The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Senstar Corporation

File: B-225744

Date: April 2, 1987

DIGEST

1. In the absence of any significant qualifying language to the contrary in the procurement documents, an agency will not be permitted to deny the express terms of its own solicitation.

2. A solicitation's commercial product requirement must be consistent with the Federal Acquisition Regulation, which essentially provides that an item is not a commercial product when its only use is for the government instead of the general public, or when it has been offered for sale commercially but no sales other than to the government have actually occurred.

DECISION

Senstar Corporation protests the award of a contract to Computing Devices Company (CDC) under request for proposals (RFP) No. F19628-86-R-0023, issued by the Department of the Air Force. The procurement is for the acquisition of a quantity of Short Ported Coaxial Sensor (SPCS) systems. Senstar principally complains that CDC's system does not meet the RFP's material requirement that the offered equipment be a commercial product.

We sustain the protest.

The SPCS system is designed for the perimeter protection of individual aircraft and restricted areas. The system basically utilizes buried transducer cables creating an electromagnetic field; when an intruder violates that electromagnetic field in approaching the protected area, the system will set off an alarm. The RFP was issued to 16 firms but only Senstar and CDC, both Canadian firms, responded. The firms' proposals were evaluated and discussions were held to allow for the submission of revised offers. Both proposals were judged to be good overall, meeting the essential requirements of the RFP. Since the two offers were essentially equivalent technically, with low degrees of perceived risk, the award was made to CDC as the lower-priced offeror.

Upon learning of the award, Senstar filed an agency-level protest complaining in principal part that CDC's offered system, the SPIR-NX, was not a commercial product but was newly-developed from CDC's older SPIR2-2, and was, in effect, a radical redesign. The Air Force denied the protest on the basis that the RFP, when read as a whole, did not seek strict adherence to the commercial product requirement, but rather contemplated that offerors would propose modifications to their present commercially available systems in satisfaction of the agency's specific needs. Following the denial of its protest by the Air Force, Senstar protested to this Office.

The firm contends that there is no justification for the Air Force's position that the commercial product provisions of the RFP had a meaning different from their express terms. Senstar asserts that the RFP unquestionably required that all systems offered were to be commercial products and that the SPIR-NX system offered by CDC does not meet that requirement. Senstar urges that the contract was improperly awarded to CDC on the basis of its materially nonconforming offer.

Alternatively, Senstar asserts that if the Air Force in fact intended to consider other than commercial products, this intent to deviate from the RFP's stated requirement was never communicated to Senstar. The firm urges that it was prejudiced competitively because it could have offered a non-commercial system, its ST-50, which was comparable to or lower in price than CDC's SPIR-NX system.

Senstar requests that CDC's contract be terminated for the convenience of the government and that the items either be awarded to Senstar as the sole offeror adhering to the commercial product requirement, or recompeted under a solicitation clearly defining the agency's requirements.

We agree with Senstar that the solicitation expressly called for a commercial product. In this regard, we note that the Statement of Work provided at section 1.1 that:

> "This Statement of Work describes the services, material and data required by the Government in support of the acquisition of a quantity of commercially available [SPCS] systems."

Similarly, the Purchase Technical Description provided at section I. that:

> ". . . The sensor system shall be a logistically supportable, commercially available, off-the-shelf system . . ."

The Department of Defense "Contract Security Classification Specification" document attached to the RFP identified the procurement as ". . . the acquisition of 235 commercial off-the-shelf [SPCS] systems."

Moreover, offerors were advised at section M of the RFP, "EVALUATION FACTORS FOR AWARD":

> "Since this acquisition is for commercial off-the-shelf equipment, full rights in data may not be available . . ."

When a dispute exists as to the actual meaning of a solicitation requirement, we read the solicitation as a whole and in a manner that gives effect to all of its provisions in an effort to resolve the dispute. See, e.g., Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. Our review leads us to conclude that the Air Force's interpretation is untenable since there is no significant qualifying language in the procurement documents which would permit the agency to deny the express terms of its own solicitation. See Loral Terracom et al., B-224908 et al., Feb. 18, 1987, 87-1 CPD ¶ ___. We conclude from the plain language in the RFP that the offer of a commercial product was a material requirement of this procurement. See McCotter Motors, Inc., B-214081.2, Nov. 19, 1984, 84-2 CPD ¶ 539.

The issue then is whether the SPIR-NX system offered by CDC is a commercial product within the meaning of the requirement.

Generally, it has been our view that a commercial product requirement is like any other specification requirement bearing on the product to be furnished--the offeror must commit itself to meeting the requirement, but its ability to do so is encompassed by the contracting officer's subjective responsibility determination. Clausing Machine Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. In the same vein, we have recognized that the commercial availability of a product is a broad concept which may be satisfied in different ways, and, therefore, we will not disturb a contracting officer's discretionary determination that a commercial product requirement has been met as long as there is evidence to support that determination. Digital Equipment Corp., B-219435, Oct. 24, 1985, 85-2 CPD ¶ 456.

