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Theodore Sasso

Proc. I

DECISION



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

FILE: B-186057

DATE: November 8, 1976

MATTER OF: Microcom Corporation

DIGEST:

1. Protest of nonmandatory Federal Supply Schedule procurement on ground that low offeror's price reduction violated basic GSA contract is denied in light of contract clause permitting price reduction without prior or subsequent GSA approval or acceptance. Additionally, since protester's price was higher than low offeror's, fact that protester is small business is irrelevant in determining awardee.
2. It is function of procuring agency to determine minimum needs and GAO will not disturb determination unless shown to be without reasonable basis.
3. Administrative burden is not justification for Navy considering only three of all suppliers on Federal Supply Schedule not mandatory on Department of the Defense, but public exigency is if conclusion is documented in accordance with ASPR.
4. Where protester asserts it is "SOP" for procurement officials to "test market" and take word of suppliers as to price without checking Federal Supply Schedule price catalogs, denial by agency creates irreconcilable conflict. Since protester has burden of proof, where conflicting statements of agency and protester constitute only available evidence, protester has not met burden.

Microcom Corporation (Microcom) has protested the placement of an order by the Navy with Teledyne Telemetry (Teledyne) under General Services Administration (GSA) Federal Supply Schedule contract GS-00S-06672. The procurement under FSC 58, part IX, class 5821, special item number 228-4, was for 10 UHF transmitters.

The navy reports that procurement officials at the Naval Weapons Center, China Lake, California, in response to a requirement for radio transmitters which referenced a product produced by Microcom (model

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T-70A.(01), consulted the Federal Supply Schedule catalog for other potential sources of supply. Counsel for the Navy has informally advised us that Navy procurement officials were proceeding under the assumption that use of the Federal Supply Schedule was mandatory in this case pursuant to Armed Services Procurement Regulation (ASPR) § 5-102 (1975 ed.). However, the Navy concedes that use of the Federal Supply Schedule was not in fact mandatory in this case.

Since time was of the essence, telephonic inquiries were made to only three of the number of companies listed on the Federal Supply Schedule: Microcom, Teledyne, and Emhiser Rand Corporation (Emhiser). Emhiser responded that its product could not meet the specifications of Microcom's transmitter; Teledyne responded that its transmitter, model TR-2700S-02, could meet the specifications.

Based on the lower cost of Teledyne's product (\$12,228.60 versus Microcom's price of \$12,276), the Navy issued delivery order No. N60530-76-F-351N for 10 UHF transmitters to Teledyne, using Microcom's specifications to describe the product. Subsequently, the delivery order was amended by deleting the word "isolater" and inserting the word "isolation" in its place and deleting the phrase "into any load impedance" and inserting the phrase "up to VSWR of 5-1" in its place.

Microcom contends: (1) reduction of Teledyne's price from that listed in the Federal Supply Schedule (according to Microcom, including all options and discounts, Teledyne's catalog price was \$12,682.50) to the purchase price of \$12,228.60, by means of offering one option at no cost if a second option was purchased, violated Teledyne's basic contract with GSA; (2) Teledyne's product is not equivalent to Microcom's product with regard to its "internal isolater" and "load impedance" characteristics; (3) it is "S.O.P." for China Lake procurement officials to "test the market" and to take the word of suppliers as to the price of items without checking Federal Supply Schedule catalogs; (4) since Teledyne's price and Microcom's price are close, award should have been made to Microcom because it is a small business.

GSA annually enters into a multitude of Federal Supply Schedule contracts. See 41 C.F.R. § 101-26.401, *et seq.* (1975). The prices offered by the contractors are filed with GSA and price lists, in conformity therewith, are distributed by the contractors to the various Government agencies for use in purchasing the items. Contractors are allowed to reduce prices during the schedule contract period provided

an equivalent price reduction is applied for the duration of the contract. 41 C.F.R. § 101-26.408-5 (1975). Accordingly, a price reduction clause is included in all schedule contracts which states as follows:

"If, after date of the offer, the Contractor (i) changes any of the pricing documents or related discounts which were offered to and used by the Government to establish the prices in this contract or (ii) sells any supplies, equipment, or services covered by this contract at a price below that listed in any of the above referenced pricing documents so as to reduce any price within the applicable maximum order limitation to any customer, an equivalent price reduction shall apply to this contract for the duration of the contract period or until the price is further reduced, except for temporary price reductions. For purposes of this paragraph, any method by which the price is effectively reduced shall constitute a price reduction; provided, that temporary or promotional price reductions shall be made available to the Contracting Officer under the same terms and conditions as to other customers, except that in lieu of accepted bonus goods, the Contractor's cost of such goods shall be deducted from the contract price."

