



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: Electronic Design, Inc.

File: B-279662.2; B-279662.3; B-279662.4

Date: August 31, 1998

Brian A. Bannon, Esq., Wayne A. Keup, Esq., Margaret A. Dillenburg, Esq., and Joseph S. Carlin, Esq., Dyer Ellis & Joseph, for the protester.
David S. Cohen, Esq., William F. Savarino, Esq., Alex D. Kondé, Esq., Victor G. Klingelhofer, Esq., and Laurel A. Hockey, Esq., Cohen Mohr, for Litton Integrated Systems Corporation, the intervenor.
John M. Davis, Esq., Michael Glennon, Esq., and Kelly Swartz, Esq., Department of the Navy, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's source selection decision in which price is considered only as an eligibility factor (*i.e.*, price does or does not fall within agency's budget) is improper because it fails to consider price as a significant evaluation factor, as required by 10 U.S.C. § 2305(a)(2)(A) and § 2305(a)(3)(A) (1994) and as contemplated by the best value evaluation plan stated in the solicitation.
2. Agency conducted competition on an unequal basis where the awardee's initial proposal was substantially in excess of the page limitation stated in the solicitation, and the agency evaluated that proposal for award without specifically advising and providing the other offerors an opportunity to submit proposals without a page limitation.

DECISION

Electronic Design, Inc. (EDI) protests an award to Litton Integrated Systems Corporation under request for proposals (RFP) No. N00024-98-R-4013, issued by the Department of the Navy, Naval Sea Systems Command, for integrated ship control system upgrades for CG 47 Ticonderoga class ships.¹

¹The requirement included the removal of existing equipment, production and installation of the upgraded systems, testing of a complete integrated system at the land-based engineering site, engineering support, and options for direct vendor
(continued...)

We sustain the protests.

The RFP, issued on December 29, 1997, contemplated award of a fixed-price contract for equipment upgrades on 26 ships through fiscal year 2003. Section M of the RFP stated the following evaluation/source selection plan:

Attention is directed to Federal Acquisition Regulation (FAR) 52.215-16 which provides that the contract will be awarded to that responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. "Other factors" shall include all of those evaluation factors which are described in this Section M. The Government has established the relative importance of the evaluation factors as displayed below in descending order:

Technical Portion

- Performance
- Integration and Testing
- Reduce Equipment Support Costs & Overcome
Obsolescence
- Enhanced Ship Operations Capability
- DVD

RFP § M at 123. Immediately following this statement, section M stated that offers must be for all items and that price must include destination shipping charges, followed by a provision governing the evaluation of previously approved Single Process Initiative processes. Section M then stated that award would be made to the offeror whose:

- (i) management proposal is acceptable, and
- (ii) proposed price for all items . . . is, in each separate year, equal to or less than the Navy budget for this effort, and
- (iii) whose technical proposal is the best of those submitted which meet the criteria of (i) and (ii) above. However, the Government reserves the right to award to a lower priced, lower technical score offeror if that offer represents the best value to the Government.

¹(...continued)
delivery (DVD) of spare parts. See RFP § C, at. 13-25 and Attachment 1, statement of work, at 1-6.

Id. at 123-24. Immediately following was the Navy's budget for this procurement for each year of the contract.²

Amendment 0002 stated the following question about the source selection plan and the agency's answer:

35. Page 123, . . . the Government reserves the right to award to a lower priced, lesser technically qualified, offeror if it represents the best value to the Government. Is there a minimum technical score or are there any absolute requirements the lower priced offer must meet in order to be considered qualified? Can a lower priced offer be at substantial variance from the RFP in areas such as software language? What is the process the Government will use to evaluate and select a lower priced, lesser technically qualified offer vs. a maximally qualified offer at the prices specified in the solicitation?

Answer: A lower priced offer would have to meet all the requirements of the RFP, as would any awardee. The process by which a best value determination is made is largely one of judgment regarding the marginal benefits of specific features of a specific proposal and price.

Amendment 0003 stated another question and agency answer concerning the source selection plan:

g. The draft information provided previously contained considerable information concerning Cost as an Independent Variable (CAIV). The current RFP is silent in regard to CAIV. Given the statement in Section M concerning awarding to a "lower priced, lower technical score offeror" does this mean that CAIV is not a consideration in this "best value" analysis?

Answer: It was not intended to discuss CAIV in the RFP, but rather to use it as a tool in formulating the evaluation criteria. Lack of a dissertation on CAIV in the RFP is not a change from the approach cited in the information document. It is still the approach to release the budget for this program, to give substantial leeway in the technical solutions offered, and to select the best system meeting the budget. This is a CAIV approach. The Navy has added a feature of a "best value" approach (which is different from CAIV) in granting the possibility that it may accept a somewhat lesser technical approach for a lower price, for two reasons:

²The total 5-year budget was \$155.1 million.

i. While the Navy has thought that the requirements cited in the [statement of work] were challenging to meet for the stated budget, technology is moving quickly enough to suggest that requirements might be capable of being met for a lower price, even in a technically optimal approach, in which case a best value approach would be needed.

ii. Substantial small business interest suggests that savings may be available through innovative, low overhead business units, thereby strengthening the possibility that meeting the requirement does not preclude the possibility of price reductions below the Navy budget.

The RFP, at 115, stated proposal preparation instructions which included the following page limitation:³

The contractor shall submit a proposal that is no more than 3 binders. Technical and management shall not exceed 150 pages - one sided, no less than 12 point font, and no fold out pages.

The Navy received initial proposals from four offerors, including EDI and Litton, by the closing date of February 27, 1998. Litton's proposal consisted of one binder labeled "Management/Technical Proposal" with 149 material pages, a CD-ROM with video, and two additional binders of attachments consisting of approximately 1,700 pages⁴ to which the first binder made frequent reference. EDI's management/technical proposal consisted of 136 material pages, including attachments.

By letter to Litton dated March 4, the Navy stated that the attachments which Litton submitted exceeded the 150-page limitation, and also contained 57 fold-out pages and a package of over-sized drawings, the submission of which was prohibited by the RFP. The Navy instructed Litton to advise the agency which 150 pages, excluding fold-out and over-sized pages, should be considered for evaluation.

Litton responded by letter of March 4, stating that the binder marked as the management/technical proposal should be evaluated and that the two binders of attachments could be disregarded. The letter explained that the attachments "were

³Amendment 0002, item No. 47, stated that the cover letter, blank dividers, and pages which simply show the arrangement of content elsewhere in the proposal would be excluded from this page limitation.

⁴Many of the pages in Litton's attachments contained text on both sides. Amendment 0001, item No. 7, stated that each double-sided page would be counted as two pages toward the proposal page limitation. The identification of page totals here considers double-sided pages as two pages.

only provided as a convenience if further information was needed during the proposal review."

The technical evaluation review panel (TERP) attempted to evaluate the initial proposals, but determined that the significant number of deficiencies and weaknesses present in each offeror's proposal made evaluations based on those proposals impossible. Agency Report, June 26, 1998 cover letter, at 6-7; Agency Supplemental Report, July 24, 1998 cover letter, at 5-6. The Navy thus established a competitive range of all four proposals and opened discussions.

By letters to offerors dated March 20, the Navy provided questions to each offeror and requested written responses by March 27. The letters also scheduled appointments for face-to-face discussions and stated, "You may present any information at discussions you wish to present."

The letter to Litton additionally stated:

Your proposal contained pages beyond the page limit and a CD with video, which was beyond the allowed material in the initial proposal, against which the competitive range determination was made. If you wish that these now be considered as a part of the material you present for discussions, please state this in writing, or submit updated materials as you see fit.

EDI responded by letter dated March 26 and provided 16 pages of answers to 92 questions and several comments posed by the Navy, as well as two attachments totaling 11 pages.

Litton also responded by letter dated March 26, which consisted of 35 pages of answers to 79 questions and several comments posed by the agency.⁵ In response to the Navy's comment regarding Litton's initial proposal pages in excess of the RFP's page limit, Litton stated, "Litton does wish that the pages attached to our proposal, including the CD with video, now be considered as part of the material we present for discussions."

In addition, the letter included six of the previously submitted attachments, as well as two new attachments of more than 80 pages.

Following these submissions, the discussions meetings were held and concluded in early April. The Navy requested that final proposal revisions be submitted by April 11. EDI's final proposal revisions included 38 pages related to its technical

⁵Included in Litton's 35-page response was the text of the agency's questions.

proposal. Litton's final proposal revisions included only minor revision of its technical proposal.

The agency evaluated final proposals. One offeror's price for the first year was higher than the agency's stated budget; the proposal was thus determined ineligible for award and eliminated from further consideration. The evaluation results for the remaining three proposals were as follows:

Offeror	Management Rating	Technical Rating	Price
Litton	Acceptable	[DELETED]	\$138,624,300
EDI	Acceptable	[DELETED]	\$(DELETED)
A	Acceptable	[DELETED]	\$(DELETED)

The contract award review panel (CARP) considered the evaluation results and made the following recommendation to award the contract to Litton:

The RFP clearly stated that award will be made to the offeror whose (i) management proposal is acceptable, and (ii) proposed price for all items . . . is, in each separate year, equal to or less than the Navy budget for this effort. Litton, EDI and [Offeror A] satisfy these two conditions. The RFP continues to state in Section M that in the event that there is more than one offeror under budget with an acceptable Management score that award will be made to the offeror "whose technical proposal is the best of those submitted which meet the criteria of (i) and (ii) above." Litton's technical score of [DELETED] far outscores the other two offerors and the difference in technical merit easily justifies the paying of an approximately \$(DELETED) million premium over the lowest priced offer submitted by EDI.

Memorandum from CARP Chairman to Procuring Contracting Officer 4-5 (May 14, 1998).

The CARP's recommendation was approved by the source selection authority on May 14 and the contract was awarded to Litton. EDI requested and received a debriefing; these protests followed. The Navy has stayed performance of the contract due to the protests.

EDI's initial protest stated that the price considered by the Navy in evaluating EDI's proposals was incorrect. EDI asserted that the price offered in its proposal was \$(DELETED), more than \$(DELETED) million less than Litton's price. EDI alleged that the price/technical tradeoff based on a \$(DELETED) million dollar difference

was unreasonable and that award to EDI was warranted. EDI later filed a supplemental protest challenging the adequacy of discussions and the specific technical evaluations of both EDI's and Litton's proposals.

The agency report acknowledged that the Navy made an error in calculating EDI's price, and that EDI's correct price was more than \$[DELETED] million less than Litton's price. Agency Report, June 26 cover letter, at 11. However, the Navy stated that this error in calculating price had no effect on the selection of Litton because the RFP gave the agency the discretion either to make award based on the highest-rated technical proposal among the proposals with prices at or below the stated budget, or to conduct a price/technical tradeoff. *Id.* at 11, 11 n.10, and 38; see also Agency Supplemental Report, July 24 cover letter, at 3-4. The report stated, "The CARP did not conduct a cost-technical best value trade-off, as it was not required to do so under its stated evaluation scheme." Agency Report, June 26 cover letter, at 11.

The agency explained its position as follows:

Because of the [DELETED] spread of [DELETED] between EDI's and Litton's total technical scores, the Navy was not required to, and in fact was precluded from, awarding to EDI on the basis of a technical-cost tradeoff, regardless of whether EDI's price was \$[DELETED] million or \$[DELETED] million lower than Litton's.

. . . [T]he decision to award to Litton was based on technical merit alone. Because of the substantial gap between Litton's and EDI's technical scores, the Navy did not conduct a best-value analysis or technical-cost tradeoff, it was not required to do so, and, because of the gap in technical scores, would not have done one regardless of the price offered by EDI.

Id. at 38 (footnote omitted).

EDI then filed a second supplemental protest, alleging that the Navy's interpretation and implementation of the source selection plan stated in the RFP violated the requirement that price be evaluated for every source selection, pursuant to 10 U.S.C. § 2305(a)(3)(A) (1994). EDI also alleged that, based on review of Litton's proposal and related agency correspondence produced with the Navy's report, the Navy treated offerors unequally by allowing Litton to submit a proposal that far exceeded the stated page limitation. We sustain the protest on these two bases.

CONSIDERATION OF PRICE

As a general rule, the Competition in Contracting Act of 1984 (CICA) requires contracting agencies to include cost or price as a significant evaluation factor that must be considered in the evaluation of proposals. 10 U.S.C. §§ 2305(a)(2)(A), 2305(a)(3)(A)(ii); Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 9-10; see FAR § 15.605(b)(1)(i) (June 1997). An evaluation and source selection which fails to give significant consideration to cost or price is inconsistent with CICA and cannot not serve as a reasonable basis for award. Boeing Sikorsky Aircraft Support, supra. Cost or price has not been accorded significant consideration if the agency's evaluation and source selection decision so minimizes the potential impact of cost or price as to make it a nominal evaluation factor. Coastal Science and Eng'g. Inc., B-236041, Nov. 7, 1989, 89-2 CPD ¶ 436 at 3.

Here, the agency states that price was considered only to determine whether a proposal was eligible for award. Proposals with prices greater than the budget were not eligible for, nor considered for award. Once three of the proposals were determined eligible for award based on price, the Navy states that it did not consider the relative differences in price among the proposals, and did not perform a price/technical tradeoff; rather, technical merit was the sole consideration in the selection decision.⁶ Thus, to the extent the agency did consider price in this procurement, it was solely to determine basic eligibility for award. Such a consideration of price is nominal; indeed, anything less would be to ignore price completely.

We conclude that the Navy's evaluation and source selection decision did not give significant consideration to price, and therefore was inconsistent with CICA and cannot form the basis for an award. Also we note that the relative weight of price to the non-price evaluation factors was not stated in this RFP as required by CICA, 10 U.S.C. § 2305(a)(3)(A)(iii). Where, as here, a solicitation does not explicitly state the relative importance of price or cost in relation to the other evaluation factors,

⁶We note that the CARP's award recommendation based on the erroneous calculation of EDI's price appears to describe a price/technical tradeoff. Memorandum from CARP Chairman to Procuring Contracting Officer 5 (May 14, 1998). However, as noted, the agency consistently denies that a price/technical tradeoff was performed. The Navy stated that the apparent tradeoff described in the CARP's recommendation "was not dispositive of the source selection." Agency Report, June 26, 1998 cover letter, at 11. It supported this statement with quotations from the CARP's recommendation to show that the selection between EDI's and Litton's proposals was based solely on technical merit. Id. at 11-12 n. 11. In any event, no best value award selection was made which considered EDI's correct price.

our Office will presume that price or cost is of weight equal to the other factors. See Ogden Support Servs., Inc., B-270354, Feb. 28, 1996, 96-1 CPD ¶ 175 at 2 n.2.

We find no merit in the allegations asserted by counsel for the agency and Litton that this protest basis was untimely filed because it was either apparent from the terms of the RFP or from information provided to EDI during its debriefing.

The protest basis was not apparent on the face of the RFP because section M states that award would be made to the offeror whose offer "will be most advantageous to the Government, price and other factors considered" and "reserve[d] the right to award to a lower priced, lower technical score offeror if that offer represent the best value to the government." RFP § M, at 123-24. This terminology indicates that a price/technical tradeoff would be performed if the highest-rated offer was not also the lowest-priced offer. This interpretation was confirmed by the agency's explanations of the best value selection scheme stated in amendments 0002 and 0003 (quoted above). Therefore, the Navy's now stated intent not to consider relative price differences was not apparent from the face of the RFP.

To the extent the Navy argues that the RFP gave the agency the discretion to choose between a best value selection or a selection based solely on evaluated technical quality of eligible offers, this interpretation of the terms of the RFP is not reasonable, because, under such an interpretation, the agency could wait to choose between two different sets of evaluation criteria until after proposals had been submitted and evaluated. This would violate the requirement in CICA that solicitations in negotiated procurements identify the significant evaluation factors and subfactors and their relative importance. 10 U.S.C. §§ 2305(a)(2)(A) and 2305(a)(3)(A). Accordingly, it was reasonable for the protester to read the solicitation, as do we, to mean that the agency would conduct a price/technical tradeoff if a technically acceptable proposal was submitted that was priced lower than the highest-rated proposal.

The record also does not show that EDI learned during the debriefing that the agency did not perform a price/technical tradeoff. The record of the debriefing states that EDI was informed that the difference in technical merit between Litton's and EDI's proposals justified award to Litton at a higher price, which is consistent with the best value selection plan stated in the RFP. We have no basis to conclude that EDI learned prior to receipt of the agency report that the Navy did not give significant consideration to price in its source selection decision. Since the supplemental protest raising this issue was filed within 10 days of EDI's receipt of the report, the protest is timely. 4 C.F.R. § 21.2(a)(2) (1998).

UNEQUAL TREATMENT/PAGE LIMITATION

It is a fundamental principle of government procurement that competition must be conducted on an equal basis; that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. For Your Info., Inc., B-278352, Dec. 15, 1997, 97-2 CPD ¶ 164 at 4; Marine Research Specialists, B-265869, Jan. 2, 1996, 96-1 CPD ¶ 1 at 3-4; see ITT Electron Tech. Div., B-242289, Apr. 18, 1991, 91-1 CPD ¶ 383 at 9-10.

Litton's initial proposal exceeded the page limitation by approximately 1,700 pages--more than 10 times the stated page limit. The record shows that the excess pages were an integral part of the initial proposal. Not only did Litton's basic proposal make frequent references to these attachments in two supplemental binders, the attachments also contained much information necessary for evaluating the proposal's compliance with the solicitation requirements. The importance of the excess pages in Litton's evaluation is readily apparent from the fact that prior to evaluation of the excess pages, Litton's proposal was considered too deficient to evaluate, and after evaluation of those pages, Litton's proposal was evaluated as "[DELETED]." Although Litton did respond to discussion questions prior to the evaluation, the amount of information provided in response to these questions was insignificant in comparison to the amount of information provided in the attachments. Neither the agency nor Litton alleges that the improvement in Litton's technical proposal was not substantially attributable to the evaluation of the excess pages, and it would strain credulity to conclude that the these pages did not significantly influence the evaluation.

The problem is not so much that Litton submitted additional material beyond the 150-page limitation during discussions; indeed, the agency instructed all offerors that they could present any information at discussions. However, the agency did not indicate to any offeror that initial proposals were so deficient as to preclude evaluation, nor did it indicate to any offeror except Litton, either during or after discussions, that the Navy would consider submissions which would essentially constitute a resubmission of initial proposals with no page limitation.⁷ Thus, even if

⁷The parties disagree about whether EDI's final proposal exceeded the 150-page limitation, with the agency suggesting that EDI's submission of more than 150 pages proves that EDI knew that it, too, was free to submit as many pages as it wished after discussions. Even if all of EDI's submissions are counted as proposal pages, however, the few pages that would exceed 150 pages would be de minimis compared to Litton's 1,700 excess pages, and the record does not otherwise indicate that EDI believed that it could submit an unlimited number of pages, particularly since, unlike Litton, it had not received notice suggesting that, either during or after discussions, it could (re-)submit a complete proposal not subject to a page limitation.

the agency would have considered what in essence would have been new initial proposals with no page limitations, the Navy did not provide the other offerors with reasonable notice of their opportunity to submit such proposals.

The Navy did give such notice and opportunity to Litton, in that the Navy's letter of March 20 specifically asked Litton if it wished the Navy to consider the previously excluded material. Litton's acceptance of the Navy's offer resulted in the Navy considering the 1,900-page submission which Litton had prepared and submitted as its initial proposal. Since, ultimately, the agency did consider Litton's initial proposal as submitted, whereas all the other offerors adhered to the stated page limitation in preparing their initial proposals, the Navy created an unequal competition which could not be rectified by the general instruction to offerors to "present any information at discussions" they wished. See ITT Electron Tech. Div., supra (agency's consideration during discussions of an appendix submitted with initial proposal which exceeded the page limitation unfairly prejudiced other offerors, even though other offerors were permitted to submit additional information during discussions).

In essence, the Navy allowed Litton to leave the starting gate well ahead of the other offerors and never gave the other offerors sufficient information or a comparable opportunity which might have allowed them to catch up and compete under the same conditions as Litton. Since the record suggests that the page limitation on initial proposals is not required to satisfy the agency's needs, the appropriate way to place competing offerors on equal footing with Litton would appear to be to similarly allow the other offerors to prepare and submit proposals without a page limitation and to benefit from discussions on such proposals to the same extent as did Litton.

RECOMMENDATION

We recommend that the agency amend the RFP to reflect its actual needs, including with regard to the page limitation and the intended evaluation scheme, solicit proposals from the four offerors who competed here, and conduct an evaluation and source selection which is otherwise consistent with this decision. If an offeror other than Litton is selected for award, we recommend that the Navy terminate the contract previously awarded to Litton. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protests, including attorneys' fees and consultant fees.⁸ 4 C.F.R. § 21.8(d)(1) (1998). The protester's

⁸Since we recommend a recompetition and new evaluation of proposals, EDI's additional issues concerning discussions and the evaluation of both its own and Litton's proposals are rendered academic. Although we are not addressing those academic issues here, we recommend that the protester be reimbursed its

(continued...)

certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Comptroller General
of the United States

⁸(...continued)

reasonable costs of filing and pursuing all protest issues because, regardless of whether the protester would have prevailed on any given issue, all of the issues are related to the same core protest of the evaluation and source selection decision from which all of the protest issues arose. See Main Bldg. Maintenance, Inc.--Costs, B-260945.6, Dec. 15, 1997, 97-2 CPD ¶ 163 at 5.