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Comptroller General
of the United States

Washington, D.C. 20548

143411

Decision

Matter of: KPMG Peat Marwick

File: B-251902.3

Date: November 8, 1993

William A. Roberts, III, Esq., Brian A. Darst, Esq., and Alice Crook, Esq., Howrey & Simon, for the protester.
Mark W. Foster, Esq., and Gregory H. Gust, Esq., Zuckerman, Spaeder, Goldstein, Taylor & Kolker, and William A. Shook, Esq., Preston, Gates, Ellis & Rouvelas Meeds, for Development Alternatives, Inc.; and William R. Thomas, III, for International Science and Technology Institute, Inc., interested parties.
Jonathan Silverstone, Esq., Agency for International Development, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAC, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's decision to exclude protester from reopened competition because it possesses evaluation and competition sensitive materials provided in response to a Freedom of Information Act request filed after the initial award is sustained where the protester did not act improperly in requesting the information, and where the information at issue--while usually not released to offerors--could be provided to the other offerors to ameliorate any competitive advantage to the protester as a result of the release.

DECISION

KPMG Peat Marwick protests its exclusion from a reopened competition under request for proposals (RFP) No. OP/B/AEP-92-003, issued by the Agency for International Development (AID) for technical assistance for macro and international economic analysis. Peat Marwick argues that the agency's decision to exclude it from the competition due to Peat Marwick's possession of information related to the previous evaluation--provided to it by the agency--is unreasonable.

We sustain the protest.

PUBLISHED DECISION
73 Comp. Gen. ____

OVERVIEW

This protest, the third review by our Office of issues related to this procurement, was filed after AID advised Peat Marwick that it would not be allowed to submit a revised best and final offer (BAFO) as part of a reopened competition for these services. The competition here was reopened as corrective action in response to a protest filed by Peat Marwick against the agency's first selection decision. The contracting officer excluded Peat Marwick from further consideration because the company gained access to "source selection information" via the agency's response to a Freedom of Information Act (FOIA) request. In its FOIA response, the agency provided information that it now believes gives Peat Marwick an unfair competitive advantage.

We conclude that the contracting officer's decision to exclude Peat Marwick from the reopened competition unreasonably imposes an undue hardship on Peat Marwick which, like all offerors on government procurements, is entitled to fair and equitable treatment. Our conclusion that the contracting officer's action is unreasonable is based on the recognition that the perceived competitive advantage is not the result of any improper action by Peat Marwick, and that the agency could level the competitive playing field through the less extreme approach of distributing the information provided to Peat Marwick to all the offerors.

BACKGROUND

On June 8, 1992, AID issued this solicitation seeking short-term technical and advisory services related to macroeconomic policy. The RFP anticipated award of indefinite quantity contracts to two offerors, with both contracts having a 39-month period of performance. Seven firms responded to the RFP, including Peat Marwick, and on September 29, awards on the basis of initial proposals were made to Nathan Associates and Developmental Alternatives Incorporated (DAI).

After Peat Marwick learned that its proposal had not been selected for award, a representative of the company filed a FOIA request for information to help the company assess its "performance on this particular proposal and to determine the feasibility for competing for future work in this area." Specifically, Peat Marwick requested the following information:

1. the technical proposals submitted by the two awardees, Nathan and DAI;

2. the combined technical and cost scores for Peat Marwick, Nathan and DAI;

3. the scores under each of the four technical evaluation factors in the RFP for Peat Marwick, Nathan and DAI;

4. the "proposer's price" or the average fixed daily rate, in the Nathan and DAI proposals; and,

5. the maximum fixed daily rate schedule.

By letter dated December 17, AID responded to Peat Marwick's FOIA request, providing the following information:

1. redacted versions of the Nathan and DAI technical proposals, released in accordance with the instructions of both awardees;

2. a 1-page table entitled "Proposals Ranked in Order of Weighted Technical and Price Scores," ranking the 7 offerors by their total weighted scores;

3. a 1-page table, without a heading, listing the maximum fixed daily rates of an unidentified offeror;

4. a 1-page document, with the handwritten title "Attachment One," showing 4 tables ranking the 7 offerors by different calculation methods (each table includes each offeror's point score and combined average daily rate);

5. 5 score sheets (apparently prepared by 5 different evaluators), entitled "Selection Criteria Summary," showing the scores given each of the 7 offerors on each of the 4 evaluation factors, and 21 subfactors; and,

6. handwritten narrative comments prepared by an unidentified evaluator assessing the 7 offerors under each of the 4 evaluation factors.

Upon reviewing AID's FOIA response, Peat Marwick learned that the agency had made its award decision on the basis of initial proposals without holding discussions, and had awarded to other than the lowest-priced offeror. Thus, on

January 4, 1993, Peat Marwick filed a protest in our Office challenging the award without discussions, and arguing that AID failed to follow the evaluation methodology stated in the solicitation.

AID acknowledged that Peat Marwick's initial protest had merit, and on March 1 advised our Office that the agency would "reopen the procurement and request BAFOs, taking whatever action is possible and appropriate to deal with the information access problems." Based on the promised corrective action, our Office dismissed the protest. KPMG Peat Marwick, B-251902, Mar. 4, 1993.[1]

On April 1, all offerors were notified that the competition was being reopened and were asked to reconfirm their interest in the procurement. In this notice, AID informed the other offerors of the FOIA response provided to Peat Marwick, and of Peat Marwick's recommendation that the same materials be provided to all offerors electing to participate in the reopened competition. The notice to offerors also asked for suggestions about how AID should handle the FOIA disclosure. Most of the offerors expressed continued interest in the procurement and suggested that Peat Marwick be excluded from the competition. At least one offeror suggested that the agency simply provide the material to the other offerors.

In a memorandum dated June 7, the contracting officer set forth the facts surrounding the FOIA request and response, and concluded that Peat Marwick should be disqualified from participating in the reopened competition. The contracting officer based her decision on the fact that Peat Marwick "possesses information concerning its competitors' initial proposals and their evaluation and scoring." Thus, according to the contracting officer, exclusion of Peat Marwick is necessary "to assure a full and fair competition and to protect the integrity of the procurement system because it reasonably appears that the information would give the firm an unfair competitive advantage."

On June 24, Peat Marwick was advised of the decision to exclude it from the reopened competition, and was provided with the June 7 contracting officer's decision memorandum. On June 30, Peat Marwick protested to our Office, arguing that the agency's decision to exclude the firm from the reopened competition is unreasonable and inconsistent with prior decisions of our Office.

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[1]Subsequently, our Office denied a request from Peat Marwick that it be reimbursed its costs for pursing the protest. KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

DISCUSSION

This protest, challenging AID's decision to exclude Peat Marwick from this competition, presents a matter of first impression for our Office. According to AID, its actions here are supported by prior decisions of our Office which have upheld a contracting officer's decision to exclude an offeror when the contracting officer finds exclusion necessary to protect the integrity of the competitive procurement process. Peat Marwick argues that the decisions cited by AID have no application here, and claims that AID's actions are unreasonable in the absence of any improper act by the protester, or in the absence of any conflict of interest on the protester's part.

The problem created by the release of information to Peat Marwick is not the result of any improper action by the firm; rather, Peat Marwick simply exercised its statutory right to file a FOIA request after contracts had been awarded under the RFP. Further, the information provided by the agency to Peat Marwick can be provided to the other offerors to level the playing field. Accordingly, as explained in detail below, we see no reason to exclude Peat Marwick, an otherwise responsible and competent offeror, from this follow-on competition.

Our review of an agency's decision to exclude an offeror from a competition in order to remedy a problem with a particular procurement requires a balancing of competing interests set forth in the Federal Acquisition Regulation (FAR). On the one hand, contracting officers are granted wide latitude in their business judgments to safeguard "the interests of the United States in its contractual relationships." FAR § 1.602-2. On the other, the same section of the FAR requires contracting officers to ensure impartial, fair, and equitable treatment of all contractors. See FAR § 1.602-2(b).

As a preliminary matter, we look first at the contracting officer's decision to take steps to correct the problem arising from the FOIA response that AID provided to Peat Marwick. According to the contracting officer's memorandum, the decision to exclude Peat Marwick is based on the firm's possession of "information concerning its competitors' initial proposals and their evaluation and scoring." Thus, the contracting officer concluded that excluding the company "is necessary to assure a full and fair competition and to protect the integrity of the procurement system because it reasonably appears that the information would give the firm an unfair competitive advantage."

There is little doubt that the information provided to Peat Marwick will impart a competitive advantage in a reopened competition. While we need not address each of the items separately, we note that the materials provided to Peat Marwick include one of the evaluator's narrative assessments of the strengths and weaknesses of each offeror, plus tables showing each offeror's technical scores and daily rates. Given the obvious value of such information in a reopened competition, we find reasonable the contracting officer's decision to attempt to alleviate the competitive advantage provided Peat Marwick by the agency's FOIA response; however, we do not think that the remedy chosen--exclusion of Peat Marwick from the competition--is warranted.

AID argues that Peat Marwick's exclusion from the competition here is appropriate since a contracting officer may exclude an offeror from a competition to protect the integrity of the procurement system where it reasonably appears that the firm may have obtained an unfair competitive advantage.[2] In support of its contention, AID points to our prior decisions in NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638, and in Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435.

In our view, AID's actions are not supported by our prior decisions in NKF Engineering and Compliance Corporation. In those cases, we concluded that exclusion was appropriate, in part, because the irregularity involved was the result of improper conduct by the offeror. See Compliance Corp., supra (exclusion based on the appearance of impropriety

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[2]Although not directly applicable to the situation here, FAR subpart 9.5, "Organizational and Consultant Conflicts of Interest," defines unfair competitive advantage as arising:

> "where a contractor competing for award of any [f]ederal contract possesses--
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> > "(1) Proprietary information (as defined in 3.104-4(j)) that was obtained from a [g]overnment official without proper authorization; or
> >
> > "(2) Source selection information (as defined in 3.104-4(k)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract."

FAR § 9.505(b).

created by "industrial espionage" involving an attempt to induce an employee of competing offeror to sell proposal information); NKF Eng'g, Inc., supra (exclusion based on the appearance of impropriety created by the hiring of the contracting officer's representative between submission of initial proposals and receipt of BAFOs, and a subsequent significant drop in that offeror's BAFO price).[3] In contrast, when the record did not show that there was a likelihood of an actual impropriety or conflict of interest, we have overturned an agency's decision to exclude an offeror from the competition. See NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291.

AID also overlooks the fact that given the potential harsh effects of excluding an offeror--both on the contractor, and sometimes on the competition--when circumstances permit, we have recommended less drastic remedies to alleviate problems associated with an offeror's continued participation in a procurement. For example, even where we sustained a protest challenging selection of the awardee based on a conflict of interest--specifically, the fact that a former government employee with access to restricted information helped prepare the awardee's proposal--we expressly rejected the remedy of excluding the awardee from the competition and instead recommended releasing the restricted information to all the offerors and calling for a new round of BAFOs. Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, aff'd, Brown

[3]Both Compliance and NKF received additional review in the federal courts. In Compliance Corp. v. United States, 22 Cl.Ct. 193 (1990), the Claims Court denied Compliance's request for injunctive relief against an agency's decision to disqualify Compliance for consideration for award. The decision relied on the analysis in both our initial decision denying Compliance's protest of the exclusion decision, and our reconsideration decision (both cited above). In NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986), the Federal Circuit overturned an order of the Claims Court enjoining an agency from proceeding with an award without reexamining the decision to disqualify NKF. The Federal Circuit's decision dissolving the injunction and concluding that the decision to exclude NKF was reasonable, in effect, reinstated our decision denying NKF's protest of its exclusion.

Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299.[4]

Here, there is no suggestion that Peat Marwick acted improperly in its attempt to obtain information about the earlier procurement--rather, the firm simply exercised its statutory right to make a FOIA request at the conclusion of the procurement. As a result, we see no reasonable basis to bar Peat Marwick from the reopened competition when a significantly less onerous remedy is available to correct an advantage given an otherwise responsible and competent offeror.

This conclusion is consistent with our prior decisions interpreting whether or how to remedy the competitive advantage that develops due to the release of evaluation materials or proprietary information. In such cases we generally have rejected protesters' contentions that recipients of such information should be excluded from procurements to protect the integrity of the competitive process. See Computer Sciences Corp., B-231165, Aug. 29, 1988, 88-2 CPD ¶ 188; Aeronautical Instrument and Radio Co., B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170; Youth Dev. Assocs., B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126; White Mach. Co., B-206581, July 28, 1982, 82-2 CPD ¶ 89.

CONCLUSION AND RECOMMENDATION

We conclude that AID's decision to exclude Peat Marwick from the reopened competition strikes an unreasonable balance between the agency's attempt to ameliorate the competitive advantage given Peat Marwick, and imposing an economic hardship on one offeror to preserve the integrity of the competitive procurement system. As such, AID's actions violate the mandate of FAR § 1.602-2(b), requiring contracting officers to ensure impartial, fair, and equitable treatment of contractors.

In reopening the competition, AID should eliminate the competitive advantage given Peat Marwick by providing each offeror in the competitive range with the full text of the agency's December 17, 1992, FOIA response, with

[4]We have also suggested that agencies first explore providing information to other offerors before excluding contractors from a competition when attempting to ameliorate the effects of an organizational conflict of interest. See GIC Agric. Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263.

attachments.[5] If the evaluation of the new BAFOs results in the selection of different offerors, AID should terminate the contracts awarded originally and award new contracts.

In recommending that these materials be provided to all offerors, we are mindful that some of the information contained in the agency's FOIA response is not generally released to offerors. However, since the agency had already made an award at the time it released its FOIA response, it could waive its authority to protect the information. We also recognize that, in one sense, the release of the evaluation documents here arguably resembles an auction. Nonetheless, under the circumstances of this case, we conclude that eliminating an unfair competitive advantage by providing information to all offerors that has already been released to one--and for which continued protection may have been waived--outweighs the government's interest in not appearing to conduct an auction. Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. To the extent the agency can minimize the importance of the information it will release to the other offerors by undertaking a fresh review of all aspects of the revised proposals, we urge it to do so.

We also find that AID should reimburse Peat Marwick for its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f), Peat Marwick's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to AID within 60 days after receipt of this decision.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States

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[5]During the course of this protest, an interested party argued that Peat Marwick also gained an unfair competitive advantage by auditing one of the other offerors on behalf of AID during the course of the competition. To date, the agency has made no decision about the impact of that audit, and instead based its decision to exclude Peat Marwick solely upon the advantage given the firm by the agency's FOIA response, as set forth in the contracting officer's justification memorandum. While Peat Marwick denies that it gained any competitive advantage from the audit, this issue is not ripe for our consideration because there has been no agency decision on the matter.

Comptroller General
of the United States

Washington, D.C. 20548

239511

Decision

Matter of: Request for Advance Decision--Survivor Benefit Plan Beneficiary of Technical Sergeant Weldon C. Sikes, U.S. Air Force, Retired

File: B-252787

Date: November 8, 1993

DIGEST

Where within 1 year of divorce decree, neither member nor ex-wife filed for former spouse coverage or a "deemed election", respectively, even though divorce decree stated that member was to maintain Survivor Benefit Plan for ex-wife, subsequent nunc pro tunc order which declares marriage dissolved (phrase which was omitted from original decree), does not give a new 1 year period for "deemed election" request.

DECISION

This is in response to a request for an advance decision from the Defense Finance and Accounting Service (DFAS) regarding the proper beneficiary of the Survivor Benefit Plan (SBP) of Technical Sergeant Weldon C. Sikes, U.S. Air Force, Retired.[1]

The issue presented is whether the date of an imperfect divorce decree or the date of the nunc pro tunc order which corrected the defect begins the running of the 1 year period in which a former spouse can obtain a deemed election of SBP coverage.

In 1957, Sergeant Sikes married Virginia Sikes. He retired in 1975 and at that time elected the maximum spouse and child SBP coverage. In March 1989, the District Court, El Paso County, Colorado, issued an order entitled "Final Orders and Dissolution of Marriage" which awarded Virginia Sikes 42 percent of Sergeant Sikes retired pay and stated that the member should keep the SBP coverage for Virginia in effect. During the 1 year from the date of the order, the member did not file a former spouse election request as required by 10 U.S.C. § 1448 (b)(3) and Virginia did not file a request for a deemed election under 10 U.S.C. § 1450

[1]The request has been assigned DFAS control number 93-15-M.

(f)(3)(A) and (B). Virginia did apply in February 1991 for the direct payment of the portion of the member's retired pay awarded her as allowed under the provisions of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408).

The member did not notify DFAS, Denver, Colorado of his divorce until December 1990 at which time the SBP deductions were discontinued and the amount collected from April 1989 through December 1990 were refunded to the member.

On October 28, 1990, the member married Linda Sikes and she became an eligible SBP spouse beneficiary on their first anniversary on October 28, 1991, at which time the SBP deductions resumed from the member's retired pay.

In April 1991, Virginia Sikes' attorney advised DFAS that a review of the March 15, 1989 court order, though titled "Final Orders and Dissolution of Marriage", did not actually declare the marriage dissolved. Therefore, the attorney argued, the marriage was still valid and Virginia should remain the member's SBP spouse beneficiary.

On February 6, 1992, the El Paso County District Court issued an order that dissolved the marriage "nunc pro tunc March 6, 1989."

By letter of August 24, 1992, Virginia Sikes requested that an election of former spouse coverage be deemed for her. DFAS found that since the status of the marriage was in doubt until the nunc pro tunc order, the 1 year period to request a deemed election should begin to run from the date of that order and therefore, the request for the deemed election was granted and the beneficiary was changed from the member's current spouse to Virginia Sikes.

By letter of January 26, 1993, the member protested the change in beneficiary to his former spouse contending that the divorce was final in March 1989 and that the request for the deemed election by Virginia was therefore made over 1 year from the date of the divorce and should not have been honored.

Nunc pro tunc refers to acts allowed to be done after the time when they should have been done, with a retroactive effect, as if regularly done. Black's Law Dictionary (Rev. 4th Ed.). A judgment entered nunc pro tunc may be given effect from different dates for different purposes. For some purposes, the judgment may be given effect from the actual date of its nunc pro tunc entry (Borer v. Chapman, 119 U.S. 587 (1887)) but generally, a nunc pro tunc entry is given a retrospective operation as between the parties

thereto, so as to take effect from the time of the original judgment. 46 Am. Jur. 2d Judgments § 223 (1969).

In any event, here both parties to the divorce treated it as final until it became evident that timely action to maintain former spouse coverage had not been taken. The member had remarried and Virginia had applied for a distribution of the retired pay of the member. It appears the sole reason for obtaining the nunc pro tunc order was to gain another 1 year "deemed election" period. To give effect to the order for this purpose and allow a new 1 year period for a deemed election beginning on the date of the order would, in our view, be an improper circumvention of the specific statutory time limit on a deemed election for the benefit of Virginia.

Accordingly, no new 1 year period for a "deemed election" was created by the nunc pro tunc order, and Linda is the proper SBP beneficiary.

for William J. Scanlon
Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

10201011

Decision

Matter of: Space Vector Corporation

File: B-253295.2

Date: November 8, 1993

Lars E. Anderson, Esq., J. Scott Hommer, III, Esq., and W. Craig Dubishar, Esq., Venable, Baetjer and Howard, for the protester.
Matthew S. Simchak, Esq., Donald P. Arnavas, Esq., David A. Vogel, Esq., and James J. Gildea, Esq., Wiley, Rein & Fielding, for Orbital Sciences Corporation/Space Data Division, an interested party.
William S. Zanca, Esq., Ballistic Missile Defense Organization, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A procuring agency's sole-source award for missile launches was reasonably justified where, after evaluating the protester's qualification package submitted in response to the agency's Commerce Business Daily announcement, the agency determined that only the awardee could meet its actual program needs within the time required, and the agency's noncompetitive procurement did not arise from a lack of advance procurement planning.

