency's technical requirements reflected in amended solicitation render that information of limited usefulness to competitors.

4. In view of agency's concern that offerors might issue catalogs with artificial product configurations created for the purpose of obtaining a favorable evaluation under the instant solicitation, and lack of evidence that there was any less restrictive cutoff date that would not have unreasonably delayed the procurement, General Accounting Office denies protest against agency's decision not to consider prices in commercial catalogs published after issuance date of draft amended solicitation.

5. Protest that agency failed in its duty to conduct proper advance planning and that solicitation will encourage unbalanced bidding is denied where incumbent protester's own data supports the agency's estimate that it will buy an increasingly greater percentage of higher performance workstations.

6. Party that was precluded from submitting a proposal by agency's decision not to consider prices in commercial catalogs published after issuance of draft amended solicitation is not an interested party to protest alleged ambiguities in scheme for determining price reasonableness.

DECISION

Sun Microsystems Federal, Inc. protests the agency's decision to suspend an award to Sun and request another round of best and final offers (BAFO), as well as the terms of amendment No. 0005 (which included the request for new BAFOs) under request for proposals (RFP) No. MDA904-92-R-K132, issued by the Department of Defense, Maryland Procurement Office (MPO) for workstations. Sun contends that MPO had no rational basis for suspending the original award; that the release of Sun's price for that award has placed Sun in an unfair competitive position, that MPO should have canceled the solicitation and issued a revised one instead of merely amending the original solicitation; and that the terms of the second request for BAFOs are unduly restrictive.

We deny the protest.

BACKGROUND

On November 22, 1992, MPO issued the solicitation for an indefinite quantity, indefinite delivery contract to meet needs for high performance workstations (HPW) for a 5-year period; the HPW was conceived of as a family of high-speed Unix-based microcomputers with large memory capacity,

advanced graphics, and sophisticated software to permit individual users to quickly analyze and compare a broad array of information.

MPO advised offerors that the specifications defined "requirements for [the] next generation of [HPWs]" and were designed to ensure satisfaction of immediate and future needs for state-of-the-art HPWs and to result in a family of workstations with features and performance ranging from basic desktop workstations with minimal expansion capabilities to powerful deskside and server models with maximum expansion capabilities. The HPW product line was to consist of a commercial-off-the-shelf (COTS) family of workstations and workstation products, *i.e.*, "available in the open market as advertised in an existing products catalog."

The solicitation provided for award to the technically acceptable proposal with the lowest evaluated price. The solicitation defined 11 categories of equipment, designated categories A-J. Prices were evaluated by applying the commercial list price (from catalogs) and offered discounts to the estimated quantities for 18 contract line items. The offerors were to provide commercial catalogs of parts and services and to propose discounts for each of the 11 product categories; the offeror was to assign all parts and services in the catalog to one of the schedule categories.

Categories A, B, and C were the most significant for evaluation purposes. Category A included desktop workstations; category B included deskside workstations with the central processing unit (CPU) small enough to fit in the user's work space but not small enough to fit on the user's desk; category C consisted of servers for where the CPU could not be fitted in the user's work space.² Contract line item numbers (CLIN) 0001-0003 represented the three workstation categories.³ With the exception of the initial

¹The 11 categories included 2 categories under G (G1 and G2).

²Categories D-J consisted of optional devices such as disc drives and monitors, software, services, parts, training, and manuals that are not critical to this discussion. Certain systems qualified as both category A and category B, in which case the solicitation instructed offerors to place them in category A.

³CLINs 0004-0007 paralleled categories D-F (CLINs 0005 and 0006, laser printers and stereo audios, fell within (continued...))

year's discount for products falling within category A, discounts were to remain constant over the 5-year life of the contract.

For new products announced during the contract period, a contractor was to offer the discount applicable to the appropriate category; after the first 90 days of performance, a contractor could raise its prices by issuing a new commercial price list, but the agency would receive the appropriate discount from the commercial list price. In no event could an offeror charge a price in excess of the Federal Supply Schedule price for an item, and should the contractor offer a lower price to any other customer during the contract period, the contractor was obligated to offer the same price to the agency here.

