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Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Magnavox Advanced Products and Systems  
Company

**File:** B-236168

**Date:** November 14, 1989

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## DIGEST

Contracting agency reasonably evaluated awardee's offer based on its proposed use of a component manufactured by protester, where protester refused to formally agree before award that it would make the component available, but the record, including a fact-finding conference, establish that the protester made statements to the agency before award from which the agency reasonably concluded that the protester would make the component available in the event of an award to another firm.

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## DECISION

Magnavox Advanced Products and Systems Company protests the award of a contract to Electrospace Systems, Inc. (ESI), under request for proposals (RFP) No. N00039-88-R-0274(Q), issued by the Navy's Space and Naval Warfare Systems Command (SPAWAR), for satellite communications terminals. Magnavox principally disputes SPAWAR's evaluation of proposals.

We deny the protest.

The solicitation requested fixed-price proposals for quantities of AN/WSC-6(V) Super High Frequency Satellite Communications Terminals and stand-alone OM-55/USC Satellite Communications Modems. One version of the terminal is deployed on board the Navy's small, noncombatant T-AGOS ships; the terminals transfer data to satellites for relay to onshore terminals in connection with the detection, classification and tracking of enemy submarines. Another version of the terminal is deployed on major combatants such as aircraft carriers and battleships, and incorporates the OM-55 modem.

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In prior procurements, the agency separately contracted with a number of firms for major components of the system (including Magnavox for the OM-55 modem and Raytheon Company for the high power amplifier (HPA) used in the terminals), and then provided these components as government furnished equipment (GFE) to ESI, which had been selected to act as the system integrator. In this procurement, however, the solicitation contemplated award of a single prime contract under which the awardee would be responsible for both providing and integrating the components. The solicitation provided that the use of non-developmental items was the preferred method of satisfying the agency's operational requirements; it required offerors to demonstrate how they would provide for the full compatibility and the physical and functional interchangeability of the new terminals with the previously supplied terminals. The solicitation further required offerors to identify proposed subcontractors, provide a clear statement of their capabilities and experience, furnish firm commitments from these subcontractors, and identify the methods that would be used to control subcontractors' performance and schedule.

The solicitation provided for proposals to be evaluated on the basis of three evaluation criteria, as follows: (1) price (with an undisclosed evaluation weight of 55 points); (2) technical (35 points), including understanding of technical requirements, schedule, technical approach, and production approach and facilities; and (3) management (10 points), including related experience and past performance, personnel, and adequacy of the production management system.

Two teams prepared proposals for submission by the scheduled September 23, 1988 closing date for receipt of proposals, one headed by Magnavox and another headed by ESI, which included Raytheon. Magnavox solicited Raytheon for a proposal to supply the HPA it had previously furnished the agency, but by letter of August 2 Raytheon conditioned submission of such a proposal on Magnavox's acknowledgment of Raytheon as the sole source for the HPA in the event of award to Magnavox. Magnavox responded that it was unable to meet this condition unless SPAWAR designated Raytheon as a sole source; however, the agency already had decided against designating Raytheon as the sole supplier for the HPA. By letter of August 22, Magnavox furnished the agency with copies of its correspondence with Raytheon and requested a 30-day extension of the closing date so that it could obtain viable alternative sources; in response, the closing date was extended to October 24.

When ESI likewise subsequently refused to respond to Magnavox's request for a proposal for certain components it

had previously manufactured unless designated a sole source, Magnavox advised Raytheon and, by letter of September 30, the agency that it had determined that "it must decline to bid the fabrication of the OM-55 modem equipment to the Raytheon ESI team" so as to keep "the competition on an even technical basis." Moreover, it stated that it had developed second sources for Raytheon's HPA and ESI's components and was "committed to those sources" for this proposal due to remaining time until the closing date. Raytheon subsequently offered to bid the HPA to Magnavox without the sole-source precondition, but by letter of October 5 Magnavox reiterated that insufficient time remained to modify its proposal effort.

On October 7, ESI wrote SPAWAR to request that, in view of Magnavox's refusal to make the OM-55 modem available to the ESI team, the agency either modify the solicitation to designate Magnavox as a directed source for the modem, and thereby require Magnavox to offer the modem to all offerors, or provide the modem as GFE. ESI explained that it believed there was no other credible source for the modem. In response, SPAWAR's Contract Award Review Panel (CARP) directed SPAWAR's contract negotiator to contact the ESI and Magnavox teams to clarify their intention with respect to making components they had previously produced available to other offerors.

An October 13 memorandum documenting the negotiator's contacts with the offerors indicates that the negotiator advised ESI on October 11 that there was insufficient time to provide the OM-55 modem as GFE and that designating Magnavox as the sole source for the modem would pose unacceptable problems. The memorandum also states that during an October 13 telephone call from the negotiator to the Magnavox contracts manager, the manager:

"confirmed that Magnavox had developed alternate sources to Raytheon and ESI. They [Magnavox] will not quote to either [Raytheon or ESI] nor accept any bids from them (returning them, if any, unopened) to avoid potential problems. However, if selected for award, Magnavox would ask each for a quote, and, if unsuccessful, Magnavox would submit a bid to either for its OM-55."

According to the agency, the negotiator briefed the CARP on October 13 and the panel concluded that the matter was adequately resolved.

Only Magnavox and ESI submitted proposals by the October 24 closing date. Both firms were included in the competitive

range and, after discussions, were requested to submit best and final offers (BAFOs). These BAFOs were found to include conditions inconsistent with the solicitation, so the agency reopened negotiations, advised offerors of the areas deemed unacceptable, and requested submission of second BAFOs.

Magnavox's revised BAFO price of \$145,987,666 was \$4,406,300 (approximately 3 percent) less than ESI's price of \$150,393,966, but ESI received a higher overall combined score--91.3 points--than Magnavox--87.5 points--primarily because of ESI's perceived relative technical superiority. In particular, agency evaluators considered it a proposal strength (under the subcriteria for understanding technical requirements, schedule, production approach and facilities, and related experience and past performance) that ESI, which had proposed Magnavox OM-55 modems, was offering components produced by the manufacturers that had previously furnished the system components under the program. By contrast, the CARP concluded that

"the overriding concern. . . with [Magnavox's] offers throughout this competition has been the inherent technical and schedule risks posed by [Magnavox's] steadfast decision to go to new vendors rather than incumbent sources for certain subsystems: high power amplifier (HPA), local operation control center (LOCC), remote operation control center (ROCC), cesium beam frequency standard. . . and LNA [low noise amplifiers]. Specifically, the HPA is an extremely complex, major portion of the AN/WSC-6(V). There are no procurement drawings available, and certain portions in the existing HPA are proprietary, necessitating redesign which is bound to be complicated by interchangeability requirements. The new vendor (MCL, Inc.) is also untested in producing militarized HPAs. All new subassemblies will require first article approval and an interchangeability demonstration for acceptance . . . the Government remains highly skeptical that [Magnavox] could master the technical and schedule challenges using new vendors, especially for the HPA."

Accordingly, the source selection authority (SSA) concluded that ESI's proposal "provides the most sound technical approach to production and presents the least risk in meeting the critical delivery schedule." Finding that these considerations offset Magnavox's lower price, the SSA

selected ESI for award. Upon learning of the resulting award, Magnavox filed this protest with our Office.

#### EVALUATION OF MAGNAVOX'S PROPOSAL

Magnavox disputes the evaluation of its proposal, first arguing that the agency unreasonably concluded that it had made a "steadfast decision" to obtain the HPA from a new vendor, MCL. In this regard, the protester notes that in its September 15 letter to SPAWAR, it stated that although it had assembled a team of suppliers for the HPA and other components, it was its intent that the ultimate selection of the component suppliers would be based on a post-award competition. Magnavox also advised SPAWAR's contract negotiator that it intended to solicit quotations from Raytheon after award. In addition, Magnavox notes that, although it indicated in its proposal that it had "selected" MCL to provide the HPA, it also listed Raytheon as an "alternate source" and stated that the "final selection of each subcontractor will occur subsequent to contract award and [BAFOs] from our potential contractors."

In reviewing the propriety of an evaluation, we will not make an independent determination of the merits of the technical proposals; rather, we will examine the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Pitney Bowes, B-233100, Feb. 15, 1989, 68 Comp. Gen. \_\_\_\_\_, 89-1 CPD ¶ 157. Applying this standard, we find that the evaluation of Magnavox's proposal with respect to the furnishing of the HPA was reasonable.

As discussed above, the solicitation emphasized the agency's preference for non-developmental items, and required offerors to demonstrate how they would provide the necessary physical and functional interchangeability with previously supplied components; where an offeror proposed to furnish products from a subcontractor, the solicitation required a description of the proposed subcontractor's capabilities and experience. Although Magnavox's proposal left open the possibility of selecting another subcontractor, including Raytheon (based on the assumption that Raytheon ultimately would agree to furnish Magnavox its HPA), for the HPA after award, the proposal furnished information only with respect to MCL's capabilities and experiences; the agency thus considered only MCL's capability for producing the HPA to be relevant. We think this was a reasonable conclusion.

While, arguably, the agency could have evaluated Raytheon's obvious ability to perform satisfactorily (as the firm that previously had furnished the HPA) without a lengthy,

detailed proposal treatment, evaluating the proposal on this basis would have entailed ignoring the detailed proposal treatment of MCL in favor of a mere possibility. In this regard, Magnavox adopted a strategy of proposing a specific alternate source for the HPA (as well as for other less important components Raytheon and ESI had not agreed to furnish), while providing that a different subcontractor could be used, depending on the results of a price competition after award. The agency was not required to evaluate Magnavox's proposal based on the possibility that components from another subcontractor ultimately would be used.

As for the propriety of the evaluation of MCL, during negotiations SPAWAR specifically questioned Magnavox concerning MCL's experience in manufacturing HPAs of the type being procured under the requirements of the applicable military specification (MIL-E-16400H), which establishes and incorporates stringent standards for the performance and testing of electronic equipment. The agency also requested a further explanation of Magnavox's assessment of only a low risk assessment in this area. Although in response Magnavox described MCL's experience in producing HPAs for military use ashore and for commercial shipboard use, it failed to list any military shipboard experience. Rather, Magnavox acknowledged that MCL would need to move from its "present design level to MIL-E-16400 [which] will be mainly in the area of more rugged mechanical design to meet shock and vibration requirements." Accordingly, in view of MCL's lack of experience in meeting the applicable military standard and the difficulties likely to be encountered by any new firm in manufacturing the highly complex component, we believe that the agency reasonably concluded that the proposal of MCL to supply the HPA represented a significant risk.

Magnavox questions the adequacy and specificity of discussions with respect to this perceived weakness in its proposal, but we think the discussions, as indicated above, clearly led Magnavox into the area of the weakness sufficiently to permit it to respond; SPAWAR specifically questioned Magnavox as to MCL's experience and as to the risk involved in using MCL. Further, the agency's failure to raise the matter again in its request for revised BAFOs did not render the discussions inadequate. The adequacy of discussions is judged by whether the offeror is informed of the deficiency and had an opportunity to revise its proposal; Magnavox had such an opportunity in its first BAFO. An agency is not required to help an offeror, through a series of negotiations, improve its technical rating

until it equals that of the other offerors. See Aydin Vector Div. of Ayden Corp., B-229569, Mar. 11, 1988, 88-1 CPD ¶ 253.

#### EVALUATION OF ESI'S PROPOSAL

Magnavox also contends that SPAWAR improperly evaluated ESI's proposal by unreasonably assuming in its evaluation that ESI could supply OM-55 modems manufactured by Magnavox. In particular, Magnavox denies that its contracts manager, ever advised the SPAWAR contract negotiator that Magnavox would make its OM-55 modem available to the awardee if Magnavox were not the successful offeror.<sup>1/</sup>

In connection with the protest, we held a fact-finding conference under our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1989), to determine what information the SPAWAR contract negotiator received during his October 13 discussions with Magnavox's contracts manager concerning Magnavox's willingness to bid the OM-55 modem to ESI after award. Based upon a preponderance of the evidence from both the conference and the written record, we find that Magnavox's contracts manager did provide the agency contract negotiator with information from which he reasonably could conclude that Magnavox, while unwilling to openly agree to make the OM-55 modem available to ESI prior to award, nevertheless would do so if ESI were the successful offeror.

Based on the fact-finding conference we specifically find as follows. As of October 13, Magnavox had not yet determined not to bid the OM-55 modem to ESI if that firm were selected for award. The Magnavox contracts manager testified that he never advised SPAWAR that Magnavox would not be willing to bid the modem to ESI if that firm received the award, Transcript (TR) at 23, and the cognizant Magnavox senior

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<sup>1/</sup> We have previously recognized that a contracting agency in evaluating proposals may consider evidence obtained from sources outside the proposals so long as the use of extrinsic evidence is consistent with established procurement practice, Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310, and indeed, in appropriate circumstances, the contracting officer should consider extrinsic evidence when evaluating proposals. Univox California, Inc., B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395; see G. Marine Diesel; Phillyship, B-232619; B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90; Inlingua Schools of Languages, B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340.

vice president general manager (VP/GM) testified that the decision not to bid the modem after award was made by him only after the source selection. TR at 59, 76-77. Although the Magnavox contracts manager denied he ever stated that Magnavox would bid the modem to ESI if that firm was awarded the contract, TR at 12, he conceded that he did advise the SPAWAR negotiator that, "downstream, management may review this and take another look at it," and that it was "very possible," TR at 8, and he did then offer to supply the modem directly to SPAWAR for provision to the ultimate contractor as GFE. TR at 9.2/

The SPAWAR negotiator's account of Magnavox's position as revealed to him on October 13 also is consistent with what we find was a reasonable interpretation of a conversation the Magnavox senior vice president/general manager (VP/GM) had with an ESI division manager on or about October 14; while refusing at that time to submit a bid to ESI for the OM-55 modem, the VP/GM indicated that after award Magnavox would sit down with ESI and "do what's right," or "do the right thing," which the ESI division manager interpreted as a statement of Magnavox's willingness to negotiate after award for the supply of the components manufactured by each firm. TR at 69, 76, 120.

Based on these statements and the information in the written record, as discussed previously, we think the agency reasonably concluded that Magnavox would furnish the modem

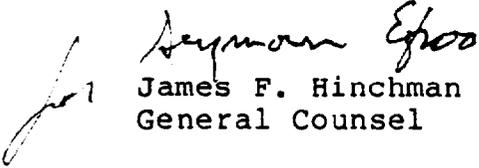
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2/ We consider it significant that while the SPAWAR negotiator prepared his memorandum the day of the conversation with the Magnavox contracts manager, TR at 94, when presumably his recollection of the conversation was still fresh in his mind, the Magnavox contracts manager testified that he had no notes on the conversation, TR at 10, and was testifying from memory concerning a conversation that occurred approximately 8 1/2 months prior to award.

to ESI.<sup>3/</sup> It follows that the agency reasonably evaluated ESI's offer favorably based on its proposed use of the highly regarded Magnavox modem.

Moreover, we do not find SPAWAR's evaluation in this regard to have been inconsistent with its conclusion that the primary weakness in Magnavox's offer was that firm's proposal of a new source, MCL, for the HPA. Although we recognize that the possibility existed that Magnavox might have used Raytheon in the event of award, SPAWAR could not reasonably have evaluated Magnavox's proposal on that basis given Magnavox's different approach of proposing both MCL and other alternate sources, subject to selecting the ultimate subcontractor based on a post-award competition. Since Magnavox retained the discretion to make award to MCL and only discussed at any length that firm as a source for the HPA, SPAWAR relied on the best information available and acted reasonably in evaluating Magnavox on the basis of its proposal of MCL. In contrast, because ESI firmly proposed using Magnavox's modem (and, as determined above, SPAWAR determined that the modem would be available), it was proper to evaluate ESI's proposal on that basis.

The protest is denied.

  
James F. Hinchman  
General Counsel

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3/ Although we do not think this arrangement amounted to a "firm commitment" of the subcontractor, as called for by the RFP, we think it is clear that the agency did not contemplate a commitment in the form of an actual subcontractor legal obligation, as evidenced by its similar consideration of Magnavox's proposal of MCL without a firm commitment of that firm's facilities.