



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** STD Research Corporation

**File:** B-252073.2

**Date:** May 24, 1993

Richard A. Wiley, Esq., Richard W. Mable, Esq., and David L. McEvoy, Esq., Powers & Hall, P.C., for the protester. Paul Shnitzer, Esq., Crowell & Moring, for Textron Defense Systems, an interested party. Gregory H. Petkoff, Esq., and Douglas J. Thiesen, Esq., Department of the Air Force, for the agency. Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. In a negotiated procurement, award to technically superior, higher priced firm offering a foreign product is proper where consistent with the solicitation evaluation criteria and the application of the Buy American Act, 41 U.S.C. § 10a-d (1988), price differential, the agency reasonably determined that the superior technical merit of successful proposal was sufficiently significant to justify award at higher cost.
2. The inclusion of a foreign source prohibition in the Commerce Business Daily (CBD) announcement did not "lock" the agency into such a prohibition where the terms of the subsequent solicitation itself did not prohibit foreign source participation. The solicitation alone represents the government's minimum needs, and a CBD announcement is not the equivalent of a formal solicitation.

### DECISION

STD Research Corporation protests the award of a contract to Textron Defense Systems under request for proposals (RFP) No. F29601-92-R-0078, issued by the Department of the Air Force for the acquisition of a Magnetohydrodynamic (MHD) power generator to drive an advanced concept weapons device. The contractor is to provide a system, subsystem, and component analysis of, and to deliver, a 15 megawatt electrical output (MW) Transportable Operational MHD (TOMHD). STD essentially argues that the Air Force should have added a 50 percent evaluation factor to Textron's

proposed costs pursuant to the Buy American Act, 41 U.S.C. § 10a-d (1988), which would have made Textron's evaluated price significantly higher than the price offered by STD. STD also argues that the agency's selection of Textron was unreasonable.

We deny the protest.

In response to Congressional authorization of funds for TOMHD research, the Air Force published in the Commerce Business Daily (CBD) a sources sought synopsis on December 17, 1991.<sup>1</sup> The sources sought synopsis was used to invite businesses to submit qualification packages. Several firms responded. The Air Force reports that none of the responses presented any information suggesting that TOMHD generators were generally manufactured in the United States in any quantity. The responses confirmed that the few MHD generators that have been built outside the former Soviet Union were experimental in nature and either too massive to be transportable or of much lower power than required.

After evaluation of the qualifications statements, the Air Force issued a solicitation. STD submitted the only proposal, but was determined to be technically unacceptable. Consequently, that solicitation was canceled.

On September 10, 1992, a second sources sought synopsis was published. This sources sought synopsis and the Notice of Contract Action, published on October 16, 1992, provided the following: "foreign firms are advised that they may not participate on this contract."<sup>2</sup> Eight firms submitted qualification statements in response to the synopsis.

The RFP, issued on November 9, 1992, contemplated the award of a cost-plus-fixed-fee contract for a 24-month period of performance and a 3-month final report preparation period. The contractor was to provide a prototype TOMHD, along with

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<sup>1</sup>According to the agency, TOMHD generators are not generally manufactured in the United States. What has been built in the United States are approximately 12 experimental or prototype units designed for industrial use, which are too massive to be transportable. One prototype unit has been built in the United States, which is small enough to be transportable. During the past 20 years, the Russians have built numerous transportable operational generator units of the type required.

<sup>2</sup>The contracting officials state that their intent was that foreign firms could participate as subcontractors, as opposed to prime contractors.

information, training and hardware to operate, maintain, support, demonstrate and verify the TOMHD power generator. The RFP did not restrict participation of foreign firms and, in fact, contained a provision concerning visit requests by foreign-owned or foreign-controlled firms that are subcontractors to United States firms. Award was to be made on the basis of the most advantageous offer based on Technical/Management and Cost, with cost having lesser importance. The Technical/ Management area was subdivided into four factors listed in descending order of importance: (1) MHD Generator System, (2) Project Management, (3) Safety, and (4) Data. Evaluation was to be performed in three ways: (1) a color/adjectival rating,<sup>3</sup> (2) a proposal risk rating, and (3) a performance risk rating.

