



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

45094

October 23, 1973

D-176329

General Electric Company  
Heavy Military Electric Systems  
Court Street  
Syracuse, New York 13201

Attention: Norman L. Arenander, Esquire

Gentlemen:

By telefax dated June 23, 1972, and subsequent correspondence, you protested the award of contracts to Hughes Aircraft Company (Hughes) and to Sperry Rand Corporation (Sperry) under request for proposals (RFP) No. DAAB07-72-R-0281, issued by the United States Army Electronics Command (ECOM), Fort Monmouth, New Jersey.

The RFP, issued on March 6, 1972, contemplated two cost-plus-fixed-fee (CPFF) contracts, each for one advanced development model of artillery locating radar (AM/TPQ-37), engineering services during military potential testing, a value engineering program, and auxiliary technical data items. On the April 17, 1972, closing date five proposals were received. The initial technical evaluation of the proposals resulted in only that of Hughes being rated technically acceptable. However, the contracting officer decided that the flaws in the remaining proposals could be corrected and, therefore, all proposals were determined to be within the competitive range and eligible for negotiations. Discussions were held with all offerors during the period of May 17-24, 1972 and all offerors were notified by TWX dated May 19, 1972, that best and final offers were due on June 2, 1972. Five final offers were received and evaluated and on June 19, 1972, CPFF contracts were awarded to Hughes at \$6,349,287 and to Sperry at \$5,447,628.

Briefly stated, your protest is based upon the contentions that GE's technical proposal was erroneously and arbitrarily determined unacceptable; that GE's design implementation was erroneously and arbitrarily determined deficient on the basis of undisclosed and unnecessary design preferences; that ECOM's determination that GE's engineering man-hour estimates were unrealistically low was arbitrary; that the RFP did not contain a sufficient statement of evaluation and award factors; that ECOM's test for cost realism was deficient; that the commonality feature between the TPQ-37 and the TPQ-36 contracts

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may have unfairly impacted upon the selection of the contractors for the respective contractors; and that ECOM failed to conduct meaningful negotiations with GE.

As explained below, we do not agree with these contentions.

Offerors were advised by the RFP that their proposals would be evaluated in accordance with the following criteria:

"D.1 \* \* \* Any awards to be made will be based on the best over-all proposals with appropriate consideration given to Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism in that order of importance.

"Of the three factors set forth above, Technical Proposal is the most important factor and bears greater weight than the other two areas combined. Of the last two areas, Past Performance/Management bears the greater weight.

"To receive consideration for award, a rating of no less than 'acceptable' must be achieved in each of the three areas.

"D.2 FACTORS AND SUB-FACTORS TO BE EVALUATED AND RELATIVE ORDER OF SUBFACTORS IN DESCENDING ORDER OF IMPORTANCE.

"a. Technical Proposal

- (1) Engineering Approach
- (2) Engineering Man-hours
- (3) Estimated Mission Equipment Unit Cost  
(See AR 37-18)  
(Note: The following factors (4), (5), (6), and (7) are of equal value.)
- (4) Personnel
- (5) Adequacy and Availability of Required Facilities
- (6) Material List
- (7) Schedule

"b. Past Performance/Management

"c. Cost Proposal/Cost Realism"

Following the above statement of evaluation criteria were 11 pages of detailed descriptions of each of the factors.

ACOM engineers developed a technical evaluation plan for this procurement. Under this plan the above-cited technical factors and sub-factors were divided into three categories. Category A, consisting of engineering approach and engineering man-hours, was to be rated both numerically and narratively; a weighted score of 70 was established as the minimum acceptable score for those factors rated numerically. Category B, the mission equipment unit cost estimate, was to be given a narrative appraisal, and Category C included factors for which a rating of satisfactory or unsatisfactory was to be assigned.

The evaluation of the initial proposals resulted in the following technical rating scores under Category A: GE 55.8; Sperry 65; and Hughes 82.7. The evaluation of revised proposals resulted in these final Category A scores: GE 54.2; Sperry 74.2, and Hughes 83.9. The evaluator's comments concerning the final proposals are as follows:

"a. Hughes Aircraft Corporation:

"This bidder received the highest Category A rating. Their proposed level of effort is about 25% below the government estimate, but is still considered to be reasonable. The high score in Category A reflects a sound technical approach, adequate proposed effort and a thorough proposal. This bidder received a marginal rating for only one factor, Maintainability. The shortcoming is not inherent in the basic design approach and it is expected that with the guidance of USAECOM personnel, the equipment developed by this bidder will meet the required maintainability standards.

