

01541

DECISION



*J. Notopoulos
Proc II*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-187994

DATE: February 18, 1977

MATTER OF: DOT Systems, Inc.

DIGEST:

1. Allegation that low offer must be rejected as an attempted "buy-in" does not provide basis for objection to award since regulations do not preclude award in such circumstances.
2. Question of whether offeror can perform at its offered price is one of responsibility. GAO does not review protests involving affirmative responsibility determinations except under circumstances not present in this case.

DOT Systems, Inc. protests the award of a contract by the U.S. Army Electronics Command (ECOM), Fort Monmouth, New Jersey, to ManTech of New Jersey Corporation (ManTech) under request for quotations (RFQ) DAAB07-76-Q-0495. The protester contends that ManTech offered unrealistically low prices at which it could not possibly provide the required technical services and that ManTech's offer therefore represented an attempted "buy-in" which should have been rejected.

The RFQ contemplated an indefinite quantity, labor hour contract of 1-year's duration, with delivery orders to be issued thereunder by ECOM for technical services pertaining to systems analysis and operations research. The solicitation provided that award would be made to the offeror submitting the lowest priced, technically acceptable offer. Prices were to be evaluated by multiplying an offeror's loaded hourly rates for various labor categories by ECOM's estimated number of man-hours set out in the solicitation. The estimates were stated to be exclusively for evaluation purposes and not a reflection of the number of man-hours which might ultimately be ordered under any resulting contract.

Four timely proposals were received and three, including ManTech's and the protester's, were determined to be technically acceptable. Although ManTech's initial offer was several hundred dollars higher than the protester's best and final offer,

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ManTech submitted a low best and final offer (\$27,714) which was more than 50 percent below both its initial offer (\$56,888) and the protester's best and final offer (\$56,416). This was effected principally by a reduction to one dollar per hour of ManTech's price for three labor categories that had initially been quoted at \$18.82, \$12.28, and \$9.81.

ECOM, concerned that a potential loss contract would result from award to ManTech (ECOM estimates that ManTech will lose almost \$32,000 on this contract), reviewed in detail its man-hour estimate for each category and conducted an exceptionally thorough financial review and analysis of the firm's financial strength in an effort to determine whether contract performance would be impaired by the anticipated loss which ManTech might incur at the prices offered. ECOM determined that its estimate did represent a reasonably accurate representation of actual anticipated needs, that ManTech's offer therefore was not materially unbalanced, and that ManTech had "the financial capacity to perform on the potential loss contract." Award was made on December 1, 1976.

There is no legal basis for sustaining the protest. Although Armed Services Procurement Regulation (ASPR) § 1-311 (1976 ed.) states that "buying in is not a favored practice," it does not legally proscribe the submission of offers at prices below cost, but merely directs that losses are not to be recouped through increases in the contract price during contract performance through change orders or other means, or through "follow-on" contracts at prices high enough to recover losses incurred on the original "buy-in" contract. As a result, we have recognized that an award is not legally precluded where "buying in" is thought to have occurred. Lester B. Knight and Associates, Inc., B-182238, January 16, 1975, 75-1 CPD 25, and cases cited therein.

The question of whether an offeror can perform at its offered price is one of responsibility. UTL Corporation, B-185832, March 30, 1976, 76-1 CPD 209; Agnew Tech-Tran Inc., B-184272, July 14, 1975, 75-2 CPD 32; Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169. Where, as in the instant case, the contracting agency has determined an offeror to be responsible, that affirmative determination of responsibility will not be questioned by this Office unless either fraud or bad faith is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Since this case involves neither of these allegations, we cannot question the contracting officer's determination that ManTech is a responsible, prospective contractor.

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Accordingly, the protest must be denied.

R. J. Kistner
Acting Comptroller General
of the United States