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DECISION



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

FILE: B-212972

DATE: September 10, 1984

MATTER OF: Information Management Associates, Inc.

DIGEST:

Agency improperly issued a purchase order against a nonmandatory General Services Administration automatic data processing schedule contract where the equipment purchased under the order differed from that described in the notice of the agency's intent to purchase required to be published in the Commerce Business Daily.

Information Management Associates Inc. (IMA) protests the purchase of microcomputers and related equipment by the Department of Housing and Urban Development (HUD). IMA contends that HUD improperly purchased equipment different from that described in its procurement notice published in the Commerce Business Daily (CBD). We sustain the protest.

In the CBD notice, HUD announced its intention to purchase 49 XT model computers from International Business Machines Corporation (IBM) under that firm's nonmandatory automatic data processing (ADP) schedule contract with the General Services Administration (GSA). The notice stated that the IBM XT "plus peripheral and the Epson MX Dot Matrix printer plus Wordstar and Dbase II software from computer solutions" met the agency's mandatory requirements. The notice listed the mandatory requirements and invited responses from interested vendors within 15 days.

The protester was one of 11 vendors that responded to the CBD notice. HUD found all unacceptable, either because their prices were higher than IBM's prices or because the proposed equipment did not meet the mandatory

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requirements. HUD rejected the protester's proposed equipment because it allegedly did not meet the requirement that it have random access memory expandable to 512K bytes on a single entity basis,^{1/} and because the protester's proposed price was higher than the schedule price of the IBM equipment.

After it had rejected all of the responses to the CBD notice, HUD determined that the notice had not accurately reflected its requirements. Rather than the 49 IBM XT (hard disk) computers announced in the CBD notice, HUD decided that it needed 35 IBM PC (floppy disk) and 14 IBM XT microcomputers. HUD reports that it did not advise any of the responding vendors of these changed requirements, but since all of the vendors held ADP schedule contracts, it compared the vendors' schedule prices for comparable equipment against the IBM schedule prices. The agency determined that IBM offered the best prices to the government and consequently, it issued a purchase order to IBM for the computers and peripheral equipment.

The protester complains that issuance of the purchase order to IBM was improper because the order was for equipment different from that listed in the CBD notice. IMA argues that HUD's action violates the requirement that the agency publish notice of its intention to place an order against a nonmandatory ADP schedule contract.

The regulations applicable to this procurement permitted an agency to place an order against nonmandatory ADP schedule contracts under certain conditions, one of which is that the agency synopsise in the CBD its intent to place an order at least 15 calendar days before ordering the equipment. Federal Procurement Regulations, 41 C.F.R. § 1-4.1109-6(b)(3) (1983). The synopsis had to include the quantity and "specific make and model" of equipment required. FPR, 41 C.F.R. § 1-4.1109-6(f)(1). The agency was required to evaluate all responses to the CBD notice to determine whether the schedule contract represented

^{1/} The agency now states that this determination was incorrect.

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the lowest overall cost alternative or whether a competitive acquisition would be more advantageous to the government. FPR, 41 C.F.R. § 1-4.1109-6(g); CMI Corporation, B-210154, Sept. 23, 1983, 83-2 CPD ¶ 364.

This notice procedure is necessary so that nonmandatory schedule purchases comply with the mandate that all purchases be made on a competitive basis to the maximum practicable extent. See FPR, 41, C.F.R. § 1-4.1109-6(a) (2). This requirement to seek competition before placing a delivery order against a schedule contract like IBM's arises because nonmandatory ADP schedule contracts are not awarded on a competitive basis. CMI Corporation, supra. Obviously this requirement for competition was not furthered by a notice which indicated that the agency needed 49 IBM XT microcomputers when in fact HUD actually ordered only 14 XT microcomputers and 35 IBM PC models. The notice indicated that one of the mandatory features of the XT model was hard disk storage, while the PC models feature floppy disk storage. We believe that once HUD became aware of the fact that the CBD notice did not accurately reflect its needs, it should have published a new notice that did reflect those needs.


We do not agree with HUD's contention that no vendor was prejudiced because it did compare the schedule prices of all who responded to the notice for equipment of the type it actually ordered with the IBM schedule prices for the equipment actually ordered. First, there may well have been nonschedule vendors who could have offered equipment meeting HUD's expanded requirements for both hard and soft disk equipment who because of the inaccurate notice had no opportunity to respond to HUD's actual requirements. Similarly, other schedule vendors who did not respond to the notice requiring only hard disk equipment may have responded to a requirement for both hard and soft disk equipment. Also, since schedule vendors who responded to CBD notices of this type may offer reductions from their schedule prices consistent with the price reduction clause of the GSA schedule contracts, A. B. Dick Company, B-211981, Feb. 1, 1984, 84-1 CPD ¶ 135, the new equipment specified could have resulted in lower prices from some of the participating vendors had they been told of the actual requirements.

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Finally, HUD argues that the protester could have called the contracting officer to learn if there had been any changes in the requirements and seems to maintain that, in any event, the equipment it purchased met the requirements of the notice.

Both arguments are meritless. We are unaware of any rule or regulation which places the burden upon prospective contractors to contact procuring agencies in order to find out whether the agency's public notice, which on its face seems reasonable, is in fact current. Further, since the CBD notice clearly stated that HUD required hard disk storage, we do not share HUD's latest view that this notice also included floppy disk models. In this regard, as far as we can determine, no vendor proposed floppy disk equipment in response to the notice and HUD itself in its original report in response to the protest stated that the notice did not indicate that it needed floppy disk storage capacity.

We are unable to recommend any corrective action here inasmuch as the IBM equipment has been delivered and installed. By letter of today, however, we are bringing this matter to the attention of the Secretary of Housing and Urban Development.


Acting Comptroller General
of the United States