



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: L.K. Comstock, Inc. and Liebert Federal Systems, Inc.

File: B-261711.5; B-261711.6

Date: December 14, 1995

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Marc F. Efron, Esq., John E. McCarthy, Jr., Esq., and Lisa A. Price, Esq., Crowell & Moring, for Exide Electronics Corporation, an interested party.

Gregory H. Petkoff, Esq., and George Holliday, Esq., Department of the Air Force, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that agency's cost evaluation of proposals was unreasonable are sustained where cost analyses used to determine the evaluated low cost offer were based upon unsupported agency quantity estimates and inappropriate evaluation provisions.

DECISION

L.K. Comstock, Inc. and Liebert Federal Systems, Inc. protest the award of a contract to Exide Electronics Corporation under request for proposals (RFP) No. F04606-94-R-0002, issued by the Department of the Air Force, Sacramento Air Logistics Center, for three-phase 125-1000 kVA Static Uninterruptible Power Supplies (SUPS)/SUPS Systems and SUPS-related services (including support services for installation, ancillary equipment, warranty, start-up, emergency/preventative maintenance, training, and data) in the United States and overseas. The protesters challenge the agency's evaluation of the proposals and the determination that Exide's proposal offered the lowest cost and best value to the government.

We sustain the protests.

The RFP, issued on May 18, 1994, contemplated the award of a requirements contract with a 3-year base ordering period and two 1-year options. The majority of the RFP contract line item numbers (CLIN) called for fixed prices, a few items (e.g., travel) were cost reimbursable, and certain site specific requirements (e.g., installation and ancillary equipment) were to be negotiated after award. For these latter items, such as CLIN 24 (installation), and CLIN 25 (ancillary equipment), offerors were to propose pre-priced conversion factors (based upon the offeror's direct and indirect costs, such as support labor hours, rates, factors, overheads, and profit) for application to the direct material, base labor hours, and ancillary equipment required for site specific installations, to be determined and negotiated after award on an individual delivery order basis.

In addition to CLIN quantity estimates, the RFP included two sample tasks ("scenarios")--requiring the provision of SUPS equipment and services--for which offerors were to provide technical and cost proposals for evaluation. Each offeror's cost proposals for the sample tasks (including labor, material, and ancillary equipment) were to be averaged and multiplied by the proposed weighted average conversion factors.¹ To determine each offeror's evaluated prices for CLIN 24, regarding installation, and CLIN 25, regarding ancillary equipment, the resulting cost figure was to be multiplied by quantity estimates listed in section M of the RFP; for evaluation of CLIN 24, the RFP provided a quantity of 1,135, and for CLIN 25, ancillary equipment, the RFP provided a quantity of 935.

Award was to be made to the offeror that submitted the proposal determined to offer the best value to the government. Section M of the RFP set forth the following evaluation factors for award, listed in descending order of importance: technical, management, and cost. The RFP provided that:

"[t]he cost/price proposals [will] not [be] evaluated against standards but all elements of cost and/or price will be evaluated for realism, completeness, and reasonableness. Although adequate price competition is anticipated, cost/price will be a substantial evaluation criterion."

¹The RFP, at section M.e.3.d.2.h., set forth in detail the formula to be used in arriving at weighted average conversion factors which, for CLIN 24, essentially involved multiplying stated RFP installation quantities for 11 complexity levels (1,135) by the proposed conversion factors (which could involve between 1 and approximately 150 different conversion factors), adding the totals, and dividing the sum by the total number of installations (1,135). The RFP provided that for CLIN 25, covering ancillary equipment, a similar weighted average conversion factor was calculated, as above, except that a factor of 935 total installations was to be used.

The RFP advised offerors that in assessing the realism of each cost proposal, a "cost risk analysis will be performed based upon technical uncertainties as well as uncertainties in the proposed cost estimates."

Proposals were received from Exide, Liebert, and Comstock on July 24, 1994, clarification requests and deficiency reports were issued to all offerors, and discussions were held. Best and final offers (BAFO) were received from the three offerors on April 17, 1995. All offerors' proposals were found acceptable and were rated essentially equal technically, with certain strengths and weaknesses noted for each.

The agency's cost evaluations found that Exide's proposal (which included discount terms) of [deleted] for the 3-year basic period, with an additional [deleted] for the first option year, and an additional [deleted] for the second option year, for a total 5-year amount of \$630,664,148, offered the lowest cost to the government. (Exide's proposed non-discounted total cost exceeds [deleted]. Liebert's evaluated price, reflecting the agency's correction of certain computational errors in the firm's proposal, for the 3-year basic period was [deleted], with an additional [deleted] for the first option year, and an additional [deleted] for the second option year, for a total 5-year amount of [deleted]. Comstock's evaluated price, reflecting the agency's correction of certain computational errors in the firm's proposal, for the 3-year basic period was [deleted], with an additional [deleted] for the first option year, and an additional [deleted] for the second option year, for a total 5-year amount of [deleted]. Since Exide's proposal was evaluated as the low cost offer among the technically equal proposals, the source selection authority determined that Exide's proposal offered the best value to the government. Exide was awarded a contract under the RFP on June 4. These protests followed.

The protesters principally challenge the agency's cost evaluation. Specifically, both Comstock and Liebert protest the evaluation of the awardee's proposal of various discounts² on the basis that the proposed discounts will not be realized during performance, rendering unreasonable the agency's determination that Exide's proposal offered the lowest cost to the government.

²The protesters maintain that the awardee's proposed discounts constitute an impermissible "alternate" proposal, prohibited by the RFP, and that Exide's proposal thus should have been rejected. The awardee did not offer the discounts to the agency as an alternative proposal to its nondiscounted prices; Exide submitted a single cost proposal which includes discount terms and the RFP did not specifically prohibit the proposal of volume or other discounts by any offeror. We see no impropriety here.

In this regard, Exide's proposal primarily offered three types of discounts to the agency. First, Exide proposed substantial SUPS equipment volume discounts to be applied in any contract year in which the preceding year's actual contract quantities reached 80 percent of the RFP's stated quantity estimates for that year. Second, Exide proposed a [deleted]. Third, Exide offered a \$50,000 discount on all delivery orders requiring in excess of \$400,000 of ancillary equipment, prior to the application of the proposed conversion factor.

Where the proposal of pricing discounts is not expressly prohibited by the RFP, there is nothing improper in an agency's decision to accept a contractor's offer to discount certain charges, see AAI Eng'g Support, Inc., B-257857, Nov. 16, 1994, 95-1 CPD ¶ 2; however, the offered discounts should be taken into account in the evaluation only if the condition on which the discount is based likely will be met. See 48 Comp. Gen. 257 (1968). Moreover, when the government solicits offers on the basis of estimated quantities to be ordered over a given period, the estimates must be compiled from the best information available; while they need not be absolutely correct, the estimates must be a reasonably accurate representation of the agency's anticipated needs. The Saxon Corp., B-232694 et al., Jan. 9, 1989, 89-1 CPD ¶ 17. An award decision is not proper if the estimates misrepresented the government's needs such that the inaccurate estimates likely made a difference in the relative competitive positions of firms participating in the procurement, see Nationwide Roofing & Sheet Metal Co., B-234222.2, June 22, 1989, 89-1 CPD ¶ 588, or skewed the determination of which offer would result in the lowest cost to the government in terms of actual performance. See Comstock Communications, Inc., B-242474, May 6, 1991, 91-1 CPD ¶ 438; see Petchem Inc., B-233006, Feb. 8, 1989, 89-1 CPD ¶ 126.

As discussed below, we conclude that the agency's evaluation based on the offered discounts was unreasonable because the estimates on which the evaluation depends are not supported by the record. In short, the agency's cost evaluation does not reasonably establish Exide's proposal as the lowest cost proposal.

First, under Exide's proposal, the agency would receive volume discounts of approximately \$30,000,000 for the SUPS CLINs beginning in year 2 if 80 percent of the prior year's estimates were reached. The agency concluded that Exide's volume discounts would not be triggered—in other words, the annual 80-percent threshold would not be reached—until the option years (years 4 and 5) of the contract. (The prior contract showed significantly increased purchases in the latter 2 years.) The evaluation therefore involved the discount prices for the last 2 contract years.

Initially, [deleted]. However, the agency did not reconsider the reliability of its estimates.

As the protesters point out, there is a 240-percent increase in quantity in the current RFP compared to the earlier contract. The agency explains that these new quantities represent projections of increased future purchases by the Air Force and other federal agencies, and are primarily based upon the personal judgment of an Air Force official (now retired) who helped design the procurement to make this Air Force's installation's program the major supplier of SUPS equipment and services to federal agency customers. This official states that a substantial part of developing the estimates was based upon his personal opinions and his experience in communicating with various agencies that expressed some "interest" in the program. There is absolutely no evidence in the record, however, that the agency performed any survey of potential customers to quantify customer commitments or needs that supports the large quantity estimates used by the agency. Although there are some "planning documents" in the record provided by the Air Force which reflect unilateral projections by the Air Force for seven federal customers, the record shows that none of these anticipated agency-customers submitted actual estimates of their needed quantities; also, the quantities noted on these workpapers do not come close to the substantial estimates in the RFP.

Further, the projected quantity estimates were 2 years old at the time of the cost evaluations. These estimate documents were prepared in early 1993 and the record does not show that the agency acted in any way to verify the accuracy of its projected estimates prior to its cost evaluations. The record shows that since the time these projected estimates were developed and the cost evaluations were conducted, several extraneous factors that could materially affect contract quantities had apparently gone without consideration by the agency--such as recent determinations for substantial military base closures (possibly including the installation which issued the RFP), and the fact that the Federal Aviation Administration (FAA) and State Department (and possibly other agencies) have issued their own solicitations for some of the SUPS equipment and services available under the RFP. The agency's submission (during the protest) of potential agency-customer correspondence expressing general interest in the contract and a statement by an FAA representative that the FAA is "potentially considering" purchasing a substantial amount of SUPS under the contract is insufficient, we believe, to support the huge increase in estimates from the prior contract.