2. An agency's total-package procurement of several missile launches in a demonstration program, rather than separately competing the launches, was reasonable where the demonstration program requires that each missile launch exhibit identical performance parameters, and the record shows that different contractors' missiles would exhibit different performance parameters.

DECISION

Space Vector Corporation protests the award of a sole-source contract to Orbital Sciences Corporation/Space Data Division by the Ballistic Missile Defense Organization (BMDO),[1]

[1]BMDO was formerly known as the Strategic Defense Initiative Organization.

Department of Defense, for launch services for the Lightweight Exoatmospheric Projectile (LEAP) program. Space Vector argues that BMDO unreasonably determined that Space Vector was not a viable source to perform the contract work, that BMDO did not perform advance procurement planning that would have allowed for a competitive procurement, and that Orbital has an organizational conflict of interest and received source selection sensitive information not available to Space Vector.

We deny the protest in part and dismiss it in part.[2]

One of the purposes of the LEAP program is to develop an effective theater missile defense system, by developing and testing the integrated technologies necessary to acquire, track and destroy incoming ballistic missiles. In 1991 BMDO and the Department of the Navy initiated a technology demonstration program to demonstrate that LEAP program technologies could be integrated with existing Navy missile systems into a ship-based theater ballistic missile defense system. Essentially, the Navy LEAP program involves testing whether a ship launched and controlled interceptor missile, when integrated with satellite reconnaissance, can intercept a target missile.

BMDO and the Navy began defining the program requirements in June 1991, and this process culminated in the "top-level mission requirements" contained in BMDO's Technical Requirements Document (TRD) dated November 24, 1992.[3] This document provided that the Navy would be responsible for the ship-based "interceptor" missiles while BMDO would be responsible for the integration and launching of the ground-based "target vehicles"--Aries missiles with support avionics and controls. The Aries target vehicle is to be launched from the Goddard Space Flight Center, Wallops Flight Facility, Virginia, and to fly easterly over the Atlantic Ocean to be acquired and tracked by a Navy missile cruiser offshore.

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[2]A protective order was issued in this case. Space Vector's and Orbital's counsel, and an expert/consultant employed by Space Vector's counsel, were admitted under the protective order and received access to protected material. Our decision is based upon protected, confidential information and is necessarily general.

[3]The TRD was compiled by BMDO's systems engineering and technical assistance (SETA) contractor in November 1992, based upon input from BMDO and the Navy.

The Navy LEAP technical demonstration program contemplates a series of missile launches, each incorporating information learned from the previous launch. Before the TRD was finalized, an interceptor missile was launched in Flight Test Vehicle (FTV)-1, in September 1992, to validate the interceptor's capabilities. The FTV-2 launch, in September 1993, also involved the launch of only the interceptor missile to test the LEAP ejection capability. These launches did not involve the Aries target vehicle.

The TRD provided for the required launches of the target vehicle in the FTV-Technical Demonstration (TD), FTV-4 and FTV-5. The FTV-TD was the first launch of the Aries target vehicle to demonstrate its delivery capability, as well as the tracking capability of the Navy missile cruiser weapon systems and of the satellite tracking systems. This launch was scheduled to take place in October 1993. FTV-3 contemplated a May 1994 launch of only the interceptor missile (no target vehicle was involved), incorporating all the data learned from FTV-1 through FTV-TD. FTV-4 contemplated a July 1994 launch of both the target vehicle and the interceptor. FTV-5 contemplated an October 1994 attempt to intercept the target vehicle with the interceptor missile. The TRD required a back-up target vehicle to support the FTV-4 and FTV-5 launches as a contingency should the primary launch vehicle not be ready to launch.[4]

The TRD stated various size, weight, and performance requirements for the target vehicle and specified ground support equipment requirements. In addition, the TRD provided that the target vehicle should be:

> "designed to optionally include a GPS [global positioning system] receiver to provide accurate position and attitude data during the mission. The GPS receiver will be used to verify range radar tracking accuracy and target vehicle performance in the target demonstration flight. A GPS receiver will be optional on FTV-4 and FTV-5 for further verification of radar and vehicle performance and as a potential back-up for the LEAP fire control solution."

Initially, BMDO program officials presumed that the four required Aries target vehicles would be procured from Orbital under Contract No. SDI084-90-C-0004 between BMDO

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[4]If the back-up vehicle was not required for either FTV-4 or FTV-5, BMDO intended to launch it on a subsequent test project not later than November 1994.

and Orbital.[5] Under this contract, Orbital provided target vehicles and launch services in support of BMDO's Flight Test Services Program.[6] See Space Servs. Inc. of Am.; Space Vector Corp., B-237986; B-237986.2, Apr. 16, 1990, 90-1 CPD ¶ 392. On October 2, 1992, due to a lack of funding for fiscal year 1993, BMDO stopped work on 5 of the 15 LEAP programs under the contract. At that time, Orbital was building four Aries target vehicles for one of the canceled LEAP programs; the Aries vehicles were estimated to be approximately 80 percent complete.[7] On December 21, 1992, Orbital's contract was partially terminated for the convenience of the government; this included the program for which Orbital was building the four Aries vehicles.

In late November 1992, BMDO's contracting officer decided that Orbital's prior contract should not be modified to provide the necessary launch services for the Navy LEAP target demonstration program. The contracting officer was concerned that the probable increased contract costs entailed in the Navy LEAP launches could be considered a "cardinal change" beyond the scope of the original contract. Accordingly, BMDO's launch services director was informed that the Navy LEAP launches should be either acquired competitively or, if appropriate, through a sole source procurement. The launch services director was also informed that a competitive acquisition would ordinarily take about 6 months.

Given the time estimated to conduct a competitive procurement and the time required for design, development, fabrication and testing by a contractor to meet the launch requirements, the launch services director concluded that only Orbital, by virtue of its prior contract work and available assets, could provide the launches within the time required. On January 19, 1993, the launch services director requested that Orbital be "'turned-on' contractually by the end of next week." The launch director was advised that a CBD announcement of the sole source action must be published

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[5]The November 24, 1992, TRD originally identified Orbital as the source for the target vehicle. The TRD was later amended to remove any reference to Orbital.

[6]Orbital was required to provide and launch up to 20 target vehicles.

[7]At least as early as October 21, 1992, BMDO program officials had determined that four Aries target vehicles would be required to satisfy the Navy LEAP program requirements, which BMDO believed could be provided under Orbital's existing contract.

before any such action could be commenced. On January 26, 1993, BMDO prepared a purchase request to acquire the Navy LEAP launches from Orbital on a sole source basis.

On February 9, BMDO published a synopsis in the Commerce Business Daily (CBD) for the proposed sole source procurement of the Navy LEAP launches from Orbital. In pertinent part, potential offerors were informed that:

> "[BMDO] intends to award a cost-plus-fixed-fee letter contract to [Orbital] for launch and integration services for four . . . LEAP technology, demonstration, suborbital targets which consist of an Aries I booster (M56A1) with a support avionics and control section. The target vehicle must have the ability to achieve approximately 350 kilometers (km) apogee and a range of approximately 500 km. The integration services include all necessary services and mission peculiar items required to develop acceptable targets for the Navy LEAP Seekers. The launch dates for the Navy LEAP targets are October 1993, July 1994, and September 1994. Two (2) target vehicles, a primary and back-up, will be required for the July and September 1994 launches with the back-up being launched at a [to be determined] date. [Orbital] is the only known source with launch vehicle assets capable of meeting the October 1993 launch date. Interested contractors who are capable of meeting the October 1993 launch date are invited to submit a qualification package to include photographs of hardware, status of all relevant assets, detailed milestone schedules and performance capability which demonstrates the ability to provide a qualified launch vehicle and available assets to support the October 1993 and subsequent launch dates."

The qualification packages were required to be submitted within 15 days of the date of the CBD synopsis. The TRD was not provided to potential offerors, although Orbital received a copy of the TRD from BMDO's SETA contractor on December 1, 1992.

On February 11, BMDO issued Task Order No. 93-1 under Orbital's prior contract for services in support of the Navy LEAP program, whereunder Orbital was required to provide "engineering efforts to establish Navy LEAP target mission requirements, mission planning concepts, system engineering, vehicle configuration, and detailed engineering design flowdowns." Orbital was informed that the TRD should be used as the "baseline" to develop mission requirements

and hardware design. On that same date, Orbital submitted its task plan in response to the task order.[8] In response to the task order, Orbital prepared several documents: the Mission Requirements Document (that defined the top-level mission requirements); the System Requirements Document (that traced the mission requirements to design requirements); and the System Design Document (that documented the actual design of the system).

On February 23 and 24, BMDO received qualification packages from Space Vector and Lockheed Missile and Space Co. Both were determined to be not qualified for similar reasons. Regarding Space Vector's package, BMDO determined that Space Vector's proposed 8-month schedule to perform the October 1993 target demonstration launch was 5 months beyond the required October launch date, assuming a date of July 15 for contract authority to proceed.[9] This proposed 8-month effort was believed by BMDO to be overly optimistic in any case, even assuming the necessary limited competition could be completed earlier. Of greatest concern to BMDO was that Space Vector did not propose a GPS receiver or propose any time in its schedule for integrating the receiver onto their missile.[10] Finally, BMDO evaluated Space Vector's package as providing for only three target vehicles, and not the required back-up vehicle.

During the week of March 15, BMDO conducted various oral discussions with Space Vector concerning Space Vector's proposed schedule and its apparent failure to provide for a back-up vehicle. On March 23, Space Vector provided additional information to BMDO supporting its proposed schedule and showing that it provided for a back-up vehicle. Space Vector also stated that it had learned "that technical and programmatic criteria other than that called for in the CBD may be used in the procurement of the Navy LEAP targets" and requested this further information. Space Vector was never provided with the TRD during the qualification process, even though the record shows that this document

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[8]Orbital received an advance copy of the task order on January 15 and began work on the task plan at its own risk.

