

DECISION



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

27551

FILE: B-214137

DATE: February 28, 1984

MATTER OF: The Harshaw/Filtrol Partnership

DIGEST:

1. A protest contending that the evaluation criteria of an RFP should have precluded a buy-in by a foreign concern constitutes an alleged impropriety in the RFP which was apparent prior to the date for receipt of initial proposals and is untimely when not received by the contracting agency or by our Office until after award of the contract.
2. The possibility of a buy-in is not a proper basis upon which to challenge the validity of an award.
3. Once the differentials of the Buy American Act have been applied, there is no legal basis for objecting to award to a foreign concern which has submitted the best proposal.

The Harshaw/Filtrol Partnership (Harshaw) protests the award to Panasonic of a contract for a thermoluminescent dosimetry system under request for proposals (RFP) No. DAA-HDI-83-R-0223, issued by the United States Army Missile Command.

We dismiss the protest in part and deny the protest in part without obtaining a report from the contracting agency in accordance with section 21.3(g) of our Bid Protest Procedures, 4 C.F.R. § 21.3(g) (1983), as amended January 17, 1983, 48 Fed. Reg. 1931 (1983), since one basis of protest is clearly untimely and the other bases of protest are without merit.

Harshaw alleges that, while at least one other supplier offers dosimeters compatible with the Harshaw system, there are no existing secondary sources for dosimeters compatible with the Panasonic system. It is alleged, therefore, that award to Panasonic places a foreign offeror in a favorable sole-source position for the future.

028149

Harshaw contends, first, that in addition to price, the evaluation factors should have taken into consideration the offer of an artificially low price, a buy-in, in order to secure a future advantage in furnishing dosimeters for its system.

Section 21.1(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.1(b)(1), provides that a protest based upon alleged improprieties in an RFP, if apparent, must be received by the contracting agency or by our Office prior to the closing date for receipt of initial proposals, or, if not apparent in the initial solicitation, then by the next closing date for receipt of proposals after the defect or defects appear in the RFP.

The contention that the RFP should have provided evaluation criteria to avoid a buy-in involves an alleged impropriety in the solicitation which was apparent prior to the closing date for receipt of initial proposals. A protest on this basis was not received either by the contracting agency or by our Office until after contract award. This contention is, therefore, untimely and will not be considered. See Universal Design Systems, Inc., B-211547, May 9, 1983, 83-1 CPD 489, affirmed on reconsideration, B-211547.2, June 28, 1983, 83-2 CPD 41.

Harshaw contends, second, that Panasonic offered artificially low prices to secure a future, favored sole-source position. We have consistently held, however, that the possibility of a "buy-in," the submission of a below-cost or artificially low offer, is not a proper basis upon which to challenge an award. See Richmond Gear, B-211589, May 9, 1983, 83-1 CPD 491; A.C.E.S., Inc., B-181926, January 2, 1975, 75-1 CPD 1.

Finally, Harshaw contends that a contract should not have been awarded to a foreign concern in competition with domestic companies with consequent loss of jobs for the United States. The protester concedes, however, that appropriate provisions of the Buy American Act, 41 U.S.C. § 10a (1976), were applied in the evaluation which resulted in a 10-percent price advantage for Panasonic.

Once the differentials are applied pursuant to the Buy American Act, there is no legal basis for objecting to an

award to a foreign offeror which is responsible and offers the lowest or otherwise best proposal. Cf. Fire & Technical Equipment Corp., B-203858, September 29, 1981, 81-2 CPD 266, in which we held, in a formally advertised procurement, that once the differentials in the Buy American Act were applied, the low, responsive, responsible bidder could not be disqualified because of being a foreign bidder.

Milton J. Aroslan
for Comptroller General
of the United States