

Cunningham
PC-1

DECISION



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

FILE: B-219636 **DATE:** November 4, 1985
MATTER OF: RCA Service Company

DIGEST:

1. Protest that contracting agency refused to provide protester with access to certain documents for the development of its protest is denied. The contracting agency has the primary responsibility for determining which documents are subject to release under the Competition in Contracting Act of 1984, Pub. L. 98-369, § 2741(a), 98 Stat. 1175, 1199-1203.
2. GAO has no authority under the Freedom of Information Act, 5 U.S.C. § 552 (1982), to determine what information agencies must disclose under the act.
3. Contrary to protester's allegation, Army did consider possibility that awardee would be less than successful in recruiting the incumbent contractor's work force as awardee proposed and, consequently, made a cost adjustment to the protester's proposal.
4. Based on review of record, GAO cannot question the Army's position that there is no merit in the protester's allegations about the awardee's compliance with the RFP's staffing and manning requirements.
5. GAO finds no basis to question the Army's evaluation of awardee's proposal concerning costs associated with awardee's performance schedule where Army adjusted upward awardee's performance costs to cover initial performance period which awardee failed to adequately cost.
6. GAO rejects as speculative protester's assertion that projected cost of "portal-to-portal" pay should be added to cost of awardee's proposal

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where protester is not currently obligated to pay "portal-to portal" compensation to contract employees.

RCA Service Company (RCA) protests the award of a cost-plus-award-fee contract to Dynalectron Corporation (Dynalectron) under Department of the Army request for proposals (RFP) No. DAAD07-84-R-0036 issued for the operation of radar devices at the White Sands Missile Range, New Mexico, for a 5-year period. RCA was the prior contractor for these services for the past 15 years. We deny the protest.

The RFP described the work requirements involved in the radar services to be furnished as follows:

"Services, consisting of operation, operational engineering, relocation, installation, and modification of instrumentation radars, surveillance radars, Miss Distance radar, and ancillary equipment and systems including power driven generators and radar site air conditioning equipment. The work called for includes gathering and processing of data to produce real and deferred time data, tracking error and signal strength recordings, missile-target miss distance data, coordinate position plots, velocity plots, impact prediction plots, digital data displays, instrument pointing, and other related air space data. . . . Performance under this contract will be at White Sands Missile Range and such other places as directed by the Government."

Performance of these services was to begin on August 1, 1985.

Considering the above services to be performed, the Army informed offerors in the RFP that the proposal evaluation criteria would be, in order of decreasing importance, technical approach, management approach, cost (involving cost realism and a comparison with the government cost estimate), quality assurance plan, and phase-in plan. The RFP also stated that, while numerical ratings would be assigned offerors' proposals in the above areas, the "ultimate source selection will not be made by the application of a mathematical formula, but by exercise of human judgment on the part of the contracting officer." Finally, the RFP

stated that "significant differences in measured proposal merit may or may not be deemed affordable or worth an additional amount of money depending upon the best interest of the Government."

The contracting officer states that a final detailed analysis of the merits of both proposals was made after negotiations with both offerors and the receipt of best and final offers. According to the contracting officer, this analysis led to her conclusion that the "award to Dynalec-tron was the 'best buy,' price and other factors consid-ered." Award was then made on July 26, 1985, to Dynalec-tron. Following the award, the contracting officer says that offerors were advised in "general terms of the reasons their offers were not accepted." Specifically as to RCA, the Army advised the company that the "Army did not consider the technical merit of RCA's proposal to be worth the extra money."

RCA first complains that the Army has "categorically refused to provide RCA with any information whatsoever regarding the Army's evaluation of proposals [and has] refused to disclose, even in general terms, how it made the selection of Dynalec-tron." RCA cites both the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), and § 3553(f) of the Competition in Contracting Act of 1984, Pub. L. 98-369, § 2741(a), 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. §§ 3551-3556). Section 3553(f), above, provides in pertinent part that:

"Within such deadlines as the Comptroller General prescribes, upon request each Federal Agency shall provide to an interested party any document rele-vant to a protested procurement action (including the report required by subsection (b)(2) of this Section) that would not give the party a competi-tive advantage and that the party is otherwise authorized by law to receive."

Clearly, the contracting agency has the primary responsibility for determining which documents are subject to release under the above provision. As for RCA's citation of FOIA, our Office has no authority under the act to determine what information agencies must disclose under the

act. A protester's sole recourse where information is not furnished is to pursue the remedies provided under FOIA. See Spectrum Leasing Corporation, B-213647.3, Sept. 10, 1984, 84-2 C.P.D. ¶ 267.

Although the Army has denied RCA access to Dynalectron's proposal and the documents related to the evaluation process, the Army has provided all of these documents to our Office solely for our review. We have honored the Army's restriction and reviewed the materials in light of the protest issues raised, but our discussion is necessarily limited because of the Army's restriction.

RCA argues that Dynalectron's selection was improper because the Army accepted Dynalectron's proposal without considering the effect of several, allegedly material, deficiencies in the company's proposal. Specifically, RCA argues that Dynalectron: (a) improperly based its proposal on the use of RCA's work force despite alleged evidence that this work force would not be available to Dynalectron; (b) proposed full performance commencing on September 1, 1985, instead of August 1, 1985, allegedly as required by the solicitation schedule; and (c) proposed employee compensation rates that did not include "portal-to-portal" pay (additional compensation to employees for travel from administrative headquarters to outlying instrumentation sites), which is said to be paid to Dynalectron's other employees in the area and "will in all likelihood" be paid to workers on this contract as well.

Concerning the Army's use of technical and cost factors, contract selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Lockheed Corp., B-199741.2, July 31, 1981, 81-2 C.P.D. ¶ 71. Where the contracting agency's selection official has made a cost/technical tradeoff, the question is whether the tradeoff was reasonable in light of the solicitation's evaluation scheme. Petro-Engineering, Inc., B-218255.2, June 12, 1985, 85-1 C.P.D. ¶ 677. Moreover, we have stated that the contracting agency's judgment in evaluating costs is entitled to great weight, since the agency is in the best position to determine the realism of proposed costs and must bear the major criticism for cost overruns caused by a defective cost analysis. Lockheed Corp., B-199741.2, above. Thus, we will not second-guess an agency's cost

evaluation unless it is not supported by a reasonable basis. Petro-Engineering, Inc., B-218255.2, above.

PROPOSED USE OF INCUMBENT'S WORK FORCE

RCA says that the Army improperly accepted, without question, Dynalelectron's proposed use of certain of RCA's work force. RCA asserts that the Army completely disregarded RCA's preaward advice that there was "strong reason to believe that RCA's workforce would choose to remain with RCA" considering that the "average tenure of all radar employees with RCA is 12.9 years" and that the "average for high tech positions is in excess of 17 years." In fact, RCA says it presented a survey to the contracting officer prior to award that showed up to 90 percent of its employees had indicated a preference to stay with RCA and relocate rather than work for a new contractor. Despite this survey, RCA says the contracting officer chose to ignore it because the survey's results "were seen as being based on data from employees concerned with protecting their future employment."

Contrary to RCA's allegation, the record shows that the Army did take into consideration the possibility that Dynalelectron would be less successful than the company proposed but that, nevertheless, the projected cost savings involved in an award to Dynalelectron was of sufficient advantage to the government to offset this possibility. As reported by the contracting officer:

"RCA states, 'This factor [relocation of RCA personnel] should have been considered by the Army in evaluating Dynalelectron's cost estimates. . . . because it will not be able to hire away the bulk of RCA's current employees at White Sands.' Based on the recommendation of the PEB [Proposal Evaluation Board], I adjusted for costs associated with relocation of personnel [required because Dynalelectron would be, in the Army's judgment, less successful in recruiting RCA employees than Dynalelectron proposed]. . . . In addition, Dynalelectron is a large company with adequate resources to attract qualified personnel from other places. However, recent experience on other

contracts appeared to indicate that employees protected by collective bargaining agreements would choose to remain in place with the successor."

We have no basis to question the Army's judgment.

Related to this argument of RCA is the argument that "Dynalectron did not provide the Army with resumes or letters of commitment for key personnel such as system chiefs." Dynalectron states that, while it supplied resumes for all key personnel, the company did not supply written letters of commitment for all these individuals. However, Dynalectron insists that its approach was not defective since these individuals were "in the present employ" of Dynalectron, and Dynalectron cites clause L.50.3.2.3 of the RFP, which provides that "individuals for whom resumes are submitted shall be in the present employ of the offeror or [emphasis supplied] the offeror shall have firm, written commitments of the individuals to perform under the resultant contract." Given Dynalectron's explanation, and the Army's acceptance of that representation in Dynalectron's offer, we conclude that Dynalectron complied with the RFP requirements regarding resumes and letters of commitment.

Also related to this issue of the protest is RCA's allegation that Dynalectron may have improperly proposed personnel for more than one job or work function (so-called "dual-hatting"), thereby improperly lowering its proposed cost for the requirement.

Both Dynalectron and the Army reject the dual-hatting allegation. As stated by the contracting officer: "The [Army] found the skill mix and manning levels acceptable as proposed."

We have no basis to question the Army's position on this issue.

PERFORMANCE SCHEDULE

RCA states Dynalectron proposed a "30 day phase-in with full performance to begin on September 1, 1985" even though the RFP called for performance starting on August 1. RCA says that Dynalectron's proposal was contrary to the intent of the RFP, which "require[d] full performance and full responsibility from the contractor during the phase-in period."

The Army notes that Dynalectron did propose costs for the month of August 1985, but did not propose assuming full

contract responsibilities until September 1. To compensate, the Army added to Dynalectron's cost proposal the full cost of RCA's performance for the month of August (a cost referred to as a "phase-out" cost) and a substantial adjustment for relocation costs, as noted above, based on the assumption that Dynalectron would not be as successful as it proposed in hiring RCA employees. The dollar adjustment for relocation is considerably higher than the suggested adjustment which RCA says should be made to Dynalectron's proposal for "severance pay and relocation" costs. In fact, the Army's adjustment to Dynalectron's cost proposal for these reasons is higher than RCA's suggested total even if RCA's performance cost for September is used in the adjustment. Consequently, we see no basis to question the Army's evaluation of costs under this issue.

"PORTAL-TO-PORTAL PAY"

RCA notes that Dynalectron did not propose to pay workers on a "portal-to-portal" basis. Although RCA recognizes that Dynalectron will not have to make these payments under RCA's current contract, which Dynalectron is assuming, RCA argues that Dynalectron will ultimately be forced to enter a new contract under which "Dynalectron will have to provide portal-to-portal pay and that these projected costs should be added to Dynalectron's proposal." The Army's position is that it properly evaluated Dynalectron's proposal without this pay since the company did not propose it. We consider RCA's argument to be speculative, at best, and we therefore reject it.

Protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel