

7391
DECISION



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

FILE: B-190341

DATE: August 16, 1976

MATTER OF: Bristol Electronics, Inc.

DIGEST:

1. Responsible authorities both within and outside Department of Army have investigated allegation of price leak and have found no evidence of leak. In absence of evidence of leak, ground of protest cannot be sustained. Nevertheless, Secretary of Army should consider stricter security measures for safeguarding proposals.
2. GAO cannot question bare legal authority to negotiate contract under urgency exception involving priority designator 2. Nevertheless, in light of investigation which suggests that negotiation was employed to exclude incompetent concerns--reason not justifying negotiation--GAO recommends that Secretary review decision to negotiate. If Secretary finds that procurement should have been advertised instead of negotiated, it is recommended that the option not be exercised.
3. There is nothing in record which reasonably questions initial technical ratings assigned protester and other offerors under which all offers were found in competitive range although in need of correction because of technical deficiencies. Consequently, award could not have been made to protester on initial proposal basis notwithstanding price advantage contained in protester's initial proposal.
4. Army properly rejected evaluation of protester's alternate proposal since proposal was based on Government-furnished property which could not be made available.

5. Generally, protests against acceptance of allegedly unrealistic bids or proposals for fixed-price contracts imply possibility of "buy-in." GAO has held, however, that possible "buy-in" is not reason to deny award unless performance at price would adversely affect financial responsibility of offeror. Nevertheless, GAO will carefully review performance in question especially in regard to modifications increasing contract price.
6. Acceptance of major price revision by Army did not contravene RFP clauses which stressed need for cost realism in fixed-price offers since clauses permitted justification of revisions and price revision was justified by "management decisions"--a permitted justification under clauses and pertinent regulation. In any event, clauses did not require rejection of unrealistic offer but only granted option for rejection--an option which is arguably inconsistent with GAO precedent.
7. GAO recommends that new accounting data--sufficient to prevent recovery of absorbed costs--be obtained from contractor prior to any future negotiated pricing actions.

On June 17, 1977, request for proposals (RFP) No. DAAB07-77-R-0577 was issued by the Procurement & Production Directorate, United States Army Electronics Command, Fort Monmouth, New Jersey, for modem radio teletypewriter sets, range quantities from 750 to 2,000 units, under a firm, fixed-price contract. Options for additional quantities of the items were reserved in the RFP.

The RFP contained two clauses--D.37 and D.38--which are involved in the present controversy. Those clauses provided:

"D.37 COST REALISM IN REQUEST FOR PROPOSALS
(1974 NOV)

"An offeror's proposal is presumed to represent his best efforts to respond to the solicitation. Any inconsistency, whether real or apparent, between promised performance, and cost or price, should be explained in the proposal. For example, if the intended use of new and innovative production techniques is the basis for an abnormally low estimate, the nature of these techniques and their impact on cost or price should be explained; or, if a corporate policy decision has been made to absorb a portion of the estimated cost, that should be stated in the proposal. Any significant inconsistency, if unexplained, raises a fundamental issue of the offeror's understanding of the nature and scope of the work required and of his financial ability to perform the contract, and may be grounds for rejection of the proposal. The burden of proof as to cost credibility rests with the offeror.

"D.38 REQUEST FOR 'BEST AND FINAL' OFFER
(1975 AUG)

"If discussions are conducted, a "W" request for a 'best and final' offer * * * will be used to close negotiations in accordance with ASPR 3-805.3. If used, the offeror's response to it will be evaluated on the same basis as his previously submitted technical and cost proposals (see subsection D.37). Unexplained or inadequately explained departures from the previous submission may result in a proposal being technically or otherwise unacceptable. * * * Major revisions are not expected, but should you revise your offer in any way, complete and detailed support for the revision and any other affected part of your proposal must accompany the revision. In the event the price is revised,

a complete cost breakdown setting forth the revisions and basis therefor shall be submitted with the revised offer. The Government reserves the right to reject any proposal if data specified above is not submitted with a revision or, if submitted, is inadequate to establish the acceptability of the revised offer. * * *

Fifty-one firms were solicited for the RFP and seven proposals were received as of the closing date on August 4, 1977. As to events subsequent to the closing date, the Army's contracting officer reports:

"Technical evaluation of the seven (7) proposals [including proposals from Bristol Electronics, Inc., and E-Systems, Inc.] revealed that none of the proposals were technically acceptable. However, all of the proposals were considered reasonably susceptible of being made acceptable by furnishing additional information clarifying or supplementing but not basically changing their proposal as submitted.

"Technical discussions were held with all seven (7) offerors via telephone and additional written clarifying/supplementing technical information was received from all seven (7) offerors. Upon completion of technical evaluation all seven (7) proposals were determined to be technically acceptable.

