DECISION

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

FILE: B-218019 DATE: April 2, 1985

MATTER OF: NI Industries, Inc.

DIGEST:

Protest is sustained where agency employed a use-evaluation formula for government property to be employed on a rent-free basis which differed materially from the formula stated in the request for proposals, thereby causing protester's low offer to be displaced.

NI Industries, Inc. (NI), protests the award of a contract to Engineering Research, Inc. (ERI), under request for proposals (RFP) No. DAAA09-84-R-0459, issued by the United States Army Armament, Munitions and Chemical Command, Rock Island, Illinois (Army), for the purchase of 16,246 8" M650 warheads. NI contends that its proposal price was incorrectly evaluated because the Army employed an evaluation factor for use of government-owned production equipment based upon a 10-month period for which NI was authorized to use the equipment, rather than the 5-month period which NI's offer stated that NI would actually use the government-owned equipment. We sustain the protest.

The RFP, at clause M-7, included evaluation procedures for use of government-owned production property. Part (b) of clause M-7 stated that "the months that will be used for the purpose of this evaluation will be the period computed in months set forth by the offeror (emphasis in original)." NI's offer stated in the blank next to clause M-7(b) that NI would use the government-owned property for 5 months. NI's computed use-evaluation factor, $13.36, based on the 5-month period, when added to its offered price per unit would have made NI the lowest priced offeror. However, the Army, instead of applying the 5-month evaluation factor as required by clause M-7(b), applied a 10-month evaluation factor, reflecting the period for which NI was authorized to use the government property. The effect of this was to double NI's use-evaluation factor (to a figure over $26), which made NI's total evaluated price higher than ERI's. ERI, which proposed not to use government equipment and

therefore did not have a use-evaluation factor added to its offer, was awarded a contract based on its lowest priced evaluated offer.

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. Arltec Hotel Group, B-213788, Apr. 4, 1984, 84-1 C.P.D. ¶ 381. Consequently, it is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Arltec Hotel Group, B-213788, supra.

It is clear that by applying a 10-month evaluation factor to NI's offer rather than the 5-month period set forth by NI, the Army deviated from clause M-7(b) which stated in an unambiguous manner that the use-evaluation factor would be calculated on the period in months "set forth by the offeror."

The Army argues that although clause M-7(b) appears to allow contractors to insert for purposes of evaluation virtually any production period, clause M-7(e) indicates that evaluation will be based on the period for which rent-free use of the government property is requested. We do not agree. Clause M-7(e) is applied in situations where the government property is to be used in more than one contract and therefore the use-evaluation factor must be based on a prorated calculation. NI argues, and we agree, that clause M-7(e) in no way applies to the instant situation because the equipment that NI planned to use was not being used to perform other contracts.

The Army contends that 10 months were used for evaluation purposes because it is "standard practice" to use the period requested and authorized. NI states, however, that it doubts that any such "standard practice" exists, and that even if it did, it cannot override the express evaluation criterion set forth in clause M-7(b) of the solicitation. We agree that if such a "standard practice" does exist, it is an improper practice which should not be continued. If the Army was going to calculate the use evaluation based on the period that property use was authorized, the solicitation should have contained a clause stating that, rather than stating that use-evaluation will be based on the period of time "set forth by the offeror." See, e.g., 51 Comp. Gen. 467 (1972) (use-evaluation clause in Army solicitation

stated that for evaluation purposes only, the proposed production period shall be considered to be 4 months.)

The Army argues that since NI was authorized the use of property for 10 months and because NI could take up to 12 months to deliver the warheads (NI did not propose an alternate delivery schedule), it would be unfair to other offerors to permit NI's inconsistent positions on the use of government property to now be interpreted most favorable to NI. Although NI is not bound to a 5-month production period, NI states that its planned production period is 5 months. Based on the terms of the solicitation, the Army cannot ignore the fact that NI has proposed to use the government property on a rent-free basis for only 5 months. Moreover, if the solicitation would have stated that the use-evaluation would be based on the period that government property use is authorized, NI would have been on notice of that fact and could have then requested that the authorized period be shortened to 5 months. In addition, we view the fact that NI could take up to 12 months to deliver the warheads to be irrelevant because the delivery period is not directly related to the amount of time that NI may use the government property on a rent-free basis.

The protest is sustained.

We recommend that the Army consider the feasibility of terminating ERI's contract for warheads for the convenience of the government and awarding the contract to NI (reducing NI's authorized rent-free use of applicable government property to 5 months) if NI is otherwise eligible for award.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Appropriations and Government Operations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency with respect to our recommendation.

Harry R Van Cleve

for Comptroller General
of the United States