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

FILE: B-206127.2 **DATE:** October 8, 1982

MATTER OF: Numax Electronics Incorporated

DIGEST:

> Bid which contained a higher option unit price than the base quantity unit price if the option were exercised for less than the same number of units involved in the base quantity, in derogation of IFB provision that the option price was not to exceed the unit price bid for the base quantity, was properly rejected as nonresponsive.

Numax Electronics Incorporated protests the proposed award of a contract to Charles Beseler Company resulting from invitation for bids (IFB) DAAB07-82-B-E033 issued by the U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, for a total of 1,522 driver's viewers. Numax contends that its bid was improperly rejected and that as the low bidder it therefore is entitled to the award. The Army found Numax' bid nonresponsive because the method of option pricing used by Numax did not comply with provisions of the IFB. We deny the protest.

The IFB, which was set aside for small business, contained a level option pricing provision (LOPP). This provision allowed the Government to increase the quantity of driver's viewers by up to but not exceeding 100 percent of the base quantity (1,522) at unit prices not higher than the lowest unit price bid by the firm for that item. (The total requirement was divided into a number of smaller quantities, and a firm could bid different unit prices for the different quantities.) The provision also included the following capitalized cautionary note: "Offerors are cautioned that an offer containing an option price higher than the lowest basic price for the same item may be accepted only if such acceptance does not prejudice any other offeror." The IFB further advised that bids would be evaluated on the basis of the quantity to be awarded, exclusive of the option quantity.

Numax was the low bidder, at $1,710 per unit, on the base quantity of 1,522 units, on which bids were evaluated. For the option quantity, Numax bid a range per unit of from $1,710 if all 1,522 option units were ordered to $2,576 per unit for progressively smaller increments of the option quantity. (For example, for 1-9 option units Numax bid $2,576 per unit and for 1,000-1,521 units it bid $1,812 per unit.) Baird Corporation, the apparent second low bidder, and Charles Beseler Co., the apparent third low bidder, protested award to Numax to the Army, alleging that Numax did not comply with the LOPP. The agency sustained the protest, agreeing that Numax' bid was nonresponsive because the firm bid a higher price per unit for the option quantities than it bid for the base quantity except for the same quantity as the base. Baird was subsequently determined to be other than small and therefore ineligible for this set-aside contract, and Beseler thus became the low bidder and prospective awardee. Beseler bid $1,834 per unit for both the basic and option quantities.

Numax contests the rejection of its bid. The firm points out that the unit price it bid for 1,522 option units is identical to its price for the 1,522 base units. Numax argues that the bid therefore complies with the LOPP because when the Government increases the quantity of driver's viewers by 100 percent, the option unit price does not exceed the lowest unit price bid on the base quantity.

In our view, Numax' manner of bidding clearly deviates from the LOPP requirement. The LOPP reserves for the Army the option to order up to 100 percent of the base quantity, and since the Army obviously may order less than the base quantity, the IFB instruction that the bidder shall not bid unit prices for the option quantity higher than the lowest unit price for the base quantity applies to <u>any</u> option quantity. Numax bid $1,710 per unit on the base quantity, but it bid option unit prices greater than $1,710 unless 1,522 or more units were ordered. Since the price bid by Numax is higher than the lowest unit price for the base quantity if the Army were to order, through the option, less than the base quantity, the bid violates the LOPP.

The determinative issue, however, is whether this deviation prejudiced the other bidders. Numax argues that if its bid is considered to deviate from the LOPP, the deviation should be waived and the bid accepted essentially because there is no prejudice. First, it maintains that other bidders were not prejudiced because there is such a wide disparity between the prices bid by Numax and the prices bid by others. It states that its bid is $229,998 less than Beseler's for the base quantity, and the minimum difference is $135,701 with an option exercise of 472 units. (As more option units are ordered, the difference increases since Numax' option price decreases while Beseler's remains the same.) Second, Numax points out that its bid is low in the aggregate (base plus option quantities), even though its option price is higher than its base price for certain quantities. It notes that the Government simply need not exercise the option for a quantity where Numax' option price is not most advantageous to the Government, see Defense Acquisition Regulation § 1-1505(d)(1976 ed.), and thus the Government is in full control of the price to be paid and will get the full benefit of the bargain Numax offers.

The Army disputes Numax' view. Regarding the other bidders, the Army points out that although Numax indeed remains low bidder in the aggregate, the contracting officer cannot conclude that Beseler would not have bid lower than it did for the evaluated base quantity had it bid in the same manner as Numax. In this respect, the Army notes that several bidders indicated to it that they felt that Numax' manner of bidding worked to their prejudice.

We considered a similar situation in our decision ABL General Systems, Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318, where we found that ABL's violation of a LOPP prejudiced other bidders. ABL was the low bidder on the base quantity, higher than the next low bidder on the option quantity, but low in the aggregate. We pointed out that we could not unquestionably conclude that if any other bidder had bid in the same manner as ABL, it would not have displaced ABL as the low bidder, and we held that the bid therefore could not be accepted under the terms and conditions of the IFB. Similarly, although Numax' bid is low in the aggregate, if Beseler had ignored the price ceiling limitation contained in the LOPP and bid in the same manner as Numax, it is possible that Beseler could have underbid Numax on the base quantity with the dollar reduction being added to its option price. Since the IFB provides that evaluation is to be made on the price of the base quantity only, Beseler then would be the apparent low bidder. Therefore, we find that Numax' bid worked to the prejudice of other bidders.

Numax' contention that the disparity between its bid and the other bids is so great that no prejudice can be found has no merit. The disparity here is not as great as the firm states. Numax' bid on the base quantity was only $124 per unit less than Beseler's, amounting to only a seven percent difference. We cannot conclude that Beseler would not have made up this difference by decreasing the price of the base units for purposes of the evaluation, and increasing the option unit prices, if the IFB had not required level option pricing. In fact, in ABL General Systems, Corporation, supra, we found bidders were prejudiced by ABL's violation of the LOPP even though its bid on the base quantity was 36 percent lower than the second low bidder. See also Keco Industries, Inc., B-195520.2, January 7, 1980, 80-1 CPD 17.

As to Numax' contention that the deviation has no real effect on the Government's option rights if a contract were awarded to Numax, the Army points out that before exercising an option the contracting officer must determine, among other factors, that the option price is the most advantageous to the Government. The Army asserts that the option price offered by Numax for up to a quantity of 1,000 exceeds the option price offered by Beseler, and thus that it would be difficult to make such a determination if the Army wanted to order less than 1,000 option units. Thus, the Army maintains the Government effectively is prevented from exercising the option at any quantity it deems necessary.

In Orlotronics Corporation, B-200382, April 22, 1981, 81-1 CPD 308, we determined that the acceptance of a bid submitted by Orlotronics that deviated from the LOPP would be prejudicial to the Government because it had the practical effect of depriving the Government of the benefit of the bargain. Orlotronics bid $300 per unit on the base quantity and a range of $390 to $700 per unit for progressively smaller increments of the option quantity, while the second low bidder bid $400 per unit for base and option quantities as contemplated by the IFB. Under the terms of Orlotronics' bid, therefore, should the Government exercise an option to purchase four additional units, for example, it would be obligated to pay a price of $700 per unit. Because it obviously would be difficult to justify such an expenditure as most advantageous to the Government, Orlotronics' method of bidding foreclosed the Government from obtaining the benefit of the LOPP.

Here, if the Government exercises its option to purchase four additional driver's viewers, for example, it would cost the Government $2,576 per unit. As in Orlotronics Corporation, supra, we do not believe the contracting officer reasonably could determine that this option price was most advantageous to the Government when another bidder under this solicitation had offered a price of $1,834 per unit. Thus, the effect of Numax' method of bidding is to prevent the Government from exercising the option at any quantity it deems necessary less than 1,000 units, for which Beseler's option price is lower than Numax', and therefore it forecloses the Government from obtaining the benefit of the option provision.

Finally, Numax contends that it used the same method of bidding in response to other Army solicitations containing an LOPP and those bids were accepted. Specifically, in contract DAAB07-81-C-0560, Numax received a higher price for the option quantity than it did for the base quantity. The Army responds that Numax' bid for that contract deviated from the LOPP, but its option price was lower than the unit price offered by any of the other bidders and in such a case there was no prejudice.

We agree with the Army that the situation in the cited contract is materially different than the one here. Where a bidder violates the option pricing clause, but the offending bidder is low on the base quantity and also is lower on the option quantity than the other base bids at a price that is higher than its own base bid, the bidder does not gain any material advantage over other bidders; similarly, the Government is not disadvantaged since the option prices offered are below any other offered price. Orlotronics Corporation, supra; 44 Comp. Gen. 581 (1965). In any case, past actions of an agency do not affect the responsiveness of a bid, which must be determined from the bid itself. Engineering Design & Development, B-185332, February 11, 1976, 76-1 CPD 92.

The protest is denied.

F. H. Barclay, Jr.

for Comptroller General
of the United States