



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harris Corporation
File: B-237320
Date: February 14, 1990

Joseph J. Petrillo, Esq., Petrillo & Hordell, for the protester.

John S. Pachter, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the interested party, Magnavox Electronic Systems Company.

James C. Devers III, Esq., Office of the General Counsel, Department of the Air Force, for the agency.

Linda C. Glass, Esq., Andrew T. Pogany, Esq., Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that amendment of solicitation improperly reopened the competition for a second round of best and final offers (BAFOs) is denied where contracting agency had a compelling reason to request second round of BAFOs.
2. Awardee's offer for minimum and indefinite quantity basic and option quantities is not materially unbalanced where the protester fails to show that the offer contained enhanced prices, that the total maximum quantities evaluated were not reasonably expected to be exercised, and that award to the firm will not result in the lowest ultimate cost to the government.

DECISION

Harris Corporation protests the Department of the Air Force's award of a contract to Magnavox Electronic Systems Company, under request for proposals (RFP) No. F04606-89-R-0313 for a quantity of four radio configurations, nicknamed Pacer Speak, that comprise a family of ground-based UHF/VHF Tactical Air Control Radios. Harris objects to the agency's decision to reopen the competition by a call for a second round of best and final offers (BAFOs). Harris also alleges that Magnavox's prices were unbalanced.

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We deny the protest.

The RFP was issued on June 22, 1989, and contemplated the possibility of a dual source award to maintain competition.^{1/} The RFP solicited an indefinite-quantity type contract with minimum and maximum stated quantities for a base year and option year. Offerors were asked to provide separate prices that would apply to 10 percent increments of the quantities to be awarded, ranging from 10 to 100 percent. The offerors were also instructed to provide prices for the minimum quantity increments and separate prices for the indefinite quantity increments. The base year minimum quantity was the only quantity in the RFP that the government guaranteed to buy. The evaluation included option year quantities and was based on the maximum quantities for both years. Awards were to be made to the responsive, responsible offerors submitting the lowest evaluated offers. However, the RFP stated that the agency would pay no more than a 5 percent premium above the absolute lowest price to maintain a dual source arrangement based on a "split award" formula contained in the RFP.^{2/}

Three proposals were received and included in the competitive range. After initial closing, the Air Force received additional requirements for the radios and, by amendment, increased the initial minimum quantity. Following discussions and a call for BAFOs, the following prices were received in response to the requirement:

1. Harris	\$51,610,124
2. Magnavox	55,009,415
3. Aydin	86,563,871

After evaluation of the BAFOs and based on the "split award" formula, the contracting officer determined that award would be made 90 percent to Harris and 10 percent to Magnavox. Magnavox, however, offered a contingent, alternate proposal which included a discount (approximately \$4.5 million) that would only apply if the government in fact ordered all quantities listed in the RFP. If

^{1/} Initially, Magnavox was the sole-source supplier of the items. In 1988, Harris became a second source; both firms are currently in production under other contracts.

^{2/} This formula was based on individual contract line items. Thus, even if an offeror proposed a total price within 5 percent of the total price of the low offeror, a second award would not be made unless the individual item prices were within the 5 percent premium.

Magnavox's discount were taken into consideration the result would have been a 100 percent award to Magnavox under the formula. The contracting officer did not believe Magnavox's contingent discount should be considered. In this regard, the award clause of the RFP made reference to quantity discounts without specifying under what terms such discounts would be considered and evaluated. The contracting officer did not believe quantity discounts were authorized by the RFP. In contrast, Magnovox interpreted the clause as permitting quantity discounts (even contingent discounts). The contracting officer concluded that Magnavox's discount should not be considered and that, based on the formula, a 90 percent award to Harris and a 10 percent award to Magnavox would be in the government's best interest. The contracting officer thereupon attempted to obtain the appropriate management approval from Headquarters, Air Logistics Command. The contracting officer was informed by Headquarters that approval would not be granted and that award should be 100 percent to Magnavox based on evaluation at the maximum quantity, to include Magnavox's discount. Thus, Headquarters believed that Magnavox had submitted a valid quantity discount. Because of the internal dispute regarding the evaluation criteria (consideration of quantity discount) and a subsequent increase in the initial minimum quantity, the contracting officer amended the RFP to correct any ambiguity in the evaluation criteria (and to prohibit consideration of quantity discounts in the evaluation), and issued a call for a second BAFO after obtaining approval from appropriate officials. (Aydin at this point was eliminated from the competitive range.) On September 25, 1989, the following second BAFO prices were received:

1. Magnavox	\$51,191,047
2. Harris	52,299,241

As none of the split award formula ratios met the 5 percent premium limitation, award was made 100 percent to Magnavox on September 29, 1989. Harris filed its protest with our Office on October 6, 1989.

Harris challenges the agency's decision to reopen the competition by amending the solicitation to correct alleged ambiguities in the evaluation criteria and calling for a second round of BAFOs. Harris contends that the agency should have awarded it the contract on the basis of its first BAFO because: (1) the Air Force had no difficulty evaluating the offers with the first BAFO; (2) Magnavox's contingent discount was defective and was properly omitted from the evaluation; (3) the evaluation criteria at the time of the first BAFO were understandable; (4) the modification

to the evaluation criteria made no substantive change; and (5) the changes in the contract quantities were de minimis. We do not agree.

