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*Dick Martin*  
*Proc. II*

**DECISION**



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

FILE: B-187128

DATE: November 16, 1976

MATTER OF: Applied Materials, Inc.

**DIGEST:**

1. Where offeror orally submits firm fixed price for amended RFQ work statement, protest based on contention that such price was based on mistake and that agency should have used earlier list of prices submitted for obsolete work statement is without merit.
2. Although procedures applicable to mistakes are set forth in regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurement to extent that they are not inconsistent with negotiation procedures.

Applied Materials, Inc. (Applied) protests the award of a contract under request for quotation (RFQ) 8-1-6-EC-04560 issued by the Marshall Space Flight Center of the National Aeronautics and Space Administration (NASA). The procurement is for the fabrication and delivery of one epitaxial silicon deposition system.

Applied alleges that pursuant to an oral request from NASA, it submitted an oral price revision and that this revised price, although accurately recorded by NASA, was the result of the offeror's mistake. Applied states that it did not, in fact, intend to change its original price and contends that NASA erred in not permitting the correction of this mistake before award after notice of selection was mailed.

The RFQ was issued on January 21, 1976 requesting proposals and firm fixed price quotations by February 23 which date was later extended to March 5. A proposal from Tempress Microelectronics (Tempress) was the only proposal received on time but its price substantially exceeded the funds available to NASA for this procurement. A proposal from Applied was received on March 8 and was accepted as being in the best interest of the Government under NASA's late proposal procedures. NASA PR

3. 802-4(c). Because both proposals contained technical exceptions and contingencies, oral discussions were held separately with each of the offerors after which each was orally requested to confirm in writing its presentation of the alternatives and optional items discussed. Both agreed to make such submittals during the week of May 2 and Tempress submitted its confirmation on May 3. After four follow-up telephone calls to Applied, a portion of its submittal was received on June 1. A NASA telegram established June 11 as the date for the receipt of the remainder and Applied met this deadline.

Because of the alternatives and optional equipment still offered by the proposals, neither provided a total firm fixed price. Therefore, NASA restructured the work statement and by letter of June 25 requested from each offeror a firm fixed price quotation by July 9 with no changes, contingencies or reservations with respect to the revised work statement. The Tempress proposal, unconditionally quoting a firm fixed price of \$184,870, was received on July 7. A telegram from Applied received on July 12, promised its proposal by July 13, and it was received on July 14. The proposal made no reference to price and the technical proposal was in the form of amendment to Applied's proposal of June 9. In response to NASA's request, Applied telephoned NASA on July 19 and quoted its price as \$195,630.

On July 30, Tempress was selected for award and the notification to Applied that it was not the successful offeror was mailed. Later in the same day, Applied telephoned to advise that the \$195,630 price was in error and that its correct price was \$178,175. This information was confirmed by letter received on August 2. NASA refused to stop the award process to permit the correction and award was formally made to Tempress on August 6. Applied made a timely protest to this Office stating that its July 14 proposal revision did not alter the price of its original proposal and the price in the original proposal should have been accepted by NASA for evaluation purposes.

The record indicates that at no time prior to its telephone call of July 19 did Applied ever submit a total firm fixed price for the specific items to be delivered. Its prior submissions had been in the nature of shopping lists from which NASA could choose and then add up the fixed unit prices for each selected item to arrive at the total price. The obvious intent of the revised work statement and NASA's letter of July 9 was to obtain an unconditional firm total price from each offeror. That such a clarification was necessary is illustrated by the fact that when Applied totaled its own prices

for its verbal submittal, it apparently and unilaterally made a mistake. It is well settled that an offeror must demonstrate affirmatively the merits of his proposal and that he runs the risk of proposal rejection if he fails to do so clearly. Kinton Corporation, B-183105, June 16, 1975, 75-1 CPD 365. It is clear that Applied's submittal did not affirmatively demonstrate either that the \$178,175 was the firm fixed price for its original proposal or for the final proposal.

Further, the Applied proposal of June 9 was based on several conditions which were not acceptable to NASA or consistent with the requirements of the RFQ. For example, the RFQ called for delivery of the entire system FOB, Huntsville, Alabama, whereas Applied's proposal provided for delivery of a power unit FOB, Sykesville, Maryland. The RFQ required a two week operator training program, whereas Applied proposed a one week program with the advice that additional training would be at additional cost. The work statement was therefore revised and each offeror requested to submit its final firm fixed price. Under these circumstances, it would have been improper for NASA to have assumed that the June 9 price prevailed with regard to the July 14 proposal in the absence of a specific confirmation and especially after the oral transmittal of a new price on July 19.

Until Applied's telephone notification after the rejection of its proposal had been mailed, the contracting officer had no reason to suspect that an error had been made. The price of \$195,630 was in line with NASA's estimate and the other offer and not out of line with Applied's previous unit prices. There was, therefore, no requirement that the contracting officer seek verification of the price prior to Applied's allegation of mistake, although sound procurement practices would require that he seek written confirmation of the verbal quotation.

There remains for resolution the question whether Applied should have been permitted to correct its price to below that of Tempress in view of the fact its notification of mistake arrived at NASA before award but after the formal rejection of Applied's proposal had been mailed. We think not.

This Office has stated that although the specific procedures applicable to mistakes are set forth in those sections of the regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurements to the extent that they are not inconsistent with the negotiation procedures. Autoclave Engineers, Inc., B-132895, May 29, 1975,

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75-1 CPD 325. In this regard, NASA PR 3,805(c), which prohibits advising one offeror before award as to the relation of his price to those of his competitors, must be considered in the light of the fact that the official notice of proposal rejection had already been mailed by the time Applied telephoned NASA about its mistake. Further, NASA PR 2.406-3(a) states that a determination permitting a bidder to correct his bid so as to displace a lower acceptable bid shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. We do not believe that the mistake alleged in this instance and the price actually intended can be clearly and convincingly ascertained from the amended RFQ and the proposal and its revision.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States