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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** EEV, Inc.

**File:** B-261297; B-261297.2

**Date:** September 11, 1995

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Timothy J. Waters, Esq., and Jon W. van Horne, Esq., McDermott, Will & Emery, for the protester.

Gena E. Cadieux, Esq., and Richard D. Vergas, Esq., Department of Energy, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Where there is no reasonable possibility that the protester was prejudiced by the agency's failure to obtain revised prices to reflect its decision, after receipt of proposals, to not evaluate options as contemplated by the solicitation, because there is no suggestion that the offerors' pricing would have changed had they known that the options would not be evaluated, the protest will not be sustained.

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## DECISION

EEV, Inc. protests the award of a contract by the Stanford Linear Accelerator Center (SLAC), a Department of Energy (DOE) management and operating (M&O) contractor, to Philips Semiconductors under request for proposals (RFP) No. 7563 for high energy klystron tubes.<sup>1</sup>

We deny the protest.

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<sup>1</sup>A klystron tube is a large vacuum tube used for amplifying microwaves. The tube itself is approximately three feet high and is surrounded by shielding, and, with the attached socket and vacuum and cooling system connections, the entire device is about seven feet high. Continuous wave klystron tubes, such as those solicited here, are used with circular electron machines for particle physics research.

The RFP requested detailed responses from the offerors demonstrating their compliance with the specification and delivery requirements. The RFP also requested unit prices and extended prices on a proposal form for alternative base quantities of four, five, six, seven, and eight klystron tubes in accordance with Stanford University Specification No. PS-341-320-01-R1 (hereafter R1). Prices for alternative base quantities were solicited because of budgetary considerations. The RFP also requested unit and extended prices for two options, exercisable by SLAC on or before December 31, 1998, for the rework of one failed klystron tube and for two additional klystron tubes. Under the RFP, award was to be made to the technically acceptable offeror meeting the required delivery date, "based on the lowest price for the [SLAC] selected [base] quantity [i.e., four, five, six, seven, or eight] totaled with" the offered option item prices. SLAC reserved the right to conduct discussions on the proposals or to make award on the prices initially quoted.

In response to offeror concerns raised during a pre-proposal conference, SLAC issued an addendum to the RFP which requested additional pricing for klystron tubes meeting different SLAC specification requirements (hereafter R2). The prices for the R2 klystron tubes were to be submitted on an "alternate proposal form" that used the same format as the original proposal form.

Philips submitted its prices on the original proposal form based on the original R1 specification and offered eight tubes for \$2,160,000 (unit price of \$270,000). Philips priced the optional rework of a failed klystron tube at \$230,000 and priced the optional two tubes at \$200,000 each.

EEV submitted its prices only on the alternate proposal form, offering eight R2 klystron tubes for an extended price of \$2,162,400 (unit price of \$270,300), making it the second low offeror for this number of klystron tubes.<sup>2</sup> Instead of entering one firm price, or percentage of price, for the optional rework item as requested, EEV listed a schedule of various possible repairs based on percentages of the new tube price depending on the nature of the repairs. EEV proposed these percentages as maximum prices and stated it would quote lower prices where possible depending on the cost of the repairs for specific cases. EEV also stated on its alternate proposal form that it reserved the right to declare a klystron tube beyond economic repair. EEV's prices for the optional two tubes were identical to its base quantity unit prices for quantities of six, seven, or eight tubes, contingent on SLAC's initially ordering four, five, or six base quantity tubes, respectively.<sup>3</sup>

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<sup>2</sup>EEV's price was low for each of the other base quantities.

<sup>3</sup>EEV did not price optional tubes based on SLAC's initially ordering seven or eight base quantity tubes.

After receipt of offers, SLAC determined that, of the four offerors, only EEV and Philips would be considered for award. SLAC officials visited both EEV's and Philips's manufacturing facilities to determine whether the firms were technically capable of meeting the delivery schedule and to inspect their facilities. During these visits, offeror officials answered technical questions about their proposals. SLAC officials did not bring up any problems regarding EEV's pricing of its option items.

Both EEV and Philips were found technically acceptable. SLAC then determined that Philips's and EEV's prices were sufficiently low to allow the purchase of eight klystron tubes and that there was no longer any need for the options.<sup>4</sup> Consequently, the option items were not evaluated, and award was made to Philips based on its low total price for the eight base quantity tubes.

Upon learning of SLAC's award to Philips, EEV protested that SLAC had disregarded the award criteria by making award without considering the option prices. SLAC responded that EEV's pricing for the option items was "nonresponsive" because a firm price for the option items could not be determined. EEV contends, however, that SLAC should have discussed EEV's "nonresponsive" pricing during the site visit; that SLAC should have provided offerors with an opportunity to submit revised proposals when it determined that the option items were no longer needed; and that Philips submitted its offer based on the assertedly superseded R1 specifications.

