

**DECISION**



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

40929

95261

FILE: B-180247

DATE: July 11, 1974

MATTER OF: Bristol Electronics, Inc.; E-Systems, Inc.,  
Memcor Division

**DIGEST:** Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation.

On November 27, 1973, request for proposals (RFP) No. DAAB05-74-R-0362, was issued by the United States Army Electronics Command (ECOM), Philadelphia, Pennsylvania. The RFP solicited proposals for a specified quantity of AN/PRC ( ) radio sets and RT-841 ( )/PRC transmitters, and included an option provision for the purchase of up to an additional 100 percent of the specified quantity of items.

In response to the RFP, five proposals were submitted. Ranked in order of price from lowest to highest, they were as follows:

Cincinnati Electronics Corp. (Cincinnati)

Bristol Electronics, Inc. (Bristol)

Sentinel Electronics, Inc. (Sentinel)

Electrospace, Inc. (Electrospace)

E-Systems, Inc. (MEMCOR Div) (E-Systems)

Cincinnati and Sentinel were determined to be ineligible for consideration as they had not submitted a first article test report for approval, as specifically required by section C.45 of the RFP entitled "Special Notice to Offerors."

On January 17, 1974, section F.12 of the RFP was amended to require interchangeability of units, assemblies, subassemblies, modules and parts. All offerors under consideration were required to submit impact costs, if any, by January 23, 1974. None of the firms in contention altered their cost submissions.

At this stage of the procurement, Bristol was the low offeror as a result of the disqualification of Cincinnati. Negotiations were formally closed on January 28, 1974, and best and final offers were required to be submitted by January 30, 1974. The results of the closing placed the offerors in the following price positions (lowest to highest):

Bristol

E-Systems

Electrospace

However, on February 21, 1974, section F.1.d of the RFP, entitled "Quality Assurance of Electronic, Electric, and Electromechanical Parts," was deleted. The contracting officer considered this deletion to be a material change to the RFP requiring the reopening of negotiations. All offerors under consideration were apprised of this decision and were requested to advise of the cost impact, if any, by February 26, 1974. Again none of these offerors amended their price quotations.

On February 25, 1974, the contracting officer was advised that 1,636 units required by the schedule were Foreign Military Sales (FMS) requirements for which no waiver had been obtained, as required by Armed Services Procurement Regulation (ASPR) 6-705.2, which prohibits sales of unclassified defense articles to foreign Governments unless these articles are not generally available for purchase from commercial sources in the United States. This quantity was identified in a telegraphic notice to the offerors under consideration on February 26, 1974. Those offerors were provided until March 1, 1974, to advise of any cost impact the information would have on their proposals. On March 1, 1974, a waiver was obtained for 110 units of the FMS requirement. All offerors under consideration were notified the same day that the total RFP quantity had been changed from 6990 to 5464 units and that the time for revision of proposals had been extended to March 8, 1974.

On March 8, 1974, the standing of the three offerors listed above changed so that the order from the lowest to the highest price was as follows:

E-Systems

Bristol

Electrospace

During the course of negotiations, Bristol, on February 9, 1974, protested to our Office against award of a contract to any other offeror under the RFP. However, a determination was made pursuant to ASPR 2-407.8(b)(3) that the procurement was urgent and that an award should be made notwithstanding the protest. Approval of award was granted on March 13, 1974. Award was made to E-Systems on March 14, 1974. All but one of the original grounds of protest were resolved prior to the award. The remaining ground was withdrawn after the award. However, as a result of the award, Bristol protested to our Office, raising the additional issue of an improper option price in E-Systems' offer, rendering the offer unacceptable.

It is Bristol's position that subsection a, of RFP section J.1, "OPTION FOR INCREASED QUANTITY (1971 JUN)," entitled the Government to purchase up to a specified quantity of supplies called for in the schedule at the price specified in the schedule or a lesser price, if so indicated in subsection (d.). Since E-Systems indicated in subsection (d.) an option price in excess of that quoted in the schedule, Bristol alleges that E-Systems offer was not properly for acceptance.

ECOM has taken the position that the RFP did not expressly require the rejection of an offer which did not quote a price for the option quantity equal to or less than the price submitted for the basic quantity. Moreover, offers were to be evaluated for award exclusive of the price submitted for the option quantity (section J.1c.) and neither the option or any part thereof would be exercised at the time of award. Finally, the contracting officer contends that the option quantity could not be exercised during the option period subsequent to the contract award unless it was determined to be the best price obtainable. In light of this reasoning, the higher option price submitted by E-Systems was considered to have been a minor irregularity, and therefore disregarded.

ECOM also relies on two of our decisions to support the action taken. ECOM refers to the statement in 46 Comp. Gen. 434, 435 (1966), that--

"The failure to quote on the option quantity \* \* \* unquestionably was a material deviation in that it deprived the Government of a substantive and valuable right to increase the quantity \* \* \* within 180 days after receipt of the notice of award. Furthermore, the invitation specifically provided that 'Bidders must bid on all items \* \* \* or their bids will be rejected as nonresponsive.'"

ECOM distinguishes the decision from the present situation by finding (a) no provision in the RFP which requires offerors to be found unacceptable based on a failure to quote a price for the option, and (b) no line item in the schedule covering the option quantity, thus exempting the option quantity from the terms of section C.31 (which required an offeror to quote on all items in the solicitation to be eligible for award).

Further, ECOM refers to the statement in 51 Comp. Gen. 528, 530 (1972), that--

"\* \* \*[there is] no substantial difference between a bid with an unreasonably high option price and a bid without any option price. Since an otherwise proper bid could not be rejected because of the high option price where the option quantity was not to be included in the award, we see no reason why the absence of any option price should result in rejection."

ECOM contends that an excessive option price in this procurement can be treated in the same manner as no option price--neither being cause for rejection of the offer.

Counsel for E-Systems, while agreeing with the position taken by ECOM, sets forth the following contentions to support the award to E-Systems. Counsel, citing 44 Comp. Gen. 581 (1965), contends that the inclusion of a higher price for the option items as opposed to the items in the schedule was an immaterial deviation, prejudicial to no other offeror, and therefore properly waivable by the Government. Additionally, counsel contends that a reopening

of negotiations based upon a waiver of the option price ceiling would have had the effect of creating an auction atmosphere of the type prohibited by ASPR section 3-805.3(c).

For the reasons set forth below, we find ECOM and E-Systems' reliance on the cited decisions for the most part to have been misplaced, and the contention of Bristol to be meritorious.

With respect to the 46 Comp. Gen. decision, supra, while we might agree that the RFP contained no specific mandate requiring a finding of unacceptability due to a failure to quote a price on the option quantity, we are of the opinion that offerors were required to quote a price on the option quantity. Even though the option quantity was not included as a line item, and therefore not subject to the requirements of section C.31, it was section J.1(d.) of the RFP which required offerors to quote a price for the option. Section J.1(d.) states that "The offeror shall indicate \* \* \* the unit price(s) for the increased quantities under this option." (Underscoring supplied). "Shall" means "imperative" ASPR 1-201.16. Therefore, it was incumbent upon offerors to quote an option price under the RFP, unless they desired to have the prices quoted in the schedule prevail for the options.

Furthermore, the 51 Comp. Gen. decision, supra, is inapplicable. The portion of the decision quoted above is applicable only when two specific requirements are met. The requirements, as stated in the decision are that (1) the IFB does not establish a ceiling for option prices and (2) the option prices are not to be included in the evaluation. Section J.1(c.) specifically excluded the option prices from evaluation. However, section J.1(a.) specifically establishes a ceiling for any option price quoted. It is our opinion that the statement "\* \* \* at the unit price specified in the schedule or the lesser price if specified below\* \* \*" clearly establishes a ceiling for any option price to be quoted. With this type of ceiling contained in the RFP, we find the 51 Comp. Gen. decision, supra, and other decisions drawing analogies between a "no-bid" and "excessive bid" to be inapplicable due to the incorporation of the requirement for an option ceiling price.

Turning our attention to the contentions of counsel for E-Systems, it is correct that we considered a case similar in many respects to the present situation in 44 Comp. Gen. 581. In that case bidders were required by the invitation to quote option prices not to exceed

their basic unit prices, and the bid evaluation was to be made on the basis of basic prices only. There also, the low bidder on the basic quantity quoted higher option prices, contrary to the invitation requirement. Under those circumstances we had no objection to permitting the low bidder to reduce its option prices to coincide with its basic prices for purpose of award, since the other bidders were not unfairly prejudiced thereby, as both the low bidder's base and option prices were the lowest offered. We pointed out that the purpose for limiting the option price to the basic unit prices was to insure minimum costs to the Government should the option be exercised in whole or in part. In that case, award to the low bidder would obviously result in the lowest cost to the Government whether or not the option was exercised. We noted also that because the low bid as submitted offered the lowest cost to the Government in any case, acceptance of that bid could not be regarded as prejudicial to the other bidders. This rationale was subsequently followed in our decision B-176356, November 8, 1972.

Applying the standards of the above-cited decisions to the instant case, we must conclude that a contrary result must follow. Here the situation is analogous to that in 51 Comp. Gen. 439 (1972), although that solicitation was an IFB whereas here we are dealing with an RFP. Here, as in 51 Comp. Gen. 439, the sum of the low offeror's basic prices for the line items in dispute plus the higher option prices quoted by the offeror exceed the sum quoted by the next low offeror on these items. As we stated at 51 Comp. Gen. 439, 442:

"If the Government should exercise the option for component parts, it might incur greater costs purchasing the kit and component parts on the basis of the bid submitted by Fourdee rather than on the bid of DC Electronics.

\* \* \* \* \*

"Applying the standards in 44 Comp. Gen. 581, supra, we must conclude that acceptance of Fourdee's bid as submitted may not result in the lowest cost to the Government, depending upon the exercise of the option. Award on the basis of the Fourdee bid may, therefore, be regarded as prejudicial to the other bidders who, as suggested in the administrative report, may well have bid higher on the basic quantities because of the IFB limitation on the option prices."

Although the line of decisions considered above (44 Comp. Gen. 581, 51 Comp. Gen. 439; B-176356, November 8, 1972) involved advertised procurements, we see no logical or reasonable basis to distinguish the rule solely due to the fact that the procurement in this instance was negotiated rather than advertised. In both advertised and negotiated procurements, the procuring agencies' purpose for including a ceiling price in the option is to achieve the identical goal. Therefore, since E-Systems' basic price plus the option price exceeds the same total price as offered by Bristol, the award to E-Systems is both prejudicial to other offerors and contrary to the best interests of the Government. Further, it may well be, as indicated in the 51 Comp. Gen. decision, supra, that the prices of Bristol and Electrospace on the basic quantity were higher than E-Systems because of the limitation in the option prices in the RFP. Thus, it was inappropriate to consider the high option price of E-Systems as a minor irregularity and unfair to Bristol and Electrospace to waive the option and make an award to E-Systems as the low offeror based upon the basic quantity price without according them an opportunity to submit a price free of an option requirement.

Accordingly, it is our opinion that the appropriate course of action for the contracting officer to have taken would have been to again reopen negotiations to either cure the deviation in E-Systems' proposal or issue an amendment to the RFP deleting the option price ceiling. See ASPR 3-805.3(a) and 3-805.4(a). Consequently, we conclude that the contract to E-Systems was improperly awarded, and recommend that negotiations be reopened for another round of best and final offers. After the negotiations, the present contract should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than E-Systems, at its newly offered price. If E-Systems remains successful, the existing contract should be modified in accordance with its final proposal.

In light of this recommendation, it should be noted that we are cognizant of the contention asserted by counsel for E-Systems that a reopening of negotiations would create an auction atmosphere. Counsel cites 50 Comp. Gen. 222 (1970) for the proposition that "they [auctions] should be scrupulously avoided, even at the cost of depriving an offeror of other rights under ASPR." However, the decision did not involve a situation where, as here, the award was made to an offeror whose proposal did not meet the requirements of the RFP. Although the procurement regulations provide that auction practices should be avoided, a possible auction is one of the unfortunate consequences of an improper award. We do not believe that an improper award must be allowed to stand solely to avoid the implications of an auction situation.

B-180247

As the decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510.

  
Deputy Comptroller General  
of the United States