[9]The contract authority to proceed date was calculated assuming a 5-month limited competition procurement cycle.

[10]Space Vector had not been informed that a target vehicle GPS system was required, so it is hardly surprising that it did not address this requirement.

was the basis on which its qualification package was evaluated.[11]

On March 25, BMDO submitted several written questions to Space Vector that in part stated that the "Mission Requirements Document states a requirement to have a GPS receiver on the target vehicle to provide location information to validate range radar data. This requires that the GPS data be transmitted real-time to the receiving station."[12] BMDO asked Space Vector whether it could easily integrate the GPS receiver onto its existing target vehicle configuration and how long the effort would take. Space Vector replied that it could perform the necessary GPS integration within its original 8-month schedule and, specifically, that "[i]ntegration and check-out of [the GPS] units, along with the other required components can be accomplished in two to four months, depending on mission requirements."

After evaluating Space Vector's responses to the agency's discussions, BMDO determined that Space Vector could not provide the contract services within the time required.[13] Specifically, the agency estimated that Space Vector would require approximately 12 to 18 months to fully integrate and test a GPS system, and that this would delay the October 1993 launch, which was considered to be a firm date, by more than 7 months.[14] The agency also questioned whether Space Vector could perform the necessary range support services within the time required.

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[11]Space Vector claims that BMDO's evaluation of its submission was also based upon the documents Orbital had prepared under Task Order No. 93-1. While BMDO denies these assertions, there is evidence in the record that supports Space Vector's claims. However, inasmuch as Space Vector cannot meet BMDO's actual requirements concerning the GPS system that were otherwise identified in the TRD and to Space Vector, Space Vector was not prejudiced by any reference to Orbital's designs.

[12]The record indicates that this is the first time that Space Vector was informed of the GPS receiver requirements in the Navy LEAP project.

[13]Lockheed also received discussions and was determined to be not qualified for similar reasons.

[14]A schedule of 12 months was considered optimistic by BMDO, while 15 to 18 months was considered a more probable schedule.

On April 23, BMDO's acting director, pursuant to 10 U.S.C. § 2304(c)(1) (1988) as implemented by Federal Acquisition Regulation (FAR) § 6.302-1(a), signed a justification and approval (J&A) document for a sole-source award to Orbital "as the only known source with available and acceptable launch vehicle assets which is capable of meeting the required launch date." The J&A stated several reasons in support of the sole-source decision: (1) there was unacceptable technical and schedule risk that Space Vector and Lockheed would be unable to meet the October 1993 demonstration launch date; specifically, the two firms "could not perform the required end to end integration of the GPS receiver[15] without an estimated 7 [to] 11 month [delay in] the production schedule"; (2) the October 1993 launch date could not reasonably be delayed because it was coordinated and integrated with several other events; for example, the launch was coordinated with the availability of Navy LEAHY class TERRIER missile cruisers[16] that are scheduled for decommissioning by October 1994, and was integrated with a number of BMDO, Air Force, Army and Navy assets and programs, such as the Miniature Sensor Technology Integration (MSTI-2) satellite that will track the Aries target vehicle to provide data necessary to evaluate space-based passive sensor tracking capability;[17]

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[15]BMDO states that:

> "end to end integration of GPS receiver into an existing launch vehicle requires significant up front design and analysis not only in choosing and procuring flight hardware but also in the development of ground support equipment, software, and operational requirements. Complete testing must be conducted to determine the interactions between GPS and all other flight systems."

[16]The "TERRIER" missile is a type of missile and associated weapon system. The Navy for its part of the LEAP testing program will use a TERRIER missile variant known as the STANDARD Missile 2, Block-II/III (Extended Range). This is the only missile in the Navy's inventory with the performance capability to launch the LEAP. Only the LEAHY and BELKNAP class cruisers can launch this TERRIER missile, and only the LEAHY class cruisers have the requisite number of missile launchers and radars.

[17]The MSTI-2 satellite was scheduled for launch in September 1993, and has an estimated life of 6 months. The agency states that historically the MSTI satellite's useful life has been shorter than that originally estimated. This satellite will perform many more functions than just monitoring the Navy LEAP tests.

and (3) only Orbital had access to the required hardware necessary to satisfy the October 1993 launch--specifically, work-in-progress Aries target vehicles and miscellaneous hardware (including GPS receivers and ground stations) were available as termination inventory from Orbital's prior contract. The J&A cited the consumption of these assets as further justification for the use of non-competitive procedures as follows:

> "Providing these assets to another contractor would require the assets to be provided as [g]overnment [f]urnished [p]roperty (GFP) without firm knowledge by either the [g]overnment or the receiving contractor of the condition or stage of completion of the assets, which may not be compatible with the receiving vehicle, potentially leading to performance problems and claims."

After being notified of the rejection of its qualification package, Space Vector protested to our Office on May 3. Award of a cost reimbursement contract was made to Orbital on May 19, based upon the agency's written determination that urgent and compelling circumstances would not permit the agency to await our decision in this matter.

Space Vector disputes the agency's determination that Space Vector could not provide the required target vehicles, with integrated GPS receivers and ground stations, by the October 1993 launch date; in this regard, Space Vector contends that it was treated unfairly by BMDO because the Aries target vehicles and GPS receivers will be provided to Orbital as GFP (from Orbital's partially terminated contract) while BMDO required Space Vector to provide its own assets. Space Vector also argues that the integration of GPS receivers on the target vehicle and the requirement for an October 1993 target demonstration launch are not essential agency requirements that would justify a determination that Space Vector was not a qualified source; that BMDO failed to conduct advance procurement planning that would have allowed a competitive procurement even if the agency did require an October 1993 launch; and that BMDO does not have a reasonable basis to bundle the remaining target vehicle launches with the October 1993 target demonstration launch.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances, such as when only one responsible source is available and no other type of property or services will satisfy the agency's needs. 10 U.S.C. § 2304(c)(1);

Kollsman, a Div. of Sequa Corp.; Applied Data Tech., Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 18; Petro Star, Inc., B-248019, July 27, 1992, 92-2 CPD ¶ 34. When an agency uses noncompetitive procedures under 10 U.S.C. § 2304(c)(1), it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority, see 10 U.S.C. § 2304(f)(1)(A) and (B); FAR §§ 6.302-1(c); 6.303; 6.304, and to publish notice of the sole source action in the CBD. 10 U.S.C. § 2304(f)(1)(C); 41 U.S.C. § 416(b)(5). Where the agency has substantially complied with CICA's procedural requirements, we will not object to a reasonably justified sole-source award. Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160. A sole-source award is justified where the agency reasonably concludes that only one known source can meet its needs within the required time, except where the noncompetitive situation arises from a lack of advance procurement planning. Servo Corp. of Am., B-246734, Mar. 31, 1992, 92-1 CPD ¶ 322, recon. denied, B-246734.2, Aug. 6, 1992, 92-2 CPD ¶ 75.

As described in detail below, we conclude that BMDO reasonably determined that only Orbital could satisfy the agency's Navy LEAP program requirements within the time required. We also conclude that the October 1993 launch and the requirement for the integration of a GPS receiver reasonably reflected the agency's actual needs at the time of Space Vector's disqualification and the sole source award, and that BMDO's conclusion that Space Vector could not perform the program work within the time required was not based upon a lack of advance procurement planning.

The core basis of the agency's determination that Space Vector could not provide the required target vehicle by October 1993 is the agency's conclusion that Space Vector could not perform the required GPS receiver integration by that date.

The record demonstrates that integrating a GPS receiver onto a ballistic missile, such that accurate, real-time position and velocity data can be received, is a complex task, requiring significant hardware modification and software development. The GPS receiver calculates position and velocity data by simultaneously receiving position information from four GPS satellites; this information is "downloaded" to ground-based computers for later analysis.[18] Essentially, all current commercial GPS

[18]Basically, the GPS receiver coordinates signals from the GPS satellites to locate the position of the receiver at any given time; as the receiver moves with the rocket,

(continued...)

receivers are designed for use on relatively slow-moving vehicles, such as airplanes or ships. The Aries target vehicle, a supersonic ballistic missile, requires the GPS receiver to acquire data from GPS satellites under significant acceleration, at extreme speeds, and under severe vibration. These conditions can result in the GPS receiver losing track of GPS satellites and not calculating accurate position and velocity data. The record shows that to achieve satisfactory performance from current commercial GPS receivers on a ballistic missile, the GPS receiver must be modified, software developed, and the system integrated with the rocket's flight computer and guidance and navigation units; in addition, ground support equipment must be developed that will support and monitor the on-board GPS receiver.

BMDO reports that it took Orbital 18 months to integrate a GPS receiver with an Aries vehicle under the prior contract and that under other similar programs the time required to successfully perform a GPS receiver/launch vehicle integration has ranged from 12 to 18 months.[19] Space Vector admits that it could take "a year or more" to perform end-to-end integration of a GPS receiver into its target vehicle, if Space Vector were required to procure the necessary hardware itself.

Space Vector argues, however, that the necessary GPS hardware and software is available as GFP from Orbital's partially terminated contract, and that, if this GFP were provided, Space Vector could perform the necessary integration within 3 to 4 months. In support of its arguments, Space Vector has submitted statements from an expert, who had significant experience in the space program and with GPS systems, and which are based upon his complete review of the record.[20] This expert's opinion is that Space Vector could perform the required GPS receiver integration within the 8 months Space Vector originally claimed was required to have an Aries target vehicle ready for the October 1993 launch. However, this opinion is based upon the expert's assumptions that:

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[18](...continued)
the velocity of the rocket can be calculated by measuring the receiver's position at known time intervals.