"Cost/Price analysis and DCAA Audits were performed on all seven (7) proposals and price discussions/negotiations were conducted with all seven (7) offerors.

"Request for 'Best and Final' Offer TWX's closing negotiations were issued to all seven offerors on 16 September 1977 with a closing time and date of 2:00 PM, 22 September 1977.

"A technical and pricing evaluation was performed on E-Systems' 'Best and Final Offer.' E-Systems was determined to be the low technically acceptable responsible offeror and contract DAAB07-77-C-1836 in the amount of \$1,484,613.46* was awarded to them on 30 September 1977."

When Bristol learned of the award, it filed an October 5, 1977, protest (as supplemented by an October 14 letter of details). The grounds of protest were:

(1) The contracting officer should have found only Bristol's initial proposal to be competitive and eligible for negotiations because it was "25% to 124%" lower than the other price proposals received. Consequently, E-Systems should never have been permitted to submit a best and final offer.

(2) The contracting officer improperly advised Bristol during the negotiation period after receipt of initial proposals that its labor hours and overhead rates were low and that Bristol should review these costs. These remarks violated Armed Services Procurement Regulation (ASPR) § 3-805.3(b) (1976 ed.) which provides that "discussions shall not disclose the strengths or weaknesses of competing offerors, or disclose any information from an offeror's proposal which would enable another offeror to improve his proposal as a result thereof." Moreover, this pricing advice made Bristol cautious as to making further price reductions.

* E-Systems' best and final proposal upon which the contract was awarded contained a price decrease of nearly 50 percent from the company's initial price.

(3) The contracting officer improperly accepted a final, major price reduction (contained in E-Systems' best and final offer) in contravention of the RFP's provision, quoted above, that major revisions were "not expected" in best and final offers. Because Bristol literally interpreted this provision, it "made only a token reduction" in its offered price. Had Bristol realized that "major revisions" would be accepted by the contracting officer, Bristol could, and would, have made additional price reductions in its best and final offers.

(4) The contracting officer failed to make a thorough review of the reasonableness and realism of E-Systems' dramatically reduced best and final price as required by clauses D.37 and D.38 of the RFP as well as ASPR § 3-807 (1976 ed.). Instead, the contracting officer spent only 5 days before making award. In any event, Bristol fails to understand how its initial proposal could have had deficiencies in inadequate labor hours and overhead rates when the Army accepted E-Systems' final price which was considerably lower than Bristol's initial price.

(5) Had the Army properly evaluated Bristol's alternate proposal, Bristol would have been evaluated as only \$23,000 more in price than E-Systems' contract price.

(6) The Army did not properly safeguard Bristol's prices during the negotiations which may possibly account for the large final price reductions proposed by E-Systems and three other offerors.

By report dated February 10, 1978, the Headquarters, United States Army Materiel Development and Readiness Command, transmitted its views on the protest as well as the views of various members of the procuring activity, including those of the contracting officer.

The contracting officer's replies to these grounds of protest (keyed to the above-numbered paragraphs) are, as follows:

(1) "The initial offers as received were not technically acceptable. However, all were reasonably susceptible of being made acceptable. Accordingly, it was imperative that technical discussions/negotiations be conducted with all offerors. At the conclusion of technical discussions all seven (7) offerors were deemed to be technically acceptable and, as such, eligible for award and therefore within the competitive range; at this juncture all offerors were deemed to have a reasonable chance of receiving an award, since final cost comparisons could not yet be made. Therefore all offerors were requested to submit best and final offers for evaluation."

(2) "On 16 September 1977 (not 15 September 1977 as asserted), telephone discussions/negotiations were conducted with Mr. Revzin of Bristol regarding areas of costs questioned. Mr. Revzin was advised that Bristol's projected labor overhead rate * * * was well below * * * the [rate] Government analysis indicated he was experiencing and should be reviewed. With regard to labor hours Mr. Revzin was advised that man-hours, labor mix and labor rates were now considered reasonable and acceptable as a result of technical negotiations. At no time during the conduct of evaluation and negotiations for this procurement was any information from a competing offeror's proposal discussed with any other offeror by Government personnel. Thus there was no possible violation of ASPR 3-805.3 (b) by the Government."

(3) "During the telephone conversation of 16 September, 1977 the only caution given Bristol regarding 'Best and Final Offer' was to review sections D.37 and D.38 of the solicitation and if their proposal was to be revised in any way to submit complete and detailed support for the revision. At no time did the Contracting Officer advise Bristol as to how to develop its final cost proposal. Obviously it is absurd for Bristol to attempt to impute responsibility for its own negotiation strategy to the Contracting Officer."

