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6/22/76

United States General Accounting Office  
Washington, D. C. 20548

For Release on Delivery  
Expected Tuesday,  
June 22, 1976

Statement Of  
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Before The  
Subcommittee On Legislation And National Security  
Committee on Government Operations  
House Of Representatives

Mr. Chairman And Members Of The Subcommittee:

We are pleased to appear at the request of the Subcommittee to discuss the decisions of July 11 and December 26, 1974, concerning the the protest of Bristol Electronics, Inc., against an Army contract awarded to E-Systems, Inc. The United States Army Electronics Command, Philadelphia, Pennsylvania, issued a request for proposals (RFP) in November 1973. The RFP solicited proposals for approximately 5,500 radio sets and transmitters for delivery to foreign national governments. The RFP also contained an option provision allowing the Army the right to buy up to an additional 5,500. Although the Army reserved an option right, the RFP informed potential offerors that award would be decided on the basis of prices submitted for the specified quantity only.

In response to the RFP, five companies submitted proposals on December 26, 1973. Two were eliminated from further competition

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Army Contract]

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for the award because their proposals did not contain a required technical report. The three remaining offerors were asked to submit final prices by January 30, 1974. The relative standing (lowest to highest) of the three offerors based on the January 30 prices were:

Bristol

E-Systems

Electrospace

On March 1, 1974, the Army notified all offerors that the specified quantity of items had been reduced and that March 8, 1974, was the date set for receipt of revised prices. The relative standing (lowest to highest) of the three offerors based on the March 8 prices were:

E-Systems

Bristol

Electrospace

E-Systems which had submitted the lowest price for the specified quantity of items, was awarded a contract on March 14, 1974. The items were to be delivered between June 1974 and April 1975. E-Systems' contract price for the specified quantity was \$2,884,992; Bristol's proposed price for the specified quantity was approximately \$180,000 more than E-Systems' contract price.

After the contract was awarded, Bristol alleged that E-Systems' final offer should have been rejected because E-Systems' price for the option quantity was higher than for the specified quantity even though the RFP called for an option price equal to or less than on the specified quantity. Bristol observed that its offer would have been lower if the option had been evaluated.

The Army and counsel for E-Systems contended that since option prices were not to be evaluated, E-Systems' failure to conform to the option price limit was a waivable defect.

Our July 11 decision rejected this argument. We found the contract to have been improperly awarded and recommended that the Army hold another round of negotiations with all competitors. We further recommended that the present contract be terminated for the convenience of the Government and a new contract entered into with the successful offeror if other than the awardee. If E-Systems were to remain successful, we recommended that the existing contract be modified in accordance with its final proposal.

We felt the recommendation struck a proper balance between the two interests we consider in fashioning relief for a successful protester. Through our bid protest review role, we try to strengthen bidders' confidence in the integrity of the Federal contracting system. Confidence in the system is fostered if bidders are sure that prompt action will be taken when contracts have been awarded under improper procedures. If fostering confidence in the integrity of the system were our only concern, we would invariably recommend that contracting agencies act to cure every improper award by termination or other means.

We are also concerned with the effect of the recommendation on the Government's operations. Our concern is shared by the courts. For example, in M. Steinthal & Co. v. Seamans (455 F.2d 1289 (D.C. Cir. 1971)), the court (at page 1304) stated:

"The balancing of the public interest in free and fair competitive bidding against both the fairness to the parties and the Government's contractual needs requires informed judgments. \* \* \*"

When the July 1974 decision was issued we were convinced that prompt action leading to a possible termination of E-Systems' contract would be a fair result and would not unduly interrupt the Army's contractual processes, particularly since our decision was issued less than 120 days after the date of E-Systems' contract.

In September 1974, the Army informed us that, although it had "no disagreement with the procurement philosophy expressed in the decision," it was impractical to carry out our recommendation because: (1) delay attending the carrying out of the recommendation would "preclude meeting critical international commitments" for delivery of the items to the foreign governments; (2) meaningful competition could not be anticipated under another round of negotiations since, of the three offerors who submitted prices in March 1974, only E-Systems, in the Army's judgment, was in a position to compete effectively; (3) E-Systems had already incurred costs under the contract of \$2,282,236 through June 30, 1974; and (4) costs resulting from termination of E-Systems contract would be \$1,671,306 as of September 1, 1974, most of them fixed as of June 30, 1974. Expanding on the international political effects which would be caused by carrying out GAO's recommendation, the Army's Director of Materiel Management said:

"Any further delay is intolerable and would further embarrass the United States of America in its international agreements and adversely impact our support of friendly nations in their role as our front line of defense. It is essential that these obligations be met."

We treated the Army's September letter as a formal request that we reconsider our July decision. Review of the Army's letter and attached documents convinced us that adverse effects would flow from carrying out the recommendation. Taking into account the new information, we concluded that, particularly in light of anticipated termination costs, the recommendation in our July decision should be withdrawn and so stated in our December 26 decision.

Nevertheless, our December 26 decision also contained a new recommendation designed to advance Bristol's interest in correcting the improper award. We formally recommended that the Army not exercise the option in E-Systems' contract. This action would eliminate the gravamen of the protest and any possibility of windfall profits by E-Systems on the option quantity. The Army has since informed us that because of our recommendation it will not exercise the option. Thus, any additional radio sets and transmitters which may be required will be released to competition under a future procurement as a result of our review of Bristol's protest.

We wish to point out that under our present Bid Protest Procedures a contracting agency must request reconsideration of a bid protest decision within 10 working days from its receipt. Thus, the Army's September 6, 1975, request for reconsideration would have been rejected as untimely.

In summary, Mr. Chairman, we found that the award cannot be characterized as illegal but that the evaluation was inappropriate. For that reason we recommended possible termination for convenience. However, in balancing the need to protect the integrity of the system and the Government's interests in the particular case, we concluded on reconsideration that the basic contract should be permitted to stand but that the option should not be exercised.

Mr. Chairman, this completes my prepared statement. I will be pleased to respond to your questions.