The purpose of this clause is to assure that the Government receives the benefit of any general price reduction that may occur during the contract period. As a result of a price reduction, a contractor may be able to better its competitive position during the contract period. Transmagnetics, Inc., B-186463, September 22, 1976, 76-2 CPD 272. However, all contractors have the same opportunity to reduce their prices during the term of the contract. Accordingly, Teledyne did not have to "request" and GSA did not have to "approve" a price reduction as Microcom contends. Under the price reduction clause quoted above, a contractor may offer a price reduction at any time and by any method without prior or subsequent GSA approval or acceptance.

With regard to its second contention, Microcom argues that Teledyne's product is not the equivalent of its product and that the amendments to the delivery order, noted above, reduced the specifications called for in the original delivery order.

The Navy reports that although Teledyne's product is not equivalent to Microcom's product in every respect, the salient characteristic

required by the Government " * * * was the protection of the internal oscillator stage from reflected signals with minimum impedance to the output signal," and Teledyne's product could meet this characteristic. We note here that Microcom does question the Navy's conclusion, in this regard. Assuming that Microcom is correct and that the delivery order's specifications were reduced by reason of the amendment noted above, we are unaware of any basis upon which to conclude that the Navy's action in this regard resulted in an impropriety.

It is a function of the procuring agency to determine its minimum needs and GAO will not disturb this determination unless it is clearly shown to be without a reasonable basis. Bayshore Systems Corporation, B-184446, March 2, 1976, 76-1 CPD 146. Pursuant to ASPR (see § 5-100, et seq. (1975 ed.)) and the Federal Property Management Regulations (FPMR) (see subpart 101-26.4 (amendment E-178, January 1976)), Federal agencies which procure from a multiple-award Federal Supply Schedule must do so at the lowest price consistent with their minimum needs. If the procurement is at other than the lowest schedule price, a memorandum justifying the purchase must be included in the contract file. See 52 Comp. Gen. 941, 945 (1973). (We note that such a memorandum was not included as a part of the agency report.) Thus, in the instant case, once the Navy determined its minimum needs with regard to the UHF transmitters, it was required to procure them from the lowest-priced supplier on the schedule.

The Navy has indicated that it made the selection from the Federal Supply Schedule from among three suppliers rather than checking all the suppliers for the item on the Federal Supply Schedule to ascertain the lowest-priced supplier. From the Navy's report, it is not clear whether this was due to insufficient time to check on all the suppliers or because it was considered too much of an administrative burden.

If administrative burden is the justification for not considering all the suppliers on the Federal Supply Schedule not mandatory upon the Department of Defense, that is insufficient. The above-cited regulations require all the suppliers for an item on the Federal Supply Schedule to be considered for supplying the items before a justification is made to utilize other than the low-priced item.

If insufficient time, i.e., public exigency, is the justification, that would be adequate if the conclusion is documented in accordance with ASPR § 3-202 (1975). In that regard, 10 U.S.C. § 2304(a) and § 2305 (1970) in general require the procurement of supplies for the Government to be made at the lowest price available after advertising. The purchase of supplies from a general schedule has been accepted by our Office as being in compliance with the advertising requirements. 21 Comp. Gen. 105 (1941).

The only exceptions in 10 U.S.C. § 2304(a) to following the advertising requirements are those set forth therein. Sub-paragraph (2) in 10 U.S.C. § 2304(a) provides an exception to advertising if "the public exigency will not permit the delay incident to advertising." ASPR § 3-202.2 provides that competition under this exception shall be obtained "to the maximum extent practicable, within the time allowed." Thus, it is contemplated that under this exception all sources available may not be considered if there is not sufficient time to do so.

Although it is not definite from the agency report that the Navy had an adequate reason to restrict its consideration to these sources of supply, it cannot be determined from the record before us that Teledyne was in fact not the lowest offeror on the schedule for the product the Navy purchased. In any event, performance has long since been completed. Thus, it is impracticable to recommend any further action on the procurement. However, we are recommending in a separate letter of today to the Secretary of the Navy that appropriate steps be taken to insure that future procurements involving nonmandatory Federal Supply Schedules are made in accordance with appropriate procedure.


With regard to Microcom's third argument, above, the Navy unequivocally denies Microcom's contentions, thus creating an irreconcilable conflict between the agency and the protester. In this circumstance, however, it is the protester who has the burden of proof. Where, as here, conflicting statements of the protester and the contracting agency constitute the only available evidence, we do not believe that the protester has met this burden. Reliable Maintenance Service, Inc., --request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Finally, FPMR § 101-26.408-4(b) provides for a preference to be given to small business concerns where two or more items at the same delivered price will meet the ordering agency's needs equally

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well. Here, however, by Microcom's own admission, its delivery price is higher than that of Teledyne. Thus, this provision is inapplicable on its face.

For the above-stated reasons, Microcom's protest is denied.


Acting Comptroller General
of the United States