The solicitation directed that requirements be satisfied by COTS products, restricted to those products for which first customer shipment had occurred by February 23, 1993 (85 days after issuance of the initial RFP). Each offeror was directed to propose a configuration from their catalogs to be used as a model for the price evaluation of categories A-C, CLINs 0001-0003, to meet specific requirements, among which were integer (SPECint) and floating point (SPECfp) ratings of 25 and 40, respectively, for the desktop and desktside configurations, and ratings of 50 and 60 for the server configurations. The solicitation also contained a series of requirements for hardware and software that could be satisfied either through products listed in the offeror's commercial catalog or from third party sources. The offeror was to identify the source for such hardware, to allow the agency to order its needs from that source; the offeror was to certify that software manufacturers had commercially available versions tested, approved, and supported for use on the proposed system.

³(...continued)
category E, optional devices). CLINs 0008-0011 represented services (category G); CLINs 0012-0013 represented spare parts (category H); and CLINs 0015-0016 paralleled categories I and J. CLIN 0014 was an annual charge for software support (one computer scientist); CLIN 0017 was for software installation; CLIN 0018 was for virus scanning.

⁴The Standard Performance Evaluation Cooperative (SPEC), an industry group, rates systems by comparing their performance on a set of benchmark programs to the performance of a Digital Equipment Corporation (DEC) VAX 11/780. A system with a SPECint92 value of 40 runs the benchmark 40 times as fast as the VAX 11/780 and twice as fast as a system with a SPECint92 value of 20.

MPO received five proposals on January 22, 1993, evaluated them, asked technical questions, and requested submission of BAFOs by May 21. MPO included four of the five proposals in the competitive range; DEC's proposal was eliminated from the competitive range because of MPO's concerns that DEC's proposed third-party software did not meet COTS requirements. On June 1, evaluators recommended award to Sun as the low, technically responsible offeror, and MPO awarded a contract to Sun on June 9.

Award of the HPW contract to Sun generated several protests. Silicon Graphics, Inc. challenged the commercial availability of Sun's third-party software; International Business Machines Corporation (IBM) challenged the results of certain benchmark tests on Sun's model 20, which was used in the pricing model. Further, over the next few weeks, Sun retailers informed Sun competitors and agency personnel making blind calls that the model 20 was not a commercial model, but was only being sold to the government. MPO contacted Sun in order to resolve these issues. After review of Sun's responses, on August 2, MPO suspended the award to Sun.

The record shows that the agency was concerned about possible "gaming" by Sun in the course of the original competition; specifically, the agency was concerned that Sun had published a catalog including an older model workstation, no longer sold except in bulk quantities, with a dramatically but artificially low price, in order to generate a low evaluated price for categories A and B. As pointed out by Sun's competitors, this left Sun free to discontinue the evaluated model and publish a new price list with workstations at a much higher price.

On November 25, MPO issued amendment No. 0005, requiring that any equipment proposed for the pricing models represent a model sold in substantial quantities to the general public. The COTS definition was changed to include only products available, sold, and shipped to customers by October 25, 1993 (the day prior to issuance of a draft of the amended solicitation), to preclude preparation of special catalogs with prices taking advantage of the solicitation evaluation plan; proposal price would be determined from catalog prices in effect October 25. Further, the revised solicitation precluded the use of any models whose end-of-life had already been announced and committed offerors to supply any evaluated models for a minimum period of time.

Amendment No. 0005 further provided that prior to evaluation, prices would be reviewed for completeness, balance, deficiencies, reasonableness, and commerciality. The solicitation provided for consideration of 10 factors

in determining price reasonableness, to prevent manipulation of catalog list prices. These factors included the following: "number of sales based on the list price"; marketing of the product to the general public referencing the proposed list price; and number of parties to whom the product was sold, specifically, "whether the sales based on the proposed list price were made to a limited number of market segments, companies, and/or government agencies."⁵ The amended solicitation provided that if the contracting officer determined that the products offered were not commercially available, the offeror's proposal would be deemed noncompliant and ineligible for award.

