

# DECISION



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

60200

FILE: B-183816

DATE: November 21, 1975

MATTER OF: EPSCO, Incorporated

97897

## DIGEST:

1. GAO lacks authority to determine what information must be disclosed by Government agencies under Freedom of Information Act. Therefore, where Air Force refused to disclose evaluation and source selection documents to protester under act, GAO will not consider request that it release documents for protester's consideration in making comments on agency's report. However, restricted information has been considered by GAO in reaching decision on protest.
2. Alleged "buy-in" by low-priced offeror in negotiated procurement for development and production of TACAN test sets furnishes no basis for objection to award where record indicates that risks inherent in accepting low offer were carefully considered in evaluation and selection process and evidence is lacking to show that Air Force will not follow requirements of ASPR § 1-311 (1974 ed.) (regulation directed at assuring that amounts excluded from original contract price are not recovered by contractor in change orders or follow-on procurements) in administering contract.
3. Where source selection plan indicates technical quality of proposals for TACAN test sets is Government's primary consideration, source selection of lowest-priced, technically "average" offer--where several higher-priced competing proposals are rated "Excellent/Very Good" technically--is departure from established award criteria.
4. Propriety of selecting low-priced technically "average" proposal in lieu of competing proposals rated "Excellent/Very Good" is doubtful where source selection statement does not provide strong justification for departure from award criteria emphasizing technical considerations over price. However, since protester's proposal was rated in same technical category as selected proposal, protester suffered no prejudice and GAO recommendation that selection

decision be reconsidered is not justified. Doubtful source selection is, however, called to attention of Secretary of Air Force to preclude repetition in future procurements.

EPSCO, Incorporated, has protested to our Office against the award of a contract to PRD Electronics, Inc., Division of Harris Corporation (PRD), under request for proposals (RFP) No. F33657-75-R-0184, issued by the Aeronautical Systems Division, Air Force Systems Command, Wright-Patterson Air Force Base, Ohio, and has contended that the award should have been made to it.

The RFP contemplated the award of a firm fixed-price contract for "TACAN" test sets. Performance was to be in two stages consisting of a development phase and, after submission of a satisfactory first article, a production phase. Three hundred and ninety-five units were specified with an option for 329 additional units.

EPSCO contends that PRD's offered price of \$3,844,372 was unrealistically low; that of the four offerors, PRD alone lacked directly related experience in providing TACAN test sets of similar or greater complexity; and that it is difficult to understand, given the contract price, how the PRD technical proposal could have been considered technically acceptable. EPSCO believes that high level political pressure may have influenced the source selection and also that by virtue of previous procurement actions--permitting a \$1,462,494 modification to a prior TACAN contract--the Air Force by selecting PRD has encouraged a "buy-in" for the present procurement.

During the course of the protest, EPSCO requested certain documents from the Air Force under the Freedom of Information Act, 5 U.S.C. § 552 (1970). These consisted basically of the PRD technical and cost proposal and the record of the Air Force technical and cost evaluation. The Air Force denied the request. EPSCO subsequently wrote to our Office seeking access to these documents in order to make a meaningful rebuttal to the Air Force report. EPSCO requested that we refrain from reaching a decision until the documents were made available.

In this regard, our Office has no authority under the Freedom of Information Act to determine what information must be disclosed by Government agencies. See DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. However, the documents requested by EPSCO have been furnished to our Office in the Air

Force report and their contents have been considered in reaching this decision. Since the information in these documents is of a nondisclosed procurement-sensitive nature, our discussion of the information in this decision will necessarily be in general terms only.

The Air Force report responding to the protest denies EPSCO's contentions. The agency's position is that the PRD proposal was properly evaluated in accordance with the criteria contained in the RFP. It is stated that while the PRD initial proposal did not fully meet the RFP's technical requirements, the deficiencies were not of such magnitude as to eliminate PRD from the competition and after discussions were corrected in PRD's best and final offer. The Air Force has also pointed out that, under several cited decisions of our Office, an alleged "buy-in" is not a basis for rejecting an otherwise successful proposal. Concerning the 1970 procurement of TACAN test sets referred to by EPSCO, the Air Force indicates that these sets were similar to the present requirement and that their unit cost is close to the unit price proposed by PRD. Also, the contracting officer states that the modification of the 1970 contract was not a "buy-in" action but was based on good business and management practice, since an upgraded capability was required, and because it is impossible for the agency to foresee all future requirements at the time a contract is awarded.

To the extent that the protest questions PRD's capability to perform, the Air Force has stated its belief that, based on a satisfactory preaward survey, PRD is a responsible contractor for this procurement. The agency also points out that, as a general rule, our Office no longer reviews protests against affirmative determinations of responsibility (Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64). It is also reported that since the contract was awarded to the offeror whose proposal was judged most advantageous to the Government, and that since no evidence has been presented by EPSCO to show "political pressure," in the Air Force's view this allegation must be found to be without any basis in fact.

EPSCO's comments on the Air Force report focus on two basic issues. First, the protester contends that a statement by the contracting officer that the PRD proposal was allowed to be "amended" to eliminate deficiencies indicates that the contracting officer abused his discretion in soliciting the amended technical proposal from PRD.

Second, EPSCO continues to maintain that the contracting officer improperly permitted PRD to "buy-in." In this regard, EPSCO contends that several of the decisions of our Office relied on by the Air Force--Oneida Chemical Company, Inc., et al., 53 Comp. Gen. 597 (1974), 74-1 CPD 73; 50 Comp. Gen. 788 (1971); B-175284, May 2, 1972; and B-179002, December 18, 1973--are not relevant to the factual circumstances in the present case.

Further, EPSCO contends that, if the cost to the Air Force of the 1970 TACAN test set procurement is adjusted to take into account the effect of inflation through 1975, the unit price in 1975 dollars amounts to \$16,152 under the prior contract, as compared to the \$9,733 unit price proposed by PRD. This demonstrates, in EPSCO's view, that PRD's price was unrealistically low.

In conclusion, EPSCO believes that the selection of PRD in light of this background information amounted to a clear abuse of discretion by the contracting officer and "\* \* \* may constitute conduct consistent with the language expressed in [Kelly Services] B-182071, October [8], 1974, as ground for interference by the GAO in such awards."

There is no merit in EPSCO's contention concerning the "amended" PRD proposal. The referenced statement by the contracting officer simply reports that, as a result of the discussions, PRD made revisions in its proposal to correct certain deficiencies. Applicable procurement regulations provide both for the pointing out of deficiencies in proposals during written or oral discussions and for allowing offerors an opportunity to submit revised proposals. See ASPR § 3-805.3 (1974 ed.).

Concerning the decisions cited by the Air Force on "buying in," EPSCO has not indicated in what respect the factual circumstances in those cases differ materially from the circumstances here. These decisions recognize certain basic principles applied by this Office with regard to allegations of "buying in," which were stated as follows in B-175284, supra:

"ASPR 1-311 addresses the situation where an offeror knowingly offers a price substantially below anticipated cost with the expectation of recouping the loss by an increase in price through change orders during performance or by receiving follow-on contracts at prices high enough to recover the loss on the original 'buy in.' The act of wilfully bidding below cost is not expressly prohibited.

However, when there is reason to believe that this has occurred, the contracting officer is required by that regulation to assure that the difference is not recovered in the pricing of change orders or of follow-on procurements subject to cost analyses. Further, since the regulation does not provide for rejection of a bid where a 'buy in' is suspected, we have recognized that there is no legal basis upon which an award may be precluded or disturbed merely because the low bidder submitted an unprofitable price. \* \* \*

While B-175284 involved the low bid in an advertised procurement, see also 50 Comp. Gen. 788, which involved an allegation of buying in as regarded the low offer in a negotiated procurement. In that decision we stated:

"Under the circumstances, we find no basis for concluding that the Air Force was required to reject any firm fixed price offer solely because it may be below cost. Whether such an offer should be rejected is a matter of judgment, and we do not feel that we may take any legal objection to the exercise of such judgment where, as here, the risks to the Government had been carefully evaluated and reasonable measures have been taken to protect the Government's interests."

We believe that 50 Comp. Gen. 788 correctly indicates that in a negotiated procurement inquiry must be directed at whether the risks to the Government inherent in accepting an unusually low-priced offer have been carefully considered by responsible procurement officials in the evaluation and selection process.

The record indicates that the evaluation and selection process in the present case was conducted under a preestablished Source Selection Plan. Offerors' initial technical/management proposals were subjected to an evaluation in which the several technical criteria were numerically weighted. Numerical scores for the total proposal were developed based on a formula which took into account the total points given by a joint evaluation decision for each of the respective technical criteria. In addition, narrative assessments of the technical criteria were prepared. Ultimately, the proposals were technically rated in one of four adjective categories. These can be described in summary form as follows: (1) Exceeds specified performance (Excellent/Very Good); (2) Average; (3) Weak or Poor; (4) Key element of proposal fails to meet RFP (Unsatisfactory). Both these ratings and a substantial

The SSA in the selection statement stated that he had reviewed and analyzed the information. The statement sets forth a summary of the conclusions about the various proposals.

The statement clearly indicates the SSA's recognition that PRD's proposal presented a high degree of risk. However, the SSA also found that the proposal satisfied all the requirements and he believed that all requirements of the program could be met by PRD. The SSA found that certain logistics cost savings to be obtained by selecting the next lowest-priced proposal would not equal the additional acquisition cost of that proposal. The SSA concluded that, of the four offerors' proposals, PRD's best met the established criteria and an award to PRD would be in the best interest of the Government.

Having reviewed the record of the evaluation and source selection, we do not see a reasonable basis to conclude that the Air Force officials failed to take adequate measures to analyze and weigh the technical and cost risks associated with the PRD proposal and the possibility that selection of this proposal might create a potential "buy-in" situation. It is not the function of our Office to evaluate proposals, and in such matters the judgments of responsible agency personnel are entitled to great weight. Riggins & Williamson Machine Company, Incorporated., et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168. We do not believe that EPSCO's

amount of narrative information were presented to the Source Selection Authority (SSA) for consideration.

Consideration by the evaluators of the "Management" factor involved analysis of offerors' manufacturing management, subcontracting methodology, production planning, and resources and manufacturing capability. The evaluation results were expressed in narrative form and in a rating for each proposal in one of the four adjective categories set forth, supra, and were also contained in the presentation made to the SSA.

The cost analysis essentially involved a breakdown of the firm fixed prices submitted by offerors into their various cost elements, which were analyzed and compared with Air Force estimates. In addition to this analysis, the presentation to the SSA took into account the cost risks and their relationship to the technical risks involved in the various proposals.

The presentation to the SSA did not recommend any offer for selection. It was for the SSA to select the proposal which he considered to be most advantageous to the Government.

PRD's initial technical proposal was rated in the "Weak" or "Poor" category, below the proposals of the other three offerors which were rated in the "Excellent/Very Good" or the "Average" categories. The narrative assessment indicates, among other things, that PRD's proposal was considered "somewhat sketchy" and a "high risk approach."

However, after the discussions with PRD, the revised technical evaluation placed PRD in the "Average" category. Based on information furnished by PRD in the discussions, the Air Force technical evaluators found that the previously sketchy details had been enhanced and a better insight had been obtained into PRD's intent to comply with the requirements. Nonetheless, the revised evaluation recognized that some doubts about the proposal remained, and that certain aspects were still considered "questionable."

In the Management area, all four offerors were considered

disclosed an apparent problem with the RFP's evaluation factors and their application in the source selection which must be considered. The RFP "Executive Summary" contained the following information for offerors:

"4. Evaluation Criteria to be used and Basis for Award

"a. Technical/Management Proposal: Industry will be required to submit technical proposals of their own approach to design and develop the required Test Set. The technical proposal will be evaluated on the basis of the information provided in response to the RFP using criteria listed below in their relative order of importance.

- (1) Special Technical Factors
- (2) Understanding the Problem
- (3) Soundness of Approach
- (4) Compliance with Requirements
- (5) Reliability and Longevity
- (6) Maintainability
- (7) Quality Assurance Provisions
- (8) Management Plan

"b. Price Proposal: Prospective contractors will submit a price proposal with complete DD 633 supporting data fifteen days after submittal of the technical/management proposal.

"c. Basis for Contract Award: The contract will be awarded on the basis of the combined best technical/management approach and the most advantageous price to the Government as determined by the Source Selection Authority. The contractor should submit his best price as award may be made without negotiations."

We have on many occasions held that offerors must be advised of the relative importance of technical, price and other evaluation factors in relation to each other. See Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 386, and decisions cited therein. In Signatron we stated:

"\* \* \* [I]ntelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is not served if offerors are not given any idea of the relative values of technical excellence and price. \* \* \*"

The foregoing statement from the RFP "Executive Summary" properly advised offerors of the relative importance of the criteria included within the Technical/Management factor. However, it did not specifically advise offerors of the relative importance of price in relation to technical/management considerations. In these circumstances, we believe that offerors were left in the position of having to interpret the RFP to determine the relative importance of the various factors. Several interpretations are possible. On the one hand, since price is listed subsequent to technical and management factors, an offeror might conclude that price was to be a secondary consideration. See Dynalectron Corporation et al., B-181738, June 5, 1975, 54 Comp. Gen. 1009, 75-1 CPD 341. Another offeror might conclude, particularly in view of the language in subparagraph "c," that the technical, management, and price factors were all considered important and, therefore, were approximately equal in weight. Cf. 52 Comp. Gen. 686. (1973).

However, from the information in the Source Selection Plan which was not disclosed to the offerors, it would appear that technical and management considerations were to be of primary importance and price was to be secondary. The Source Selection Plan indicates that the basis for award would be the following factors, in order of importance: (1) the ability of the test sets to perform in accordance with the specifications; (2) delivery within the established schedule; and (3) total cost to the Government. This statement provides a more definite indication of the various evaluation factors' relative importance. It would have been preferable to include this information in the RFP itself.

Of greater concern is the selection decision made by the SSA in light of the established evaluation factors, the Source Selection Plan, and the results of the evaluation as presented to him. Though the Source Selection Plan indicated that technical considerations were of primary importance, the SSA decided to select the proposal which was lowest in price and rated only average in technical quality.



Of the three competing offerors' proposals, one was also rated average technically and was higher priced; but two other offerors' higher-priced proposals were rated, both in the evaluation and the Source Selection statement itself, in the "Excellent/Very Good" category.

It has been held that where several competing proposals are "essentially equal" technically, price properly becomes the determining factor. See Analytic Systems, Incorporated, B-179259, February 14, 1974, 74-1 CPD 71; 50 Comp. Gen. 246 (1970). Clearly this was not the case here as between PRD and the other higher-rated technical proposals.

We recognize that it is primarily the function of source selection officials to weigh the various factors placed before them in making an appropriate source selection decision under the circumstances of a particular case, and that these officials are vested with a considerable range of judgment and discretion in carrying out this task. See Bell Aerospace Company, B-183463, September 23, 1975, 55 Comp. Gen. \_\_\_\_\_, 75-2 CPD 168, and decisions cited therein. It is also conceivable that, notwithstanding an established evaluation and source selection plan placing primary importance on technical considerations, a source selection official could judge that the cost of a technically superior proposal is so high that selection of a lower-priced, technically inferior proposal is justified. Such a selection, however, would be a departure from the established criteria and would have to be supported by an extremely strong justification.

As noted, supra, there is some discussion in the source selection statement of the relative advantage of the PRD proposal vis-a-vis the next lowest-priced proposal. But overall, we do not think that the statement shows a sufficiently strong justification for a source selection of the lowest-priced proposal in lieu of one of the competing proposals offering higher technical quality. Accordingly, we believe that serious doubt exists on the record as to the propriety of the source selection made here.

As far as the competitive position of the protester in this matter is concerned, we must note that EPSCO's proposal was rated in the same technical category as PRD's--"average." It would likely be the other two competing offerors, then, not EPSCO, which suffered any material prejudice by reason of the doubtful source selection

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decision. In the circumstances, we do not believe that a recommendation by our Office that the SSA reconsider his source selection decision is called for in connection with this protest. However, by letter of today to the Secretary of the Air Force we are calling attention to our conclusions reached concerning the doubtful source selection decision with a view towards precluding a repetition of these circumstances in the future.

*R. G. Keller*  
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of the United States