Proc. -I

DECISION

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

9821

FILE: B-192574 DATE: April 13, 1979

DL600038

MATTER OF: Electrospace Systems, Inc.

[Protest of Exclusion From Competitive Range]

DIGEST:

1. First ground of protest is held to be timely notwithstanding agency objections since initial protest letter--timely received--questioned exclusion from competitive range as well as making other assertions. Other grounds of protest relating to effect of Public Law 95-89 on rights of small business and to indirect allegation of pattern of abuse of public exigency negotiating authority are considered "significant" under GAO's Bid Protest Procedures and for review even if untimely filed.

2. GAO finds that RFP did call for experience information found lacking in protester's proposal.

3. Based on review of record, GAO cannot take exception to Army's technical evaluation of protester's proposal--especially given complexity of procurement--or specific judgment that protester's proposal did not demonstrate understanding of requirements. Consequently, exclusion of protester's higher priced proposal (compared to initial and final prices proposed by awardee) from competitive range is not questioned.

4. Agencies are not prohibited from making relative assessments of responsibility-related factors in determining competitive range without regard to certificate of competency procedure. Rejection of protester's proposal from competitive range cannot be regarded as tantamount to nonresponsibility finding as found by GAO in 52 Comp. Gen. 47 (1972).

5. Mere fact that offeror is in competitive range does not necessarily ensure award to offeror given negotiating opportunities afforded all competitive offerors and flexibility inherent in negotiated method.

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6. D&F, although relying on expired QRC designator for negotiation authority, also recites additional 02 priority designator. 02 priority designator is fact of record lending support for negotiation under DAR § 3-202.2(vi). Moreover, GAO cannot question continued validity of 02 designator.

7. Consistent GAO position that mere citation of certain "priority designators" authorized negotiation under "public exigency" statutory exception was founded on two suppositions. First, that designators were symbols for facts which would demonstrate exigency and--in terms of 10 U.S.C. § 2310(b)--"clearly and convincingly" establish that formal advertising would not have been feasible; second, that designators would be cited in good faith. Recent observations of House Committee on Government Operations have severely undermined assumptions.

8. Because of observations that raise serious questions about propriety of use of priority designator as a substitute for facts justifying use of "public exigency" negotiating authority, GAO recommended regulatory change was recommended. If change is not made by start of 1980 fiscal year, GAO informs Secretary of Defense that, in event future year D&F's are subject of protests, D&F's reciting only priority designators for competitively negotiated procurements involving formal proposals, contemplated discussions, and evaluations will be held invalid.

9. Army's failure to give GAO required preaward notice is procedural defect not affecting validity of award. Nonetheless, Secretary of Army is informed of failure.

The Sec'y Defense was informed in the future D&F's cited will be held invalid.

The protest was denied.

AGC 00020
AGC 00005

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This protest questions the award of an Army contract for the "Quick Look II" system. For the reasons set forth at length below, we cannot question the award.

Background

On November 18, 1977, the contracting officer, AGC00219 United States Army Electronics Command, Fort Monmouth, New Jersey, executed a Determination and Findings (D&F) supporting the negotiation of a contract for the "Quick Look II" system. The D&F reads:

"Upon the basis of the following findings and determination, the proposed contract described below may be negotiated without formal advertising pursuant to the authority of 10 U.S.C. § 2304(a)(2), as implemented by paragraph 3-202.2(vii) of the Armed Services Procurement Regulation.

"Findings

"1. The U.S. Army Electronics Command proposes to procure by negotiation Quick Look II Systems as follows: ten each Airborne Systems and one each Ground Support System. Pertinent ancillary items will also be procured. The proposed procurement will also provide for an up to 100% option provision for the hardware items. The estimated cost of the proposed procurement is $15,000,000.

"2. Procurement by negotiation of the above described property and services is necessary because the Quick Look II program is assigned an 02 priority and is part of Electronic Warfare QRC No. 41.

"3. Use of formal advertising for the procurement described above is impracticable because Electronic Warfare QRC 41 has been assigned this procurement.

"Determination

"The proposed procurement is for services and property for which the public exigency will not permit the delay incident to formal advertising."

RFP

Under this D&F the Army issued request for proposals (RFP) DAAB07-78-R-2703 on February 24, 1978, for a "fully militarized airborne emitter location-identification system * * * which will detect, parametically identify and locate emitters," known as Quick Look II. Specifically, the RFP called for--in the Army's words--ten "highly specialized items." The RFP further informed prospective offerors that award would be made to that responsible offeror who submitted the lowest fixed-price proposal provided the proposal was technically acceptable as evaluated under the "Technical Factors and Sub-Factors" part of the RFP.

Those technical factors and subfactors were set forth at length in the RFP as follows:

"D.3 Technical Factors and Sub-factors to be Evaluated.

"FACTOR A - PRODUCTION ENGINEERING

"a. Production Evaluation - The offeror shall describe the nature and extent of effort and contractual obligations required by the Production Evaluation Provision. He will enumerate the extent and amount of engineering and related efforts allocated in the proposal to accomplish the required initial and continuing technical data reviews and to implement any changes or corrections to the hardware and/or technical data found essential during the reviews.

"The offeror shall describe detailed procedures to be employed or actions taken to resolve or correct conflicts, errors or deficiencies of the nature

shown by the following examples of some of the conditions that could be uncovered or encountered:

"(1) The omission of a dimension or the inclusion of an incorrect tolerance on a component part drawing, precluding practical assembly of the part into the next assembly.

* * * * *

"b. Experience - Very strong emphasis will be placed on offeror experience in the evaluation for contract award. Failure to meet experience requirements will cause rejection of the offer.

"The offeror shall furnish evidence including complete details of recent (within the past two years) experience in the integration of large multiple minicomputer-based systems. A key task in the contractual effort is the integration of minicomputers, some contractor-built minicomputer equipment, and other hardware with Government furnished software. Since any such integration involves hardware and software, requirement for experience in system integration as stated above shall include experience in the design and development of such systems with data link operation, both hardware and software.

"The offeror shall completely detail his experience and expertise in the fabrication and test of airborne Electronic Intelligence (ELINT) equipments utilizing phase interferometer direction finding techniques as well as spiral antennas.

"The offeror shall also provide complete details of his experience with systems requiring pre and postflight test procedures, flight testing, antenna and tempest test facilities and measurement experience and automatic test equipment.

> "In evaluating the proposals, strong emphasis also will be placed on the offeror's record of past performance for jobs of comparable complexity. Consideration will be given to the degree to which offeror has met requirements including technical, and delivery requirements."

Seven amendments were issued to the RFP, the last of which extended the date for receipt of proposals to May 15, 1978. On May 15, 1978, a total of five proposals --including proposals from Electrospace Systems, Inc. (ESI), and UTL Corporation--were received. Technical evaluation of the proposals then began. The initial evaluation of technical proposals was completed on July 14, 1978, with the result that two proposals-- including the proposal of ESI--were judged unacceptable and excluded from the competitive range for the procurement. On July 26, 1978, the contracting officer sent a letter to ESI informing the company of his determination. Thereafter, the Army completed negotiations with competitive range offerors and awarded a contract to UTL on December 21, 1978.

Timeliness Issue

The Army has argued that ESI's grounds of protest --discussed below--are untimely filed.

As to the first ground of protest, GAO received ESI's August 7 letter of protest within 10 working days from the company's receipt of the Army's letter rejecting its proposal. Since the letter specifically protested the rejection of its proposal as well as asserted that ESI had the capability to do the required work and that the Army rejection reasons were "irrelevant," we consider the company's protest against the rejection of its proposal to be timely filed, even though the specific complaints about the Army's evaluation were later received.

Assuming, without deciding, that the other grounds of protest are untimely filed, we nonetheless find the issues raised to be "significant" under 4 C.F.R. § 20.2(c) (1978) and otherwise for consideration since the bases of protest affect a class of procurements (those negotiated under 10 U.S.C. § 2304(a)(2)) as well as the purported rights of small business offerors generally in negotiated procurements under the 1977 Public Law.

Propriety of Exclusion From Competitive Range

ESI initially protested its exclusion from the competitive range to our Office. Throughout its protest ESI has insisted that several details included in the Army's description of the reasons for excluding ESI from the competitive range are considered confidential and should not be publicly disclosed. Neither the Army nor any interested party has contested this restriction. Consequently, we are necessarily constrained in our discussion of the facts relating to the exclusion.

The Army's reasons for rejecting ESI's proposal were originally set forth as a list of eight "proposal deficiencies" in the July 26, 1978, letter to ESI. Of these eight deficiencies, ESI considers the vast majority as relating to the "RFP's requirement to describe the offerors' experience in this field of technology." Further, ESI contends that the evaluation criteria relating to experience were construed "so narrowly as to virtually preclude offerors who had not previously participated in the developmental or initial production contracts for the Quick Look II system."

As explained by ESI:

> "The agency's basic description of ESI's deficiencies is set forth in Item 1 [of the July 26 letter]: The proposal failed to demonstrate the ELINT experience necessary to deliver a QUICK LOOK II system which will fulfill the Government's requirements. Literally, only a prior producer could satisfy this test. This view is confirmed by the detailed descriptions listed under Item 1.
>
> "For example, Item 1(b) required ESI to have experience in interfacing several minicomputers and a sophisticated microprogrammed computer, like the C-9537 monitor-controller. The underscored portion of this language represents requirements not contained in the solicitation criteria. Schedule D.3, A(b) contains no requirement for experience with the C-9537 monitor-controller, or even like

devices. It merely requires experience in mini-computer equipment and systems. There is similarly no requirement for experience in 'sophisticated microprogrammed computers.' These represent additional evaluation criteria 'interpreted into' the solicitation after the proposals were submitted.

* * * * *

"Similar examples of imposing experience requirements more restrictive than the solicitation can be found in Items 1(a), 1(c), 1(d), and 1(h). The solicitation required experience with 'spiral antennas' and with 'phase interferometer direction finding techniques.' See Schedule D.3, A(b). Yet Item 1(d) required ESI 'to demonstrate experience and expertise needed to integrate the spiral antennas into the QUICK LOOK II phase interferometer DF system.' (Emphasis added.)

* * * * *

"Moreover, the antenna experience was required to be with 'the Quick Look II spiral antennas' (see Item 1(c)) instead of merely spiral antennas as required by the solicitation.

"The manner in which the agency interpreted the solicitation's requirement for experience with 'jobs of comparable complexity' also is overly restrictive (see Schedule D.3, A(b)). Item 1(h) engrafted the additional requirement that there be experience with 'ELINT systems of comparable complexity.'

"Item 7 of the deficiencies required demonstration of production capability for all major components.

* * * * *

"Similarly, Item 6 required experience in producing microwave phase interferometer DF systems while the solicitation requirements

(Schedule D.3A(b)) required only experience in equipment utilizing these systems.

* * * * *

"Two of the criteria on which ESI's proposal was rejected do not have any foundation in the solicitation. There are no requirements for experience in the areas covered by Item 1(e) or requirements to list personnel with expertise listed in Item 8. These were apparently added to the criteria by the agency after the proposals were submitted.

* * * * *

"It is apparent from the foregoing that the criteria by which ESI's proposal was evaluated were different, and more restrictive, than the criteria expressed in the solicitation. Perhaps it is permissible to engraft normative interpretations on an offeror's technical approach to the problem (e.g., where one technical approach is superior or more feasible than another's). But to engraft normative requirements on experience listing requirements is totally without justification. In the case of a technical approach, a completely new design concept may be required to achieve feasibility. But in the case of experience listing, all that may be required is a more detailed description of jobs already listed in the solicitation.

* * * * *

"If the offeror had known in advance the agency's restrictive interpretation of the criteria, it would have been a simple matter of adding details and highlights to jobs already described in order to satisfy the agency's desires. In this particular case, however, we believe only the prior producers of Quick Look II could have satisfied the after-the-fact restrictions the agency placed on proposals." (Emphasis supplied.)

The narrow construction of the evaluation criteria complained of related, in ESI's view, to the Army's insistence that ESI's proposal simply did not contain the information which demonstrated "that ESI was * * * responsive to the RFP."

As explained by the contracting officer:

> "The protestor, in attempting to justify his position, states that ESI was not rejected due to inferior technical approaches, using as a basis for this the fact that the agency's rejection letter does not specify evaluation factor D.3.A.a * * * Production Evaluation. A look at the Technical Factor Matrix shows that, in fact, ESI received an 'acceptable' rating for this factor; however, this is only one of six Production Engineering factors. Of these six, ESI received twice as many 'unacceptable' and 'unacceptable but susceptible to being made acceptable' as it did 'acceptable' ratings. Furthermore, this factor, D.3.A.a., does not, despite the protestor's claim, 'involve all the engineering and technical skills represented by the contract work.' A reading of the solicitation requirements bears this out. ESI is again missing the point that viewing the solicitation as a whole, the proposal submitted contained a number of material deficiencies, the cumulative effect of which was to render the proposal unacceptable. The rejection letter lists these major deficiencies. It does not contain, nor was it intended to contain, an exhaustive list of every deficiency uncovered, but simply those which, taken together, are sufficiently substantial to render the proposal unacceptable absent a major revision or complete rewrite. The rejection letter was not the evaluation, but was intended to be indicative of the basis for finding the proposal unacceptable."

To this argument, ESI has replied that the alleged informational deficiencies in its proposal could not have properly been cited for reasons to exclude its proposal under applicable GAO precedent. As stated by ESI:

"The Army argues that proposals may be excluded for informational deficiencies, cited Servrite International, Ltd., 76-2 CPD 325 (1976). This is only true, however, when the deficiencies 'are so material as to preclude any possibility of upgrading the proposal to an acceptable level.' Servrite, 76-2 CPD at 5. Therefore, the question is not whether there were informational deficiencies, but whether they could be corrected.

"Your office has elaborated on this test by providing the following guidelines:

> "'* * * In determining whether allegedly "informational" deficiencies in a submitted proposal are of such nature that an agency, within the reasonable exercise of its discretion, may exclude that proposal from the competitive range, our Office has, at times, looked at the following factors: (1) how definitely the RFP has called for the detailed information, the omission of which was relied on by the agency for excluding a proposal from the competitive range, * * *; (2) the nature of the "informational" deficiencies, e.g., whether they tended to show that the offeror did not understand what it was required to do under the contract or merely made the proposal inferior but not unacceptable, * * *; (3) the scope and range of the proposal "informational" deficiencies, e.g., whether the offeror had to essentially rewrite its proposal to correct the deficiencies, * * *; (4) whether only one offeror was found to be in the competitive range * * *; and (5) whether a deficient but reasonably correctable proposal represented a significant cost savings, * * *.'"

In reply, the Army maintains that the above criteria for excluding an informationally deficient proposal were, in fact, satisfied in the circumstances of this case. As stated by the contracting officer:

"The protestor has listed five factors which your Office has at times considered in determining whether exclusion of a proposal from the competitive range involved an unreasonable exercise of agency discretion * * *. These factors are: (1) how definitely the RFP has called for the detailed information, the omission of which was relied upon by the agency for excluding a proposal from the competitive range; (2) the nature of the 'informational' deficiencies; (3) the scope and range of the proposal's 'informational' deficiencies; (4) whether there was only one offeror in the competitive range; and (5) whether a deficient but reasonably correctable proposal represented a significant cost savings. With regard to (1), (2), and (3), both the Administrative Report and this Supplemental Report have clearly demonstrated that the RFP did definitely call for the information here involved (1), that ESI did not in its proposal demonstrate an understanding of what it would be required to do under the contract (2), and that ESI would have had essentially to rewrite its proposal to correct the deficiencies (3). As protestor notes, the fourth criterion is not applicable here. With regard to the fifth, ESI's proposal did not represent a significant cost savings (as has been noted, only one offeror submitted a higher-priced proposal then did ESI); furthermore, ESI did not submit a 'deficient but reasonably correctable proposal' so that cost savings could not have been considered in any case. There is no basis for determining what ESI's costs would have been, had its proposal been acceptable from a technical standpoint."

Analysis

Competitive range determinations necessarily involve the exercise of a considerable range of administrative discretion. See Magnetic Corp. of America, B-187887, June 10, 1977, 77-1 CPD 419. Moreover, it is not our function to evaluate proposals, and we will not substitute our judgment for that of the procuring agency as to the adjectival ratings

or numerical scores to be assigned proposals. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. We will not question competitive range determinations--particularly where, as here, the procurement involves complex technical matters unless they are clearly lacking in rational support. See, for example, Plessey Environmental Systems, B-186787, December 27, 1976, 76-2 CPD 533.

In analyzing the propriety of ESI's exclusion, we will follow the guidelines of the PRC Computer Center decision, supra, which are described under the headings listed below.

Did the RFP Specifically Call for the Information Which the Army found Lacking in ESI's Proposal?

We have held that a "specific" call for information may consist of no more than a general request which obviously was intended to elicit specific responses. See PRC Computer Center, Inc., supra, at page 73.

Based on this general principle, we conclude that the RFP did specifically call for the information which the Army found lacking in ESI's proposal. We offer the following specific comments regarding the deficiencies listed in the Army's July 26 letter (as later supplemented) to ESI.