(4) "E-Systems 'Best and Final Offer' complied with Sections D.37 and D.38 of the solicitation. In accordance with ASPR 5-807.3 a certificate of current cost or Pricing Data was obtained for E-Systems 'Best and Final Offer.' The review and analysis of E-Systems offer was accomplished by the expenditure of approximately twenty six (26) person days of effort. Many weekend and overtime hours were utilized during this evaluation at the conclusion of which E-Systems offer was found to be completely acceptable and fully documented and supported. The Contracting Officer cannot control the fluctuation in offerors' prices during the competitive negotiation process. He can only assure himself that an award is made to the low priced technically acceptable offeror, [on] the basis for award stated in the solicitation. In this instance a thorough and comprehensive review confirmed E-Systems to be that low priced, technically acceptable offeror."

(5) "All offerors including Bristol were advised of the deficiencies in their proposals and were allowed to correct or resolve the deficiencies. Admittedly the alternate

proposal submitted by Bristol was not discussed. The alternate proposal required the use of Government owned tools and gauges which were not available for use on this procurement; if these tools and gauges had been available their use would have been offered to all participants during the solicitation period so that offerors could compete on an equal basis. In any event, discussions in regard to the alternate proposal could not have led to revisions or corrections since the proposal was simply and unequivocally unacceptable because of the unavailability of the Government equipment. All offerors competed on an equal basis because none had possible use of the Government equipment, so there was no possible disadvantage to Bristol. Also it is unclear how Bristol can assert that consideration of the alternate proposal by the Government would have lowered its best and final price. If, as Bristol says, its best and final price was based on the alternate proposal the fact that the equipment was not available and Bristol would then have to supply the equipment would raise Bristol's price, not lower it. In view of the foregoing there was no violation of ASPR 3-805.3."

(6) "All required security measures were observed and proposals were made available only to those persons having a 'need to know.' I am not aware of any unauthorized persons being in possession of Bristol's or any other offeror's proposal and I have no knowledge whatsoever as to how such circumstances could have arisen if in fact any offers were known to unauthorized parties. If in fact there were 'leaks' of sensitive information Government personnel were not, to my knowledge, involved and I, as Contracting Officer, took every reasonable and required precaution to protect the confidentiality of all proposals."

The Army's report (containing the contracting officer's statement, a legal opinion, and other procurement documents at "tabs A-K"*) was then made available to the legal counsels for Bristol and E-Systems.

By letter dated March 30, 1978, counsel for Bristol submitted comments on the Army's report. Those comments may be summarized as follows:

(1) GAO should determine whether E-Systems' final, 50-percent price reduction was a "legitimate business decision or an illegal second chance to price on the basis of intelligence arising from [knowledge of] the initial offer results."

(2) The request for best and final offers, the 104-day period needed to make award and the inclusion of option provisions in the RFP under which the E-Systems' contract was awarded were "totally irreconcilable" with the "public exigency" negotiation authority under which the RFP was issued; but for a convenient urgency determination the procurement would have been advertised. Moreover, it would have been proper for the Army to award a contract to Bristol on the basis of its initial proposals without discussions, especially since initial proposals were technically acceptable contrary to the contracting officer's statement. Further, the discussions conducted among offerors between September 14-16, 1977, were a sham--consisting only of price discussions--and a mere "cover" for the failure to make an initial proposal award to Bristol.

* The Army would not allow Bristol's counsel to examine tabs F (E-Systems' proposal), G (the Army's technical evaluation of E-Systems' proposal), H (the Army's "Cost/Price Analysis and Negotiations Memos for E-Systems' proposal") and J (the Army's evaluation of E-Systems' "best and final offer"). In arriving at our decision we have reviewed all parts of the Army's report, notwithstanding that some parts were not released to Bristol. See Systems Research Laboratories, Inc. - Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341, and cases cited in text.

(3) The "cast of characters" who improperly conducted the subject procurement were the same Army individuals who were responsible for the improper award described by GAO in Bristol Electronics, Inc., et al., 54 Comp. Gen. 16 (1974), 74-2 CPD 23, and Bristol Electronics Inc., 54 Comp. Gen. 521 (1974), 74-2 CPD 381.

(4) The contracting officer ignored areas of "negotiation objectives" suggested for each offeror by the Army's price analyst.

(5) The Army's price analyst, 1 day after the receipt of best and final offers, improperly accepted E-Systems' cost data submitted with the company's initial proposal as an "equitable base" to justify acceptance of E-Systems' final, 50-percent reduction. This statement was made before the contracting officer had received a current certificate of cost and pricing data. The admitted lack of current data should have required rejection of E-Systems' offer under clause D.3 of the RFP. Moreover, the Army's Chairman of the Board of Awards for the procurement considered that reliance on E-Systems' initial cost data was improper by commenting, prior to award, that there was "nothing in the file to indicate whether the contractor's back-up was analyzed to determine whether his final offer was acceptable." Even though the contracting officer thereafter submitted backup data, the GAO should determine when this was furnished and whether it justified the award.

In response to Bristol's March 30 comments, the Army's contracting officer submitted a supplemental report, dated May 10, 1978, to our Office. Other than disclosing the transmittal letter forwarding the report, the Army has not disclosed the contents of the report to Bristol. The supplemental report's responses keyed to the numbered paragraphs of Bristol's comments are:

(1) The allegation of an improper price leak is currently being investigated by responsible authorities.

(2) This ground of protest is untimely raised under GAO's Bid Protest Procedures (4 C.F.R. § 20 (1977)). In any event, ASPR § 1-1503 (1976 ed.) expressly permits inclusion of option provisions in the subject RFP. The Army has no intention of exercising option rights under the contract while the protest is pending. Further, since the contracting officer does not have authority to determine priority designators, he could not have "conveniently determined the existence of an exigency." Consequently, the procurement was properly negotiated under the "public exigency" exception because the purchase request for the items carried a priority designator 02 which, under ASPR § 3-202-3, justifies negotiation.

Although ASPR § 3-805.1 (1976 ed.) permits award on an initial proposal basis, this is an exceptional procedure; moreover, this procurement was not suitable for an initial proposal award. Initial proposals were not technically acceptable--thus none was capable of being made the subject of an immediate award.

The pricing analyst memo describing the "acceptable" character of technical proposals refers to the technical proposals, as amended by August 30 submissions, not to initial proposals. Discussions were had as to technical matters (August 1977) and pricing matters (September 14-16). As to pricing matters, the discussions were based on the price analyst's evaluation of each offer. This evaluation was later formally submitted to the contracting officer after the close of price negotiations on September 19.

(3) Although the allegedly related background is not considered relevant, the Army employees involved in the 1974 procurement and, most significantly, the contracting officer, who is certainly the key person in any procurement, are not the same as in the 1977 procurement.

(4) As stated under (2) above, the contracting officer relied on the price analyst's evaluation in conducting the September 14-17 price negotiations.

(5) The contracting officer properly relied on E-Systems' initial cost data to project cost and price and to establish cost objectives for the September 14-17 negotiation of initial proposals. E-Systems submitted a "DD Form 633" dated September 21, 1977, which fully supported its September 21 best and final offer. Moreover, the contracting officer's memo of pricing evaluation in the initial Army report shows that the contracting officer properly evaluated E-Systems' best and final price, especially as to how E-Systems' "management decisions" affected its final price reductions. The initial Army report shows that E-Systems furnished a September 30 certificate of current cost and pricing data.

After Bristol's March 31 comments were received, but prior to the receipt of Army's May 10 supplemental report, we were made aware of an Army Audit Agency investigation into the issues involved in this procurement and of the Army Audit Agency's intent to make a written report on the results of its investigation. Counsel for Bristol requested that we delay our review of the protest pending our receipt of this report. Bristol was informed that the Army would not release its investigative report to the company. GAO received a copy of this Army investigative report on April 27, 1978.

The contents of the investigative report were such that the procuring activity immediately requested GAO's permission to file its own comments on the contents of the report. GAO granted this request. On May 19, GAO received the procuring activity's comments on the report.

The investigative report is classified. Although the comments to the report have not been classified, the Army has not released the comments to Bristol or E-Systems.

ANALYSIS

Issue - Was the E-Systems' final price reduction based on a price leak?

Responsible authorities both within and outside the Department have investigated the allegation of a price leak. We understand that these authorities have found no evidence of a price leak. Notwithstanding Bristol's request that GAO become involved in this investigation in some way, GAO has no authority to investigate on its own alleged criminal conduct. Gull Airborne Instruments, Inc.--Reconsideration, B-188743, March 21, 1978, 78-1 CPD 217, and cases cited in text.

To the extent Bristol is alleging that E-Systems learned of competitors' prices through noncriminal means--say negligent safeguarding of prices by the Army--we note the procuring activity's firm denial of negligent safeguarding of prices and the back-up analysis for this conclusion. Specifically, the activity notes that ASPR § 3-507.2(a) (1976 ed.) states only that "no information contained in any proposal * * * shall be made available to the public, or to anyone within the Government not having a legitimate interest therein." The regulation, moreover, does not require the same type of storage required for classified documents.

Notwithstanding this observation, the Army's investigative report concludes that procedures for safeguarding offerors' proposals were not sufficient to preclude the possibility of a price leak. Although the procuring activity questions this conclusion, we cannot take exception to the investigative finding.

The fact remains, however, that there is no firm evidence of a price leak. In the absence of evidence of a leak, we cannot find for Bristol on this ground of protest.

Nevertheless, we are recommending to the Secretary of the Army consideration of stricter security measures for safeguarding proposals at all procuring activities.

Issue - Should the procurement have been formally advertised rather than negotiated?

The several points Bristol has raised against the negotiated procurement method used in this procurement were not lodged with GAO until Bristol submitted its March 30 comments to GAO.

Since the negotiated format was evident in the RFP as issued, as a general proposition the protest concerning that format had to be filed prior to the August 4, 1977, closing date for receipt of proposals, in order to be considered timely filed under GAO's Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977). However, because the procurement was officially negotiated and awarded under the urgency exception cited and Bristol would not have known at that time that a subsequent Army investigative report would suggest that the procurement was negotiated to keep incompetent companies from competing--a reason which does not justify negotiation--and that the procuring activity would agree in reply that it might have been more appropriate to use formal advertising, we consider the challenge against the negotiation basis timely.

We cannot question the bare legal authority of the Army to negotiate and award a contract under the urgency exception cited. As we said in Ampex Corporation, B-190529, March 16, 1978, 78-1 CPD 212:

"As noted, the procurement was upgraded from Issue Priority Designator 6 to Designator 2 under the Uniform Materiel Movement and Issue Priority System. Either designator would have permitted use of the 'public exigency' exception for negotiation, 10 U.S.C. § 2304(a)(2) (1970), without further justification, pursuant to ASPR § 3-202.2(vi) (1976 ed.)."

However, we are recommending that the Secretary of the Army review this issue. If he finds that the procurement should have been advertised instead of negotiated, we recommend that the option in E-Systems' contract not be exercised.

Moreover, it is our understanding that E-Systems has filed a number of claims for increased costs due to modifications. Assuming negotiation is found to be proper, if the modifications result in the allowance of increased costs, the market should be tested before accepting the option to insure that E-Systems' modified prices represent the best price available to the Government. In any event, we intend to carefully review all the modifications increasing the contract price.

Issue - Were there defects in the negotiation process concerning the handling of Bristol's proposal?

(a) Should Bristol's initial proposal have been considered the only competitive-range proposal received?

Competitive-range determinations necessarily involve the exercise of a wide range of discretion on the part of procurement officials in analyzing complex technical and pricing aspects of proposals. Consequently, we will not question these decisions unless they are unreasonable. Jet International Inc., B-185754, August 2, 1976, 76-2 CPD 108.

We see no basis to question the contracting officer's decision to consider all initially submitted proposals to be in the competitive range for this procurement in that, while the proposals of all concerns were considered not technically acceptable as received, all proposals were considered "reasonably susceptible of being made acceptable by [offerors'] furnishing additional information to clarify and supplement the proposals, but not basically changing the proposals as submitted."

We see nothing in the record before us--or in the investigative report--which reasonably questions the initial technical ratings assigned to Bristol and all other offerors. Although Bristol made much of an apparent discrepancy between these ratings and the Army's price analyst's subsequent reference to proposals as being "technically acceptable," we consider that the contracting officer has explained this apparent discrepancy by noting that the analyst's reference was not to initial proposals, but to initial proposals as amended by subsequent technical negotiations.

Since Bristol's technical proposal needed to be supplemented via negotiations before it could be made the subject of a contract, the fact that Bristol's initial price proposal was most advantageous would not in itself make the proposal the sole offer in the competitive range. As we said in 52 Comp. Gen. 382 (1972):

"* * * price [need not] be considered in all instances in determining competitive range. * * * in appropriate cases either factor [price or technical considerations] can [determine] whether an [offer] is in a competitive range, and we have frequently recognized that price need not be considered when a totally unacceptable technical proposal is submitted." Id. at 388-389.

"* * * To [hold that price must be considered in all instances in determining the competitive range] would place procurement officials in the unreasonable position of having to consider the price proposals of all offerors, no matter how deficient * * * the accompanying technical proposals might be. We do not believe that Congress intended such a result. Rather, it seems to us that Congress wanted to insure that the prices proposed by qualified offerors who submit

acceptable proposals would be considered prior to the making of awards to higher-priced offerors on the basis of technical considerations alone." Id. at 388.

Even though Bristol's technical proposal was not totally deficient, it still needed to be supplemented prior to award. In this perspective, it was appropriate for the contracting officer to maintain competition by conducting subsequent discussions with Bristol and its competitors under a decision--which we find rationally supported--that all offerors were in the competitive range.

Since discussions were properly entered into with more than one company, Bristol's collateral objection that award should have been made on the basis of its initial proposal is rejected even if we assume, contrary to the Army's insistence, that this collateral ground was timely raised.

Bristol's objection--that one rather than many companies should have competed for award in final negotiations--really insists that competition was not restricted enough.

We view this objection as similar to objections in other cases that the Government was not using sufficiently restrictive specifications. We no longer review protests that specifications are not sufficiently restrictive of competition because our bid protest function is intended to insure full and free competition. See, for example, Miltope Corporation--Reconsideration, B-188242, June 9, 1977, 77-1 CPD 417.

(b) Were the September 14-17, 1977, price discussions with Bristol a "sham"?

This ground of protest was not filed with GAO until months after the date of the award. It is, therefore, untimely filed under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 20 (1977)) and will not be considered.

(c) Were the discussions of Bristol's alleged "low rates" improper?

There is nothing in the record to rebut the Army's analysis that these discussions were had with Bristol in good faith to point out a perceived deficiency in Bristol's proposal under ASPR § 3-805.3(a) (1976 ed.) which provides that "all offerors selected to participate in discussions shall be advised of deficiencies in their proposals." There is no indication that the information so discussed was provided to any other offeror or that the Army in any way attempted to influence the overall strategy of Bristol's final price proposal.

(d) Did the Army improperly fail to evaluate Bristol's alternate proposal?

We agree with the Army's analysis that, assuming it neglected to evaluate the company's alternate proposal, the failure was not prejudicial because: (1) Government-furnished property--a contingency built into the alternate proposal--could not be made available; and (2) since the Government property could not be made available, Bristol's alternate price--already \$23,000 higher than the award price--would have had to be raised still more, thus further increasing the difference between the award price and the alternate price.

Issue - Are the same procurement employees involved in the subject procurement as were involved in a 1974 contract also awarded to E-Systems which was the subject of protests by Bristol? If so, does this fact affect the legality of the award?

We find nothing to contradict the contracting officer's view that different employees are involved in the present procurement, especially as regards the key employment position of contracting officer. In any event, it is axiomatic that the test of whether

proper procedures have been followed in a given procurement is to be determined by examination of the procedures without regard to the identity of the employees carrying out those procedures. Further, the fact that improper procedures may have been used in prior procurements does not make present practices suspect unless the practices are improper in themselves.

Issue - Was E-Systems' best and final offer properly reviewed?

Before addressing this issue and its component sub-issues, the points of which are mainly concerned with the realism of E-Systems' final price reduction, it is appropriate to review applicable GAO precedent and pertinent regulations.

Generally, protests against acceptance of allegedly unrealistic bids or proposals for fixed-price contracts imply that the allegedly too-low bidder or offeror is attempting to "buy-in" to a contract with the expectation of either (1) increasing the contract price or estimated cost during the period of performance through change orders or other means or (2) receiving future follow-on contracts at prices high enough to recover any losses on the original "buy-in" contract. See ASPR § 1-311 (1976 ed.). Thus, contracting officers are cautioned by ASPR § 1-311 to assure that amounts excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on procurements subject to cost analysis. Reflecting this general policy, clauses D.37 and D.38 were placed in the subject RFP, in part, so as to obtain cost data sufficient to aid in determining if a "buy-in" was present.

Notwithstanding the DOD policy reflected in ASPR § 1-311 and in clauses D.37 and D.38 of the contract, we have consistently held that the submission of a low, "below-cost," fixed-price bid or proposal is not a reason in itself to disqualify the bid unless the bidder performance at the low price would adversely affect the financial responsibility of the concern. As we said in Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34:

"Even if Allied's contentions concerning [below-cost bidding] * * * are correct, ASPR § 1-311 (1975 ed.) does not preclude the acceptance of below cost bids, but mainly cautions contracting officers to assure that amounts excluded in the 'buy in' contract are not recouped through change orders or by follow-on contracts. Since the regulation does not provide for rejection where a 'buying in' is suspected, our Office has repeatedly held that an award may not be withheld or disturbed merely because the low bid is below cost. 53 Comp. Gen. 597 (1974); 50 Comp. Gen. 50 (1970); EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338. The Navy was convinced that Esterline fully understood the Government's requirements, and that it would comply with the specifications. This Office has held that so long as the bid of the suspected 'buying in' bidder is low and is responsive to the invitation requirements, and the bidder is determined to be responsible, award must be made to that bidder. ACL-FILCO Corporation, B-179835, January 29, 1974, 74-1 CPD 39. To the extent that Allied contests the affirmative determination of Esterline's responsibility, such contention will not be considered since none of the exceptions to our rule against considering such determination are present. Commercial Envelope Manufacturing Company, Inc., B-186042, April 14, 1976, 76-1 CPD 254."

Although the cited case involved an advertised procurement, the holding has also been applied to negotiated procurements. See Management Information Technology, B-190453, March 15, 1978, 78-1 CPD 205.

ASPR § 1-311 requires Government personnel to exercise due diligence in preventing a below-cost offeror from recovering absorbed costs in future pricing actions. (This can be done, for example, according to ASPR § 1-311(b), by obtaining priced options (which were obtained from E-Systems in the present procurement).)

To the extent a below-cost bidder will not recover absorbed costs in future pricing actions, it is clearly in the financial interest of the taxpayers to have the benefit of a below-cost, fixed-price contract awarded to a responsible contractor.

We shall now address the sub-issues raised by this ground of protest.

(a) Was the final price reduction contrary to clauses D.37 and D.38 of the RFP even if the reduction was otherwise justified?

Clause D.37 cautioned offerors to make sure they explained "apparent inconsistencies" between proposed performance and proposed price; for example, if a "corporate policy decision" had been made to absorb some estimated costs, that decision was to be "stated in the proposal."

Read together, the clauses merely cautioned an offeror to justify proposed prices and costs, but they did not absolutely bar the submission of a major price revision so long as an offeror justified its revisions. Therefore, we cannot conclude, as Bristol apparently would have us do, that E-Systems' major price reduction was barred by the RFP if the reduction was otherwise justified.

(b) Did the Army rely only on the cost data contained in E-Systems' initial offer in determining whether to accept E-Systems' final offer?

This argument focuses on a memo prepared by the price analyst which stated that E-Systems' initial cost data was "accepted as an equitable base to project cost and/or price." Bristol argues that the statement shows that the Army was not concerned with cost data submitted after the initial date.

The record does not support Bristol's argument, however reasonable the argument may be considered when the quoted statement is viewed in the abstract. The record clearly shows that E-Systems submitted subsequent cost data--dated as of the date of its final offer--and that this subsequent cost data was analyzed by the contracting officer prior to award.

Even if we were to conclude that the contracting officer relied on the initial cost data only, under applicable GAO precedent, noted above, award could not have legally been denied E-Systems to the extent the company--an admitted financially responsible offeror--had submitted the lowest, fixed-price, technically acceptable final offer.* To the extent this result is argued to be inconsistent with RFP clauses D.37 and D.38, we point out that the clauses do not mandate rejection of an allegedly below-cost, "unrealistic" fixed-price offer, but they only gave the Army the option to reject an offer--an option arguably contradicted by the above GAO precedent.

In this perspective, we also cannot question the contracting officer's acceptance of "management decisions" to absorb costs as an explanation of the greatest part of E-Systems' final price reductions. Apart from our precedent, we note that the contracting officer correctly points out that ASPR § 3-807.3(h) (1976 ed.) (and RFP clause D.37) specifically mentions "any other management decisions [for example, to absorb costs] which could reasonably be expected to [affect costs] under the proposed contract" as factors which can properly be considered in carrying out cost or price analysis. Moreover, the contracting officer insists that E-Systems' final offer as to labor hours was in line with the Government's estimate.

Issue - Did the contracting officer properly document his award decision prior to award? Does this documentation justify award?

*The RFP provided that "[a]ward shall be made to that responsible offeror who submits the lowest-priced, technically acceptable proposal."

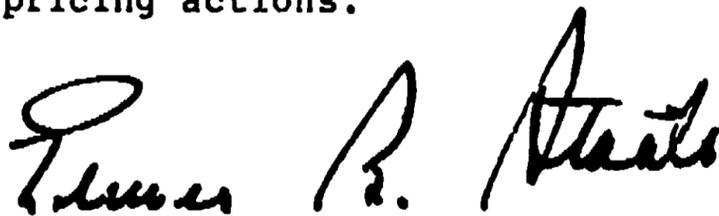
GAO is not in a position to question the date (September 27, 1977) of the contracting officer's memo evidencing his technical and price evaluation of final offers which culminated in the E-Systems' award. We are further unable to question the rationale evidenced in the memo and other relevant documents prepared before and after the award which have justified the E-Systems' contract.

Other Issues

Issues other than those raised in the protest are discussed in the Army's investigative report and the procuring activity's comments on the report.

Viewed in their entirety, except as noted above, the issues and countering comments do not provide a basis to question the award. We are concerned, however, that the reported condition of E-Systems' accounting system--which, overall, was found acceptable--might hinder the Government in ensuring that E-Systems does not recover in future pricing actions costs associated with the instant contract. Consequently, we are also recommending to the Secretary of the Army that new accounting data--sufficient to prevent recovery of absorbed costs--be obtained from E-Systems prior to any future negotiated pricing actions.

Protest denied.



Comptroller General
of the United States



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

J. Cunningham
P. I.

IN REPLY
REFER TO:

B-190341

August 15, 1978

The Honorable Dan Quayle
House of Representatives

Dear Mr. Quayle:

Pursuant to your interest in the protest of Bristol Electronics, Inc., against an award to E-Systems, Inc., we enclose a copy of our decision of today denying the protest.

Notwithstanding our denial of the protest we have informed the Secretary of the Army by letter of today, copy enclosed, of further observations and recommendations stemming from our review. The recommendations are made under the authority of the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours,

James B. Atchell

Comptroller General
of the United States

Enclosures - 2

UNITED STATES GOVERNMENT

J. Cunningham
GENERAL ACCOUNTING OFFICE *PK I*

Memorandum

TO : Director, PSAD

August 25, 1973

FROM : Comptroller General - E. B. Staats

E. B. Staats

SUBJECT: Review of E-Systems, Inc., Army Contract for Radios--
Brooks' Committee Interest 5-130341

Because of concerns expressed in the attached decision of today denying the protest of Bristol Electronics, Inc., against an E-Systems' radio contract, we are informing the Brooks' committee that GAO will carefully review change orders and other future pricing actions under the contract to determine if any absorbed costs are included.

The purpose of the review is to insure that E-Systems is not "made whole" for costs which it absorbed on a "buy-in" approach in order to win the contract. The review should also determine whether E-Systems' accounting system is in accordance with the cost accounting standards.

I understand that Messrs. Flynn and Stapleton of your Division have started this review. Legal questions arising in connection with the review should be coordinated with the Office of General Counsel.

Attachment



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

J. Cunningham
PL I

IN REPLY
REFER TO:

B-190341

August 15, 1978

The Honorable Gerry E. Studds
House of Representatives

Dear Mr. Studds:

Pursuant to your letter of October 13, 1977, expressing interest in the protest of Bristol Electronics, Inc., against an Army award to E-Systems, Inc., we enclose a copy of our decision of today denying the protest.

Notwithstanding our denial of the protest we have informed the Secretary of the Army by letter of today, copy enclosed, of further observations and recommendations stemming from our review. The recommendations are made under the authority of the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours,

James B. Starks

Comptroller General
of the United States

Enclosures - 2



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

J. Cunningham
PLI

IN REPLY
REFER TO:

B-190341

August 15, 1979

The Honorable Olin E. Teague
House of Representatives

Dear Mr. Teague:

Concerning the interest expressed by you in the protest of Bristol Electronics, Inc., against an award to E-Systems, Inc., by the Department of the Army (Fort Monmouth, New Jersey), we enclose a copy of our decision of today denying the protest.

Notwithstanding our denial of the protest we have informed the Secretary of the Army by letter of today, copy enclosed, of further observations and recommendations stemming from our review. The recommendations are made under the authority of the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours,

James B. Stacks

Comptroller General
of the United States

Enclosures - 2



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

J. Cunningham
PH I

IN REPLY
REFER TO:

B-190341

August 15, 1978

The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today denying the protest of Bristol Electronics, Inc., against an award to E-Systems, Inc.

Notwithstanding our denial of the protest, we have informed the Secretary of the Army, by letter of today, copy enclosed, of further observations and recommendations stemming from our review.

The recommendations are made under the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours,

James B. Stewart

Comptroller General
of the United States

Enclosures - 2



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20540

J. Cunningham
DL I

IN REPLY
REFER TO:

B-190341

August 15, 1978

The Honorable Warren G. Magnuson
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today denying the protest of Bristol Electronics, Inc., against an award to E-Systems, Inc.

Notwithstanding our denial of the protest, we have informed the Secretary of the Army, by letter of today, copy enclosed, of further observations and recommendations stemming from our review.

The recommendations are made under the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours

James B. Atchefs

Comptroller General
of the United States

Enclosures - 2



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

J. Cunningham
PL I

IN REPLY
REFER TO:

B-190341

August 15, 1978

The Honorable George H. Mahon
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today denying the protest of Bristol Electronics, Inc., against an award to E-Systems, Inc.

Notwithstanding our denial of the protest, we have informed the Secretary of the Army, by letter of today, copy enclosed, of further observations and recommendations stemming from our review.

The recommendations are made under the Legislative Reorganization Act of 1970.

In view of concerns expressed in the decision, we will carefully review change orders and other future pricing actions under this contract to determine if any absorbed costs are included.

Sincerely yours,

James B. Steele

Comptroller General
of the United States

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