The RFP incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, which implements the Buy American Act and provides for the addition of an evaluation differential to offers proposing to furnish foreign end products when they are in competition with offers of domestic end products. The differential to be applied to a nonqualifying country end product is 50 percent of the offered price exclusive of duty. DFARS § 252.225-7001(d). A domestic end product is defined as an "end product manufactured in the United States if the costs of its . . . components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components." DFARS § 252.225-7001(a)(5)(ii). Components are defined by the DFARS as "those articles, materials, and supplies directly incorporated into end products." DFARS § 252.225-7001(a)(1).

Five offers were received by the closing date of December 9, 1992. After the initial evaluation, only the offers of STD and Textron were included in the competitive range. Textron proposed to acquire from Russia an MHD generator which would be analyzed, tested, modified as necessary, integrated onto a transport platform and delivered together with required technical data and training. STD offered a TOMHD unit built in the United States which it had begun to build under a previous contract with the Department of Energy and which it asserted was approximately 80 percent developed. Negotiations were held with Textron and STD on December 28 and 29.

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<sup>3</sup>The color/adjectival rating consisted of blue (B) exceptional, green (G) acceptable, yellow (Y) marginal and red (R) unacceptable.

Best and final offers (BAFO) were received from both offerors on January 4, 1993. For factor 1, MHD Generator, Textron's proposal was evaluated as exceptional (Blue) for soundness of approach and personnel qualifications. Textron received an acceptable (Green) rating for all other Technical/Management evaluation factors and received an overall rating of acceptable (Green). STD's proposal was rated acceptable for all factors in the Technical/Management area. Textron's proposal risk was rated moderate, while STD's proposal risk was rated high. Textron's evaluated performance risk was low, and STD's was high.

Textron's total evaluated cost was \$3,837,185, \$1,417,288 of which was based on the purchase of the basic MHD generator hardware through a subcontract with a Russian entity called IVTAN. Of the funds going to IVTAN, \$1,049,529 was for hardware acquisition; \$342,368 was for verification and demonstration testing; and \$22,391 was for data and documentation related to the hardware. STD's total evaluated price was \$3,800,000. No Buy American Act differential was applied.

The Source Selection Authority (SSA) selected Textron for award because Textron offered a technically superior approach which involved lower overall proposal and performance risk at an insignificantly higher cost (\$37,000). The SSA noted that Textron proposed to satisfy RFP requirements by providing, from the former Soviet Union, an MHD generator with proven advanced technology in comparison to STD's proposed method which required a great deal of research and development to reach the point from which Textron was starting. The SSA concluded that the soundness of Textron's approach as explained in its BAFO merited an exceptional rating. The SSA found that Textron's use of former Soviet Union scientists to do the training required by the government was an excellent approach in the area of personnel qualification. The SSA also found that STD's proposal was high risk in that its approach called for development of MHD generator technology into parameter regimes not yet achieved and as such was considered inherently technically risky. Textron's proposal was considered to be only moderately risky and that risk came more from the mechanics of procuring Russian technology than from the technical approach. Further, the SSA concluded that the past performance risk analysis revealed a high overall risk for STD due to a number of difficulties encountered in its performance of prior efforts, while past performance for Textron was considered low risk. Textron's proposal was thus determined to be the most advantageous proposal to the government technical price and other factors considered. Award was made to Textron on January 13, 1993. STD filed this protest with our Office on January 28.

After receipt of this protest, the agency applied a 50 percent Buy American Act differential to Textron's total evaluated cost. Applying that factor, Textron's evaluated cost was \$5,755,778. The SSA considered the impact of the 50 percent factor and determined the technical merit of Textron's proposal to be worth the extra cost. A revised source selection document was signed on February 12.

STD asserts that the selection of Textron was improper because the overall ratings under all Technical/Management evaluation factors were identical for both Textron and STD and therefore award should have been made to STD, the lower priced offeror. STD maintains that the agency's proposal risk assessment and performance risk assessment for Textron were arbitrary and inconsistent.

We will examine an agency's technical evaluations to ensure that they are reasonable and consistent with the evaluation criteria. See Wellington Assocs., Inc., B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. The fact the protester disagrees with the agency does not itself render the evaluation unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. Further, in a negotiated procurement, there is no requirement that award be made on the basis of lowest cost unless the RFP so specifies. Spectra Technology, Inc.; Westinghouse Elec. Corp., B-232565; B-232565.2, Jan. 10, 1989, 89-1 CPD ¶ 23. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Awards to offerors with higher technical scores and higher costs are proper so long as the result is consistent with the evaluation criteria and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178.

We find that the agency's evaluation was reasonable and in conformance with the evaluation scheme set forth in the RFP. While STD maintains that both it and Textron received the same overall adjectival rating for all evaluation factors, the record shows that the SSA considered Textron's proposal to be technically superior. Adjectival ratings, like numerical point scores, when used for proposal evaluation, are useful only as guides to intelligent decision-making, and are not generally controlling for award because they often reflect the disparate, subjective judgments of the evaluators. See generally Ferguson-Williams, Inc., B-231827, Oct. 12, 1988, 88-2 CPD ¶ 344. Notwithstanding Textron's receiving an overall rating of acceptable, the record clearly shows that Textron's proposal was considered

very good in that Textron proposed to provide a system based on proven components, with significant operating data accumulated over several years of operations. The proposal was considered outstanding in its soundness of approach and qualifications of personnel. The evaluators found no significant weaknesses in Textron's proposal. The SSA reviewed these evaluation documents and determined that Textron offered a technically superior approach which involved lower overall proposal and performance risk. STD was determined to have a high risk in that its approach called for development of its prototype 5 MW MHD generator technology into parameter regimes not yet achieved and as such was determined to be inherently technically risky. Past performance risk was also high for STD due to a number of difficulties encountered in their performance of prior efforts.

With respect to the risk assessments, the RFP provided that the agency would assess proposal risk as it related to the offeror's proposed effort to accomplish the requirements of the solicitation. The agency considered Textron's proposal risk from a purely technical standpoint to be extremely low, since all of the components of the proposed MHD generator had been tested and operated in other configurations, so that essentially little development was required. However, Textron's proposal risk was actually assessed as moderate because of the uncertainty in stability of the former Soviet Union over the period of performance of this contract. STD disagrees with this assessment and maintains that because of the political climate in Russia, a proposal risk assessment of anything less than "high" for Textron is arbitrary. While STD disagrees with the proposal risk assessment, the record shows that the agency took into consideration the instability of the former Soviet Union and concluded that it merely changed the low risk assessment to moderate. We have no basis to object to the reasonableness of the evaluation of this factor.

The RFP provided that evaluation of performance risk would assess the probability of the offeror successfully accomplishing the proposed performance based on the offeror's demonstrated present and past performance. Here, based on an evaluation of Textron's performance on past contracts, the agency assigned Textron a low risk. STD argues that since Textron proposed to acquire its MHD from the former Soviet Union, Textron's satisfactory past and present government contract performances were irrelevant to its performance of this contract. As stated above, the RFP specifically provided that an offeror's demonstrated present and past performances were to be evaluated to determine the performance risk assessment. The record shows that all

offerors were evaluated for the performance risk assessment in accordance with this solicitation provision. On this record, we have no basis for finding the evaluation to be unreasonable.<sup>4</sup>

STD also argues that Textron's proposal must be evaluated and adjusted in accordance with the provisions of the Buy American Act. STD maintains that the Buy American Act differentials are applicable here because the primary objective of the subject RFP is the delivery of an operational transportable MHD power generator, a manufactured end product, and not performance of research services. STD states that its power generators are commercially available in the United States. STD argues that Textron's proposed MHD generator is a manufactured end product based upon a current operating system from IVTAN and that IVTAN's component costs exceed 50 percent of the cost of all components and therefore Textron's proposal should be subject to a 50 percent evaluated cost differential pursuant to the provisions of the Buy American Act.

While the Air Force does not agree with the protester that the Buy American Act's 50 percent price differential is applicable to Textron's cost, the Air Force applied the price differential to Textron's cost which increased the cost to \$5,5755,778. The Air Force concluded that even with this price differential, Textron's proposal was technically superior and therefore most advantageous to the government. For reasons stated below, we find the agency's selection decision after application of the price differential to be unobjectionable.

As stated above, the solicitation provided that the technical evaluation was significantly more important than cost. Textron's actual evaluated price was \$37,000 higher than STD's and the SSA selected Textron for award on the basis that Textron offered a technically superior approach which involved lower overall proposal risk at an insignificantly higher cost. Specifically, Textron was providing an MHD generator with proven advanced technology in comparison to STD's proposal of an inherently technically risky method which required a great deal of research and development. The SSA further concluded that even with the

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<sup>4</sup>The protester contends that the performance requirements of the MHD generator included in the RFP were tailored to the known performance characteristics of the former Soviet Union generator Textron proposed. This contention concerns a solicitation impropriety that should also have been raised prior to the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (1993).

application of the price differential which resulted in a cost difference between STD and Textron of approximately 50 percent. Because of the proven advanced technology of Textron's proposed generator, Textron's superior approach was worth the cost premium.

In a negotiated procurement, if a foreign offer is evaluated as the higher priced offer after application of the differential, but is determined to be the best offer considering the combination of price, differential, and technical approach, then an award based on the foreign offer is appropriate. Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶ 431; ABB Power Co. T&D, Inc., B-246249, Feb. 6, 1992, 92-1 CPD ¶ 157. Since the solicitation made clear that technical considerations were more important than price and given that the agency considered Textron's proposal to be exceptional technically, we have no basis to object to the SSA's determination that Textron's technically superior proposal was worth a 50 percent price premium.<sup>5</sup>

STD next argues that it was misled by the Air Force when the Air Force included a foreign source prohibition in the CBD announcement and Notice of Contract Action and then removed the prohibition from the final RFP without warning or

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<sup>5</sup>We note that the agency applied the 50 percent price differential to Textron's total evaluated price, which included the price of the foreign hardware, and evaluated price for verification and demonstration testing, data and documentation related to the hardware. The remainder of Textron's evaluated price is for, among other things, operational testing and modification as necessary in the areas of systems safety, environmental safety and explosives safety, progress briefings, system integration, performance demonstration, performance verification and completion testing to be performed by an American subcontractor. We question whether the testing and modifications of the hardware specifications are subject to the Buy American Act. See Hawaiian Dredging & Constr. Co., a Dillingham Co.; Gibbs & Hill, Inc., B-195101; B-195101.2, Apr. 8, 1980, 80-1 CPD ¶ 258; MRI Sys. Corp., 56 Comp. Gen. 102 (1976), 76-2 CPD ¶ 437; Blodgett Key punching Co., 56 Comp. Gen. 18 (1976), 76-2 CPD ¶ 331. In this regard, the 50 percent Buy American Act differential should only be applied to the cost of the generator manufactured in the former Soviet Union. Application of the differential in this manner would result in Textron's evaluated price being 16 percent not 50 percent higher than STD's.



notice.<sup>6</sup> STD maintains that had it been properly apprised of the deletion of the foreign source prohibition, STD could have investigated the possibility of subcontracting with the former Soviet Union.

A CBD announcement is not the equivalent of a formal solicitation and, in our view, does not "lock" an agency into the advertised provisions. See Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., B-244686 et al., Nov. 7, 1991, 91-2 CPD ¶ 434. The protester acknowledges that the RFP clearly contained no foreign source prohibition. In fact, the RFP contained a provision entitled "Visit Requests By Foreign Owned/Controlled Firms" which notified foreign-owned or foreign-controlled firms which were planning to subcontract with American firms that the American firms must have an export license and that the American firms' security office must sponsor the foreign firm's visit on base. The RFP alone represents the government's minimum needs, and there is no evidence in the record that the terms of the RFP itself were misleading. Id. To the extent the protester is arguing that the solicitation should have contained a foreign source prohibition, its protest concerns a solicitation impropriety that should have been filed prior to closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

Accordingly, the protest is denied.



*for* James F. Hinchman  
General Counsel

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<sup>6</sup>STD argues that the purpose of the RFP as stated in the CBD announcement and Notice of Contract Action was the acquisition of an operational transportable MHD generator from a domestic source. However, the record simply does not support this argument. The record shows that the agency's goal was to acquire a transportable MHD from any source capable of meeting its specific requirements.