At the same time, the intent of a solicitation's commercial product requirement must be consistent with the use given the term "commercial product" by the governing provisions of the Federal Acquisition Regulation (FAR). Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153. In Hicklin, we noted

that the FAR, 48 C.F.R. § 11.001 (1986), defines a "commercial product" as one sold or traded to the general public in the course of regular business operations at prices based on established catalog or market prices. The FAR, 48 C.F.R. § 15.804-3(c), defines "established catalog prices" in part as requiring a record of current or last sales prices to a "significant number of buyers constituting the general public;" and "commercial items" as "supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations." The "general public" is further defined as "a significant number of buyers other than the Government. . . ." FAR, 48 C.F.R. § 15.804-3(c)(5).

Hence, applying the FAR usage, it is clear that an offered item cannot be deemed to be a commercial product when its only use is for the government instead of the general public--e.g., a strictly military application--or when it has been offered for sale commercially but no sales other than to the government have actually occurred. Hicklin GM Power Co., B-222538, supra, 86-2 CPD ¶ 153 at 3.

From our review of the record, we conclude that CDC's offered SPIR-NX system does not meet the commercial product requirement here. CDC's own protest submission establishes that the firm offered for sale to Sandia National Laboratories a quantity of 30 SPIR-NX systems in June 1986, prior to the issuance of the Air Force's solicitation, but to date it has only sold two of the systems to that buyer. Sandia National Laboratories is not a commercial entity, but rather a facility of the Department of Energy managed and operated by a private contractor. See the FAR, 48 C.F.R. § 17.600 et seq. Thus, any sale to Sandia National Laboratories must be viewed as a sale to the government and not to the general public, Hicklin GM Power Co., B-222538, supra, and, even assuming that CDC fully intends to sell the SPIR-NX commercially, that market clearly is not in existence at the present time. Id.

Moreover, the Air Force's source selection report states that although CDC's previous model, the SPIR2-2, was tested extensively by the agency and found to meet its requirements, "there is no assurance the new design will meet the [current] requirements." Significantly, the smaller diameter cable used for the SPIR-NX is expressly stated in the report as "a completely new design." Hence, we do not believe it can be successfully argued that the SPIR-NX merely represents a limited modification of the older SPIR2-2 (the commercial history of which itself is unclear) so that it would still meet the commercial product test. See Clausing Machine Tools, B-216113, supra.

Accordingly, we conclude that CDC's offer was improperly accepted by the Air Force since it did not comply with the express commercial product requirement of the RFP. McCotter Motors, Inc., B-214081.2, supra. Therefore, with a view toward corrective action, it would be appropriate for the Air Force now to terminate CDC's contract for the convenience of the government and award the requirement to Senstar as the only firm offering a commercial product. Although the Air Force has argued that Senstar's offered system is itself a significant modification which does not meet the commercial product test, we do not believe the record shows that the item now offered by Senstar is other than an acceptable minor modification of its previous commercial system. See Caelter Industries, Inc., B-203418, Mar. 22, 1982, 82-1 CPD ¶ 265.

For example, the Air Force states that Senstar has not previously sold its product with the uninterruptible power source (UPS) now proposed. However, Senstar has responded that it has merely opted to contract out for the manufacture of the UPS which is most compatible functionally with its offered system. The firm indicates that the UPS, essentially a back-up power supply utilizing rechargeable batteries, is an interchangeable component widely available in the commercial market, and, hence, that the use of a particular UPS in place of another is not material to the commerciality of the SPCS system as a whole.

Similarly, the firm has countered the Air Force's assertion that its proposed shorter cable length and transreceiver module version represent significant modifications by responding (1) that the firm's commercial custom is to provide routinely for cables of varying lengths with a set standard price for those lengths; and (2) that the transreceiver module version now offered to the Air Force is only different in enclosure size from the module which has been sold commercially. On these facts, we are not persuaded that Senstar's system, in contrast to CDC's, fails to meet the commercial product test. Caelter Industries, Inc., B-203418, supra.

Alternatively, in view of Senstar's assertion that it could have offered its significantly lower-priced noncommercial ST-50 system if it had known of the Air Force's departure from the express commercial product requirement, the agency should also consider reopening discussions with both Senstar and CDC under a clarified solicitation if it now determines

that strict adherence to the commercial availability standard is not an actual minimum need of the government for purposes of this procurement.[1]/

By separate letter of today, we are so recommending to the Secretary of the Air Force.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States

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[1]/ We refer the Air Force to the Federal Acquisition Regulation, 48 C.F.R. § 11.001, which also provides for the acquisition of "commercial-type products," that is, those modified to meet some "Government-peculiar" requirement or otherwise differing in identity from their "normal commercial counterparts."