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**DECISION**



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

**FILE:** B-185906

**DATE:** November 11, 1976

**MATTER OF:** Philips Audio Videc Systems Corporation

**DIGEST:**

1. Protest that agency's specifications were based on proprietary data in protester's prior unsolicited proposal, where protest was not filed prior to closing date for receipt of proposals, is untimely and not for consideration.
2. Where record reveals that agency evaluated risks inherent in low-priced offer and concluded that estimated costs were reasonable and realistic, and therefore did not create potential "buy-in" possibility, GAO will not disturb that conclusion.
3. Allegation that prospective contractor is not responsible because it cannot possibly perform contract within its offered price, is not for consideration since GAO does not review protests involving affirmative determinations of responsibility, except where fraud is alleged or where definitive responsibility criteria allegedly have not been applied.

Philips Audio Video Systems Corporation protests the proposed award of a contract to Xerox Electro-Optical Systems (Xerox) by the Department of the Interior's U. S. Bureau of Mines under request for proposals (RFP) No. H0366005, for an infrared imaging borehole probe device to detect objects through smoke by means of their thermal radiation.

The protester alleges that the requirement set out in the subject RFP constitutes an unauthorized use of proprietary data embodied in an unsolicited proposal submitted to the Bureau of Mines in April 1974. It is further contended that since the protester's price is "valid" and "extremely tight", any price that is lower, such as Xerox's, indicates that such an offeror either does not understand the technical requirements of the RFP or has purposely under-bid or "bought in" to a cost-type program.

The instant RFP was issued October 31, 1975 after prior solicitations for the requirement had been canceled for various reasons, and specified a closing date of December 15, 1975 for receipt of initial proposals. Upon initial evaluation, Xerox's proposal received 552 points out of a possible 1000 while the protester's was accorded 514. (A third firm was determined to be outside the competitive range.)

An analysis was performed on the proposed costs of the remaining two offerors, resulting in a determination that the protester's proposed cost of \$176,258 removed its proposal from the competitive range when compared with Xerox's proposed cost of \$97,062. The analysis indicated that the fundamental difference between the proposals was based upon proposed direct labor hours, and that a reduction therein of approximately 53 percent was required to bring the protester's proposal within a competitive range from the standpoint of cost. It was concluded that such a drastic reduction would degrade the quality of the effort as to jeopardize the program objective, and that technical clarification sessions and negotiations should be conducted with Xerox alone.

By letter of February 13, 1976, Philips was advised of this determination, whereupon it filed a protest with this Office, alleging substantially the same contentions as the instant protest. The agency then re-opened discussions, and the protester withdrew its protest. However, these further negotiations with the protester resulted in an amended proposed cost that was still substantially in excess of Xerox's, and the protest was subsequently reinstated.

With regard to the allegation that the RFP constituted an unauthorized appropriation of proprietary data set out in the protester's prior unsolicited proposal, the agency states that most of its specifications in the RFP for dimensions and electrical transmission requirements were based on the agency's experience with visible light television; that the specifications for minimum resolvable temperature were predicated upon published capabilities of available equipment, namely the AGA Thermovision 750, the Dynarad Model 810, and the Norelco Handheld Viewer; and that other specifications, such as the angular field of view and the resolution, were based upon its needs and published information on available equipment. Moreover, the agency has set forth a comparative analysis of its original solicitation and the protester's unsolicited proposal indicating that there are "only minor similarities" between the two systems.

In any event, we note that this allegation was first filed under the instant RFP approximately two months following the closing date for receipt of proposals. Our Bid Protest Procedures,

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4 CFR Part 20 (1976), require in pertinent part that protests based on alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals must be filed prior to such date. 4 CFR 20.2(b)(1). The term "filed", as used in this section, means receipt in the contracting agency or in our Office, as the case may be. 4 CFR 20.2(b)(3). Inasmuch as the alleged impropriety in the instant RFP was not filed in a timely manner as required by the foregoing provisions, this particular allegation is untimely and will not be considered.

Concerning the allegation that Xerox cannot satisfactorily perform the prospective contract at the offered cost, and either does not possess an understanding of the undertaking or is attempting to "buy-in", the protester alludes to the most recent Government cost estimate of \$180,000 as support for the contention.

It appears from the record that the Bureau of Mines, in arriving at the conclusion that Xerox's proposed cost was reasonable, subjected the Xerox cost proposal to analysis. After the technical evaluation committee reviewed the proposed hours without taking exception, and after the technical project officer determined that the proposed materials and disciplines were both necessary and reasonable, the overhead and G and A rates were verified by a resident Defense Contract Audit Agency auditor. Finally, the cognizant Defense Contract Administrative Region administrative contracting officer reported that Xerox had a good record of cost consciousness.

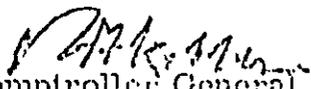
More specifically, the technical project officer concluded that the Xerox proposal was cost realistic. He reported that the company had extensive experience in the assembly of infrared imaging devices and had delivered several such systems to the Air Force and Army. In the instant case, he reports that Xerox intended to adapt presently existing equipment for thermal imaging with a remote display to Bureau of Mines requirements for a small diameter probe. Therefore, Xerox's development costs for the system would be relatively low or non-existent in terms of engineering and manufacturing costs.

Accordingly, it was determined that Xerox's proposed cost was reasonable and an affirmative determination of responsibility was made pursuant to FPR 1-1.1203 that Xerox would satisfactorily perform the prospective contract.

We have stated that, within the context of a negotiated procurement, inquiry must be directed at whether the risks to the Government inherent in accepting a low-priced offer have been carefully considered by responsible procurement officials in the evaluation and selection process. EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338. Where, as the record in the instant case indicates, a thorough agency evaluation reveals that the low offeror's particular technical approach allows it to incur substantially lower costs for the required services or items, and that such estimated costs are reasonable and realistic, our Office will not disturb such a conclusion. Baganoff Associates, 54 Comp. Gen. 44, 51-52 (1974), 74-2 CPD 56. Accordingly, we cannot say that agency officials failed to take adequate measures to analyze and weigh the technical and cost risks associated with the Xerox proposal, and the possibility that selection of this proposal might create a potential "buy-in" situation. EPSCO, Inc., supra.

To the extent that the protester suggests that Xerox cannot possibly deliver a conforming item at its estimated price, the issue raised pertains to Xerox's responsibility which the record reveals to have been determined in the affirmative. In this regard, our Office has discontinued its review of protests involving affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contained definitive responsibility criteria which allegedly have not been applied. Although we will consider protests involving determinations of nonresponsibility to provide assurance against the arbitrary rejection of offers, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. See Shiffer Industrial Equipment, Inc., B-185372, January 27, 1976, 76-1 CPD 52; Worldwide Services, Inc., B-184259, July 15, 1975, 75-2 CPD 40, and cases cited therein. In view thereof, this matter is not for our consideration. Accordingly, the protest is denied.

Deputy

  
Comptroller General  
of the United States