



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Coherent, Inc.

File: B-270998

Date: May 7, 1996

Dr. Stephen P. Smith for the protester.

Edward L. Fitzmaurice, Esq., and Capt. Stephen T. Davis, Department of the Air Force, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly accepted awardee's certification that its proposed laser model complied with the solicitation's commercial item requirement, where although the offered product has not been sold, it has been offered for sale to the general public.

DECISION

Coherent, Inc. protests the award of a contract to Laser Systems Devices, Inc. (LSDI) by the Department of the Air Force under request for proposals (RFP) No. F19650-95-R-0106, for a single frequency titanium sapphire ring laser. Coherent contends that the laser model proposed by the awardee fails to meet the commercial product requirements of the solicitation.

We deny the protest.

The RFP, issued on July 14, 1995, contemplated the award of a firm, fixed-price contract to the responsible offeror submitting the low, technically acceptable offer. The RFP specified a brand name, Coherent model "899-01 [Ring Laser] with 895 [Solid Etalon Assembly]," or equal. The RFP listed the solicited laser's salient characteristics and required offerors proposing an equal product to submit descriptive literature and to specify the manufacturer's name and model number. The RFP included the clause found at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.211-7012, "Certifications-Commercial Items" Alternate I, which provided that "[o]ffers received in response to this solicitation that do not

offer commercial items shall not be considered for award."¹ Pursuant to that clause, offerors were required by the solicitation to certify whether the items proposed were commercial items defined by the clause as follows:

"(b)(1) Commercial items means items regularly used in the course of normal business operations for other than Government purposes which:

- (i) have been sold or licensed to the general public;
- (ii) have not been sold or licensed, but have been offered for sale or license to the general public;
- (iii) Are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time;
- (iv) Are described in paragraphs (i), (ii) or (iii) that would require only minor modification in order to meet the requirements of the procuring agency.

(2) 'Minor modification' means a modification to a commercial item that does not alter the commercial item's function or essential physical characteristics."

The Air Force received proposals from LSDI, Coherent, and a third offeror, and determined that all three proposals were technically acceptable and within the competitive range. LSDI certified in its proposal that its proposed laser model TS-202 was a commercial product under subclause (b)(1)(ii), that is, that the item has "not been sold or licensed, but [has] been offered for sale or license to the general public." On September 28, 1995, the Air Force awarded the contract to LSDI as the lowest priced, technically acceptable offeror.

Coherent questions the Air Force's acceptance of LSDI's certification, claiming, in essence, that since LSDI's proposed laser model has not actually been sold or licensed to the general public, it is not a commercial item. However, actual sale or license to the general public is not required for an item to be considered a commercial product under the clause, and LSDI has certified, in accordance with

¹This clause was subsequently deleted from the DFARS by Defense Acquisition Circular No. 91-9, Nov. 30, 1995, to conform to changes in the Federal Acquisition Regulation (FAR) implementing the provisions of the Federal Acquisition Streamlining Act of 1994 (FASA) with regard to the acquisition of commercial items.

the clause, that it has not actually sold or licensed its proposed laser model to the general public, but has offered the product for sale or license to the general public.

The determination of whether a product is a commercial item is largely within the discretion of the contracting agency, and will not be disturbed by our Office unless it is shown to be unreasonable. See Komatsu Dresser Co., B-255274, Feb. 16, 1994, 94-1 CPD ¶ 119. The protester does not assert that LSDI's proposed laser model was not offered for sale or license to the general public, and there is nothing in the record indicating that the contracting officer was on notice prior to award of facts which would lead to the conclusion that the item to be furnished was not a commercial item as defined in the solicitation. Absent such notice, the contracting officer reasonably accepted LSDI's certification in making the award. See Attachmate Corp., B-250030.6; B-250030.7, July 30, 1993, 93-2 CPD ¶ 63.

Coherent nevertheless alleges that under FAR § 11.006, the Air Force should have requested information from LSDI on the number of sales and the length of time its product has been sold in the commercial marketplace in evaluating whether LSDI is indeed offering a commercial product.² FAR § 11.006 provides that such information "may be requested from each offeror" (emphasis added) in evaluating whether an offered product is a commercial product. The Air Force was thus not required to request this information from the offerors in the RFP and, as discussed above, could rely upon LSDI's certification that it was providing a commercial product. To the extent Coherent disagrees with the Air Force's failure to request such information, its protest of the alleged solicitation impropriety is untimely filed after the time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1996).

The protest is denied.

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²After the solicitation was issued, FAR part 11, Acquisition and Distribution of Commercial Products, was completely revised by Federal Acquisition Circular No. 90-32, Sept. 18, 1995, in response to FASA to address the process of describing agency needs; FAR part 12 now addresses the acquisition of commercial items and FAR part 10 the market research to be conducted by the agency in determining if commercial items meet the agency's requirements.