Amendment No. 0005 subdivided CLIN 0001 into two CLINs, 0001AA and 0001AB, for low-end and high-end workstations, with higher integer/floating point requirements--SPECint of 35 and SPECfp of 50, increased from SPECint of 25 and SPECfp of 40, for the desktop and deskside stations, and values of 55 and 80 for the server configuration, increased from SPECint of 40 and SPECfp of 60. MPO also revised its estimated quantities downward; for CLIN 0001, the agency would evaluate offers based upon the purchase of an estimated quantity of 780 high-end workstations and 520 low-end stations in the 1st year, 1,120 high-end stations and 280 low-end stations in the 2nd year, and the elimination of low-end stations in subsequent years.

On December 21, Sun protested to the agency the terms of amendment No. 0005; MPO received a new round of BAFOs on December 22, and Sun, which had not submitted a BAFO, protested to our Office on January 6, 1994. After receipt of the agency report on February 18, Sun filed a second protest with our Office on March 7, contending that MPO's decision to suspend the award and request another round of BAFOs had no rational basis.

⁵The factors also included a comparison of list price of the proposed configuration versus list prices of comparable configurations, list price of the proposed configuration versus the sum of component list prices, number of sales at list price versus number of sales at higher prices, number of sales of the proposed configuration compared with sales of comparable configurations at higher prices, whether the proposed price was announced close to the October 25 cutoff or whether a higher price was announced subsequent to the cutoff, and whether a significant number of sales was made after the cutoff.

REOPENING OF THE COMPETITION

Sun did not protest the decision to suspend the initial award until March 7, 7 months after the agency informed Sun of its decision to reopen the competition. Sun argues that it had no basis for protest until it received the agency report on its first protest, in which the agency argued that it was necessary to reopen the competition in view of Sun's failure to respond satisfactorily to questions concerning the commerciality of its hardware and software. MPO argues, and the record shows, that Sun was aware of the questions raised concerning its proposal before the agency report on Sun's protest was filed; MPO argues that Sun therefore should have known that concerns over the commerciality of the products offered by Sun were a significant factor in its decision.

Although MPO concedes that the explanation provided to other offerors (as well as to our Office in a prior protest, contending that Sun should be disqualified from the competition) did not reference problems with the Sun proposal, the agency contends that the contracting officer advised Sun orally of the reasons for the suspension. MPO asserts that it agreed with Sun's president that to preclude embarrassment to Sun and challenges to Sun's further participation in the procurement, there would be no written determination that Sun's offer had not complied with the solicitation.⁶

As pointed out by IBM, regardless of whether the agency orally advised Sun of the basis for its decision, Sun's internal correspondence indicates that it did not believe the agency's explanation ("[W]hy did MPO suspend the contract award to Sun[?] We do not know. MPO has refused to answer our requests for a specific explanation."). Sun contends that it accepted the agency's explanation that it was suspending the award because its needs had changed, but the record demonstrates that the solicitation was drafted to ensure that any changes in agency needs could be satisfied under the resulting contract. Sun has not identified and our Office has not found any requirement of the amended solicitation that could not have been met under the contract awarded to Sun.

⁶In fairness to Sun, we note that the agency was equally concerned that the original solicitation may have been ambiguous and misled Sun into creating a configuration for evaluation purposes, even though the agency would never purchase the products used in the price evaluation. Nor is there any basis for concluding that Sun "gamed" the initial competition more than any other offeror.

A protester has an affirmative obligation to diligently pursue the information that forms its basis of protest. Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. A protester may not unduly delay when facts warrant further investigation, nor may the protester fail to take steps to demand a fuller explanation if the original explanation appears unsatisfactory. Management Eng'g Assocs., B-253920, Sept. 24, 1993, 93-2 CPD ¶ 182; Air Masters Corp., B-249240, Nov. 2, 1992, 92-2 CPD ¶ 299. Sun's protest is therefore untimely. See 4 C.F.R. § 21.2(a)(1), (2) (1994).

