



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ford Aerospace Corporation; Hughes Electro-Optical Operations, Inc.; and the Department of the Navy--Reconsideration

Hughes Electro-Optical Operations, Inc.--Protest

File: B-239676.2; B-239676.3; B-239676.4; B-239676.5

Date: March 8, 1991

John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Hughes Electro-Optical Operations, Inc.; Jules F. Miller, Esq., and Donald E. Sovie, Esq., for Ford Aerospace Corporation, now Loral Aerospace Corporation, the protesters.

Harry D. Boonin, Esq., Denise McLane, Esq., and Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.

Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's implementation of General Accounting Office recommendation by issuing a request for best and final offers which incorporates a \$13.1 million penalty on any offeror's price, other than the incumbent contractor's under the improper award, has the effect of unreasonably excluding other offerors, and is an improper attempt by the agency to nullify any meaningful implementation of the prior decision.

2. Where contract award was improper because of agency's failure to specifically identify the basis on which it would split award, the entire quantity awarded under the solicitation should be included in the second round of best and final offers. Prior recommendation sustaining protest is so modified.

3. Recommendation that a second round of best and final offers be solicited will not be modified on the ground that it will result in an impermissible auction since the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.

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DECISION

This is our second decision concerning request for proposals (RFP) No. N00383-89-R-5529, issued by the Department of the Navy for components to support the AN/AAS-38 Forward Looking Infrared Receiver (FLIR) System for the F/A-18 aircraft. In our first decision, Ford Aerospace Corp., B-239676, Sept. 20, 1990, 90-2 CPD ¶ 239, we sustained Ford's protest against the award of a contract to Hughes Electro-Optical Operations, Inc. Ford, Hughes, and the Navy each has requested that we reconsider that decision (B-239676.2, .3, and .4, respectively). After the requests for reconsideration were filed, the Navy implemented our recommendation for corrective action by issuing a request for best and final offers (BAFOs). The day before BAFOs were due, Hughes filed a protest with our Office (B-239676.5) in which it essentially alleges that the Navy's BAFO request was an improper implementation of our decision.

Ford requests that we reconsider our recommendation only, arguing that Ford should have received the award of a contract based on the original delivery terms of the RFP, since it was the only compliant offeror. Hughes and the Navy challenge our decision, essentially reiterating their position that the solicitation allowed offerors to propose relaxed delivery schedules, and arguing that even if the agency relaxed a material term of the RFP, Ford's recovery should be limited to proposal preparation and bid protest costs. We dismiss those portions of the requests for reconsideration that largely repeat arguments made and considered in conjunction with our initial decision. We have considered them to the extent they concern the propriety of the corrective action we recommended. We modify our prior decision, and sustain Hughes' protest in part and deny it in part.

Ford's and Hughes' initial protests resulted from a split award made by the agency on April 30, 1990, to Hughes for 75 percent of the requirements included in the solicitation, and to Ford for 25 percent. On May 14, Ford challenged the award to Hughes on the ground that Hughes' proposal failed to comply with the required delivery schedule. The award provided for Hughes' deliveries to occur between September 1991 and March 1992, while the RFP required offerors to deliver these items between May 1991 and January 1992. Ford also alleged that the Navy's split award determination was improper in that it was not based on the lowest price for all items. Essentially, Ford alleged that the relaxation of the delivery schedule and the award of certain contract line items (CLINs) to Hughes at a higher price than Ford's constituted an award based on requirements other than those contained in the solicitation.

We found that the agency did relax the solicitation's required delivery schedule for Hughes without providing an equal opportunity for Ford, and that this could have had a material impact on Ford's proposed price. We also found that the solicitation failed to adequately identify the basis, other than low price, on which the Navy would make split awards. We recommended that the Navy reexamine its actual delivery requirements. If, as appeared to be the case, a relaxed delivery schedule would meet the agency's minimum needs, we held that the Navy should amend the solicitation and request BAFOs from all offerors in the competitive range. We also recommended that the solicitation be amended to disclose to offerors the criteria that would be used in the determination to make split awards so that offerors could calculate their offers accordingly. We held that if, on the basis of these BAFOs, Ford or another offeror was in line for award, Hughes' contract should be terminated for the convenience of the government. We found that Ford was entitled to be reimbursed its protest costs, including reasonable attorneys' fees.

Following our decision, the Navy issued a request for BAFOs for those items awarded to Hughes under its contract arising out of RFP No. N00383-89-R-5529. The request for BAFOs deleted the delivery schedule that was contained in the solicitation and incorporated, by reference, the delivery schedule offered by Hughes as the "required" delivery schedule. The request for BAFOs provided that award would be made to the low offeror for the entire quantity of all items awarded in Hughes' contract, excluding CLINS 0012, 0013 and any option quantity. Since the entire quantity would be awarded to one offeror, there was no provision for a split award. The request also notified offerors that:

"The contracting officer will add to the offered price, for any offeror other than Hughes, the costs of termination of [Hughes'] Contract N00383-90-6342. This cost is \$13.1 million and this factor will be applied, along with the other applicable evaluation factors where applicable, in the evaluation of offers hereunder."

Only Hughes responded to the request.

On the day before BAFOs were due Hughes filed a protest challenging the propriety of the request for BAFOs on the grounds that: (1) it does not, but should, include the total base quantities under the initial RFP and thus permits Ford to take advantage of the tainted 25 percent award it received; (2) the request in effect prevents Hughes from increasing the

price of its existing contract and is therefore improper; and (3) it will result in an impermissible auction.^{1/}

We have reviewed the terms of the Navy's request for BAFOS issued in response to our recommendation for corrective action. As a general matter the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. See OMNI Int'l Distrib., Inc., 67 Comp. Gen. 123 (1987), 87-2 CPD ¶ 563. We also recognize that no potential offeror has filed a bid protest objecting to the termination evaluation factor. Nevertheless, we find that the agency's implementation in this instance nullified any meaningful effect of our decision. The Navy's assessment against any offeror other than Hughes of a \$13.1 million evaluation factor, which is intended solely to cover the termination for convenience costs of an improper award, is without any justification in law, regulation, or policy. While generally an agency is not required to ignore an incumbent's competitive cost advantage, this is not the case when the advantage is the result of improper governmental action. See Kaufman Lasman Assocs., Inc., 68 Comp. Gen. 34 (1988), 88-2 CPD ¶ 381. The assessment on other offerors of the costs of terminating the incumbent's improperly awarded contract is tantamount to a circumvention of our recommendation, since no offeror other than the incumbent has a reasonable chance of winning the competition and, as such, is an abuse of discretion on the part of the contracting officials.

Our decision did err in recommending that the Navy request another round of BAFOS only on the quantities awarded to Hughes rather than the total quantities being procured under the RFP. We agree with Hughes that the entire procurement was tainted by the Navy's failure to specifically delineate the criteria by which it would make a split award. To permit only Ford to benefit by retaining its share of the improper award would be contrary to the rationale of our decision and our intention of preserving the integrity of the competitive procurement system. We modify our prior decision to reflect this finding.

^{1/} Hughes also alleges that the issuance of the request for another round of BAFOS is premature since there were filed requests for reconsideration which challenge our prior decision. There is no legal support for Hughes' position in this regard; our decisions and any resulting recommendations are final until we affirmatively modify or reverse them. Requests for reconsideration do not invoke the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c) and (d) (1988); 4 C.F.R. § 21.12(c) (1990).

There is no merit, however, to Hughes' argument that our recommendation and the agency's implementation thereof through a request for BAFOs results in an impermissible auction. The risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action. Cubic Corp.--Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174. Also, the Navy's request for a second BAFO is not improper because Hughes is effectively prevented from increasing the price of its existing contract. Hughes is not being asked to perform under new circumstances or conditions, rather it is performing under the conditions it is contractually obligated to operate under in the first instance. It is not necessary to provide Hughes with the opportunity to alter a business decision it made during the original competition, when now in hindsight it realizes it could have increased its profit margin. It is not our function to maximize profits for participants in government procurements, but to ensure that all parties are competing equally and according to law and regulation. The Navy's actions in this regard are appropriate and do not violate fundamental principles of federal procurement law. See, e.g., Federal Data Corp., B-236265.4, May 29, 1990, 90-1 CPD ¶ 504.

We, likewise, do not agree with Ford's position that as the only offeror who complied with the delivery terms of the original RFP it should be awarded the contract for the entire quantity to be procured under the solicitation. There is no legal support for requiring the agency to purchase these units at a significantly higher total price under an earlier delivery schedule than that which the agency now states represents its minimum needs.

In light of our determination that the agency improperly implemented our prior recommendation, and that the recommendation should be modified, we conclude that the Navy should request another round of BAFOs incorporating the new delivery requirements of the Navy, the criteria for making split awards, and all of the items called for under the initial solicitation. Since performance of the parties' contracts was not stayed during the resolution of these protests and certain early deliveries by Ford under the original RFP are scheduled to begin in May 1991, some of these FLIR units to be delivered in the early months may be substantially complete and it would be impracticable to recompetete these units. However, deliveries continue through March 1992, and where feasible the later scheduled quantities should be subject to another round of BAFOs. If on the basis of these BAFOs, Ford, Hughes, or another offeror is in line for award, the appropriate contract(s) should be terminated for the convenience of the government.

We also find that Hughes is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

The protest is sustained in part and denied in part.

Milton J. Fowler
for Comptroller General
of the United States