



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Metric Systems Corporation

File: B-271578

Date: July 9, 1996

E. Bruce White Wolf for the protester.

Marian E. Sullivan, Esq., Department of the Air Force, for the agency.

Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation did not improperly disclose protester's design information where information was contained in a brochure the protester previously had provided to the agency without restrictions on its use or disclosure, or any indication that the protester considered the information confidential or proprietary; restriction on the use of ideas in unsolicited proposal does not apply where information was furnished to agency in advertising material, not an unsolicited proposal.

DECISION

Metric Systems Corporation protests the specifications in invitation for bids (IFB) No. F32605-96-B-0015, issued by the Department of the Air Force, Grand Forks Air Force Base (AFB), for containers to store and transport Metric's KC-135 aircraft cargo roller handling system. Metric contends that the specifications in the IFB are based on proprietary data furnished by Metric to the agency in an unsolicited proposal.

We deny the protest.

In May 1995, Grand Forks AFB received from Scott AFB, Illinois, a pricing sheet and brochure--that had originally been furnished by Metric to the Air National Guard detachment at Salt Lake City, Utah--describing Metric's AMC-135 container. The brochure and pricing sheet were not marked as containing proprietary data. Subsequently, the contracting office at Grand Forks AFB requested from Metric pricing information on the containers. Metric responded by sending the agency (by facsimile transmission) the same pricing sheet that had been included with the original brochure. Again, the pricing sheet did not contain a legend indicating that the container design information was proprietary to Metric.

The contracting office thereafter synopsisized (in the Commerce Business Daily) a possible sole source award for the AMC-135 containers to determine whether other manufacturers could supply similar containers. After seven potential offerors responded that they could supply the containers, the agency determined that a sole source award could not be justified, and that the containers should be procured on a competitive basis. The agency then based the specifications for the competitive solicitation on the description in Metric's AMC-135 container brochure.

Metric argues that the brochure and pricing sheet it submitted to the Air Force constituted an unsolicited proposal, and that the Air Force's use of the information to develop the IFB specifications violated Federal Acquisition Regulation (FAR) § 15.508(a) (FAC 90-29), which states that:

"Government personnel shall not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation or in negotiations with any firm unless the offeror is notified of and agrees to intended use. However, this prohibition does not preclude using any data, concept, or idea available to the Government from other sources without restriction."

Metric concludes that competing the requirement is improper, and that award instead should be made to it on a sole source basis.

We find that Metric's brochure and pricing sheet as submitted to the Air Force did not constitute an unsolicited proposal, and thus were not subject to the FAR restrictions. The FAR provides that an unsolicited proposal should contain certain specified basic information, indicate that it is a proposal, and permit its consideration by the agency in an objective and timely manner. FAR §§ 15.501, 15.503(c), and 15.505 (FAC 90-32). The brochure and pricing sheet did not set forth such information--it did not include the signature of a person authorized to represent and contractually obligate the firm, the period of time for which the "proposal" was to be valid (a 6-month minimum is suggested), or the type of contract preferred, and did not identify any proprietary data to be used only for evaluation purposes. See FAR §§ 15.505(a) and (c) (FAC 90-32).

Further, the FAR distinguishes an unsolicited proposal from mere "advertising material," defined as "material designed to acquaint the Government with a prospective contractor's present products or potential capabilities, or to determine the Government's interest in buying these products." FAR § 15.501 (FAC 90-32). Advertising material is not an unsolicited proposal. FAR § 15.503(b) (FAC 90-32). We think the language of Metric's brochure indicated that it was advertising material intended to introduce the product to a potential customer. For example, although Metric's brochure contained detailed drawings of the containers, the

brochure invited recipients to "Call Metric Now for More Information," thus indicating that Metric did not consider its submission to be a complete proposal that could be evaluated on its own. See generally Technical Assessment Sys., Inc., B-242436, May 3, 1991, 91-1 CPD ¶ 432 (agency reasonably considered letters to agency to be advertising material or an offer of a commercial product, and not an unsolicited proposal, where letters announced the "general availability" of a product).

We conclude that the agency properly viewed Metric's brochure and pricing information as promotional in nature, and thus was not precluded from using the information in conducting a competitive procurement.

The protest is denied.

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