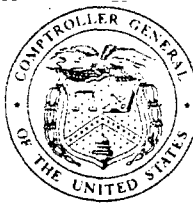


DECISION



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

12425

FILE: B-195082

DATE: January 3, 1980

MATTER OF: AM International, Inc.
AM Varityper Division

DIGEST:

1. Protester's objection to comparative analysis of cost associated with its proposed equipment and that of awardee need not be considered where record establishes that only technically acceptable offer was that of awardee. Award may not be made to technically unacceptable offeror no matter how advantageous its proposed price.
2. Where RFQ included security requirement for processing of classified data and left to agency personnel decision whether proposed equipment met acceptable standards, GAO will not object to acceptance of awardee's equipment where agency personnel ascertained that testing of awardee's equipment demonstrated compliance and there is no evidence to refute such findings.
3. Allegations of improprieties in RFQ which were not filed until after evaluation of quotations and subsequent award are untimely.
4. GAO finds no inconsistency between RFQ provision stating that RFQ was not per se delivery order legally obligating agency to purchase equipment proposed in response thereto and eventual award made since award was made pursuant to other RFQ provisions stating that purchase would be made by placement of separate delivery order against successful offeror's Federal Supply Schedule (FSS) contract.
5. Protester has furnished no evidence to support allegation that award violated Maximum Order Limitation of applicable FSS contract, and agency has provided figures to show there has been no such violation.

[Protest Involving the Award of 111191
DELIVERY ORDER] ~~008191~~

6. Protester's contention that agency improperly awarded greater number of units than specified in RFQ, thereby preventing protester from proposing more attractive prices or increased quantities, is irrelevant where protester's proposed equipment was technically unacceptable and ineligible for award regardless of price.

AM Varsityper Division of AM International, Inc. (AM) protests the award of a delivery order to CPT Corporation (CPT) for the lease and maintenance of word processing systems under request for quotations (RFQ) DAAH03-79-Q-0174, issued by the Department of the Army, Missile Command (MICOM), Redstone Arsenal, Alabama.

The major portion of AM's protest pertains to the comparative cost analysis between AM's prices and those of the successful offeror, CPT. AM contends that the Army, in the course of its cost analysis, improperly utilized intangible cost factors, whereas a cost comparison on the basis of prices in the CPT and AM Federal Supply Schedule (FSS) contracts indicates that AM's response was more advantageous. However, CPT submitted the only response that was considered technically acceptable; AM's proposal was viewed as technically unacceptable because it did not meet certain mandatory requirements. Consequently, we need not consider AM's contention as award could not be made to it on the basis of its technically unacceptable offer no matter how low its price.

As additional grounds for protest, AM questions whether the RFQ was the proper instrument for this procurement; contends that the RFQ improperly restricted consideration to FSS pricing; points to a purported contradiction between the RFQ statement that the Government did not intend to award a contract on the basis of the RFQ and the fact that the Army did make an award; alleges that the award exceeded the Maximum Order Limitation (MOL) of the FSS contract which would nullify

the obligatory use of FSS prices; and points out that the RFQ and a subsequent amendment called for pricing on nine systems but that the award was made for fifteen systems. Finally, AM questions whether CPT's response was acceptable when that response purportedly failed to demonstrate that CPT's equipment was "Tempest" approved.

The RFQ specified that the system would be procured by the placement of a delivery order against a mandatory FSS contract and provided that offers would be evaluated, inter alia, on the basis of technical acceptability and monthly cost. The RFQ indicated that, at a minimum, proposed systems must meet all mandatory specifications listed in the RFP in order to be considered.

The agency indicates that AM was not selected because it failed to meet four mandatory requirements. In this regard, the agency reports that AM failed to meet: (1) acceptable storage of user files (2) the 12-inch paper requirement and (3) the requirement for maximum communications rate of 2400 "baud asynchronous". In addition, AM did not show it could meet the Tempest security requirement.

In this instance, the protester has not specifically disputed the initial three conclusions of the technical evaluation and our review of the record indicates that these agency conclusions are reasonable. Thus, we have no basis to question the agency's conclusion that the AM equipment is technically unacceptable.