SLAC's failure to base award on the option items was contrary to the terms of the solicitation stating that option prices would be considered in making the award selection. See Data Test Corp., B-193205, May 7, 1979, 79-1 CPD ¶ 312. Upon determining that its needs had changed after proposals had been received, in that it no longer required the option items, SLAC should have provided offerors with an opportunity to submit revised proposals. See Department of State--Recon., B-243974.4, May 18, 1992, 92-1 CPD ¶ 447; Afftrex, Ltd., B-231033, Aug. 12, 1988, 88-2 CPD ¶ 143. Moreover, since this is a negotiated procurement, where the concept of responsiveness is not strictly applicable, see Ascom Hasler Mailing Sys., Inc., B-257327, Sept. 22, 1994, 94-2 CPD ¶ 137, and since we consider that discussions did take place here,<sup>5</sup> EEV's problematic pricing of its option items was a matter that

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<sup>4</sup>According to SLAC, there was no need for the two optional klystron tubes and the prices proposed for tube rework made it more economical to perform the repairs in-house or to issue a purchase order to the supplier of the tube for repairs at the time the work was necessary.

<sup>5</sup>Because the communications during SLAC's visit to the protester's manufacturing  
(continued...)

should have been raised by SLAC during its discussions with that firm. See Microeconomic Applications, Inc., B-258633.2, Feb. 14, 1995, 95-1 CPD ¶ 82.

However, competitive prejudice is an essential element of every viable protest, and where no reasonable possibility of prejudice is shown or is otherwise evident from the record, our Office will not sustain a protest, even if a deficiency in the procurement is apparent. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209; Network Solutions Inc., B-234569, May 15, 1989, 89-1 CPD ¶ 459. Although EEV contends that offerors' proposal pricing strategies "could" have changed if offerors had known that the option items were no longer required, EEV has offered nothing to explain how the omission of option prices from the evaluation reasonably could have affected the price for its base bid item for the quantity of eight tubes selected by SLAC. We first note that Philips, in response to the protest, stated categorically that it does not price its products based on spares or option acquisition programs. In addition, there is no indication that had EEV known beforehand that the option items would be excluded its base price for the quantity of eight tubes would have been different. Indeed, EEV's unit prices for the optional tubes were identical to unit prices for the base quantity tubes and dependent on the quantity of base bid tubes initially ordered by SLAC. There is thus no reasonable possibility for believing that either offeror would have lowered its base prices had it known that the options would not be evaluated. See Browning-Ferris Indus. of the S. Atlantic, Inc.; Reliable Trash Serv. Co. of Md., Inc., B-217073; B-218131, Apr. 9, 1985, 85-1 CPD ¶ 406.<sup>6</sup>

EEV's contention that Philips improperly submitted an offer based only on the original R1 specification, and not on the alternate R2 specification, which EEV alleges supersedes the R1 specification, is without merit. The RFP, as amended, requested that offerors submit a proposal based on the R1 specification and a proposal based on the R2 specification. The alternate R2 specification did not replace or amend the original R1 specification, and klystron tubes meeting either specification were acceptable to the agency. Any price difference attributable to EEV's offering to a specification different from what Philips offered to is the result of a business decision by EEV to submit only a proposal based on the alternate R2

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<sup>5</sup>(...continued)

facility involved information essential for, and considered in, determining the acceptability of EEV's proposal, we think the communications between SLAC and the protester constituted discussions. See The Hotel San Diego, B-260971, July 7, 1995, 95-2 CPD ¶ 4.

<sup>6</sup>We need not consider EEV's contention that Philips's option pricing was unbalanced since SLAC did not evaluate the option items.

specification.<sup>7</sup> See Techniarts Eng'g, B-238520.5, B-238520.6, Dec. 31, 1991, 92-1 CPD ¶ 20.<sup>8</sup>

The protest is denied.

\s\ Ronald Berger  
for Robert P. Murphy  
General Counsel

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<sup>7</sup>We note that the two other offerors responded to both specifications, with one offering identical prices for each, and the other offering reduced prices for the alternate R2 specification.

<sup>8</sup>EEV also contends that Philips did not properly sign the proposal. This contention has no merit. Philips's proposal contained a signature by a Philips official, who could apparently bind the company firm, that evidenced that Philips intended to be bound by its offer. See Southern Technologies Inc., B-256190, May 23, 1994, 94-1 CPD ¶ 321.