[19]For example, Hughes Missile Systems is developing a GPS system to fly on the Navy LEAP interceptor; this effort, which is separate from the target vehicle, is currently estimated as taking 17 months.

[20]This individual was admitted to the protective order to assist counsel for Space Vector.

> "the Navy LEAP program had progressed to the point of completing all major airborne and ground support equipment design efforts prior to January 1993 and that the only work remaining was to complete the vehicle final assembly and test phase, software verification, final mission and range planning activities, and final launch operations"

and that the GFP would be provided with "a maximum of documentation, software, specifications and general design data."

BMDO and Orbital both dispute Space Vector's expert's assumptions that there is a complete GPS hardware and software system available as GFP and useable by other companies, and that detailed manuals, blueprints, or technical data exists for the GPS system. BMDO states that GFP from the prior contract was not made available to other potential offerors because this material was not considered useable by other companies. Specifically, BMDO and Orbital state that Orbital's GPS system from the prior contract consists of hardware and software that has been heavily modified and designed to integrate with Orbital's flight computer and proprietary guidance/navigation operating system. In this regard, since the prior contract did not require that Orbital provide the government with detailed technical or software data for the GPS system, the government does not have detailed technical design or software code/program information to explain Orbital's unique design. Other contractor's vehicles would necessarily have their own proprietary guidance/navigation operating systems, with which Orbital's GPS system would not interface without significant hardware modification and software development. Both BMDO and Orbital state that while Space Vector, or any other aerospace contractor, could "reverse engineer" Orbital's hardware, such an effort would take considerable time and would necessarily involve hardware modification and software development to integrate the GPS system with Space Vector's own flight computer and operating system.

Space Vector, and its expert, while disputing the agency's and Orbital's conclusions regarding the usefulness to Space Vector of the government-owned, Orbital-designed GPS system, do not show that BMDO's conclusions are unreasonable. Specifically, Space Vector does not rebut BMDO's and Orbital's arguments that Orbital's GPS system was not useable by Space Vector without significant hardware modification and software design to enable the GPS system to work with Space Vector's vehicle design. Rather, Space

Vector essentially argues that if the GPS system is complete,[21] it must be useable.[22]

Based on this record, we conclude that the furnishing of Orbital's GPS system from the prior contract would not have significantly shortened the time required to integrate a GPS receiver with Space Vector's vehicle, as the protester argues.[23] Rather, significant hardware modification, software development and system testing would need to be performed. Accordingly, we find reasonable the agency's conclusion that there was significant risk that Space Vector would be unable to perform the necessary GPS receiver integration within 8 months as Space Vector claimed. This is especially true since Space Vector during the qualification discussions regarding its ability to perform GPS integration indicated that it had only "done a preliminary evaluation on how to integrate similar hardware into our vehicles" but that integration could be accomplished within 2 to 4 months. Given Space Vector's lack of specific experience and the government's experience with integrating GPS receivers with rockets under similar programs, BMDO reasonably concluded that it was highly unlikely that Space Vector could perform the required integration in less than 12 months and that it was likely that this integration would take even longer.

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[21]Space Vector references certain documentation in the record that suggests that Orbital had, or had more nearly, completed the GPS system under the prior contract. Even assuming this was the case, Space Vector has not shown that significant hardware and software work would not nevertheless be required to make it useable. In this regard, the record shows that the majority of the time required to integrate a GPS receiver with the target vehicle involved software development and testing.

[22]Space Vector's expert admits, however, that to accomplish the integration of the GPS receiver with the rocket guidance system would require the development of an algorithm that would provide position versus time data in a form that can be later used to compare the ground station position versus time data generated during the flight.

[23]Orbital estimates that it would take a contractor between 1 1/2 and 2 years to "cannibalize [Orbital's] GPS design . . . to develop their own unique hardware and software, to test the system, to integrate it into their launch vehicle and to develop a set of GPS ground support equipment."

Space Vector argues that the requirement for integrating a GPS receiver with the Aries target vehicle and for an October 1993 launch are not actual agency requirements that would justify a determination that Space Vector was not a qualified source. Regarding the GPS receiver integration, Space Vector asserts that the agency's requirements documentation shows that the GPS receiver was never an essential or firm requirement. As Space Vector notes, the TRD only provides that the target vehicle be "designed to optionally include a [GPS] receiver," and there is no mention of a requirement for integrating a GPS receiver in the CBD synopsis. In this regard, Space Vector argues that the GPS receiver would only provide redundant position information which the agency would already be receiving from sea, land and satellite based radars. In Space Vector's view, BMDO only decided to require a GPS system on the target vehicle when the agency learned that such a system would be available from Orbital's prior contract as GFP.

The record shows that the requirement for a GPS receiver on the target vehicle evolved during the agency's definition of its program requirements. Specifically, the record shows that prior to the creation of the TRD, BMDO's SETA contractor recommended the use of a GPS receiver as a means of verifying radar tracking performance and Aries target vehicle performance in the target demonstration flight. The TRD recognized this requirement, although unartfully, by providing that while a GPS receiver might be used during the flight to provide current position and attitude data, the GPS receiver would be required for later verification of radar tracking accuracy and target vehicle performance in the target demonstration flight.[24] A November 30 Navy LEAP program briefing also identified a "C-band radar beacon and GPS receiver" as requirements on the target vehicle. Furthermore, the record shows that the GPS system will be used to verify the tracking capability and accuracy of the ship and land based radar, as well as the satellite surveillance system. In sum, we find that the GPS receiver requirement is a "real" requirement and did not represent an unnecessary redundancy, as Space Vector suggests.

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[24]The TRD also provides that "[a] GPS receiver will be optional on FTV-4 and FTV-5 for further verification of radar and vehicle performance and as a potential back-up for the LEAP fire control solution." The agency states it will decide after the FTV-TD launch whether to use the GPS receiver on later launches, but that in order for the GPS system to be available on later flights, its operation must be validated on the target demonstration flight.

Even though the CBD synopsis failed to mention the GPS receiver requirement, this does not demonstrate that it was not an actual requirement. While it is true that an agency contemplating a sole source action has a duty to make its essential requirements clear to potential vendors so as to assure that potential alternatives are brought to the agency's attention, see Masstor Sys. Corp., 64 Comp. Gen. 118 (1984), 84-2 CPD ¶ 598, this does not mean that the CBD announcement, which is being used to test the market, must identify all requirements against which a potential source will be evaluated.[25] Rather, the agency may identify further requirements to vendors that respond to the CBD announcement. See, e.g., Racal-Milgo, 66 Comp. Gen. 430 (1987), 87-1 CPD ¶ 472. Here, while we think that GPS receiver integration was such a critical factor in the agency's sole-source determination that it should have been disclosed in the CBD synopsis, Space Vector was informed of the GPS integration requirement during qualification discussions, was given the opportunity to demonstrate its capability in this regard, and still has not demonstrated that it had the capability to timely satisfy this requirement. See AUL Instruments, Inc., 64 Comp Gen. 871 (1985), 85-2 CPD ¶ 324.

Space Vector also argues that there is no reasonable justification for the October 1993 launch. Space Vector contends this launch date simply reflects Orbital's capabilities rather than BMDO's actual needs. Space Vector points out that BMDO's SETA contractor recommended in October 29, 1992, prior to approval of the TRD, that "[t]o ensure the maximum benefit from [the target demonstration] test, it should occur at least three months prior to FTV-4 (which was scheduled for July 1994)." Thus, Space Vector argues that the target demonstration launch could occur as late as April or May of 1994.

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[25]We do not understand why the agency refused to provide the TRD to Space Vector after it responded to the CBD announcement, especially since the statement of the government's requirements had already been provided to Orbital. If an agency does not treat potential sources fairly in determining its actual requirements and determining whether the sources can satisfy them, this adversely reflects on the reasonableness of the agency's determinations. See Maremont Corp., 55 Comp. Gen. 1362, 1379 (1976), 76-2 CPD ¶ 181. Here, however, Space Vector was not prejudiced since it was informed of the GPS requirements, which, as discussed above, it cannot timely meet.

AS indicated in the J&A supporting this sole source award, BMDO contends that there were several interlocking factors that formed the basis for the agency's selection of an October 1993 launch date. First, the Navy's decommissioning of the LEAHY class cruisers in October 1994 results in an overall compression of the entire Navy LEAP demonstration program, since the last launch (FTV-5) must occur prior to October 1994. Next, each of the scheduled launches uses information learned from prior launches. Thus, the radar tracking information learned from the FTV-TD launch will be used by the Navy to perform shipboard fire control system modifications prior to their interceptor missile launch in FTV-3.[26] Finally, the October 1993 launch was scheduled to coincide with the planned September 1993 launch of the MSTI-2 satellite, which will be used to track this launch.[27]

While Space Vector challenges each of these interconnected factors, we find that they form a valid basis for the required October 1993 launch date. First, the record supports the agency's statements as to its need for a LEAHY class TERRIER missile cruiser, and that these cruisers will be decommissioned after October 1994. Space Vector's various arguments that there may be other missile cruisers in the Navy's fleet that would satisfy BMDO needs or that BMDO can somehow delay the Navy's planned decommissioning of the LEAHY class cruisers, which BMDO disputes, do not demonstrate that there are in fact any other ships that currently meet BMDO's needs or that BMDO can effectively delay the decommissioning of these cruisers.[28]

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[26]These modifications were identified as including extending the range of shipboard radars, improving accuracy, and upgrading detection, weapons and fire control systems to include ballistic state vector prediction and extrapolation.

[27]The agency also references the need to coincide with a planned joint BMDO, Army, Navy, and Air Force Cooperative Engagement Capability (CEC) program to coordinate sensor observation and engagement decisions between ships, aircraft and land-based systems. However, Space Vector has referenced documentation in the record that suggests that a delay in the launch may allow for greater satisfaction of the CEC program objectives.