Additionally, the reasons for the increases in purchases in the latter years of the prior contract are not explained by the agency, nor has the agency explained why it believes that this purchasing pattern will repeat itself under the current contract; this is significant, we think, since the historical pattern appears inconsistent with the RFP's stated yearly estimates, which are essentially equal throughout the 5-year period. The data is especially uncertain since base closures (even if realignment of stations, as the agency contends, could require some new SUPS), and the issuance

of other SUPS-related solicitations could substantially affect the relevance of the historical percentages.

Second, Exide proposed [deleted].³ [deleted]

[deleted]. The protesters argue that the application of [deleted] to the 935 quantity estimate is unreasonable because [deleted]. As the protesters point out, a comparison to Exide's prior contract, even after taking into account [deleted]. In response to the protester's challenges, the Air Force did not substantiate its basis for this estimate, nor has the agency refuted the reasonableness of the protester's [deleted] contentions that applying this large quantity unreasonably skewed the cost evaluation. As Exide itself recognized in its proposal, [deleted]. The agency's evaluation approach--considering non-discounted prices for some offerors and a discounted price for another offeror for a quantity not likely to be realized--produced a distorted indication of what proposal represented the likely lowest cost to the government.

Third, Exide proposed a \$50,000 discount to be applied to delivery orders with ancillary equipment exceeding \$400,000 prior to the application of the firm's conversion factor. Although this discount was not initially evaluated by the agency, the Air Force decided during the protests that the \$50,000 discount would have applied to Exide's cost proposal for the RFP's scenario 2 sample task since more than \$400,000 of ancillary equipment was required. Similar to the above-noted defect in the agency's evaluation of Exide's [deleted], the agency determined that Exide's \$50,000 discount (since it was applicable to the firm's scenario price) should be multiplied by 935, the RFP's quantity estimate for the CLIN 25 ancillary equipment. This evaluation resulted in a further decrease in Exide's evaluated nondiscount price for the 5-year period by approximately [deleted]. In its proposal, Exide again noted that it did not believe that the high dollar amount of the ancillary equipment required for that scenario was representative of the majority of delivery orders to be placed under the contract. The protesters contend that prior contract history shows that few installations will involve over \$400,000 in ancillary equipment that will trigger Exide's offered \$50,000 discount. The agency has offered no evidence to support its application of the \$50,000 discount to the full quantity of installations, nor has the Air Force rebutted the protesters' contentions that the agency will not typically order such high dollar installations under the contract. The prior contract in fact shows that many of that contract's installations were relatively minor, inexpensive installations and that the discount would not

³The [deleted] was required in responding to the [deleted]. The cost of the [deleted] was a factor in the agency's calculation of the awardee's [deleted] evaluated prices since the agency evaluators multiplied the [deleted] by the RFP's large quantity estimates.

have applied to many of the ancillary equipment orders issued under the contract. In other words, while most orders under the contract will not trigger this discount, the agency evaluated the discount as applying to the total RFP estimated quantities. There is no evidence in the record that indicates that the agency ever considered the fact that the discounts offered would not apply to every order to be placed under the contract or why the agency believes the discount will be realized to the extent evaluated.⁴

In light of the above, we conclude that the record does not reasonably support the agency's determination that Exide's proposal offered the lowest cost to the government among technically equal offerors. ([deleted].)⁵ We recommend that the agency review the quantity estimates and evaluation provisions of the RFP in accordance with the above discussion and amend the RFP as appropriate. Following the submission of new cost BAFOs⁶ (since this decision only concerns the cost proposals) and the evaluation thereof, Exide's contract should be terminated and award made to Comstock or Liebert, if either is in line for award. We also find that Liebert and Comstock are entitled to be reimbursed for their costs of pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1995). Liebert and Comstock should submit their

⁴We believe the above irregularities in the cost evaluation of the awardee's proposal are sufficient to sustain the protests. However, we also note that the record shows inequality in other cost evaluation areas that further support the conclusion that the cost evaluation was flawed. For instance, although Exide's proposal was evaluated based on its offer of [deleted], Liebert's cost proposal was evaluated to include prices [deleted]. Similarly, Liebert's evaluated cost included [deleted] involved in scenario 2 even though the RFP stated that [deleted] would not be considered for evaluation purposes. (In this regard, we also note that Liebert chose to include [deleted].) Liebert contends that these discrepancies equate to at least [deleted] that should be deducted from its evaluated price.

⁵We have reviewed the many other arguments raised by the protesters, some of which unpersuasively seek exclusion of Exide from the competition. We conclude that they are either without merit or are rendered academic by this decision.

⁶Due to the disclosure of certain proprietary information, including certain prices, released in violation of the protective order issued by our Office, we recommend that the Air Force ensure to the greatest extent practicable a level playing field among the offerors. See Devres, Inc., B-251902.8, Mar. 30, 1995, 95-1 CPD ¶ 170. By separate letters to the parties, we will address these improper disclosures.

claims for such costs, detailing and certifying the time expended and the costs incurred, directly to the contracting agency within 60 working days of its receipt of this decision. 4 C.F.R. § 21.6(f).

The protests are sustained.

Comptroller General
of the United States