Computer Experience

We view these experience requirements--including experience with the C-9537 device (descriptively referred to by the Army as a sophisticated microprogrammer)--as a general call for specific experience in the described areas. Moreover, we cannot contest the Army's stated position that the technical description of the system and the general description of the required experience should have placed a reasonably prudent offeror on notice that the necessary experience required here also involved an offeror's experience with interactive computers.

Spiral Antennas

Here again we view the RFP's generally described spiral antenna experience requirements as specifically calling for the kind of experience information which was found wanting in the ESI proposal. Specifically, we cannot question the Army's position that the RFP's antenna experience requirements described a specialized experience closely related to the described technical requirements of the system and that the phrase "Quick Look II"--as used in the evaluation of ESI's proposal--was nothing more than a descriptive reference to the system as such without in any way implying that only prior specific experience with Quick Look II was necessary.

Jobs of Comparable Complexity

We must agree with the Army's position that there was a general call for specific information under this title. We further find no basis to question the Army position that the requirement for description of "ELINT systems of comparable" complexity is reasonably and specifically found in the RFP--even though the finding is dependent on a reading of cumulative requirements.

Microwave Phase Interferometer DF Systems

We cannot disagree with the Army's position that cumulative RFP requirements, reasonably read, specifically called for the information found lacking in ESI's proposal.

Personnel Experience Requirements

Again we find a specific call for the kind of information the Army found lacking in ESI's proposal; in so finding, moreover, we disagree with ESI's interpretation of the Army's evaluation.

How Important Were the Informational Deficiencies?

Based on a complete review of the record, we cannot take exception to the Army's technical evaluation of ESI's proposal, especially given the complexity of the information being evaluated. Further, we cannot disagree with the

Army's specific technical decision that the cumulative deficiencies showed that ESI "did not demonstrate an understanding of what it would be required to do under the contract." Nor can we disagree with the Army's related technical judgment that these informational deficiencies--together with other deficiencies--meant that a major revision of ESI's proposal would be required to correct the deficiencies; hence, even if cost savings* were present in ESI's proposal, the savings were not for consideration. See 52 Comp. Gen. 382 (1972).

Was There Only One Other Offeror in the Competitive Range?

ESI acknowledges this was not the case here.

Based on the above reasoning, we cannot question the Army's decision to exclude ESI's proposal from the competitive range.

ESI has raised two additional grounds of protest, namely: (1) whether the certificate of competency (COC) procedure of the Small Business Administration (SBA) applies to the rejection of its proposal; and (2) whether the procurement was properly negotiated.

COC Procedure

Arguing in the alternative that the standards regarding informational deficiencies should not be considered the appropriate legal measure of the correctness of the Army's actions here, ESI argues that the RFP criteria involved here are all responsibility-related and, thus, under section 501 of Public Law No. 95-89, 91 Stat. 561 (August 4, 1977), which specifically gave the SBA authority to certify, with respect to "all elements of responsibility," any small business concern to receive and perform a specific Government contract, SBA should review ESI's "exclusion from award."

*The award price of UTL's contract was considerably below the price ESI proposed for the work; further, UTL's initial price was also below ESI's price.

Both the Army and ESI agree that SBD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511 (which also involved the question of the propriety of excluding a small business' proposal from a competitive range), provides insights into this issue. In that decision we held:

> "SBD's contention that its proposal was rejected for reasons related to its responsibility, i.e., its capacity to perform the contract, is based on various decisions of this Office, cited by SBD, in which matters bearing on capacity to perform, including offeror experience, are treated as matters of responsibility. The decisions cited, however, involved either formal advertising, see 52 Comp. Gen. 647 (1972); 52 id. 87 (1972); 38 id. 864 (1959), or a situation in which it appeared that while technical evaluation criteria dealing with capacity were set forth in an RFP, the agency did not expect to receive different technical approaches but only offers indicating that the work to be performed would 'conform to the best practices of the industry, and be of a quality acceptable to the Government * * *.' 52 comp. Gen. 47, 53 (1972).
>
> "In many other cases, we have recognized that contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determinations when the needs of those agencies warrant a comparative evaluation of those areas. See 53 Comp. Gen. 388 (1973); 52 id. 854 (1973); Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410; Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366."

