

**DECISION**

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

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**FILE:** B-213891**DATE:** March 5, 1984**MATTER OF:** Ikard Manufacturing Company**DIGEST:**

1. Protest against the ability of the awardee to meet the contract's delivery schedule raises a challenge to the contracting officer's affirmative determination of the awardee's responsibility, which GAO will not review since the solicitation contained no definitive responsibility criteria and there has been no showing of possible fraud or bad faith on the part of the procuring officials.
2. Protest that agency buyer told protester that its price had to meet a particular price to be considered for award is denied since agency, while conceding that its price goal was revealed to both competitors during negotiations, denies that either was told it had to meet that price, so that protester has not met its burden of proof.
3. It is not improper for an agency to reveal a price goal during discussions for purposes of negotiating a fair and reasonable price so long as the agency is not conducting direct price bidding (an auction) among competing offers.
4. GAO has no authority to determine what information another agency must disclose in response to a Freedom Of Information Act request.

Ikard Manufacturing Company protests an award to R&D Electronics, Inc. by the Department of the Army under request for proposals (RFP) No. DAAH01-83-R-A764. Ikard contends that R&D cannot deliver the 19 fail safe kits for the Hercules Missile System within the required 270

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days and that, during the negotiations, the agency improperly told Ikard that if Ikard did not lower its offered unit price to \$1,740, the offer would not be considered for award. Ikard also complains about the Army's response to the firm's request for information under the Freedom of Information Act.

We dismiss the protest in part and deny it in part.

Ikard and R&D initially proposed unit prices of \$2,800 and \$2,865, respectively, and neither offeror changed its price in its best and final offer. Based on the procurement history for the items, the contracting officer determined that both prices were unreasonable. He therefore reopened negotiations and obtained a second round of best and final offers. Ikard's price remained unchanged at \$2,800, while R&D lowered its price to \$2,585. The contracting officer, based on a preaward survey, then determined that R&D was responsible, that is, was capable of meeting the contractual obligations, and therefore awarded the contract to the firm.

Ikard contends that R&D cannot deliver the fail safe kits within 270 days, as required. The protester takes issue with a memorandum in the record prepared by the contract specialist the same day the preaward survey was signed in which the specialist states that the delivery history for the item is 150 to 282 days, and that R&D previously delivered the item in 270 days. Ikard contends that R&D had five contracts between 1971 and late 1975 where the shortest required delivery actually was 180 days, and that R&D's delivery on four of the contracts was substantially late, and always more than 270 days.

Ikard's challenge to R&D's ability to meet the required delivery schedule raises an issue pertaining to the agency's affirmative determination of R&D's responsibility. Because responsibility determinations generally involve business judgment within the sound discretion of the contracting officials, we do not review a decision that a firm is responsible in the absence of a showing of possible fraud or bad faith on the part of the procuring officials, or where the solicitation contains definitive criteria of responsibility which allegedly have not

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been applied. Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Morse Typewriter Co., Inc., B-212636.2, September 27, 1983, 83-2 CPD 383.

Even if the negotiation memorandum is inaccurate as to R&D's past performance, that does not, in our view, indicate fraud or bad faith on the Army's part. See American Athletic Equipment Division, AMF Incorporated-Reconsideration, 59 Comp. Gen. 90 (1979), 79-2 CPD 344. Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually undeniable proof that the officials had a malicious and specific intent to harm the protester. Creative Electric Incorporated, B-206684, July 15, 1983, 83-2 CPD 95. The fact is that the Army's contracting officials, based on a preaward survey and their business judgment, have determined that R&D is capable of delivering the fail safe kits on time. Ikard's disagreement with the procuring officials' determination does not meet the firm's heavy burden of proof. J.F. Barton Contracting Co., B-210663, February 22, 1983, 83-1 CPD 177.

Therefore, as there has been no showing of possible fraud or bad faith, and there are no definitive responsibility criteria in the solicitation, Ikard's protest as it relates to R&D's responsibility is dismissed.

Ikard also complains that it was told it had to lower its offered unit price to \$1,740 to be considered for award. As evidence, Ikard has submitted a copy of its own record of a telephone message from the Army's buyer stating that Ikard should "get your pen ready to negotiate-- they are looking at \$1,740.00." In response, the agency does not deny that Ikard and R&D were told that the government's price negotiation goal was \$1,740 per unit, but it does deny that either of them was told that it had to propose a price of \$1,740 to be considered for award at all.

Defense Acquisition Regulation (DAR) § 3-805.3(c) (1976 ed.) does preclude an agency from indicating to an offeror a price that must be met to obtain further consideration. The protester, however, has the burden of proof, and in our view the language in the telephone message that the Army

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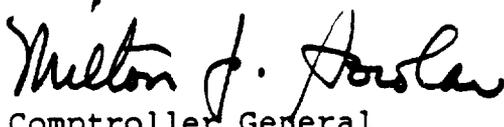
is "looking at \$1,740.00" simply does not support Ikard's position. Moreover, we note that Ikard and R&D, submitted final offers substantially more than \$1,740. At best, we have a factual dispute between the Army and Ikard as to the substance of the cost discussion, and where the only evidence on an issue is conflicting statements by the protester and the procuring agency, the protester has not met its burden of proof. Jensen-Kelly Corporation, B-208685; B-208960, January 10, 1983, 83-1 CPD 21.

In any event, the purpose of DAR § 3-805.3(c) is to prevent direct price bidding between competing offerors, not the negotiation of a price with the government where an offeror's standing in the competition is not divulged. See 52 Comp. Gen. 425, 429 (1973). Indeed, the regulation expressly permits an agency to inform an offeror that its price is too high. Thus, it is not improper for an agency to disclose, during discussions with an offeror, the agency's price goal as a negotiation tool for reaching a fair and reasonable contract price. Id.; see Griggs and Associates, Inc., B-205266, May 12, 1982, 82-1 CPD 458.

Therefore, this part of Ikard's protest is denied.

Finally, Ikard complains that the agency did not comply with the Freedom of Information Act, 5 U.S.C. § 552 (1982), in reacting to Ikard's request for information about the procurement. We have no authority, however, to determine when or what information must be disclosed by an agency in response to such a request. Ikard Manufacturing Company, B-211041, March 23, 1983, 83-1 CPD 302. Ikard's recourse is to pursue the disclosure remedies provided under the procedures set out in the Freedom of Information Act itself. Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49.

The protest is denied in part and dismissed in part.

*for*   
Comptroller General  
of the United States