In any event, Sun has not responded to any of the agency's arguments that it was reasonably concerned that the initial award was flawed. MPO's report submitted in response to Sun's protest details the agency's concerns that Sun had failed to offer truly commercial products. The agency asserted that Sun's model S10-20 workstation, for which Sun had offered a dramatically low list price, was discontinued, was no longer sold to the public, and was not in fact commercially available. The agency was concerned that Sun had included the model in its catalog solely for the purpose of obtaining an advantage under the solicitation. The record also indicates that the agency had concerns whether it had properly rejected DEC's proposal, based on problems with the commerciality of its software that may have been shared by a number of offerors. In short, regardless of the validity of competitors' complaints about Sun's proposal, MPO concluded that offerors had conflicting interpretations of what the solicitation allowed to be proposed for pricing purposes and that ambiguities in the solicitation may have precluded the submission and evaluation of offers on a common basis.

Sun challenges none of these conclusions,⁷ but argues only that the agency made no formal written determination that it was clearly in the government's best interest to reopen discussions and that the agency's discretion to reopen discussions is not unfettered.⁸ While Sun is correct in

⁷Ordinarily, where a protester submits a response to the agency report and fails to address issues to which the report responded, we consider such issues abandoned. Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328. Here, Sun continued in its comments to assert that the cancellation was improper but took no issue with the agency's basis for the cancellation.

⁸Sun initially argued that the agency failed to make a written determination that reopening of the competition was in the best interest of the government. In response to the
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its argument that the agency's discretion is not unfettered, contracting officials do have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Oshkosh Truck Corp.; Idaho Norland Corp., B-237058.2; B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274. We will not object to proposed corrective action where, as here, the agency concludes that award was not necessarily made on a basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. PRC, Inc., 72 Comp. Gen. 530 (1992), 92-2 CPD ¶ 215. Sun provides no basis for challenging the agency's determination that corrective action was needed and no basis for finding that reopening of the competition was inappropriate.

Sun also argues that the changes accomplished by amendment No. 0005 mandate cancellation of the solicitation rather than mere amendment. Federal Acquisition Regulation (FAR) § 15.606(b)(4), Sun argues, states that if a change is so substantial that it warrants complete revision of a solicitation, the solicitation should be canceled rather than amended. Sun argues that the changes to the solicitation definition of commerciality, the alteration to the field of competition (by expanding the competitive range to include DEC's proposal), the substantial changes to technical requirements, and the substantial reduction in the agency's requirements (principally the estimated quantities) constitute a basis for canceling the original solicitation and issuing a new solicitation reflecting the agency's current requirement.

We fail to see how this decision, to amend rather than reissue the solicitation, affects Sun. While, as discussed below, the changes to requirements do affect Sun's ability to compete, the effect is the same whether Sun responds to an amended solicitation or a completely new one. FAR § 15.606(b)(4), cited by Sun, addresses solely the issue of whether an agency should conduct a new procurement to allow potential competitors who did not previously participate to submit offers; Sun, whose proposal was included in the competitive range and who was invited to submit a proposal in response to the amended solicitation, is not the appropriate party to raise the issue on behalf of potential

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agency report, Sun argued that there was no contemporaneous written documentation of such a determination and challenged the authority of the contracting officer to make it. The agency has provided us with a copy of a delegation of authority to the chief of the contracting office at MPO to approve requests for additional BAFOs.

offerors who may have been deterred from competing by the terms of the initial solicitation. Mark Group Partners and Beim & James Properties III, Joint Venture, B-255762 et al., Mar. 30, 1994, 94-1 CPD ¶ 224; Anderson Hickey Co., B-250045.3, July 13, 1993, 93-2 CPD ¶ 15 (protester failed to show how it would be prejudiced by decision to resolicit instead of reopening negotiations).

Sun also complains that the decision to reopen the competition, in view of the information disclosed about the Sun proposal that won the competition initially, placed Sun in an unfair competitive position. Sun urges the agency to provide similar information about its competitors' proposals to "level the playing field." Access to Sun's pricing and disclosure of the products proposed prejudiced Sun, the protester argues, because it gave competitors access to Sun's price structure and proposal strategy.

Sun's position is inconsistent with its assertions, discussed above, that the agency's requirements and the evaluation scheme have changed so drastically that the solicitation should be reissued rather than amended. The record indeed supports the view that the changes in technical requirements accomplished by amendment No. 0005 render any information released concerning Sun's proposal of limited usefulness to competitors.

The information released, mostly in response to the competitors' protests, included the model numbers used for the evaluation of CLINs 0001-0003; the version of the operating system; results of tests by AIM Technology (an evaluation factor in the initial competition); Sun's evaluated price for the 18 CLINs; and the fact that Sun offered a 2-year warranty. The Sun model 20, used for the evaluation of CLINs 0001-0002, no longer meets the revised requirements; the AIM benchmark is no longer part of the evaluation. As Sun itself admits, the amendment forces Sun to revise its proposal strategy and find new products to offer for evaluation; ultimately, as IBM points out, Sun argues that the changes were so drastic as to preclude Sun from submitting an offer. In view of the changes in the agency's requirements and the passage of time, more than 7 months since the initial submission of BAFOs, we have no basis to find that MDO acted improperly in declining to make public information on the competitors' proposals. See Moon Eng'g Co., Inc., B-251698.7, Dec. 14, 1993, 93-2 CPD ¶ 315.

REVISED REQUIREMENTS

Sun contends that the October 25 cutoff for catalog revisions unduly restricts competition. Sun argues that the decision to announce a new product line or new pricing for an older line is a major one, resulting in the issuance of a

new catalog only on an occasional basis. Here, the October 25 cutoff gave a major advantage to three of the competitors who had more recent catalogs with high-end workstations at a lower price (the industry trend being toward higher performance at lower price). In view of the lower catalog price, these offerors will not have to offer as drastic a discount to be competitive as would Sun, which had an older catalog and which had not planned to issue a revised catalog until February 1994. The date itself, Sun argues, is arbitrarily chosen and has no relation to what the agency plans to buy under the solicitation; because of its competitive disadvantage resulting from the older catalog, Sun states that it is unable to submit a proposal that would be competitive.

Sun fails to demonstrate that the October 25 date set by the agency was unreasonable. Some cutoff, for the purpose of demonstrating commerciality, was necessary. The earlier solicitation had such a cutoff, and Sun does not challenge the need for a cutoff. Sun's suggestion, that the agency use the original February 23, 1993, cutoff, is neither realistic nor reasonable, in view of the rapid changes in the industry which the solicitation was designed to address. While Sun now argues that a month would have been enough to allow issuance of a catalog with a competitive mix of products at a competitive price, the record indicates that the alternative suggested by Sun to the agency involved a considerably longer delay in the procurement--February 1994. Indeed, Sun did not in fact publish a catalog until April 1994, and informed the agency that it was unable to produce one earlier because it had no control over product announcements, which were dictated by its parent company. Establishment of the October 25 cutoff was calculated to counter the creation of artificial products targeted solely at obtaining a favorable price evaluation under the instant solicitation; the agency set a date prior to issuance of amendment No. 0005 because of its concern that Sun previously might have created such an artificial product. The agency's concern does not appear unfounded, and in view of our finding that no other date would have been less restrictive of competition without an unreasonable delay in the procurement, we have no basis to sustain Sun's protest against the October 25 cutoff.

⁹At a hearing held in connection with the protest, Sun suggested that a delay until February or April would have had no serious consequences, since MPO in any event did not select an awardee until March. Sun later revised its position, informing our Office that a shorter delay such as 1 month would have been sufficient to improve its competitive position.

Sun also asserts that the use of integer/floating point requirements does not provide a useful measure of the agency's performance requirements and challenges the estimated quantities in the amended solicitation, contending that the agency is incorrect in its assumption that the high-end workstation will constitute the greater portion of its needs over the 5-year period of performance. Sun asserts that the agency's estimates are incorrect because of the agency's failure to conduct proper advance planning and that the estimates will encourage unbalanced bidding.

The original solicitation used integer/floating point to define the agency's needs; Sun had no objection at that time. While there may be other valid methods of measuring computational performance, none of these other methods is less open to objection, and we are unable to conclude that integer/floating point constitute an unreasonable method of defining the agency's needs.

