DECISION

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

ce1321

FILE: B-186235 DATE: August 10, 1976

98704

MATTER OF: SCM Corporation, Kleinschmidt Division
Kleinschmidt Incorporated

DIGEST:

1. GAO will not undertake to resolve dispute involving interpretation of license agreement even though it bears upon evaluation factors of solicitation where parties to dispute each present reasonable arguments to support differing interpretations and dispute ultimately is for resolution before Armed Services Board of Contract Appeals or United States Court of Claims.

2. Agency's use of actual cost method of price adjustment is justified where regulation provides that its use is appropriate for contract involving no major element of design or development work and protester fails to rebut agency's conclusion that only minimal design and development is required for particular procurement.

This bid protest, in large part, results from a disagreement as to the interpretation of a license agreement entered into between the protester and the administrative agency. The interpretation of the license agreement materially affects the evaluation factors in the protested solicitation that pertain to royalties foreseeably payable under the license agreement.

As background, in the late 1960s the Army Electronics Command (ECOM) instituted a program to replace obsolescent electromechanical teletypewriter field equipment with new equipment using modern solid state techniques designated forward area tactical teletypewriter (FATT). SCM Corporation, Kleinschmidt Division (Kleinschmidt) prevailed in competition for design of the system and was awarded a development contract. Prior to the award of the contract, Kleinschmidt claimed a proprietary interest in a portion of the FATT system.

In the spring of 1971, the Army Materiel Command (now Army Materiel Development and Readiness Command /DARCOM/), investigated Kleinschmidt's claim that it had developed part of the FATT system at private expense and concluded that the

claim was valid. So that a procurement of FATTs could be solicited competitively, DARCOM entered into an agreement with Kleinschmidt styled: Release and License for Manufacturing Rights, Privately Owned Rights, Data and Patents (hereinafter called the "license agreement"). The license agreement became effective August 25, 1971, and was designated contract No. DAAB07-71-C-0294.

Under the terms of the license agreement, Kleinschmidt furnished ECOM a technical data package comprised of patents, background data and other proprietary information relating to the FATT system, and granted to the Government an irrevocable, nonexclusive license to certain of Kleinschmidt's patents, data and other proprietary information. In return for this, the Government paid Kleinschmidt $1,000,000 and promised to pay royalties, in the aggregate not to exceed $6,500,000, on certain FATT related procurements.

On January 30, 1976, ECOM issued solicitation No. DAAB07-76-R-0430 for production quantities of communications terminals, AN/UGC-75 ( )V4. ECOM recognizes that some portion of the equipment to be procured under the solicitation will incorporate Kleinschmidt proprietary technology. As a result, ECOM proposes to add as an evaluation factor to each offer an amount equal to the royalty which the Government will be required to pay to Kleinschmidt under the license agreement.

Kleinschmidt Incorporated, as one of the offerors, and its parent company, SCM Corporation, jointly protest against the Government's method of royalty computation as set forth in the evaluation factors, as well as the contracting officer's utilization of an economic price adjustment clause based upon an actual cost system of price adjustment.

In its submissions to our Office the Government, like Kleinschmidt, has submitted reasonable legal arguments in support of its position on the merits of the royalty issues. Under Kleinschmidt's interpretation of the license agreement royalties would be computed on the total contract price and would be payable unless Kleinschmidt was the prime contractor. On the other hand, the Government would exclude royalties for supplies furnished by Kleinschmidt as a subcontractor or vendor, as well as prime contractor, and then apply royalties only on the portion of the contract price attributable to the Kleinschmidt design.

The license agreement contains a Disputes clause. Disagreements between the parties to the agreement as to their rights and liabilities should be resolved by the Armed Services Board of Contract Appeals or the United States Court of Claims. However, since it will affect costs under the contract, the terms of the agreement should be considered in establishing the evaluation formula for the procurement. We will examine the agreement to insure that the solicitation evaluation formula reasonably reflects costs to be incurred by the Government under the procurement. We conclude that the evaluation formula is reasonable. Therefore, we do not believe it is necessary to go further in this regard even if the Kleinschmidt interpretation is also reasonable.

With regard to the price adjustment clause used in the solicitation, we note that ASPR § 3-404.3 provides two types of adjustment provisions based upon labor and material cost. One, the actual cost method, bases adjustments on the price of specified labor or material actually experienced by the contractor during performance of the contract. The agency decided to use this method. The other, the cost index method, is based upon an increase or decrease from specified labor or material cost standards or indices made applicable to the contract. The protester urges that this method of price adjustment should be used.

To the extent relevant here, the actual cost method is to be used if there is no major element of design engineering or development work involved. The agency, after an in-house demonstration, determined that the effort will require no more than integration of existing technology with off-the-shelf components. According to the contracting officer, approximately 6 percent of the first year contract cost will represent the design effort. In this connection, Kleinschmidt has not offered any significant evidence to rebut the agency's position. Indeed, as the record indicates, one of the major thrusts in Kleinschmidt's basic protest has been the minimal amount of change from the development of the FATT system to this procurement. Accordingly, we find no basis to question the agency's determination.

Finally, while the protester initially raised a number of other issues, these issues were withdrawn by the protester during the course of the protest.

For the foregoing reasons, the protest is denied.

R.F.K.114

Deputy Comptroller General
of the United States