"b. Sperry Gyroscopes Company:

"This bidder received the second highest Category A rating. Their proposed level of effort is about 40% below the government estimate and is considered to be somewhat low. The Category A score reflects a good technical approach, adequate proposed effort and a good proposal. This bidder received a marginal rating for only one factor, Reliability. The shortcoming is not inherent in the basic design approach and it is expected that with the guidance of USAECOM personnel the equipment developed by this bidder will meet the required reliability standards.

"a. General Electric:

"This bidder received the lowest Category A rating. As a result of the additional data provided their rating increased in only one factor. A re-examination of the proposed level of effort disclosed that the rating in the Data Processing System factor should have been dropped one level. As a result, the overall Category A rating is lower than in the original evaluation. The overall level of effort proposed is 65% below the Government estimate and is considered to be very low. The poor Category A rating is a result of the combination of design deficiencies, inadequate proposed effort and a poor technical proposal. This bidder received marginal ratings for several factors. The marginal rating for the Trailer Configuration represents a design deficiency in a critical area. A complete redesign of the trailer configuration is required to correct this deficiency."

The record indicates that GE's technical proposal was determined to be unacceptable because ECOM considered the GE proposal deficient in 7 of the 14 numerically scored technical factors. For 5 of these factors (trailer configuration, electronic counter counter-measures (ECCM), transmitter, receiver, and maintainability) GE was judged to be deficient in design implementation. GE was considered weak in the antenna and data processing system factors because in the agency's view GE's level of effort for these areas was insufficient.

Initially, you contend that ECOM considered the GE proposal unacceptable merely because it did not rate a score of 70, ECOM's predetermined cut-off point. You assert that such a determination based on a predetermined score is arbitrary, citing B-174589(2), March 28, 1972, wherein this Office criticized the use of a predetermined cut-off point.

While we have objected to the use of a predetermined score to delineate the competitive range, we do not believe the inclusion of a predetermined cut-off point in the evaluation plan was prejudicial in view of GE's low score in comparison to the array of scores achieved by the other offerors and in any event, GE was included in the competitive range for the purpose of discussions.

You also contend the determination that GE's technical proposal was unacceptable was erroneous because it was based primarily on ECOM's arbitrary conclusion that GE's design implementation was deficient. It is your position that these alleged deficiencies were actually failures of the GE design to meet undisclosed ECOM design preferences rather

than failures to meet requirements set forth in the RFP. Although you admit that some of these areas (ECOM, transmitter tube protection, receiver components and receiver protection, the inflatable radome, special tools and test equipment under maintainability, and the azimuth drive motor under trailer configuration) were mentioned during negotiation, you insist that any discussion held in these areas did not inform you that a specific detailed design was required. In view of the fact that the RFP contains only performance specifications, you urge that no specific design can be required. You argue that since the GE design met all the performance requirements of the specification it could not be considered unacceptable. In support of this argument, you cite 48 Comp. Gen. 314 (1968), wherein we held that a requirement important enough to require proposal rejection was also significant enough to have been explicitly provided for in the RFP.

We do not believe that the holding in the cited case is applicable to the instant situation. There, we criticized the agency for denying offerors the opportunity for negotiations because their designs failed to include a safety requirement which was not specified in the solicitation. In the case at hand, the GE proposal was considered to be within the competitive range and negotiations were held with your firm. The discussions included the areas which contributed to ECOM's ultimate determination that the GE proposal was unacceptable. The GE proposal was not selected for award because GE's overall plan for the implementation of its design was considered weak in comparison to the designs of the other offerors and not on the basis of any predetermined design preferences in the areas where GE received low scores. It was not one specific detail or design factor which led ECOM to this conclusion, but a combination of factors involving unsatisfactory design concepts, insufficient levels of effort under two factors, and the lack of adequate information in the proposal. Therefore, ECOM concluded that GE's approach to accomplishing the desired performance involved a higher degree of risk than the approaches of the selected offerors.

We do not agree with the contention that since a performance specification was used in the solicitation, any design which conceptually meets the performance criteria must necessarily be considered equal to that proposed by the other offerors, particularly where it is determined that the proposed method of implementing the otherwise acceptable design concept is doubtful. As indicated in the ECOM report, one of the objectives of such a specification is to obtain the most feasible technical approach at the lowest cost. This entails placing a high premium on an offeror's innovative and creative techniques in meeting the performance specifications. The record indicates that based on the information submitted in the GE proposal, ECOM did not consider GE's approach to design implementation as feasible as those offered by other offerors. While you have put

forth arguments which you assert justify GE's design concept and approach, we are unable to conclude that ECOM's evaluation of your proposal was arbitrary.

Concerning your argument that ECOM's objections to the GE design involves features which are not essential to the system's performance, we note that the agency clearly does not share your categorization of the deficiencies in the GE design. We do not feel that the record shows that ECOM's view of the impact of the deficiencies in GE's technical proposal is unreasonable.

You contend that ECOM's man-hour and cost estimates against which the GE proposal was evaluated were unreasonably high. In this connection, you point out that the ECOM estimates were considerably higher than those proposed by the offerors who are all experienced firms.

The record indicates that the basis for ECOM's man-hour and cost estimates was a study performed by the General Research Corporation (GRC), entitled "Cost Estimating Methods for Electronically Scanned Weapon Locator Radar", dated June 1969. We are informed that this report indicates that development costs can be related to production costs, and that the report also provides a method for estimating production costs from the basic design parameters of the radar.

In this connection, the agency informs us that a baseline set of radar parameters for artillery locating radars was evolved during a study for ECOM by the Technology Services Corporation (TSC). Using this set of design parameters the agency reports that it developed a generalized production cost figure and using this figure and the GRC method it backed into the costs for development. It is reported that the man-hours needed for development were obtained by applying an expected distribution of labor rates, overhead, G & A, fee and materials cost and by using each offeror's design parameters and the GRC methodology, a Government estimate of production costs for each offeror was developed; and that the total man-hours for each offeror was derived by multiplying the generalized man-hour estimate by the ratio of costs for each offeror's design over the Government's generalized estimated production cost.

Although you contend that ECOM's estimates are inaccurate, we find no basis for concluding that the method used by ECOM is erroneous. In matters such as this, the administrative judgment as to the method to be used is entitled to great weight. In our view, that judgment should not be questioned by this Office unless it is shown to be unreasonable. Based on our review of the record, we cannot say that ECOM's method of developing its estimates was improper or that its estimates were unreasonably high.

You also contend that ECOM's evaluation of the costs and man-hours proposed by GE is erroneous in that ECOM merely compared its estimates to those proposed by GE without exploring the factors peculiar to the GE proposal. In support of this position you cite 47 Comp. Gen. 336 (1967), where we held that it is inconsistent for an agency to use cost-reimbursement contracting on the one hand, while on the other hand, maintaining that estimated costs are capable of being determined to such a degree of certainty that any offered estimated costs other than those stated by the Government are unrealistic. It is your view that this principle is equally applicable to the man-hour estimates.

The record indicates that all the information contained in the GE proposal was considered by the ECOM evaluators. It appears, however, that they were not convinced that the data contained in the GE proposal justified GE's proposed cost and man-hour figures. We do not find that ECOM's evaluation of these factors was arbitrary. Moreover, we believe it is significant to note in this regard that GE's technical proposal was not considered unacceptable solely because of the deficiency in the proposed level of effort. In fact, the ECOM report indicates that the GE technical proposal would have been considered unacceptable even if the proposed level of effort had not been included in the evaluation.

Further, we do not agree that 47 Comp. Gen. 336, supra, is applicable to the case at hand. In that case we criticized the agency for its failure to reopen negotiations after agency personnel determined that all offerors had proposed cost estimates for a cost-type contract which were considered to be unreasonably low. As a result of these determinations the agency based its award selection solely on the proposed fee floor and health benefit costs. It was our opinion that the method of selection constituted a change in the stated evaluation approach. We emphasized in that case that the award was improper because none of the offerors was given the opportunity to justify the reasonableness of its cost estimates. In the case at hand, GE was informed of ECOM's doubts regarding its overall cost estimate and was given an opportunity to establish the reasonableness of its cost estimate.

You further contend that the solicitation did not contain sufficient information to enable offerors to prepare their proposals properly. In this regard, you urge that ECOM did not follow its own regulations in developing the evaluation scheme used in the subject RFP.

It is clear that the evaluation plan which is cited in the ECOM internal operating instruction ("Evaluation and Award Procedures for R&D Procurements", dated October 20, 1971), is only a sample and not intended to be mandatory. As long as the evaluation criteria set forth in the RFP comply with the standards set forth in the Armed Services Procurement Regulation (ASPR) 3-501(b) Section D, the fact that the factors and relative weightings applied may not comport with an internal agency instruction cannot affect the validity of the award selection.

You also object to ECOM's evaluation plan because in your view the RFP did not include reasonably definite information as to the weight to be assigned the various factors in the evaluation. You further argue that the evaluation criteria were deficient because insufficient information was supplied concerning the methods to be used in evaluating the level of effort and cost proposals.

Section D.1 of the RFP provides, in part, that of the three factors, technical proposal is the most important factor and to be accorded greater weight than the other two areas combined; of the last two factors, past performance/management bears the greater weight. The subfactors are set forth in descending order of importance. Offerors were also warned that a rating of acceptable under each of the three factors was necessary for award consideration.

This Office does not require an agency to set forth its exact scheme of scoring in a solicitation. All that is required is that offerors be provided with a reasonable indication of the relative importance of the evaluation criteria. In our view the instant RFP met this standard. In this regard, we note that GE did not complain that it felt the RFP statement of evaluation criteria was unsatisfactory until after the awards were made. The proper time to question the evaluation criteria is before proposals are submitted. Concerning the evaluation of the level of effort and cost realism factors, we do not believe it is reasonable to argue that GE was misled by the failure of the RFP to mention that those factors would be evaluated by the use of Government estimates.

You also assert that meaningful negotiations were not conducted with GE either before or after the submission of GE's best and final offer. It is your position that at no time did ECOM personnel explore, in any detail, the GE cost and man-hour estimates. You also point out that ECOM personnel did not mention the fact that they considered the GE trailer design unsatisfactory and, although questions were asked concerning the other four areas considered deficient in design, particular deficiencies were not discussed.

In regard to the technical deficiencies, you have cited cases (50 Comp. Gen. 117 (1970) and 47 Comp. Gen. 336, supra), wherein we held that deficiencies had to be pointed out in order to have meaningful discussions. We have also concluded that whether the statutory requirement for discussions must include the pointing out of deficiencies, and the extent thereof, is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for competitive negotiations, and that such determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis. See 51 Comp. Gen. 621 (1972).

In the instant case the agency determined that it would not be appropriate in this research and development procurement to discuss design deficiencies in detail. It is the agency view that since it was primarily interested in innovative and cost effective approaches to its performance specifications any discussion of design details which would allow an offeror to bring up its original inadequate proposal would subvert the intent of the procurement. It should be noted in this connection that ECOM personnel did inform GE that the agency had reservations about the GE design in all but one of the areas which ultimately contributed to GE's low final score. In the one area not mentioned (trailer configuration), it is ECOM's view that a complete redesign would be needed in order for GE's trailer design to be acceptable. In these circumstances, we do not feel that ECOM abused its discretion in not informing GE more explicitly why the technical proposal was considered inadequate.

Next, you assert that ECOM conducted meaningful negotiations only with Sperry, enabling that firm to raise its unacceptable proposal to an acceptable level. You contend that GE should have been afforded the same opportunity.

The record reveals that the discussions held with Sperry were no more comprehensive than those held with GE. We do not think that the fact that Sperry is able to improve its initial proposal (which was ranked considerably higher than the initial GE proposal), while GE was not able to do so, can be said to establish that more extensive discussions were held with Sperry.

You also contend that ECOM may have given Hughes an unfair cost advantage because of the commonality feature between this contract, which has already been awarded to Hughes, and the similar AN/TFQ-36 contract which ECOM proposes to award to Hughes. The

AN/TPQ-36 procurement has also been protested by GE and other firms. You assert that since Hughes already has received the award in the subject procurement, ECOM, in order to take advantage of the savings under the commonality adjustment clause in this contract, would have to award the AN/TPQ-36 contract to Hughes. Accordingly, you conclude that the award of this contract must impact on and have had a significant affect on the evaluation for determination of the AN/TPQ-36 award.

It is ECOM's position, as stated in its administrative report in response to the same allegation raised in the AN/TPQ-36 protest, that potential savings on commonality features between the AN/TPQ-36 and equipment on other contracts was not made an evaluation factor and, thus, was not considered in making the award selection. The record provides us with no basis upon which we may dispute ECOM's position in this matter.

Throughout your argument you have emphasized the point that ECOM was arbitrary in ignoring the cost savings inherent in GE's lower estimated costs. Of course, this argument is premised on your conclusion that the GE proposal is technically acceptable and substantially equal to the Hughes and Sperry proposals. As mentioned above, we find no basis to disagree with ECOM's contrary conclusions.

In the instant case the Hughes and Sperry proposals were selected for award because in ECOM's opinion they were the only proposals which were acceptable from both a technical and cost standpoint. We have held in similar situations that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches. We believe that such judgments must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis. See 50 Comp. Gen. 390 (1970).

Based on the record, we are not able to conclude that ECOM's selection of Hughes and Sperry was arbitrary.

Accordingly, your protest is denied.

Sincerely yours,

R. F. Keller

Deputy Comptroller General  
of the United States