With respect to its challenge to the estimated quantities, Sun provides figures showing that in the 6 quarters from April 1992 to September 1993, 53.1 percent of agency orders were for low-end workstations. These statistics show, however, a steady rise in the need for high-end machines, and orders for machines with integer/floating point requirements of 35/50 have represented the following percentages of orders: April-June 1992, 1 percent; July-September, 29 percent; October-December, 37 percent; January-March 1993, 43 percent; and April-June, 71 percent. In the 4th quarter of fiscal year (FY) 1993, which Sun states is not truly representative because of uncertainties over the suspension of Sun's contract and the decision to reopen the competition, high-end stations still represented 51 percent of buys.¹⁰ The agency states further that because of decreased funding, it anticipates more purchase of high-end models, to avoid obsolescence; low-end models are available under other contractual vehicles. We find that the record, principally the data supplied by Sun, supports the agency's estimates of its need for high-end versus low-end workstations.

Sun also argues that the 10 factors used to determine commerciality (actually, in the terms of the solicitation, "price reasonableness") unnecessarily restrict competition, are ambiguous, and provide the contracting officer with

¹⁰Data supplied by the agency indicates high-end stations represented 46 percent of purchases in the 3rd quarter, FY 93, and nearly 68 percent in the 4th quarter; for the 1st quarter of FY 94, 62 percent of purchases were of high-end stations, meeting the solicitation's integer/floating point requirements.

unfettered discretion to reject proposals. The requirement that an offeror demonstrate that a product actually has been sold, Sun argues, restricts an offeror's ability to offer new products. Further, Sun asserts, the emphasis upon sales of single machines in establishing commercial price penalizes firms such as Sun who normally sell in large quantities. Sun also objects to the inclusion of government agencies in the definition of "general public."

Since Sun contends that the October 25 cutoff combined with the higher integer/floating point requirements for the high-end workstation preclude it from submitting an offer, and since Sun elected in fact not to submit a proposal, Sun is not an interested party to challenge the alleged ambiguities in the evaluation scheme, in view of our finding that the October 25 cutoff and high-end workstation requirements were reasonable. Loral Fairchild Corp., B-242957, June 24, 1991, 91-1 CPD ¶ 594. Further, although Sun asserts that it is challenging unduly restrictive specifications, its objection to the inclusion of government agencies in the definition of "general public" is clearly an attempt to impose a more restrictive definition, of a kind that our Office does not consider. Mark Group Partners and Beim & James Properties III, Joint Venture, supra.

In any event, we see nothing unreasonable about the agency's attempts to provide guidelines for determining price reasonableness; these guidelines stem directly from the problems that MPO experienced with Sun's prior offer and are designed to provide the agency the flexibility to prevent "gaming." The agency notes that it did not specify any minimum number of sales, so that it could accept the offer of new products while rejecting offers of models such as the Sun model 20, which was new only in the sense of not having been sold to the public before. The agency notes that the model 20 was not mentioned in Sun's commercial literature and that Sun's distributors and resellers did not know of its existence. To preclude similar offers, of what MPO terms "artificial" products, the agency identified a need for evidence of commerciality beyond a catalog listing--evidence of actual sales and actual efforts to market the product--to ensure that the dictates of the commercial marketplace would restrain future price increases, as the solicitation intended. We see no basis to object to the contracting officer's reservation of considerable discretion to ensure that this basic purpose of the solicitation is fulfilled. Sun has not shown how MPO's guidelines for determining commerciality/reasonableness affect its ability to submit a competitive proposal based on its existing commercial product line, and its assumption that the agency would apply the guidelines in an unreasonable or arbitrary manner is simply premature.

Finally, Sun asserts that the solicitation is defective because it fails to consider all the costs to the government, particularly those of switching from Sun to another supplier. Since the original solicitation contained no provision for such an evaluation, Sun's protest of this alleged defect, filed nearly 1 year after the submission of initial proposals, is untimely. 4 C.F.R. § 21.2(a)(1).

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel