

DECISION



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

61235

FILE: B-184732

DATE: July 29, 1976

MATTER OF: Datametrics

98789

DIGEST:

1. Even though agency referred question of protester's responsibility to SBA and COC was issued prior to completion of negotiations and request for best and final offers, such action did not foreclose agency from selecting other offeror's more advantageous final proposal. Since rejection of protester's final proposal as less advantageous was made irrespective of its capacity or credit, prior COC in favor of protester was not determinative of award. However, corrective action is recommended to prevent premature and unnecessary COC referrals.
2. Where solicitation contained no requirement for providing "off-the-shelf" equipment but provided for maximization of existing previously qualified military and/or commercial items with minimal design changes, modifications to previously qualified equipment which did not involve high-risk developmental approach was properly accepted by agency.
3. Affirmative determinations of responsibility are no longer reviewed by GAO absent a showing of fraud on part of contracting officials or other circumstances not applicable here.
4. GAO does not review allegations of "buy-in" since ASPR 1-311 does not provide for rejection of offer where "buy-in" is suspected.

This is a protest by Datametrics Corporation under Request for Proposals (RFP) 19628-75-R-0147 issued by the Electronics Systems Division (ESD), Air Force Systems Command, for the acquisition of Line Printer Units (LPUs).

Essentially Datametrics contends that it was entitled to the award since it was issued a certificate of competency (COC) by the Small Business Administration (SBA), qualifying it for this procurement. In addition, the protester objects to the evaluation and acceptance

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of an allegedly noncompliant technical proposal. The firm also alleges a "buy in" since it believes the award price is less than the contractor's anticipated costs and it questions the responsibility of the awardee.

Technical proposals were received from five offerors and evaluated by the Source Selection Evaluation Board (SSEB). Its findings were reported to the Source Selection Authority (SSA) and based thereon, the SSA determined that three proposals, including Data-metrics', were within the "competitive range" for the procurement. However, a pre-award survey on Datametrics noted a low cash flow and negative net worth and recommended that the firm not be considered for award of the contract. Since Datametrics was a small business concern, the contracting officer requested SBA to determine whether it would issue the firm a COC for this procurement. The contracting officer states that at the time this matter was referred to SBA, Datametrics had not been selected for award even though COC referrals normally occur after the selection process has been accomplished. Both he and the SSEB believed that an early referral would be desirable for several reasons. However, SBA reports that it advised the contracting officer that no action would be taken on his referral pending completion of negotiations.

Subsequently, negotiations with all three offerors were conducted and the SBA was advised by the contracting officer that a "satisfactory negotiation was held" and was requested to begin the COC proceedings. SBA assumed that Datametrics was in fact the low responsive offeror and/or the offeror considered to be the most highly qualified from a technical viewpoint. Therefore, it initiated action which culminated in the issuance of a COC on November 4, 1975. On November 6, 1975, the San Francisco regional office of the SBA notified Datametrics of this fact and stated "The Contracting Officer should award a contract to your firm as a result of our Certificate of Competency action and we are sure you will justify our confidence by expeditious handling of the contract."

However, prior to the issuance of a COC, the Air Force had not requested offerors to submit their best and final offers. Also, several amendments to the solicitation were issued just prior to and subsequent to SBA's issuance of its COC. Accordingly, the contracting officer requested revised proposals from all three offerors and he conducted further negotiations with them from December 15, 1975

through December 19, 1975. On December 24, 1975, the three offerors were requested to submit best and final offers on or before January 2, 1976. Concurrent with the submittal of its best and final offer on December 31, 1975, Datametrics made a formal protest to this Office against the award of the contract to any company other than Datametrics. A contract for this procurement was awarded to Electronic Communications Inc. (ECI) on February 12, 1976.

Datametrics believes it was entitled to the award because of the contracting officer's request for, and SBA's issuance of, a COC. It argues that pursuant to Section 8(b) of the Small Business Act of 1958, 15 U.S.C. 637(b), the issuance of a COC by SBA is binding on procuring officials, citing decisions of this Office to that effect. Further, Datametrics states that procurement regulations require that a COC determination be requested only if the small business has been selected for award and the contracting officer declines to make the award on the basis that the bidder's capacity or credit is inadequate. The protester believes that the regulatory scheme for limiting requests for COC's to such firms is designed to avoid unnecessary efforts, expenses and impositions on the SBA as well as on the small business concern. Therefore, it contends that the contracting officer has wrongfully ignored the COC issued on its behalf and that he should not now be permitted to avoid the consequences of a violation of the regulations.

In our opinion, the referral to SBA should not have been made since Armed Services Procurement Regulation (ASPR) 1-705.4(c) (1975) provides for a referral to SBA "[i]f a bid or proposal of a small business concern is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit * * *." (Emphasis added.) The record shows that such a determination was not made prior to the contracting officer's referral to SBA.

In this case, the process of negotiation and contractor selection had not been completed at the time of the SBA referral. Nevertheless, the contracting officer was required to establish a common cut-off date to allow a reasonable opportunity for submission of "best and final" offers before selecting the most advantageous price and technical proposal. ASPR § 3-805.3(d). The record shows that upon fulfillment of this regulatory process, the necessity for which should have been obvious, the Datametrics proposal was not evaluated as the most advantageous to the Government, irrespective of the firm's capacity or credit. Thus, the COC previously issued by SBA became irrelevant to this procurement and we therefore cannot agree with

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Datametrics that the award to another offeror amounts to an improper evasion of the COC process. However, we are recommending that the Air Force take corrective action to prevent premature and unnecessary referrals for COC action.

