



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Liebert Federal Systems, Inc.

File: B-274823

Date: January 8, 1997

Brian J. Donovan, Esq., Peter B. Jones, Esq., and Toni L. DeGasperin, Esq., Jones & Donovan, for the protester.

Marc F. Efron, Esq., Paul Shnitzer, Esq., John E. McCarthy, Jr., Esq., Raymond F. Monroe, Esq., and Cheryl A. Soloman, Esq., Crowell & Moring LLP, for Exide Electronics Corporation, the intervenor.

Gregory H. Petkoff, Esq., Maj. Mark R. Land, John E. Lariccia, Esq., and George W. 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

1. Protest that agency waived mandatory technical requirements (regarding commercial availability and Underwriters Laboratory (UL) certification of products) for awardee is denied where cited specifications were included in solicitation's performance requirements and were not preconditions for award and agency reasonably considered information in awardee's proposal regarding firm's ability to meet commercial availability and UL certification requirements prior to performance of the contract in determining awardee's low proposal risk.

2. Agency was not required to exclude awardee from competition, despite that firm's improper receipt (in violation of protective order issued in prior protest) of certain of protester's proposed prices where agency reasonably "leveled the playing field" for the competition by releasing to all offerors, without objection, similar information regarding the awardee's proposal, as well as certain model contract pricing information for all offerors, and, contrary to protester's contention that awardee's substantial change in salvage value pricing was the result of awardee's improper use of protester's proposal information, the record does not support protester's allegations; rather, the record reasonably shows that awardee's changed pricing on recompetition was the result of its own business initiative and judgment.

3. Protest that awardee's prices were materially unbalanced is denied where: there is no evidence that the offer contains enhanced prices; higher prices in early base years and lower prices in last base year and option years of contract reasonably reflect awardee's offered volume discount, and were calculated and evaluated against agency's stated revised anticipated quantity estimates (which estimates were not timely protested); and although awardee's price becomes low in the third base year of the contract (which included two 1-year option periods), agency reasonably expects to exercise all options and protester fails to show that reasonable doubt exists that award to the firm will result in the lowest ultimate cost to the government.

4. Protest of agency's evaluation of cost proposals is denied where the evaluation was conducted in accordance with the solicitation's stated evaluation provisions and post-award protest of those provisions (and estimated quantities included in those provisions) is untimely in light of the information given to protester prior to recompetition--if protester had reason to believe the evaluation should have been conducted other than in the manner specifically set out in the amended solicitation, the firm should have protested prior to submitting its proposal on the recompetition.

DECISION

Liebert Federal Systems, Inc. protests 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 protester challenges the agency's evaluation of the technical and cost proposals, and the agency's determination that Exide's proposal offered the lowest cost to the government.

We deny the protest.

BACKGROUND

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 RFP provided quantity estimates for proposal preparation and evaluation purposes. Most of the RFP contract line item numbers (CLIN) called for fixed prices, while others were cost reimbursable or time-and-material items; certain prices for particular site requirements (e.g., CLIN 24--installation and CLIN 25--ancillary equipment) were to be negotiated after award. For these latter CLINs, offerors were to propose pre-priced conversion factors (reflecting the offeror's direct and indirect costs) to be applied after award to the material or labor required for the site installation. For

evaluation of cost proposals for CLIN 24 (installation) and CLIN 25 (ancillary equipment), the RFP provided two sample tasks, or "scenarios," for which the offerors were to provide responses to include proposed labor, material, and ancillary equipment--after application of weighted conversion factors (and adding conversion factor cost) to the average of the cost proposals for the scenarios, proposed costs were to be multiplied by estimated quantities provided in the RFP at section M-900.¹

The RFP provided the following evaluation factors for award, listed in descending order of importance: technical, management, and cost (cost was to be evaluated for realism, completeness, and reasonableness); proposal and performance risk were also to be evaluated. Award was to be made to the offeror that submitted the proposal determined to offer the best value to the government. Three proposals were received in response to the RFP, discussions were held with the offerors, and best and final offers (BAFO) were received. The agency, after determining that the proposals were [deleted], and that Exide's proposed discounts (where the other two offerors had not proposed discounts) rendered that firm's cost proposal low, made award to Exide on June 4, 1995.

That award was protested to our Office by the two unsuccessful offerors, Liebert and L.K. Comstock, Inc. We sustained the protests by decision of December 14, L.K. Comstock, Inc. and Liebert Fed. Sys., Inc., B-261711.5; B-261711.6, Dec. 14, 1995, 96-1 CPD ¶ 4. We found the agency's cost evaluation of the proposals unreasonable because the agency's evaluation of Exide's proposed discounts were based on inaccurate estimates which skewed the evaluation so that it was uncertain whether Exide had submitted the lowest cost proposal. In that decision, we recommended that the agency review the quantity estimates and evaluation provisions of the RFP and amend the RFP as appropriate. In light of the improper disclosure of certain proprietary proposal information (Liebert's and Comstock's total BAFO prices and one of Liebert's first year unit prices) to Exide, we also recommended that the agency ensure to the greatest extent practicable a level playing field among the offerors. In response to our decision, the agency terminated the original contract awarded to Exide, amended the RFP, and requested and evaluated new proposals. (The current protest concerns the agency's actions in response to that decision's recommendations and the resulting recompetition for award.)

Amendment No. 4 to the RFP, issued on April 29, 1996, contained revised quantity estimates (the amendment reduced the estimated quantity of SUPS modules from 1,135 to 618, reduced the CLIN 24 quantity estimate from 1,135 to 494, and reduced the CLIN 25 quantity estimate from 935 to 410) and clarified, but did not materially

¹Proposal responses to the scenarios were also evaluated for technical merit.

change, the agency's cost evaluation methodology; the balance of the RFP generally remained unchanged, including the scenario tasks for which new proposals were requested. To "level the playing field," the agency released Exide's total price to the other offerors and all offerors were required to release to the other competitors (at least in an acceptable redacted form) their model contracts (providing pricing information) that were submitted with their earlier proposals. All three offerors were determined to have submitted [deleted]. The agency determined that Exide's proposal (which included discount terms, as did each of the offeror's revised proposals) offered the lowest cost to the government and awarded a contract under the RFP to Exide on September 20, 1996. This protest followed.

DISCUSSION

Technical Evaluation

The RFP, in the statement of work (SOW) section, included a requirement for the contractor to provide standard products that "shall be commercially available equipment," and incorporated ("to form a part of this SOW") an engineering specification (SM-ALC/LIEE 92-03) which provided that "SUPS modules shall be UL 1778 certified." Section L of the RFP, which provided instructions for proposal preparation, instructed offerors to include in their proposals certain existing documentation--operational and maintenance manuals, related parts lists, brochures, and evidence of UL certification for each SUPS kVA size. Liebert contends that since [deleted] of Exide's SUPS models [deleted] are not currently in the commercial marketplace and are not currently UL certified, the agency improperly waived mandatory technical requirements for Exide and unreasonably failed to assign a higher risk to the Exide proposal for failure to comply with these technical requirements.

Exide's proposal indeed did not establish that these [deleted] SUPS models were commercially available or UL certified at the time of proposal submission. It did provide a basis for the agency to conclude, however, that the models would be UL certified and commercially available by the time of delivery. In this regard, the record shows that the agency considered that [deleted] of Exide's proposed models were [deleted]. The agency also considered, based upon Exide's proposal information and explanations, that the [deleted] model [deleted]. The agency found that Exide had [deleted] and that, regarding these [deleted] challenged models, Exide's proposal still offered low risk given the offeror's [deleted]. (The agency evaluators specifically concluded that the "risk due to the lack of [UL certification] documentation is mitigated by Exide's approach for obtaining UL certification prior to the government's required delivery date.")

Contrary to the protester's position, the RFP did not require that offerors propose already commercially available and UL certified SUPS. The commercial availability and UL certification requirements of the RFP were set forth in the RFP's performance work statement and as such constitute contractor performance/delivery requirements rather than preconditions to award. See ADT Sec. Sys., Inc., B-249932.2, Feb. 4, 1993, 93-1 CPD ¶ 100. Although offerors were instructed to include in their proposals documentation regarding SUPS commercial availability and UL certification, this documentation requirement must be read in conjunction with the actual RFP specification requirements to which it relates. As indicated, those requirements were for delivery of commercially available, UL certified models, not for models meeting those requirements prior to award. In other words, the documentation requirement was only to establish that the offeror would meet performance requirements at the time of delivery. Based on Exide's proposal and explanations, we think that the agency could reasonably conclude that Exide's products at issue would meet the commercial availability and UL certification requirements at that time.²

Improper Use of Protester's Proposal Information

Liebert next contends that Exide should be excluded from the competition due to its improper use of Liebert's proprietary proposal information (principally, the protester's proposed salvage value offered as a credit in its response to a scenario task to account for the value of equipment to be removed and replaced). As stated above, during the prior protest to our Office, proprietary proposal information (the total BAFO prices proposed by Liebert and Comstock and one of Liebert's first year unit prices) was improperly released to Exide in violation of the terms of a protective order issued by our Office.³ Liebert contends that it is likely that Exide

²Liebert also contends that Exide's proposal failed to comply with the RFP's [deleted]. Our review of the record, however, shows that the agency reasonably determined that the Exide proposal met this requirement. Exide clearly proposed the use of either [deleted]. The RFP did not prohibit the use of ancillary equipment to meet this requirement, as proposed by Exide, and did not address in detail how [deleted]. Liebert also challenges the reasonableness of the [deleted] assigned to the Exide proposal in light of a concern that [deleted]. The record shows, however, that the agency's initial concern in this regard was reasonably alleviated because [deleted]. Moreover, [deleted].

³By separate letters of April 15, 1996, to Exide's counsel and Liebert's counsel (who was also found to have inadvertently violated the terms of the protective order), our Office imposed, respectively, appropriate sanctions and admonishment.

Submissions from Exide on the matter assured that the copies of the documents
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had access to and used improperly obtained information regarding the protester's originally proposed high salvage value since the salvage value proposed by Exide in the recompetition is approximately [deleted] higher than the salvage value included in Exide's proposal submitted in the initial competition.

The agency contends that there is no reason to question that Exide's increase in salvage value is the result of anything other than Exide's own business initiative and judgment. Our review of the record confirms the reasonableness of the agency's position. Liebert's proposed salvage value was not released to Exide. What was released was Liebert's (and Comstock's) original BAFO total prices and one of Liebert's first year unit prices. The subsequent release of information to level the playing field after the improper release included the model contract prices (although some of Liebert's prices, including its proposed salvage values, were redacted by Liebert prior to distribution to the other offerors). Although an offeror could, at most, deduce from that information the prices proposed for the scenario effort, an offeror could not determine the level of salvage value claimed by any other offeror.

Liebert also contends that a further improper release to Exide of protected Liebert pricing information must have occurred because there is no other rational basis to account for the dramatic increase in Exide's proposed salvage value. We find this assertion entirely speculative. In any event, Exide has explained that upon reexamination of its proposal under the recompetition, Exide investigated many alternatives to reducing its cost proposal. For example, [deleted]. This reduced Exide's costs in a number of areas, some of which are discussed further in this decision. Exide also reexamined its prior salvage value proposal, [deleted] (and which was initially considered reasonable by Exide), and determined that the prior figure was unrealistically low. [deleted] Thus, the record supports Exide's explanation that its increase in its proposed salvage value was the result of its own business initiative and judgment to maintain its competitive position. In this regard, we note that [deleted] supports that Exide's cost reductions were the result of its own initiative, not its knowledge of Liebert's pricing strategy.

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which failed to redact the protected pricing information were retrieved from Exide and that any individuals who saw those documents were instructed not to discuss the protected information. The inappropriately redacted documents in question, contrary to Liebert's suspicions, did not include information regarding proposed salvage value.

Unbalanced Pricing

Liebert contends that the agency failed to recognize that Exide's proposal is materially unbalanced because it is based upon quantity discounts [deleted] which reasonably will not be realized, and if the stated quantities are realized, the proposed discounted prices will not take effect until the last base year of the contract. Liebert contends that Exide's proposal should therefore be rejected.

The concept of unbalancing may apply in negotiated procurements where, as here, price constitutes the primary basis for the source selection. Laidlaw Envtl. Servs. (GS), Inc., B-261603, Oct. 11, 1995, 95-2 CPD ¶ 171. Unbalanced pricing has two aspects: first, if the offer is based on nominal prices for some of the work and enhanced prices for other work, it is mathematically unbalanced; and second, whether award on the basis of that mathematically unbalanced offer will result in the lowest overall cost to the government--if there is reasonable doubt that it will not, the offer is materially unbalanced and cannot be accepted. Astrosystems, Inc., B-260399.2, July 11, 1995, 95-2 CPD ¶ 18. With regard to estimated quantities in requirements-type solicitations, consideration of the materiality of unbalancing begins with a determination of the accuracy of the solicitation's estimates of the agency's anticipated needs--unreliable estimates can raise doubts as to whether a low mathematically unbalanced offer would actually result in the lowest cost to the government. Id.

Liebert's allegations that Exide's offer is materially unbalanced fail for several reasons. First, there is no evidence that the Exide offer contained enhanced prices and thus the offer has not been shown to be mathematically unbalanced; the differential among the offerors' prices here does not by itself render the offer mathematically unbalanced. See Laidlaw Envtl. Servs. (GS), Inc., *supra*. Second, although Liebert was aware of the problems noted in the originally issued RFP's quantity estimates, our prior decision recommending that the agency verify and revise its quantity estimates, the agency's amendment to the RFP's stated quantities for the recompetition, and the agency's confirmation of the accuracy of those estimates, it did not protest the use of the solicitation estimates until after the award on the recompetition. In these circumstances, (unlike the earlier protest, where we concluded that there was no reasonable basis for a protester to question the stated estimates until after learning that one offeror had included discount terms in its proposal and the resulting increased importance of the accuracy of the estimates to the evaluation for award), if Liebert believed that the amended RFP contained inaccurate estimates which permitted offerors to devise a pricing approach to take advantage of the allegedly defective estimates, Liebert should have protested on this basis before the closing time for receipt of proposals on the recompetition. Bid Protest Regulations, section 21.2(a)(1), 61 Fed. Reg. 39,043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1)). To the extent Liebert is now protesting the accuracy of the amended RFP's estimates, its challenge is untimely.

Astrosystems, Inc., supra. Since Exide's [deleted] reasonably reflect the awardee's offered volume discount, and were calculated and evaluated against the agency's stated revised anticipated quantity estimates, we again have no reason to find the offer mathematically unbalanced.

Third, although the protester argues that, irrespective of the accuracy of the RFP estimates, there is reason to doubt that acceptance of Exide's offer will result in the lowest cost to the government because the proposed volume discount would not be triggered [deleted], the record supports the agency's position that exercise of the options is reasonably likely (e.g., due to anticipated need under the contract, as well as the time and effort necessary to prepare for a follow-on procurement of this complexity). Thus, there is no reasonable basis to doubt that Exide's offer will result in the lowest ultimate cost to the government. Accordingly, we do not find Exide's offer unbalanced. Id.

Cost Evaluation

Liebert next protests the award on the basis that the agency's cost evaluations were unreasonable and improper. Liebert contends, for instance, that the agency improperly failed to adopt our Office's recommendation to revise the evaluation provisions and used inaccurate estimates in evaluating the offerors' ancillary equipment costs, that the agency failed to appropriately consider (and rate higher) the risk involved in Exide's unrealistically low prices, that the agency unreasonably accepted Exide's unsupported decreases in proposed effort and hours (resulting in, as the protester contends, unsupported substantial decreases in Exide's proposed prices), and that the agency unreasonably accepted Exide's unrealistically high proposed salvage value without allowing Liebert an opportunity to submit a similar highest possible proposal for that value.

Regarding Liebert's challenge that the agency failed to adopt our recommendations to revise the RFP evaluation provisions and used inaccurate estimates in evaluating the offeror's ancillary equipment costs in its total evaluated cost and most probable cost evaluations, we find, as stated above, that Liebert's post-recompetition, post-award challenge to the recompetition terms is untimely.⁴ Given the information

⁴Exide maintained in its recompetition proposal the firm's earlier proposed discount of \$50,000 for ancillary equipment exceeding \$400,000 per installation site. Since the Exide response to scenario No. 2 contained ancillary equipment in excess of \$400,000, the \$50,000 discount was used by the agency in evaluating the awardee's CLIN 25 evaluated price by factoring that discount, in accordance with the evaluation formula in the RFP, to the number of installations stated in the RFP for evaluation of that CLIN (410). Although we still believe, as was a basis for our

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available to the protester regarding the original competition (including the importance of the accuracy of the agency's stated estimates for purposes of evaluation of proposed prices--especially in light of the need for proper evaluation of an offeror's discount terms), our decision sustaining its protest of that competition, and the stated terms of the recompetition (where the agency repeatedly confirmed that cost evaluations would be conducted as stated in the RFP using the stated revised quantity estimates for cost evaluation purposes), if the protester had reason to believe the evaluation should have been conducted other than in the manner specifically set out in the amended solicitation, the firm should have protested prior to submitting its proposal on the recompetition. Id.

Notably, the protester did not contest the RFP's stated cost evaluation scheme, but instead participated in the competition on those terms and submitted newly proposed discounts to the government to be factored in the agency's evaluation of its scenario and ancillary equipment pricing. In fact, in its proposal on the recompetition, Liebert urged the agency

"[deleted]."

As the agency points out, and as the record confirms, the cost evaluations for ancillary equipment (including the evaluation of Exide's and [deleted] proposed discounts for such equipment) were conducted in accordance with the stated RFP terms, as Liebert itself had desired. The protester's untimely protest in this regard will not be considered.

Liebert next challenges that the agency failed to appropriately consider (and rate higher) the risk involved in Exide's unrealistically low prices. For example, Liebert questions Exide's proposed prices for salvage value, Exide's substantial decrease in its ancillary equipment costs, and Exide's decrease in its proposed labor hours and conversion factors.⁵

⁴(...continued)

prior sustain of the original competition, that since it is unlikely that all of the stated installations will require in excess of \$400,000 in ancillary equipment, it is questionable for the agency to evaluate most probable cost by factoring the full quantity stated in the calculation of CLIN 25 evaluated prices, we find the protester's current challenge to the agency's evaluation methodology, which was conducted in accordance with the stated terms of the amended RFP, untimely, as discussed above.

⁵Liebert correctly points out that the agency's cost evaluation contains, as the agency concedes, a mathematical error in its calculation of Exide's discount for
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We have reviewed the record in response to each of Liebert's contentions and find that the agency reasonably evaluated the awardee's proposal in these areas after having considered Exide's explanations for the decreases in its prices, hours, and conversion factors. For instance, as Exide explains in its recompetition proposal, [deleted] (which, as the incumbent, has substantial demonstrated experience and ability) to perform [deleted] more efficiently and economically using its own resources. Next, as to Liebert's challenges to Exide's allegedly unrealistically low prices for ancillary equipment, the record clearly shows that the agency reasonably adjusted Exide's proposed prices upward in calculating the firm's total evaluated price--for instance, [deleted] and [deleted]. Finally, as to Liebert's contentions that the agency improperly based its evaluation on Exide's proposed highest possible salvage value, the agency points out that even if it normalized the salvage value amount for all offerors or gave Liebert credit for a higher salvage value, given the substantial difference in evaluated prices between the offerors, the competitive standing of the offerors would not change. In short, the agency on this recompetition performed a comprehensive evaluation of the proposals (including at least seven different calculations of evaluated price under which Exide remained the low offeror by at least [deleted]). Liebert's protest contentions provide no basis to question the propriety of the agency's cost evaluation and the ultimate source selection decision.

The protest is denied.

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⁵(...continued)

installation material and that [deleted] should be added to Exide's evaluated total price. Given the substantial difference in price between the offerors' evaluated prices, however, this error had no effect on the award determination.