



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Electro-Voice, Inc.

File: B-278319; B-278319.2

Date: January 15, 1998

Larry King for the protester.

James J. McCullough, Esq., Anne B. Perry, Esq., Nancy R. Wagner, Esq., and Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Specialty Plastic Products of PA, Inc., the intervenor.

Vera Meza, Esq., and Richard R. Mobley, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Restriction on protests of orders placed under delivery order contracts contained in 10 U.S.C. § 2304c(d) (1994) does not apply to protests of downselections implemented by the placement of a delivery order under a multiple award delivery order contract, resulting in the elimination of one of the contractors from consideration for future delivery orders.
2. Agency's testing and evaluation of helmet communications headsets for hearing protection is reasonable and consistent with the terms of the solicitation where the agency conducted its tests in accordance with the testing standards prescribed in the solicitation.
3. Agency's failure to reasonably evaluate one performance characteristic in downselecting among two contractors to supply helmets is not prejudicial to the protester, which proposed a significantly higher price, where the record shows that the selected contractor's helmet was, in fact, superior with regard to this performance characteristic, such that the protester's overall marginal technical advantage was not affected by this unreasonable element of the evaluation.
4. Agency's selection of a similar rated, but significantly lower priced, contractor is reasonable where the best value selection plan considered technical considerations and price of equal importance.

DECISION

Electro-Voice, Inc. protests the selection of Specialty Plastic Products of PA, Inc. by the U.S. Army Soldier Systems Command, Natick, Massachusetts, to proceed with

the production of Advanced Combat Vehicle Crewman (ACVC) helmets with communications systems under a delivery order contract awarded pursuant to request for proposals (RFP) No. DAAK60-97-R-9617.

We deny the protests.

These protests concern the downselection (i.e., the selection of one of multiple contractors for continued performance) of Specialty Plastic instead of Electro-Voice, both of which firms had received awards of indefinite delivery/indefinite quantity contracts for the helmets. The initial line item that was ordered under the contracts was the production and delivery of four product demonstration models (PDM) for testing in the downselection process. The RFP indicated that the downselection would be on a best value basis considering certain specified factors, including cost and technical performance of the PDM helmets and communications headsets.

The technical requirements for the helmets and headsets were stated in Purchase Description A3261199 dated March 14, 1997, which was incorporated into the RFP.¹ Of particular relevance to this protest is the requirement for hearing protection, i.e., physical ear attenuation, at section 3.5.2 of the purchase description, which states:

The headset shall attenuate vehicle noise to a maximum of 85 dBA² from 63 to 8000 Hz when tested [in accordance with (IAW) section] 4.6.5.2.

Section 4.6.5.2 stated the following testing methodology:

The physical ear attenuation shall be tested IAW ANSI/ASA S12.42-1995 for 1/3 octave bands from 63 Hz to [8000 Hz]. . . . The production test sound field shall be the M1 Abrams at 110 dBA. Test to show compliance with [section] 3.5.2.

The referenced ANSI/ASA standard is published by the Acoustical Society of America and prescribes testing methodologies for determining hearing protection.

¹The agency inadvertently provided a draft version of this purchase description in the agency report in response to this protest, the use of which the protester asserts caused a defective evaluation. However, the record shows that this draft document was not used in the evaluation.

²The measurement unit "dBA" is a composite decibel (dB) value, i.e., the A-weighted dB value, which reflects the industry standard for weighing the dB measurement for each frequency, i.e., hertz (Hz), to account for the impact of noise on the ear at that frequency and for combining the resulting individual weighted values into an overall measurement of the noise level for all applicable frequencies.

Under the PDM delivery orders, Electro-Voice and Specialty Plastic were also to provide verification test data demonstrating the performance characteristics of their PDMs. Section M-4.1(d) of the RFP stated that the agency would test and evaluate PDMs using contractor supplied information and data.

The data submitted by both contractors evidenced that their respective PDMs satisfied the 85 dBA requirement for physical ear attenuation. The agency conducted its own tests to verify the reliability of the data submitted by the contractors. The agency first tested the PDMs in accordance with ANSI/ASA S12.42-1995, and then converted the resulting attenuation measurements for each frequency to a graph depicting dBA values for the PDMs on a noise level continuum using a formula for estimated exposure level (EEL).³ The agency determined that its dBA measurements for both contractors' PDMs sufficiently approximated the measurement which each contractor stated that its PDMs met, so that the contractors' data could be relied upon to determine whether each contractor's PDM was technically acceptable.