First, as the protester asserts, the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 215.611(c)(ii) (DAC 88-6) limits second or subsequent requests for BAFOs to circumstances where "[u]navoidable changes in requirements or funding or other compelling reasons" require a subsequent BAFO. Thus, second BAFOs are now generally discouraged. We note that the head of the contracting activity in this case approved the request by the contracting officer to reopen the competition. Here, one significant reason for the second BAFO request was the contracting officer's belief that an ambiguity existed in the RFP which reasonably misled Magnavox into offering a contingent discount. Further, even if Magnavox's discount had been defective as Harris alleges, the contracting officer became aware through the discount that one of the offerors in the competitive range was willing and able to offer a significantly lower price (approximately \$4.5 million lower) which, in our view, he reasonably refused to ignore. Magnavox was apparently ready to offer a significantly lower price, and we cannot fault the agency for proceeding to obtain it.

Second, the agency acted properly in amending the solicitation to advise the offerors that its needs changed with respect to the initial minimum quantities. The Federal Acquisition Regulation (FAR) § 15.606(a) (FAC 84-16) states that when there is a change in the government requirements either before or after the receipt of proposals, an amendment shall be issued. One proper basis for the issuance of an amendment is a significant change in the government's requirements as to quantity. See Magneco, Inc., B-235338, Sept. 1, 1989, 89-2 CPD ¶ 207. Harris argues that the increased quantity was minimal when compared with the evaluated maximum quantity, since the quantity increase was only 66 units, from a total of 2,615 to a total of 2,681, or an increase of 2.5 percent. However, the quantity that actually increased was the initial minimum guaranteed quantity which resulted in more than an 18 percent increase for that quantity at an additional estimated cost of almost \$3.3 million. In our view, a change in the minimum known purchase quantity requirement can be expected to have an effect on offerors' pricing, since the government is only committed to purchasing the minimum quantity and may or may not order the additional indefinite quantities. See Kisco Co., Inc., B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334. Under these circumstances, we conclude that the contracting officer had a compelling

reason to request a second round of BAFOs. Accordingly, we deny this basis for protest.

The protester also asserts that by telling Magnavox that its discount could not be evaluated, and then reopening the competition, the Air Force "telegraphed" what Magnavox needed to do to win the award. The protester argues that after this disclosure, Magnavox allegedly knew that (1) its offer was not low, (2) the consideration of the discount made its offer low, and (3) by lowering its price by the approximate amount of the discount it could displace the low offeror. The record indicates, however, that the contracting officer did not reveal Harris' price to Magnavox nor did he indicate that the evaluation of the discount would make Magnavox low. In fact, Magnavox could just as easily have concluded that it was already low. Absent any evidence of actual disclosure, we find Harris' allegation to be without merit.

Finally, Harris contends that Magnavox's offer is mathematically unbalanced because the unit prices for the 1989 minimum quantity range from 49 percent to 107 percent higher than the prices for the 1989 maximum or the 1990 minimum or maximum quantities. Harris contends that Magnavox's offer also is materially unbalanced because more than 75 percent of the total 1990 optional quantity must be ordered before Magnavox becomes equal in price to Harris.

We have recognized that the concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. An offer is materially unbalanced where: (1) it is mathematically unbalanced, that is, each item does not carry its share of the cost of the work, in that nominal prices are offered for some of the work and enhanced prices for other work; and (2) there exists a reasonable doubt as to whether award based on a mathematically unbalanced offer will result in the lowest cost to the government. Surface Technologies Corp., B-233312; B-233312.2, Mar. 3, 1989, 89-1 CPD ¶ 233.

The record indicates that Magnavox offered prices for maximum option quantities that were from 33 percent to 52 percent lower than the minimum quantities. Although Harris argues that there is no reason for Magnavox's disparity in prices, there is no indication in the record that Magnavox's offer contains enhanced prices for any quantities. Magnavox states that its prices reflect actual predicted costs and savings Magnavox expects to achieve by maintaining its production line and providing 100 percent of the Air Force needs. Magnavox has submitted proprietary cost and pricing data to support this view. This appears to

be a legitimate reason for Magnavox's pricing structure. We have specifically held that an offer is not unbalanced absent evidence that certain prices are overstated. See IMPSA Int'l, Inc., B-221903, June 2, 1986, 86-1 CPD ¶ 506.

In any case, we find that Harris has not shown that there is a reasonable doubt that award to Magnavox will not result in the lowest cost to the government. In this regard, the agency reports that funding is available to exercise the 1990 option, and the requirement for the 1990 minimum quantity already exists. The agency states that it has a high probability of purchasing enough of the indefinite quantities to make the total contract cost less using Magnavox's prices. We have no basis to question the Air Force's intentions. Although Harris questions the availability of adequate funding, the Air Force reports that for two of the radio configurations, funding, which is greater than the requirement available under the contract, has already been approved.

We deny the protest.



James F. Hinchman

James F. Hinchman
General Counsel