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**DECISION**



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

*[Protest Alleging Procedural Irregularities in Award]*

**FILE:** B-197768

**DATE:** June 3, 1980

**MATTER OF:** Westinghouse Electric Corporation

**DIGEST:**

1. Agency may appropriately award firm fixed-price contract, notwithstanding solicitation of cost-plus-fixed-fee contract, where negotiations disclose that successful offeror has definite design and agency has sufficient cost information to realistically estimate cost of performance.
2. Where agency lacks knowledge of technological state-of-the-art, agency may properly include doubtful offeror in competitive range; however, when negotiations show one proposal's substantial technological lead and significant financial advantage, agency may properly drop second offeror from competitive range without allowing submission of revised proposal.
3. Agency is not required to issue amendment to offeror no longer in competitive range, notwithstanding change in contract type negotiated with successful offeror, where change is not directly related to reasons for excluding offeror from competitive range.
4. Buy-in allegation is not reviewed by GAO; related allegation concerning awardee's lack of understanding of requirements has not been substantiated.
5. Protester has not substantiated allegation that Army knew of awardee's technological advantage before releasing solicitation; moreover, Army was not obligated to cancel

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solicitation after advantage became known during evaluation of offers since cancellation would have served no useful purpose given technical and cost merit of awardee's proposal.

Westinghouse Electric Corporation (Westinghouse) protests the Army's award of a contract to ARDEV Company, Inc. (ARDEV), under request for proposals (RFP) No. DAAK80-79-Q-1012 issued by the United States Army Communications Research and Development Command, Fort Monmouth, New Jersey. Westinghouse alleges procedural irregularities leading to the award. Based on our review of the record, we deny the protest.

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The RFP sought a feasibility study of an enhanced video disc system culminating in the demonstration and provision of an actual prototype. The Army solicited 93 sources on a cost-plus-fixed-fee (CPFF) basis. Of the five offers received, only two were deemed to be in the competitive range--those submitted by ARDEV and Westinghouse. Negotiations were conducted with both. At the conclusion of negotiations in October 1979, ARDEV was rated "outstanding" at a cost of approximately \$3,000, while Westinghouse was rated "acceptable" at a cost of approximately \$200,000. The principal reason for the discrepant ratings was ARDEV's technological status which was "at least two years ahead of where \* \* \* [the Army] thought the state-of-the-art in video disc technology existed \* \* \* [;]" the principal reason for the cost discrepancy was ARDEV's decision to absorb charges for the cost of completed research and development efforts for the prototype.

By determination dated November 21, 1979, the contracting officer excluded Westinghouse from the competitive range based on the cost and scoring differences between the proposals which indicated that Westinghouse did not have a reasonable chance of being selected for award. The determination also contained the contracting officer's view that a firm fixed-price (FFP) contract would be appropriate given the "advanced state-of-the-art attained by ARDEV." Subsequently, the Army and ARDEV negotiated a FFP contract for the prototype unit at a price of \$2,990.

Westinghouse initially asserted four grounds of protest: (1) inappropriate award of an FFP rather than a cost contract; (2) improper change of requirements (from CPFF to FFP and from 1 to 2 prototype units) without notice to Westinghouse; (3) failure to request a best and final offer (B&FO) from Westinghouse; and (4) improper award at an unrealistically low price. Following receipt of the Army's report, Westinghouse argued that the Army may have known of ARDEV's technical advantage prior to the RFP's issuance. In any event, Westinghouse urged that once the Army knew of ARDEV's advantage it should have canceled the RFP "and reissued [the requirement] on a sole-source or a truly competitive basis."

#### Appropriateness of FFP Contract

The use of FFP contracts is authorized when reasonably definite design or performance specifications are available and where "cost or pricing information is available permitting the development of realistic estimates of the probable costs of performance." Defense Acquisition Regulation (DAR) § 3-404.2(b)(iii) (1976 ed.). By contrast, cost-reimbursement-type contracts should be used "\* \* \* only when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of any type of fixed-price contract." DAR § 3-405.1(b) (1976 ed.). Here, ARDEV's proposal disclosed both a definite design and sufficient cost information to enable the Government to realistically estimate the cost of performance contrary to the expectation of the Army in issuing the RFP on a CPFF basis. In view of the above, we cannot question the appropriateness of the FFP contract.

#### Propriety of Final Negotiations

Our consideration of Westinghouse's contentions, concerning improper changes in requirements and failure to request a B&FO from Westinghouse, is intertwined with the question whether the Army properly excluded Westinghouse from the competitive range. Generally, a proposal, once included within the competitive range, should not be rejected without affording an offeror the opportunity

of submitting a revised proposal. Nevertheless, in Operations Research, Inc., 53 Comp. Gen. 860 (1974), 74-1 CPD 252, we said:

"\* \* \* in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission of a revised proposal."

Here, the ambiguity was not so much in Westinghouse's proposal as it was in the Army's understanding of the technological state-of-the-art. Once negotiations confirmed the high level of ARDEV's technological position and, consequently, the actual state-of-the-art, it was clear that Westinghouse should not have been included in the competitive range initially. We therefore believe that Westinghouse's exclusion was proper and that the Army was under no obligation to solicit a B&FO from Westinghouse, for to do so would have only served to put Westinghouse to needless expense.

We also find no merit in Westinghouse's contention that the Army improperly changed the contract type from CPFF to FFP without either amending the RFP or notifying offerors. An agency is not required to issue amendments to offerors no longer in the competitive range, notwithstanding the changes negotiated with the successful offeror, so long as the changes are not directly related to the reason for the excluded offeror's rejection. See Broomall Industries, Inc., B-193166, June 28, 1979, 79-1 CPD 467. Manifestly, the change in contract type had nothing to do with the reasons for Westinghouse's exclusion as to the contention that the prototype units were changed, Westinghouse has not questioned the Army report that it did not alter the units required.

#### Award At Unrealistically Low Price

Westinghouse insists that the award price reveals either a "buy-in" or a lack of understanding of the

work requirements. We have held that "buy-in" allegations are to be considered by the procuring agency in making responsibility decisions, but that the allegations are not reviewable by our Office. Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164. In any event, it is our view that the Army fully explored the reasons for ARDEV's proposed price prior to awarding the contract.

Concerning the "lack of understanding" argument, the record contains the Army's reasons for the evaluated superiority of ARDEV's proposal. Westinghouse, which has the burden of substantiating its case, has not questioned these reasons. Therefore, we cannot question the rating assigned the proposal.

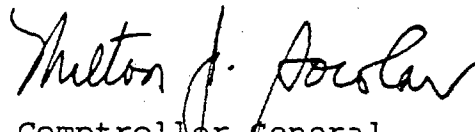
#### Army's Knowledge of ARDEV's Competitive Advantage

The Army admits it surveyed several companies, including ARDEV, before issuing the RFP in an attempt to ascertain the status of the technology involved. Nevertheless, the Army insists that ARDEV's technological advantage did not become clearly apparent until proposals were evaluated. Moreover, it is clear that the financial advantage of an award to ARDEV was not apparent until after proposals were evaluated. Westinghouse, having the burden of substantiating its case, has not submitted any probative evidence which would rebut the Army's position.

Even if the Army had been aware of ARDEV's strong position in video disc technology prior to issuing the RFP, this fact would not have foreclosed issuance of the RFP. The contracting officer has a statutory duty to solicit proposals from the maximum number of qualified sources. 10 U.S.C. § 2304(g) (1976); See Non-Linear Systems, Inc.; Data Precision Corporation, 55 Comp. Gen. 358 (1975), 75-2 CPD 219. In this regard, the Army did rate Westinghouse as "acceptable," which, in our view, is indicative of a qualified source. Also, Westinghouse admits that a sole-source award to ARDEV "would have been most difficult to justify."

Contrary to Westinghouse's view, the Army was not required to cancel the RFP once ARDEV's competitive advantage became known during the procurement because cancellation would not have served the purposes apparently claimed by Westinghouse. First, formal negotiation of a sole-source contract upon cancellation of the RFP would not have furthered the Government's interest in obtaining a reasonably priced contract given the low ARDEV price available under the RFP. Second, there is no indication in the record that the Army's technical requirements were other than as set forth in the existing RFP; under this circumstance, the competitive results to be anticipated under a new RFP would not likely be changed. Thus, we cannot question the Army's decision to continue the procurement under the existing RFP.

Accordingly, the protest is denied.



For the Comptroller General  
of the United States