ESI argues:

> "This case is squarely within the SBD Computer example given. The experience-listing factors were not used in weighing ESI's technical approach vis-a-vis others' since ESI's technical

> approach was acceptable, the only rating given. Instead, the factors were used to reject ESI's offer as not meeting the solicitation requirements (virtually identical to rejecting a bid for non-responsiveness). If this result was a violation of the Small Business Act prior to the 1977 amendments [see 40 Comp. Gen. 106 (1960) involving an advertised procurement in which GAO held that a small business' compliance with experience requirements was to be decided under COC procedures and could not be made a matter of bid responsiveness] a fortiori it is a violation of the amended act. We would further point out that the Small Business Act relates equally to negotiated as well as advertised procurements. Since no exception is provided in the act for negotiated procurements, the agency's distinction would violate the act."

Responsibility involves, among other things, a prospective contractor's organization, technical experience, knowledge, skills, "know-how," technical equipment, and facilities. 45 Comp. Gen. 4, 7, (1965). Assuming, without deciding, that all the evaluation factors here (or at least the ones under which ESI was ranked as unacceptable) are responsibility-related, that fact does not necessarily mean that the Army was precluded, per se, from using these considerations as proposal evaluation factors even considering the 1977 legislative changes.

ESI, like other small businesses (see, for example, the arguments raised in Design Concepts, Inc., supra), apparently believes that a negotiated contract must be awarded to any small business offeror which submits the lowest priced proposal under a solicitation so long as the offeror is responsible--has the minimum competency to do the work.

ESI's position fails to recognize the flexibility inherent in the negotiated procurement method. As we stated in 50 Comp. Gen. 110, 113 (1970), quoting from B-152306, September 15, 1967:

> "'The "competitive negotiation" contemplated by Public Law 87-653 [10 U.S.C. 2304(g)] is clearly distinguishable from "competitive bidding" or price competition under the formal advertising for bids statutes. While the rigid rules applicable to formally advertised procurements generally require award to the lowest (price) responsive, responsible bidder, the flexibility inherent in the concept of negotiation permits an award to be made to the best advantage of the Government, "price and other factors considered." Negotiation permits, and indeed requires, the contracting officials of the Government to consider these "other factors" of the procurement, which, in a proper case, may result in an award to one offeror as opposed to another less qualified offeror submitting a lower price. * * *'"

Since neither 10 U.S.C. § 2304(g) nor applicable regulations in any way restrict the "other factors" that may be used by agencies in selecting the proposal having the greatest value to the Government, we have not prohibited procuring agencies from using responsibility-related factors in making relative assessments of the merits of competing proposals. There is no indication on the face of Public Law 95-89 or in the legislative history of the law that Congress intended to eliminate this long-standing practice as far as the evaluation of small business proposals are concerned. Thus, neither the cited precedent (40 Comp. Gen., supra) of advertised procurements nor the 1977 Public Law prevent the relative-assessment evaluation of responsibility-related information contained in small business proposals.

Of course, where an agency--in the guise of a relative-assessment of responsibility-related factors--seeks to reject a small business proposal as unacceptable even though there was no indication that the small business (which had previously secured a COC from SBA on a nearly identical procurement) had not met the needs of the procuring agency under a "best practice of the industry" RFP evaluation standard, the rejection will be held to be tantamount to a nonresponsibility finding if the final prices for selection purposes show that the small business

is lowest in price. See 52 Comp. Gen. 47 (1972). Here, however, there is no indication in the record that ESI had ever obtained a COC for work of identical complexity or that ESI met the expressed needs of the Air Force for the work in question. Moreover, the Air Force's needs were not listed under a "best practice of the industry" standard. (Indeed, at several points in its protest, ESI has insisted that only a "prior producer" of the items being sought--which ESI is not--could meet the needs of the RFP as interpreted by the Army.) Finally, and of significant importance, ESI's price was higher than the initial (and final) prices of the small business concern ultimately awarded the contract.

Although there is no way to have known whether the initial and final price advantage of the selected small business offeror would have been overcome had ESI been permitted to submit a final price, ESI would have been permitted to submit a final price only on the assumption that the COC procedure is applicable for the purpose of placing a small business offeror in the competitive range. In short, the COC procedure is not for application in determining whether a small business shall be placed in the competitive range for a given procurement.

Propriety of Negotiation

Finally, ESI contends that the procurement was improperly negotiated for several reasons mainly having to do with the "Electronic Warfare QRC" number listed in the D&F. ESI contends that this "QRC" number had expired and that it could not, therefore, justify negotiation under the cited "exigency" exception.

In reply, the Army argues that the "02 priority [designator]" assigned the procurement independently justified negotiation of the requirement under DAR § 3-202 (1976 ed.) which provides:

> "3-202 Public Exigency
>
> "3-202.1 Authority. Pursuant to the authority of 10 U.S.C. 2304(g)(2) purchases and contracts may be negotiated if-- [in terms of the cited statute] 'the public exigency will not permit the delay incident to advertising.'

"3-202.2 Application. In order for the authority of this paragraph 3-202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:

"(i) supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster;

* * * * *

"(vi) purchase request citing an issue priority designator 1 through 6, inclusive, under the Uniform Material Movement and Issue Priority System (UMMIPS):

"(vii) purchase requests citing 'Electronic Warfare QRC Priority' as the priority designator.

"3-202.3 Limitation. Every contract negotiated under the authority of this paragraph 3-202 shall be accompanied with a determination and findings justifying its use, signed by the contracting officer and prepared in accordance with the requirements of Part 3 of this Section III, except that in the case of a contract resulting from a purchase request citing an issue priority designator 1 through 6 or the priority designator 'Electronic Warfare QRC Priority,' the determination and findings need only cite the designator or 'Electronic Warfare QRC Priority' as justification. * * *"

In reply to the Army's position, ESI argues:

(1) The D&F does not rely on the priority designator;

(2) The cited priority designator had in fact expired or had never been properly established in the first place;

(3) The priority designator does not, in itself, justify negotiation under the statutory authority (10 U.S.C. § 2303(a)(2) (1976)) which authorizes negotiation when the "public exigency" will not permit the delay incident to advertising since the statute requires that both exigency and impracticality of advertising be found prior to negotiation.

Analysis

Although finding 3 in the above D&F recites that it is impracticable to negotiate because "QRC 41 has been assigned this procurement" and the implementing DAR paragraph (3-202.2(vii)) cited is concerned with "QRC" authority, we cannot overlook the "02 priority" designator cited in finding 2. Finding 2, in our view, is a fact of record in the D&F lending support for negotiation under DAR § 3-202.2(vi) even though not specifically cited.

As to the actual validity of the priority designator for this procurement, the Army has furnished us classified documentation which reasonably supports the continued validity of the designator for this procurement. In any event, we cannot disagree with the view of the contracting officer that the procurement regulations do not require that he investigate the authority of a priority designator before relying on it to commence a negotiated procurement.

Finally, we have repeatedly observed that negotiating under "priority designators 01 through 06" is consistent with the statutory authority involved. As we said in B-167389(1), February 12, 1970:

> "You have additionally alleged that there was no justification for the Air Force's use of the 'public exigency' exception (10 U.S.C. 2302(a)(2)) as the basis for negotiating this contract. However, the contracting officer executed the required 'Determination and Findings' (D&F) on February 25, 1969, reciting the fact that the purchase request cited a priority designator of 01 under the Uniform Materiel Movement and Issue Priority System (UMMIPS). ASPR 3-202.2(vi) provides that one of the circumstances authorizing negotiation under the public exigency exception is a procurement in which the purchase request cites a UMMIPS priority designator 01 through 06. Furthermore, ASPR 3-202.3 specifically provides that the D&F need only cite the issue priority designator as justification for undertaking procurement by negotiation. See our decisions 45 Comp. Gen. 374 (1966) and B-166886, August 7, 1969, indicating our approbation of this procedure. [See also, for example, Bristol Electronics, Inc., B-190341, August 16, 1978, 78-2 CPD 122; Ampex Corporation, B-190529, March 16, 1978, 78-1 CPD 212.]"

Implicit in our approving negotiation when only priority designators "01 through 06" are cited were two suppositions. First, that the priority designators were symbols for a series of facts which, if taken together and elaborated in detail, would not only demonstrate exigency but also satisfy the requirement of 10 U.S.C. § 2310(b) for a "written finding * * * [setting forth] facts and the circumstances that * * * clearly and convincingly establish * * * that formal advertising would not have been feasible and practicable."* Second, we presumed that the designators would only be cited in good faith.

* Such a finding, of course, is made final by 10 U.S.C. § 2310(b).

Both these suppositions have recently been questioned in House Report No. 95-1677, October 2, 1978, entitled "Procurement Practices at the U.S. Army Communications and Electronics Materiel Readiness Command." In this report--issued by the Committee on Government Operations--the committee observed:

> "C. Loopholes in the defense acquisition regulations (formerly ASPR) [page 15 of the Report]
>
> "During our review of Army procurement practices, the subcommittee observed significant loopholes in the defense acquisition regulations (DAR's). These loopholes need to be closed in order to limit the opportunity for game-playing in the award and administration of Government contracts. Specific areas of abuse concerned the: (i) frequent use of urgent priority codes to go competitive negotiated when formal advertisement is as quick or quicker, * * *.
>
> "1. Urgent Priority Codes.-Procurement regulations need tightening to avoid the indiscriminate use of urgent priority designator codes as the justification for not using advertised solicitations.
>
> "For example, CERCOM has avoided using formal advertising by citing an '02' priority as justification. This is permitted by the procurement regulations. However, as shown in the Army report on the award of the Modem 522 Radio Tele-typewriter [the subject of GAO's decision in Bristol Electronics, Inc., supra] the formal advertised method would have been quicker than the competitive negotiations method utilized. Loopholes such as this should be closed. Encouraging formal advertising in the award of contracts is a good method for ensuring that minority and small business are treated fairly and that the Government gets the best price. At our review date, the Office of Assistant Secretary of the Army (ASA)(RDA) had not made any proposals for changes to the procurement regulations designed to stop the indiscriminate use of priority designator codes.

"It is the subcommittee's opinion that when formal advertising is as quick or quicker, (DAR's) exception 3-202.2 'Public Exigency' cannot be used."

Also in appendix 9 of the Report (page 58) the following observation (contained in a letter from the Chairman of the Committee to the Secretary of the Army), was made concerning the negotiation of this procurement:

"The command is about to award a contract for what is termed the 'Quick Look II'-a surveillance device-by competitive negotiation. The rationale initially given for utilizing competitive negotiation is that the procurement is of such urgency that it must be made by a method quicker than formal advertising. However, no determination was made that formal advertising would cause an unacceptable delay.

* * * * *

"In many of the instances examined by the subcommittee in which the command utilized the urgency rationale to avoid formal advertising, it turned out that the formal advertising method would have been quicker than the method the command actually utilized. And, in this instance, it seems clear that the competitive negotiation method being used will actually take longer than if the award was formally advertised. It is obvious that delays will occur if the Government has to review the capability of numerous offerors to perform as in the case of negotiated competitive procurements whereas only the lowest bidder need be reviewed in the case of formal advertising.

"It makes little sense to permit contracting officers to cite urgency as the reason for deviating from normal procedures and then allow them to use an exception which actually takes longer."

It is clear that these observations raise serious questions about the propriety of the use of a priority designator as a substitute for the facts justifying the use of the "public exigency" authority. Specifically,

the competitive negotiation method selected here and in other procurements--requiring formal proposals, competitive range determinations, competitive discussions, final offers and a series of time-consuming evaluations--would take at least as long--or longer--than if the procurements had been formally advertised. Moreover, in Bristol Electronics, Inc., supra, another competitively negotiated Army procurement made under an "urgency" rationale, we also noted:

> "* * * the procurement was officially negotiated and awarded under the urgency exception [; however,] a subsequent Army investigative report [suggested] that the procurement was negotiated to keep incompetent companies from competing--a reason which does not justify negotiation--* * *."

For this reason, we are recommending that DAR § 3-202.3 be amended to eliminate--insofar as competitively negotiated procurements involving formal proposals, contemplated discussions and evaluations are intended--the provision which recites that where a purchase request carries a "priority designator 1 through 6" or a "QRC" priority designator the D&F need only cite the designator as authority for negotiation. We are further informing the Secretary of Defense that if the recommended amendment is not enacted prior to the end of the current fiscal year, we will not give future force and effect to the provision; therefore, in the event future fiscal year D&F's are the subject of protests, we will find invalid any D&F's which, as here, merely cite a priority designator as authority for "public exigency" competitive procurements involving formal proposals, contemplated discussions, and formal evaluations without further detailed findings as to why the urgently required goods or services could not be obtained as quickly under formal advertising. Nevertheless, since the current D&F citing an "02" priority designator validly authorized negotiation under existing regulation and GAO precedent, we cannot question the award made.

Award Notice To GAO

Although the Army failed to give GAO preaward notice of the award to UTL as required by DAR § 2-407.8(b)(2), this procedural defect did not affect the validity of the award. Nonetheless, we are bringing this failure to the attention of the Secretary of the Army.

Protest was denied.

Comptroller General
of the United States