

Goldman



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Plessey Electronic Systems Corporation

File: B-236494

Date: September 11, 1989

DIGEST

Protest that agency improperly rejected protester's offer as unacceptable is denied where protester took exception to material requirement of the solicitation and attempted to limit liability for delinquent deliveries.

DECISION

Plessey Electronic Systems Corporation protests the award of a contract to Kearfott Guidance and Navigation Corporation, under request for proposals (RFP) No. DAAA09-88-R-0967 issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) for 693 servo torque drive assemblies, line of sight/electronic units, and gun trunnion resolvers. The equipment to be acquired under the contract is to be provided by AMCCOM as government furnished equipment under a General Dynamics Contract.

The protest is denied.

AMCCOM rejected Plessey's offer as being unacceptable because Plessey proposed a \$130,000 liability limit under clause H56051 entitled "Delinquent Materiel under Government Furnished Material Contracts" which was included in the RFP. Clause H56051, stated in part that:

"In the event deliveries under your contract become delinquent and the reason for the delinquency does not constitute an excusable delay within the meaning of the clause in your contract entitled 'Default,' the government may assert a claim against your firm for any additional costs (Whether in-house government costs or additional costs payable to GENERAL DYNAMICS or any other contractor) to the government as a result of your delinquency."

Plessey's proposal was also rejected because Plessey failed to respond to the government's request for prices with and without first article tests for all items.

Plessey's original proposal stated that Plessey was unable to accept clause H56051. This initiated a series of discussions between Plessey and AMCCOM in which each party stated their respective views as to whether the clause was necessary. Plessey informed AMCCOM that the clause was not consistent with the Federal Acquisition Regulation (FAR) and Plessey was unable to determine its potential financial risk. AMCCOM disagreed and requested best and final offers (BAFOs). In its BAFO request, AMCCOM notified offerors that clause H56051 was being retained and failure to accept the clause would render a proposal "nonresponsive", i.e., unacceptable. Plessey's BAFO stated that it accepted clause H56051 "predicated upon the maximum liability to [Plessey] pursuant to this clause being limited to \$130,000." Plessey's proposal was then rejected.

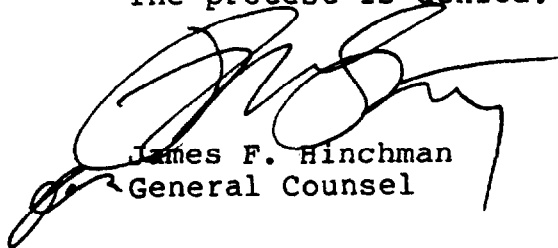
Plessey contends that clause H56051 is not a material requirement so its proposal was not rendered unacceptable by its above-quoted limitation. Plessey argues that AMCCOM itself has stated that the clause merely alerts the contractor to the right the government has to submit a claim against the contractor for damages resulting from inexcusable delinquencies. Plessey argues that since impact costs caused to another contractor by a delinquent contractor's actions are recoverable pursuant to the government's common law right of set-off for actual damages suffered, no separate contract clause is needed to give the government that right. Plessey concludes that the clause could have been omitted from the RFP without altering the government's rights in any way.

In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Telenet Communications Corp., B-224561, Feb. 18, 1987, 87-1 CPD ¶ 181.

We find that clause H56051 was material and Plessey's exception to the requirement rendered its proposal unacceptable. Regardless of AMCCOM's rationalization for its inclusion of the clause, Plessey obviously objected to its inclusion because it held the potential for increasing Plessey's liability if Plessey's deliveries became inexcusably delinquent. This is the very reason Plessey sought

to limit its liability to \$130,000. We have held that a proposal condition that qualifies an offeror's liability for special or consequential damages materially affects the substance of the offer and renders it unacceptable. Tracor Applied Sciences, B-219735, Sept. 26, 1985, 85-2 CPD ¶ 343.

The protest is denied.



James F. Hinchman
General Counsel