Datametrics also objects to the selection of the ECI technical proposal because in the protester's opinion the accepted proposal did not offer "off-the-shelf" equipment which it believes was an essential requirement of this procurement. In this connection the protester points out that the solicitation's cover letter advised that:

"This acquisition envisions maximization of existing previously qualified military and/or commercial LPUs with minimal design changes to meet the requirements of the * * * specifications. A developmental or high-risk approach will not be considered for award."

The protester also refers to other documents internal to the Air Force to show that the Air Force desired proven technology and existing hardware from a firm in the printer manufacturing business with the full capacity to engineer, produce and test production line printer units. Datametrics cites the provision in ASPR 14-001.7 defining "off-the-shelf item" as one which is produced and placed in stock by a contractor prior to the receipt of orders or contracts of sale. It therefore argues that the solicitation was limited to existing previously qualified or off-the-shelf LPUs, that is, "one that has been or is in production and has been qualification tested," and that the use of modified existing LPUs is noncompliant. It contends that it is the only competitor which is a manufacturer and regular dealer of an acceptable "off-the-shelf" military LPU.

Although the solicitation envisioned "maximization" of existing previously qualified LPUs, in our opinion, it did not restrict the acquisition only to previously qualified and existing equipment so long as necessary design changes do not involve a high risk developmental approach. In other words, it did not require that a previously qualified LPU be in production. While the Statement of Work (Task 5, Parts Control, para. 1.0) provides that "off-the-shelf" equipment is exempted from certain specifications for establishing and maintaining a parts selection control and standardization program otherwise applicable to modified equipment, we find no requirement in the solicitation for furnishing off-the-shelf equipment. Contrary to the protester's

position, this provision would appear to anticipate the use of equipment which is not off-the-shelf.

Datametrics further contends that the contractor does not have an off-the-shelf printer that can be modified with minimal design changes to meet the Government's specification. The protester believes that the contractor has never manufactured production printers which operate above 100 printed lines per minute with full print capabilities, whereas the solicitation specifies a minimum speed requirement of 300 lines per minute. It argues that a major development effort and scientific advancement of the contractor's technology is required to meet this speed. Furthermore, the necessity for compacting the contractor's existing 21-inch printer into an 11-inch model and other changes require significant and extensive modifications resulting in a virtually new printer.

The Air Force disagrees. It reports that all offerors proposed to modify existing printers. The successful offeror, in particular, proposed a modification of the teleprinter currently utilized by the Air Force on the AWACS Program. The Air Force notes that the printer is fully militarized and has been tested for shock, vibration EMC, temperature and humidity. The primary differences originally proposed by the successful offeror between the AWACS printer and the subject printer were: (1) a reconfigured internal frame support which reduces the complexity of the cabinet module and (2) an improved paper feeder mechanism. The Government's technical evaluators considered all of the printer modifications to be of low risk. The contractor's best and final offer also proposed: (1) repackaging of the printhead assembly and (2) improvements in functional electronic arrangement. A model that demonstrated these changes was displayed and discussed during negotiations. The changes made in the contractor's best and final offer were also considered to be of minimal risk by the Government's technical evaluators. Thus, the Air Force believes that the accepted offer did not propose a high-risk developmental printer, as alleged by Datametrics.

Our review of the successful proposal indicates that the modified print mechanism was developed on a company funded IR&D program in preparation for this procurement. Moreover, we have reviewed independently the modifications proposed by ECI to the internal frame support to reduce the complexity of the cabinet model; the

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improved paper feed mechanism; the repackaged printhead assembly and the improved functional electronic arrangements. It is our opinion that the modifications proposed by ECI to its AWAC printer were minimal in design and as such do not involve a high-risk state-of-the-art development effort.

Datametrics also argues that the contractor's price was substantially reduced in its best and final offer and was unrealistically low. The protester believes it is essential that the procuring activity carefully evaluate the bidder's responsibility in the context of its low price citing DOD Directive No. 4105.62, January 6, 1976, to this effect. The firm points out that the Air Force has declined to provide it with supporting documentation to demonstrate the cost credibility of the contractor's low price and therefore it requests this Office to review the record to determine whether the procuring agency's affirmative determination of responsibility was reasonable in view of the low price. Furthermore, Datametrics believes the final reduction in the contractor's price should have been identified as an attempted buy-in and should have resulted in a rejection of the bidder as nonresponsive.

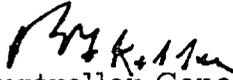
In this connection the Air Force has reported that the contractor's price for the instant procurement has been subjected to extensive analysis by the procuring activity, the Defense Contract Audit Agency and the Defense Contract Administrative Services District Orlando. No buy-in effort was found. In fact, a detailed cost analysis was made of the contractor's best and final offer and the price was determined to be fair and reasonable and compatible with the Government's target price.

In this connection, this Office no longer reviews affirmative determinations of responsibility, absent a showing of fraud on the part of contracting officials or other circumstances not applicable here. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we do consider protests involving negative determinations of the protester's responsibility in order to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgment, which are largely within the discretion of procuring officials who must suffer any difficulties resulting by reason of a contractor's inability to perform. In addition, we do not consider allegations of "buy-in" since ASPR 1-311 does not provide for rejection of a suspected buy-in. Allied Technology, Inc., B-185886, July 12, 1976, 76-2 CPD ___.

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Finally, insofar as Datametrics has protested any award to Aeronutronic Ford, the protest became moot upon award to ECI and need not be discussed in this decision. However, we refer the protester to decisions wherein we dismissed protests because the responsibility for determining whether or not an offeror is qualified as a manufacturer or a regular dealer rests with the contracting officer whose decision is subject to review by the Department of Labor rather than by this Office. See Trand Advertising Company, B-182212, February 19, 1975, 75-1 CPD 101.

For the reasons stated above, the protest is denied.


Deputy Comptroller General
of the United States