The Tempest approval requirement to which AM refers did not set forth objectively determinable performance criteria. Instead, this provision merely required that the proposed equipment have the ability to process classified data, and left to evaluating personnel the discretion to decide whether the equipment met "acceptable standards." Specifically, this provision, appearing on page 11 of the RFQ, states:

- "F. Security - The proposed equipment shall be capable of processing classified data. The contractor shall provide a TEMPEST Accession Number or other documented evidence of TEMPEST type testing.

Final decision as to system acceptability for processing of classified information lies with the appropriate security officials. Failure to meet acceptable standards shall be cause for disqualification from consideration."

The agency indicates the term Tempest refers to studies of the ability of the equipment to provide security from hostile interception. MICOM advises there is no such thing as a Tempest approved piece of equipment. Rather a Tempest Accession Number is a file or test number assigned to a completed Tempest test report, which merely indicates testing has been completed and the results are on file.

The RFQ required that respondents furnish such a Tempest Accession Number, if available. It did not provide that an offer would be rejected for failure to do so.

CPT did not furnish a Tempest Accession Number; it advised MICOM of the firm providing security testing for its equipment, and stated that it would subsequently be tested by NSA with a Tempest Accession Number to be furnished at that time. However, CPT stated that due to its lack of security clearance, CPT could not provide the status of the tests, with the consequence that MICOM would have to contact a specified representative of the testing firm.

MICOM reports that the award to CPT was made after MICOM's technical evaluators had ascertained, on the basis of classified information, that preliminary testing on the CPT equipment showed that it had been successfully Tempest modified. Inasmuch as the RFQ stated that security personnel evaluating this matter would determine whether the proposed equipment was acceptable from a security standpoint and since the protester has not furnished any evidence to show that CPT's equipment failed its security tests, we cannot question MICOM's determination of acceptability.

(Since the AM response also indicated the site where its equipment was undergoing security testing, we question MICOM's rejection of AM's response as technically unacceptable under the security requirement without further consulting the designated testing source to ascertain the results of such tests. However, since the record establishes an adequate basis for the rejection of AM's proposed equipment under the three before mentioned performance requirements, the determination of AM's technical unacceptability must be affirmed on that basis irrespective of the security requirement.)

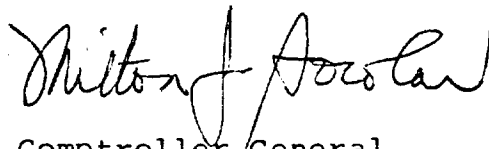
With regard to the contentions that an RFQ was not the proper instrument for this procurement and that the RFQ should not have restricted the quotation of prices to those contained in existing FSS contracts, our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), require that protests concerning alleged improprieties apparent from the face of a solicitation must be filed prior to the specified date for receipt of offers. Section 20.2(b)(1). In this instance, these allegations were not raised until after responses had been received and evaluated, and award made to CPT. Accordingly, we consider them untimely and not for consideration.

AM also questions the agency's action in making an award under the RFQ because that document indicated that it was not issued for the purpose of awarding a contract. While the first page of the RFQ states that it was not an order but merely a request for information that did not obligate the Government to procure the supplies or services offered in response thereto, the third page of the RFQ clearly stated that the system would be procured through the placement of an order against a mandatory FSS contract. We do not find the provisions on pages one and three to be inconsistent. Offerors were merely advised that the RFQ was not per se an order that, upon execution by an offeror, would legally obligate the Government to purchase the offered equipment; instead, any legal obligation would be incurred only by MICOM's placement of a separate order against a FSS contract.

MICOM asserts that, contrary to AM's allegation, the delivery order issued to CPT did not violate the MOL of its FSS contract since the contract contained a MOL of \$200,000 or 15 units for the subject equipment whereas the delivery order was for 15 units for a total dollar value of \$51,510.63. AM has provided no information in support of its contention and we find nothing in the record which disputes the agency position.

MICOM admits that the actual award was increased to fifteen systems from the nine called for in the RFQ due to the receipt of additional requirements after the RFQ was released. However, the record includes a memorandum indicating that AM, as well as CPT, was contacted four days after quotations were submitted and requested to offer an improved delivery for a quantity of nine or fifteen systems. At any rate, inasmuch as AM's allegation is merely that it might have submitted better price quotations on the increased number of units, we find the matter academic since AM's offer was technically unacceptable.

The protest is denied in part and dismissed in part.



For the Comptroller General
of the United States