The source selection evaluation board (SSEB) considered the evaluation results that led to the selection of the contractors under the RFP and its own test results of the PDMs in making its recommendation as to which contractor should be downselected. In addition to the sound attenuation testing, the agency also conducted field tests to evaluate the PDMs for other technical criteria. Using an adjectival scale with four ratings--excellent, good, acceptable, and unacceptable--the agency rated each contractor's PDMs as follows:

Criterion	Electro-Voice	Specialty Plastic
Comfort & Fit	Excellent	Good
Durability/Reliability	Acceptable	Acceptable
Operational Effectiveness	Good	Good
Logistics/Maintainability	Excellent	Acceptable
Weight	Acceptable	Acceptable
Sound Attenuation	Good	Excellent
System Safety	Good	Good

³The use of this formula is a methodology which the Army uses to produce estimates of the noise hazard for any given user considering various noise environments. The Army uses it instead of the Noise Reduction Rating, which is often used within the industry to calculate sound attenuation dBA values.

Overall	Good	Good
Unit Price	\$661.72	\$443.98

The rating for sound attenuation was assigned based on the sum of the differences between each contractor's attenuation measurements at three selected frequency levels and the respective Physical Ear Attenuation Test (PEAT) requirement values for those levels.⁴ Ratings for this criterion were assigned based on the sum of the differences: the higher the sum, the higher the rating.

Overall, the contractors were assigned the same technical rating for the PDMs because, although the SSEB determined that the results at the criterion level showed that Electro-Voice's PDMs offered some marginal advantage in technical performance, it determined that the qualitative differences between the PDMs was not significant. The SSEB determined that any marginal technical advantage of Electro-Voice's helmet and headset was not worth the additional 33-percent price premium, and recommended selecting Specialty Plastic as the production contractor.⁵

The source selection authority reviewed and accepted the SSEB's recommendation. On September 29, the Army issued a delivery order for 10,015 helmets to Specialty Plastic. Electro-Voice received a debriefing on October 6. These protests followed.

As a preliminary matter, Specialty Plastic contends that our consideration of the protests of the downselection decision is precluded by 10 U.S.C. § 2304c(d) (1994), which provides that "[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued."

⁴The PEAT requirements were established by the Surgeon General as a safety guideline. They were not identified in the RFP or otherwise disclosed to the contractors.

⁵Specialty Plastic submitted one set of PDMs with passive noise reduction and one set with active noise reduction (ANR). Although Electro-Voice alleges that the test data from the ANR PDMs was, in whole or in part, the basis for Specialty Plastic's PDMs being rated better than Electro-Voice's, there is no support for this allegation in the record. The agency kept separate the test data for the passive and ANR PDMs, and based its source selection entirely on the evaluation of the Specialty Plastic's PDMs employing passive noise reduction technology. The agency's testing of Specialty Plastic's ANR PDMs resulted in rejection of those PDMs from further consideration.

We do not find this position persuasive, because there is no evidence that the provision is intended to preclude protests of downselection decisions implemented by the issuance of an order under a task or delivery order contract. The above restriction on protests was included in the Federal Acquisition Streamlining Act of 1994 (FASA), § 1004, Pub. L. No. 103-355, 108 Stat. 3243, 3252-53 (1994), as part of FASA's treatment of task and delivery order contracts. The legislative history concerning the provisions of FASA treating task and delivery order contracts indicates that they were intended to encourage the use of multiple award order contracts, rather than single award order contracts, in order to promote an ongoing competitive environment in which each awardee was fairly considered for each order issued. H.R. Conf. Rep. No. 103-712, at 178 (1994), reprinted in 1994 U.S.C.C.A.N. 2607, 2608; S. Rep. No. 103-258, at 15-16 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2575-76. We have held that the protest restriction does not apply where the nature of the protested order contract is not that which could have been contemplated. See Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3 n.1 (protests of orders placed under Federal Supply Schedule contracts are not precluded by 10 U.S.C. § 2304c(d)).

Here, the delivery order contracts issued to Electro-Voice and Specialty Plastic contemplated orders to both contractors only for the initial delivery of the PDMs for the downselection process; once the downselection decision was made, only the selected contractor would receive orders for the agency's production requirements. That is, once the downselection of a contractor is made, there will be no ongoing competition for orders among the multiple award contractors as envisioned by FASA. The placement of the delivery order for the initial production quantity of helmets was merely the vehicle that implemented the downselection decision. Therefore, the restriction on protests of the placement of orders contained in 10 U.S.C. § 2304c(d) does not bar Electro-Voice's protest of the downselection decision.

In cases where the terms of existing contracts are used to conduct a competition resulting in the elimination of contractors as sources for the agency's requirements for the duration of the contracts in question, as is the case here, we will consider protests concerning that competition and selection decision. Mine Safety Appliances Co., 69 Comp. Gen. 562, 564 (1990), 90-2 CPD ¶ 11 at 4 (downselection implemented by the exercise of a contract option).

Electro-Voice alleges that the method which the agency used to evaluate sound attenuation was not consistent with the purchase description and was unreasonable. Electro-Voice also alleges that the agency unreasonably evaluated the experience of Specialty Plastic's headset subcontractor, and placed too much significance on price in the downselection decision.

In considering protests against an agency's evaluation, we will not evaluate competing technical solutions anew in order to make our own determinations as to

their acceptability or relative merits. Id. at 6. However, we will examine the record to determine whether the evaluation was fair, reasonable, and consistent with the stated evaluation factors. Id.

Here, the agency evaluated sound attenuation according to the requirements stated in the purchase description (except for its evaluation using the PEAT values discussed below). As indicated, the RFP stated that the agency would test and evaluate PDMs using the data provided by the contractors. At the time of the evaluation, the test data provided by the contractors was limited and the agency conducted its own tests using methodology prescribed under ANSI/ASA S12.42-1995. This was the same methodology which the terms of the purchase description required contractors to use in compiling the verification test data to be provided to the agency. The results of this test methodology was a sound attenuation measurement stated in dB units for each frequency prescribed by the ANSI/ASA standard. Since the attenuation requirement stated in the purchase description was 85 dBA, the ANSI/ASA test results had to be converted to dBA values. The RFP did not prescribe a methodology for this conversion and, in such cases, the amended terms of the RFP (at amendment 0002, item 11) stated that standard commercial practices, test methodologies, and standards should apply. The agency used the EEL methodology, which produced a graph providing the dBA measurement for a contractor's PDM across a range of noise levels, including the 110 dBA noise level--the required noise environment under which the PDMs had to attenuate noise to 85 dBA.

During the course of this protest, Electro-Voice acknowledged that the agency's tests conducted under the stated ANSI/ASA standard appear reasonable and consistent with the prescribed methodology; however, it alleges that the way the agency used this data in the qualitative evaluation of proposals was unreasonable. In this regard, Electro-Voice alleges that the EEL methodology is not a reasonable basis for computing an overall dBA measurement. In its efforts to prove this allegation, Electro-Voice applied its own preferred methodology using the agency's ANSI/ASA test data of its PDMs. However, at the critical 110 dBA noise level, the resulting dBA measurement for Electro-Voice's PDMs was nearly identical to the agency's EEL-based measurement for these PDMs. Thus, the protester has not shown, and the record does not otherwise establish, that the ANSI/ASA and EEL testing and evaluation methodology was unreasonable or inconsistent with the terms of the RFP.

Although the protester did not have access to similar data for Specialty Plastic's PDMs, the agency states that it consistently applied the same test and evaluation methodologies to the PDMs of both contractors. Our Office has reviewed the record in this regard and finds no basis to doubt the agency's representations. The record evidences that Specialty Plastic's PDMs performed somewhat better than Electro-Voice's in attenuating noise at the 110 dBA level. Thus, we do not find

persuasive Electro-Voice's unsupported allegation that its PDMs are superior under the sound attenuation criterion.

However, we do find persuasive the protester's allegation that the agency unreasonably and arbitrarily used the sum of dB measurements in excess of the PEAT requirements for three frequency bands for each contractor's PDMs as the basis for the adjectival rating for the sound attenuation criterion. The protester has demonstrated that simple addition of dB values does not produce a meaningful measure of relative sound attenuation performance, because the analysis of such dB measurements requires a logarithmic function--a proposition with which the agency does not disagree. Moreover, since the agency has not stated a consistent basis for selecting the three frequency bands that it used for this purpose, we cannot find that the selection of these bands had a reasonable basis. Thus, the actual methodology used to assign the sound attenuation ratings was unreasonable.

Nevertheless, as discussed above, the ANSI/ASA testing and EEL methodology--which is based on a logarithmic formula--evidence that Specialty Plastic's PDMs performed better than Electro-Voice's PDMs. Thus, even apart from the PEAT-based ratings, the evaluation record does provide a sufficient basis to give Specialty Plastic's PDMs a higher adjectival rating than Electro-Voice's PDMs. Therefore, there is no basis to find that Electro-Voice's PDMs' overall marginal technical advantage, based on its higher ratings under two other criteria, would be more than marginal, had the sound attenuation criterion been reasonably evaluated. Given Specialty Plastic's significant price advantage, we find that Electro-Voice was not prejudiced by the agency's PEAT-based ratings. Such non-prejudicial defects in an evaluation/selection process do not provide a basis for disturbing the agency's selection decision. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

The protester next alleges that the agency's evaluation of the experience for design and production of communication headsets for Specialty Plastic's subcontractor was unreasonable. We disagree.

As indicated, the record shows that in making the downselection decision, the agency considered the evaluation ratings of proposals under the management and past performance factors that were used for the initial awards of these contracts. These factors included the evaluation of an offeror's similar design, testing and production experience, and historical record of performance under similar contracts. The record shows that Specialty Plastic's subcontractor was rated excellent in this regard based on a long list of contracts and subcontracts involving design, testing and/or production of headsets and other communications equipment for military and industry applications.

The protester alleges that two of these contracts are not sufficiently similar or complex as compared to the current contract requirements to merit an excellent

rating. However, the contracts which the protester identified are just two of many listed by the subcontractor and are not representative of the overall experience of Specialty Plastic's subcontractor. The remainder of the subcontractor's record of experience and performance includes requirements quite similar to those here, which we find reasonably supports the agency's evaluation rating.⁶

Finally, Electro-Voice alleges that the agency's selection decision did not give technical performance significantly more weight than price/cost, which it asserts was required. This contention has no merit, since the stated downselection scheme did not provide for such a weighing of technical performance. Although the downselection plan did not state the relative importance of the selection criteria, it did state that technical performance of the PDMs and cost/price were to be factors in the agency downselection decision. In cases where the solicitation does not state the relative importance of the selection factors, but, as here, clearly indicates that a trade-off determination considering the stated factors will be performed, it must be assumed that the factors are of approximately equal importance. Logicon RDA, B-252031.4, Sept. 20, 1993, 93-2 CPD ¶ 179 at 7. Also, the RFP stated that the initial award of contracts would be based on a best value selection plan under which technical and cost/price were the most important factors and of equal importance to each other. Here, the downselection decision was based on a cost/technical trade-off with equal weight given to technical and cost/price. Such a weighing scheme is consistent with the weight initially assigned these two areas in the plan stated in the RFP for contract awards and with the weights implied in the stated downselection plan.⁷

⁶To the extent the protester is also alleging that the subcontractor does not have the resources or capabilities to perform the solicited requirement, the protest challenges the agency's affirmative determination of responsibility which our Office will not review, absent a showing of possible fraud or bad faith by government officials, or the misapplication of definitive responsibility criteria, none of which are present here. 4 C.F.R. § 21.5(c) (1997); Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115 at 6 n.3.

⁷Although Electro-Voice alleges that it relied on oral instructions that technical was more important than cost/price, the agency denies that any such oral instructions were given and the protester has not provided any evidence to support its allegation.

The determination that the marginal technical superiority of Electro-Voice's PDM's was not worth the substantially higher unit price is reasonable and consistent with these two criteria being of equal weight. See Management Sys. Applications, Inc., B-259628, B-259628.2, Apr. 13, 1995, 95-1 CPD ¶ 216 at 11; Logicon RDA, supra, at 12. The protester presents no evidence to the contrary.

The protests are denied.

Comptroller General
of the United States