[28]Space Vector asserts that documentation in the record suggests that BMDO and the Navy will actually use an AEGIS class missile cruiser to support the Navy LEAP program launches. We disagree. The record shows that BMDO and the Navy early in its requirements planning discovered that an AEGIS missile cruiser could not launch the required TERRIER

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Secondly, we find no merit to Space Vector's argument that the intended September 1993 launch of the MSTI-2 satellite was not a "driver" for the October 1993 target demonstration launch because a later target demonstration launch can be covered by the launch of the MSTI-3 satellite (scheduled for April 1994). This argument ignores the fact that information learned from the MSTI-2 satellite's tracking of the target demonstration flight will be incorporated in the tracking algorithms for the MSTI-3 satellite, and that early use of the satellite was necessary to fit the launches within the compressed window caused by the decommission of the LEAHY class cruisers.

During our consideration of the protest, the anticipated September 1993 launch of the MSTI-2 satellite was delayed until November 1993 because of technical problems with a state-of-the-art infrared camera planned for the MSTI-2 satellite.[29] This camera, which is being developed by Lawrence Livermore National Laboratory, failed to meet vibration tests after its receipt from Lawrence Livermore in July 1993, causing the delay of the MSTI-2 launch.

As a result of this delay, BMDO decided to change its Navy LEAP program launch schedule. Specifically, the FTV-TD launch will be delayed from October 1993 to December 1993.[30] The FTV-3 launch mission will be changed from an

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[28](...continued)
interceptor missile or provide the required number of radar tracking systems. While the protester argues it should be possible to use several different missile cruisers, such as the AEGIS cruisers, to provide the required radar tracking and fire control systems, and that this is the purpose of the planned CEC program, the record shows otherwise. The Navy does not currently have the capability to share radar tracking and fire control information between ships, and one of the purposes of the CEC program is to develop this capability.

[29]The timing of the MSTI launch is not controlled by the Navy LEAP program office but by a separate BMDO MSTI program office, although the two offices are attempting to coordinate their programs.

[30]The protester argues that this date may be further slipped to January 1994. Orbital's contract, as amended, provides for a December 1993 target demonstration launch, with January 1994 as a back-up launch date. There is no reason to believe that the December 1993 launch date is not a bona fide date, given the fact that further slippage of the target demonstration launch will exacerbate the risk involved in the remaining launches, as explained below.

interceptor-only launch to a combined interceptor and target vehicle launch; thus, the second target vehicle launch will now occur in May 1994, rather than in July 1994, on FTV-4. The FTV-4 launch will continue to be in July 1994, and FTV-5 is now scheduled for September 1994.[31] This new schedule results in the back-up vehicle being used during the regular launching schedule and being unavailable as a contingency asset. The agency states that this compression of the target vehicle schedule launches makes the program higher risk, but is required by the October 1994 LEAHY class cruiser decommissioning[32] and the need to coordinate its launch schedule with the MSTI-2 satellite launch.

Space Vector argues that the agency's delay in the October 1993 target demonstration launch demonstrates that this launch date does not reflect the agency's actual needs. We do not agree. The delay in the October 1993 launch was caused by the delay in the MSTI program and is not attributable to any actions by the Navy LEAP program office. Rather, the target demonstration launch has been delayed so that BMDO can receive the technical information that will be supplied by the MSTI-2 satellite, as well as the later MSTI-3 and MSTI-4 satellites that will build upon information learned from the earlier MSTI satellite. The record shows that, at the time of BMDO's determination that Space Vector could not satisfy the agency's requirements within the time required, the agency did not know that the MSTI-2 satellite launch would be delayed.

We also do not agree with Space Vector that the delay in the October 1993 launch and acceleration of the next target vehicle launch demonstrates that the agency had no need for the originally scheduled relatively long delay between the FTV-TD and FTV-4 launches. As noted by the agency, this compression in the Navy LEAP launches, which is necessary because of the planned decommissioning of the LEAHY class cruisers, unavoidably makes this program much riskier than the agency originally had desired.[33] While the agency must

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[31]Orbital's contract was modified to reflect this new launch schedule.

[32]While Space Vector questions whether the LEAHY class cruisers will actually be decommissioned on that date if that Navy LEAP program is not completed, BMDO has verified this date.

[33]The delay between the FTV-TD and FTV-4 launches was necessary to allow BMDO and the Navy to analyze and incorporate information learned from the FTV-TD target vehicle launch into both the originally scheduled FTV-3 interceptor and the FTV-4 target vehicle launches.

now accept this risk, due to the planned decommissioning of the LEAHY class cruisers, we do not think that the agency had to voluntarily assume what the agency reasonably believed to be unacceptable risk by delaying the target demonstration launch to allow Space Vector to attempt to integrate a GPS system on its vehicle.

Space Vector also argues that BMDO created this sole source situation by a lack of advance procurement planning. In Space Vector's view, the agency's requirement for Aries target vehicles arose as early as August 1992 when the Navy provided BMDO with the Navy's LEAP program plan for the interceptor missile, and BMDO should have issued its CBD announcement in August/September 1992 to notify and identify potential offerors. Space Vector then contends that a solicitation could have been issued contemporaneously with the November 1992 TRD, with offers due 30 days later. Under the protester's procurement scheme, award would be made 30 days after offers were received, or approximately January 1993. Thus, in Space Vector's view, assuming a January 1993 award date, Space Vector could provide the required October 1993 target demonstration launch within the 8 months Space Vector originally proposed.

The record does not support Space Vector's projected procurement cycle. Rather, the record supports the agency's position that it was not until the November 1992 TRD that the agency's target vehicle requirements were sufficiently established to determine how it would acquire its program needs.[34] In November 1992, BMDO's program office assumed that the required target vehicles and launches would be obtained from Orbital under its existing contract. At the end of November 1992, the Navy LEAP program contracting officer informed the program office that the target vehicles and launches could not be obtained from Orbital under the prior contract, and that the requirements must either be procured competitively or a sole source justification prepared.[35] In mid-December Orbital's contract was partially terminated. During December 1992/January 1993, the program office, after assessing the time required to conduct a competitive procurement and for potential sources to perform the necessary target vehicle integration services, determined that only Orbital could meet the program needs within the time required. In January 1993,

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[34]The Navy's October 1992 program plan for the interceptor missiles does not even mention the target vehicles or what the target vehicles' performance requirements would be.

[35]The record is unclear as to whether modifying Orbital's prior contract to add the Navy LEAP program launches would be a "cardinal change."

the contracting officer was requested to begin planning a sole source acquisition from Orbital. A sole source action announcement was published in the CBD in February 1993.

We find that BMDO performed adequate advance procurement planning where in a matter of little more than 2 months it assessed its program needs and published a CBD announcement of an intended sole source award to the only source that the agency believed could meet its minimum needs in the time required. While it is true that a procuring agency can publish special notices of future procurement actions in the CBD in order to assess possible competition, see FAR § 5.205(c), we are unaware of any requirement that an agency publish a CBD announcement of a contemplated requirement before it determines its requirements or how it will procure them.

In any event, even if a competitive award could have been made in January 1993 to support an intended October 1993 launch, 9 months later, the agency, as noted above, reasonably determined that Space Vector could not perform the required GPS receiver integration in less than 12 months. Thus, even under Space Vector's argued for procurement cycle, the protester would not have been found qualified to perform the Navy LEAP program launches.

Space Vector also protests BMDO's "bundling" of the FTV-4 and FTV-5 target vehicle launches with the October 1993 target demonstration launch. Space Vector argues that even if it was unable to provide the target vehicle with an integrated GPS receiver by the October 1993 launch date, the protester could provide the remaining target vehicle launches. Space Vector contends that the only reason BMDO has provided for a total-package procurement of the target vehicle launches was to "consume" the government-owned Aries vehicles from Orbital's partially terminated contract.

BMDO responds that the primary purpose of the Navy LEAP program is to evaluate the interceptor missile and its fire control systems, not the target vehicles. In order to perform this evaluation, it is essential that the target vehicle performance parameters remain constant throughout the launches. In this regard, the target demonstration launch will provide performance and tracking data that will be used as a baseline for the following launches. The agency states that no two contractors' vehicles will perform identically; that is, the differences in the vehicles and their associated avionics, control system and configuration, will affect the target vehicles performance. BMDO concludes that using different contractors to launch the target vehicle would introduce new performance variables that would invalidate the target demonstration baseline performance parameters.

Because bundled or total-package procurements, combining separate, multiple requirements into one contract, can restrict competition by excluding firms that can only furnish a portion of the requirements, we review such procurements to determine whether the approach is reasonably required to satisfy the agency's legitimate minimum needs. See Electro-Methods, Inc., 70 Comp. Gen. 53 (1990), 90-2 CPD ¶ 363; Airport Markings of Am., Inc. et al., 69 Comp. Gen. 511 (1990), 90-1 CPD ¶ 543. We have found reasonable a total package procurement where a single contractor was required to ensure the effective coordination and integration of interrelated tasks, or where procurement by means of separate acquisitions would involve undue technical risk or would defeat a requirement for interchangeability and compatibility. Electro-Methods, Inc., supra; LeBarge Prods. Inc., B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510.

Here, we think the agency expressed a legitimate technical need for its target vehicle to maintain constant performance parameters throughout the Navy LEAP program launches. Since Space Vector does not assert that its vehicle would have identical performance parameters to those of Orbital's vehicle (and the record evidences that it would not), there is no basis to question the agency's decision to procure these launches on a total-package basis.

Space Vector finally protests that Orbital received source selection information, which was not made available to Space Vector, and participated in the drafting of the agency's minimum requirements in violation of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (Supp. III 1991) and FAR Part 9.5 (organizational conflict of interest). Space Vector argues that Orbital must be disqualified from providing Navy LEAP program launch services and these requirements competed.

While BMDO and Orbital dispute all of Space Vector's allegations in this regard, we need not address these issues because we find that Space Vector is not an interested party to raise them, given our conclusion that BMDO's sole source award to Orbital was reasonably justified. Our Bid Protest Regulations provide that only an actual or prospective bidder or offeror, whose direct economic interest would be affected by the award of a contract or the failure to award a contract, may have its protest considered by our Office. 4 C.F.R. §§ 21.0(a), 21.1(a) (1993). Where, as here, we find reasonable an agency's sole source determination that only the awardee can satisfy its minimum needs, the protester would not be eligible to receive award and thus does not have the requisite economic interest to protest that the awardee has an organizational conflict of interest or that the awardee has received source selection sensitive

information not available to the protester. See Eagle Research Group, Inc., B-213725, May 8, 1984, 84-1 CPD ¶ 514. In any event, even if we assume the validity of the protester's allegations, we fail to see how Space Vector was prejudiced, since the agency reasonably determined that it could not conduct a competitive procurement and that only Orbital could meet its requirements. See, e.g., Comptek Research, Inc., 68 Comp. Gen. 117 (1988), 88-2 CPD ¶ 518.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

9191511

Decision

Matter of: Telos Field Engineering

File: B-253492.2

Date: November 16, 1993

Timothy Sullivan, Esq., and Martin R. Fischer, Esq., Dykema Gossett, for the protester.
Robert E. Casey for Employee Owned Maintenance Company, an interested party.
Edward S. Christenbury, Esq., Tennessee Valley Authority, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency conducted discussions with offerors but failed to request best and final offers; permitting offerors to submit extensive written responses during discussions did not eliminate the possible prejudice arising from the lack of an opportunity to revise proposals in response to discussions.

DECISION

Telos Field Engineering protests the award of a contract to Employee Owned Maintenance Company, Inc. (EOMC), under request for proposals (RFP) No. YJ-93525E, issued by the Tennessee Valley Authority (TVA). Telos contends that the agency improperly failed to request best and final offers (BAFO) at the conclusion of discussions and unreasonably evaluated both Telos's and EOMC's technical proposals.

We sustain the protest.

TVA issued the RFP on September 3, 1992, seeking proposals for a time and materials contract to provide maintenance services for TVA computer hardware at a number of different locations. The contract is for a 2-year base period, with four 1-year options. Section M of the RFP stated that technical factors (specifically, what the RFP called evaluated optional features) and cost would be given equal weight in source selection, and that award would be made to the responsible offeror whose proposal was determined to be most advantageous to the agency. In this regard, the solicitation further stated the following:

> "In order to assure that the most advantageous offer is procured, TVA retains the discretion to examine the technical point scores to determine whether a point differential between offers represents any actual significant difference in technical merit. If it is determined that there is not a significant difference in technical merit, cost will become the overriding factor."

Section M also advised offerors that the agency reserved the right to make award on the basis of initial proposals, without conducting discussions.

To implement the RFP award criteria, the agency established a 930-point scheme, not disclosed to offerors, under which 465 points (50 percent of the total) were assigned through the technical evaluation; the other 465 points were reserved for cost. The technical points were assigned according to how well each proposal scored on various aspects of the RFP's evaluated optional features. On the cost side, the proposal with the lowest proposed price received 465 points, while other proposals' cost scores were based on how close their price was to the lowest one. Technical and cost points were then added, and the proposal with the highest total score was deemed to be the most advantageous to the agency.

The agency received 16 proposals, of which three were either withdrawn or rejected as noncompliant. The evaluators determined that they were unable to evaluate the remaining 13 proposals without additional information. In December 9, 1992, letters to the offerors, the agency so advised the offerors and requested detailed "responses" to items in Sections C and M of the solicitation. In the letters to some of the offerors, including Telos, the agency also identified what it termed "deficiencies" in the proposals and asked the offerors to "clarify" those matters. For example, one offeror was told, with respect to three specified subparagraphs of Section C of the RFP, "Your response is non-compliant"; another offeror was advised that its insistence that callers from TVA must be limited to authorized personnel was unacceptable; another offeror was advised that TVA would not allow the offeror the option of administering drug tests. Offerors responded in writing to the matters raised in the December 9 letters, some in considerable detail (Telos's response was more than 60 pages long).

No further discussions were held with offerors, and BAFOs were not requested. Based on the initial proposals and the offerors' responses to the agency's written questions, the evaluators assigned point scores to each technical and cost proposal. To the extent that the evaluators viewed the

responses as different from initial proposals, they treated the responses as modifications to the proposals. For example, the evaluators appear to have given EOMC credit for improving its proposed principal period of maintenance from that offered in the initial proposal.

The highest-ranked technical proposal was submitted by an offeror which is not a party to this protest ("Offeror C"). EOMC's technical proposal was ranked second. Telos's technical proposal received the third highest score.[1] With respect to cost, EOMC's proposal was low, and the agency therefore assigned it all 465 cost points. Telos's proposed price was next low; Offeror C's proposed price was considerably higher.

The agency totaled the technical and cost points and determined that, since EOMC's proposal received the highest combined point score, it was the "most advantageous" to the agency. Telos's point score was next high. The record does not indicate that the agency considered whether Offeror C's technical proposal's higher score represented technical features worth the proposal's higher price. Instead, based solely on the combined technical and cost point scores, a recommendation was reached that award be made to EOMC.

An April 12, 1993, notice in the Federal Register stated that the new business portion of the TVA Board's April 14 meeting would consider the following topic: "Time and Material On-Site Hardware Maintenance and Support Services Contract with Employee Owned Maintenance Company, Subject to Final Review Prior to Execution."

The notice did not include the solicitation number or otherwise identify the procurement at issue; no notice of the proposed award was published in Commerce Business Daily. The agency advised Telos on May 13 that it intended to award a contract to EOMC. Telos protested to our Office on May 18.[2]

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[1]The agency conceded during the course of the protest that Telos's technical score had been incorrectly totaled. Correction of the arithmetical error raises Telos's technical score above that of all other proposals.

[2]Although the protest was filed prior to award, the agency proceeded to award a contract to EOMC notwithstanding the protest, based on a determination that urgent and compelling circumstances significantly affecting the interests of the United States required that award be made. Award was for an interim 9-month contract, and the agency advises that this award was not intended to supersede the contract to be awarded once the protest is resolved.

Telos contends that the agency improperly failed to request BAFOs at the conclusion of the discussions, and lacked a reasonable basis for the technical scores assigned to Telos's and EOMC's proposals and for the determination that EOMC's proposal was the most advantageous to the agency.[3] The agency counters that the protest is untimely, because it was not filed within 10 working days of the April 12 notice in the Federal Register. The agency also alleges that its December 9 letters to offerors constituted mere requests for clarifications, not discussions, and that BAFOs were not required. Concerning the alleged errors in scoring technical proposals, the agency denies most of the alleged errors, and argues that the conceded error in totaling the score of Telos's technical proposal did not prejudice Telos because correction of the error would not raise the protester's proposal's combined technical and cost score above that of EOMC.

We first address the timeliness issue.[4] The April 12 Federal Register notice cannot fairly be read to alert a reader to the agency's intent to make award under this solicitation. The notice did not mention the RFP number or otherwise identify this procurement, and cannot reasonably be construed to have put the public on notice that award in this procurement was imminent. It thus did not trigger the 10-day timeliness period for filing a protest by providing the information from which the protester knew, or should have known, the basis for protest. See 4 C.F.R. § 21.2(a)(2). We therefore conclude that the protest, which was filed within 10 days of TVA's advising Telos that the agency intended to award a contract to EOMC, was timely.

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[3]Telos's protest of the technical evaluation is based on protected information in the agency report made available to Telos's counsel for the first time on June 24, 1993, under a protective order issued by our Office. A supplemental protest raising the technical evaluation issues was filed with our Office on July 9, 1993.

[4]TVA notes that it does not accede to our Office's jurisdiction. Nonetheless, the agency provided all required documentation and otherwise complied with our Bid Protest Regulations. See 4 C.F.R. § 21.3(c) (1993). It is well settled that TVA is subject to our jurisdiction. See, e.g., Monarch Water Sys., Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146.

The next question is whether the agency was required to request BAFOs from offerors. Resolution of that question is governed by the Federal Acquisition Regulation (FAR).[5] FAR § 15.611 provides, in pertinent part, as follows:

> "(a) Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers. Oral requests for best and final offers shall be confirmed in writing.
>
> "(b) The request shall include--
> (1) Notice that discussions are concluded;
> (2) Notice that this is the opportunity to submit a best and final offer;
> (3) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers"

This provision requires the contracting officer to provide common notification to offerors that discussions have been completed and that offerors must, by a common date, submit their "best and final" offers. The purpose of this requirement is to ensure that all offerors are being treated fairly and on an equal basis. See, e.g., 48 Comp. Gen. 536 (1969).

TVA does not dispute that BAFOs must be requested upon completion of discussions. However, TVA argues that no discussions were conducted here. In the agency's view, the December 9 letters to the offerors did not constitute discussions. Instead, the agency contends that the letters and the offerors' responses were simply clarifications.

The difference between clarifications and discussions is set forth in FAR § 15.601:

> "'Clarification' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. . . . Unlike discussion . . ., clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision."

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[5]The FAR applies to automatic data processing equipment procurements for all federal agencies, even where such procurements would not otherwise be subject to the FAR. 40 U.S.C. §§ 472 (a)-(b), 759(a) (1988); 41 C.F.R. § 201-39.102(b) (1992). TVA agrees that the FAR applies to this procurement.

> "'Discussion' . . . means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification) . . . that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

The issues raised in the agency's December 9 letters to offerors were plainly more than clarifications. The letters identified deficiencies in proposals, and they stated that the information requested was essential for determining the acceptability of proposals. The agency's evaluation of offers assumed that the responses to its letters modified offerors' proposals, at least as to those offerors that were informed of specific aspects of their initial proposals which were unacceptable. EOMC's relatively high score for its principal period of maintenance was apparently based on what the agency perceived to be a proposal modification introduced for the first time in that company's response. The communications between TVA and the offerors here thus fall within the definition of discussions, not of clarifications. Because discussions were conducted, it was improper for TVA to make award without first providing all offerors an opportunity to revise their proposals. Astro-Med, Inc., B-232000, Nov. 21, 1988, 88-2 CPD ¶ 500.

TVA contends that Telos was not prejudiced by the agency's failure to request BAFOs. Specifically, the agency argues that all offerors were treated equally and that Telos's lengthy response to the December 9 letter demonstrated that the agency had afforded the company an adequate opportunity to provide additional information.

We conclude that the offerors were not treated equally and that Telos was prejudiced. While the agency argues that offerors were permitted only to clarify their proposals rather than modify them, this was clearly not the case. The record shows that the letters to several offerors identified specific areas of non-compliance with requirements. EOMC, which received a more general notice of deficiencies, was allowed to modify its proposal at least in the area of the proposed principal period of maintenance, and this modification had a favorable effect on EOMC's ultimate technical score. On the other hand, Telos does not appear to have understood the TVA letter as allowing significant revision to its offer. Given the offerors' different responses to TVA's discussion request, it is clear that offerors were not treated equally. Telos alleges that, if given the opportunity to submit a revised proposal, including prices, it would have made significant revisions.

There is no basis to assume that this would not have occurred, and the outcome of the competition may well have been different.

We think the existence of prejudice is further suggested by the agency's concession that Telos's proposal was higher rated technically than the awardee's. Thus, any BAFO price reduction by Telos which would have narrowed the price difference between Telos and the awardee could have resulted in a different award decision. In the circumstances present here, the protester was prejudiced by the agency's failure to request BAFOs, and we therefore sustain the protest.[6]

We recommend that TVA reopen negotiations with all offerors whose proposals are in the competitive range, conduct discussions, and request BAFOs. The agency should then make award on the basis of the BAFO which the agency finds represents the most advantageous proposal.[7] If an offeror other than EOMC is selected for award as a result of the evaluation of BAFOs, the interim contract with EOMC should

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[6]Telos also challenges various specific aspects of the technical evaluation of both Telos's and EOMC's proposals. Because of our conclusion regarding the requirement that BAFOs be requested, we need not address the specific technical evaluation issues. We note, however, that at least some of the disputed technical scores involve straightforward informational questions which should be readily resolvable during reopened discussions, as recommended below.

[7]If evaluation of BAFOs creates the need for a cost/technical tradeoff, the agency must determine, consistent with the RFP weighting of cost and technical factors, whether the qualitative benefit which the agency expects to derive from the proposal with the higher technical score is worth its higher cost. International SOS Assistance, Inc., B-245571.5, Jan. 26, 1993, 93-1 CPD ¶ 273; NUS Corp.; The Austin Co., B-221863; B-221863.2, June 20, 1986, 86-1 CPD ¶ 574. While point scores can provide guidance to decisionmakers in resolving a cost/technical tradeoff, the scores alone may not serve as a substitute for reasoned analysis in reaching a source selection decision. See Met-Pro Corp., B-250706.2, Mar. 24, 1993, 93-1 CPD ¶ 263; NUS Corp.; The Austin Co., supra. Here, the agency improperly relied exclusively on combined technical and cost point scores instead of performing a reasoned cost/technical tradeoff analysis--both in the initial selection of EOMC's proposal rather than Offeror C's, and in the argument that Telos's proposal would not be in line for award, even after it became apparent that Telos's technical proposal, once the scores were added correctly, was ranked highest.

be terminated or, if that contract is near completion, the award under the RFP should commence upon completion of the interim contract. We find that Telos is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1), Telos's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to TVA within 60 days after receipt of this decision.

for Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commodity Futures Trading Commission's Installation of Call Forwarding Service

File: B-254666

Date: November 18, 1993

DIGEST

The Commodity Futures Trading Commission may use appropriated funds to pay the costs of installing, maintaining, and removing call forwarding telephone service on the office telephone of a Commission employee temporarily working from her home.

DECISION

The Acting General Counsel, Commodity Futures Trading Commission (Commission) asks whether the Commission may use appropriated funds to pay the costs of installing, maintaining, and removing call forwarding telephone service on an employee's government office telephone. For the reasons stated below, we do not object to the proposed expenditure of appropriated funds.

BACKGROUND

The Commission has authorized Linda Elkan, an attorney in the International Operations unit of its Division of Enforcement, to work part-time from her home for 6 months in order to care for her newly born child. In connection with that arrangement, the Commission proposes programming Ms. Elkan's office telephone to ring at her home. The Commission would pay the costs of installing, maintaining, and removing the call forwarding service with funds appropriated for its "necessary expenses." See Title VI of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for Fiscal Year 1994, Pub. L. No. 103-111, 107 Stat. 1046, 1077 (1993).

DISCUSSION

Generally, appropriations for "necessary expenses" of an agency may be used for purposes not specifically set forth in the appropriations act, if the expenses in question are for the direct support of the agency's mission. 68 Comp. Gen. 502, 505 (1989). According to the Commission, the call forwarding service would facilitate Ms. Elkan's

communications with Commission staff and persons outside the Commission with whom she conducts official business over the telephone. Therefore, the call forwarding service clearly would enhance Ms. Elkan's ability to carry out her responsibilities while working from her home. Accordingly, the Commission's determination that call forwarding service is "necessary" for agency operations appears reasonable.

We have long held that appropriated funds may not be used for expenditures otherwise justified as "necessary" that are prohibited by a provision of law or legal principle. See 4 Comp. Gen. 1063 (1925). In this regard, 31 U.S.C. § 1348(a)(1) (1988) provides that "appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences."

On its face, section 1348(a)(1) does not bar the Commission's proposed use of appropriated funds. Section 1348(a)(1) applies to telephones located in actual private residences. See B-236232, Oct. 25, 1990 (approving the installation of a telephone line in a Naval Reserve member's civilian business office) and B-227763, Jan. 5, 1988 (holding that section 1348(a)(1) does not bar the installation of devices designed to facilitate long distance telephone calls in Senators' home state offices). Here, the Commission does not propose to install call forwarding service in Ms. Elkan's residence, but rather in her government office. In addition, section 1348(a)(1) prohibits agencies from using appropriated funds to pay charges for telephone service from private residences. However, the Commission's proposal does not involve charges for calls or other services originating from Ms. Elkan's residence, but rather for forwarding calls from Ms. Elkan's government office to her residence.

Moreover, the Commission's proposed use of appropriated funds does not frustrate the purpose of section 1348(a)(1). Section 1348(a)(1) was enacted to prevent public officials from obtaining personal telephone service at government expense. 61 Comp. Gen. 214, 216 (1982). The Commission's proposal is not designed to improve Ms. Elkan's personal telephone service or facilitate her receipt of private or personal messages. As stated earlier, the proposal is designed to enhance Ms. Elkan's ability to carry out her responsibilities by ensuring that she receives telephone calls related to official business. Since the Commission's

determination that call forwarding service is "necessary" appears reasonable and the expenditure is not barred by 31 U.S.C. § 1348(a)(1), we do not object to the proposed use of appropriated funds.

for Milton J. Socolar
Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

2162411

Decision

Matter of: The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act

File: B-253179

Date: November 29, 1993

DIGEST

The Justice Department is advised that litigative awards against the United States to reimburse claimants for the government's share of response costs and natural resource damages paid or payable under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1988), are payable from the permanent, indefinite Judgment Fund appropriation created by 31 U.S.C. § 1304 (1988), to the same extent as are other litigative awards against the United States.

DECISION

The Justice Department has asked whether the permanent, indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304 (1988), may be used to pay litigative awards obtained against federal agencies in order to reimburse claimants for the agencies' share of "response costs" and "natural resource damages" paid or payable by claimants under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9601-75 (1988). As explained below, so long as the criteria otherwise applicable to requests for payment from the Judgment Fund are satisfied, such litigative awards may be paid from the Judgment Fund.

BACKGROUND

As its name suggests, CERCLA, enacted in 1980, established a far-reaching program to remedy many years of often unknowing, but potentially devastating, contamination of the environment caused by the disposal of hazardous waste. Under this statutory scheme, those who generate or transport hazardous waste and those who own or operate sites where it is found (known as "potentially responsible parties" or PRPs) are generally required to share strict, joint-and-

several liability for clean-up of the hazardous waste sites.[1] 42 U.S.C. §§ 9607(a)(1)-(3), (b), 9613(f)(1). This liability includes the costs of assessing and remedying the harm done, containing or removing the waste, and additional "damages" for injury to, or loss of, "natural resources." 42 U.S.C. § 9607(a). (The award of interest on these assessments is specifically authorized as well. Id.)

Primary responsibility for implementation and enforcement of CERCLA is given to the President, who has delegated these responsibilities to the Environmental Protection Agency (EPA) and certain other federal agencies.[2] E.g., 42 U.S.C. §§ 9604, 9615; Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987), as amended, Exec. Order No. 12777, 56 Fed. Reg. 54757 (1991). Among other things, the act authorizes EPA to order PRPs to contain or clean up contaminated sites, to enter into legally-binding, negotiated agreements (issued either as administrative orders or consent decrees), and to bring lawsuits to compel PRP compliance and collect fines. 42 U.S.C. §§ 9606, 9622. In the alternative, EPA may choose to begin (or even complete) the cleanup itself and seek reimbursement from the PRPs at a later time. 42 U.S.C. §§ 9604(a), 9613(f). The option to initiate or complete site cleanup with subsequent reimbursement from PRPs is also available to the states, as regulators, and to private citizens and the PRPs, themselves. 42 U.S.C. § 9613(f).

The costs incurred in initiating or completing cleanup prior to seeking reimbursement are known as "response costs." EPA funds its initial outlays of response costs from the amounts Congress appropriates annually to it from the Hazardous Substance Response Trust Fund, commonly known as the Superfund. 42 U.S.C. § 9611(a)(1), (c)(3). See also 26 U.S.C. § 9507. This fund consists of money appropriated from the Treasury, along with industry-based fee collections, penalty and punitive damage awards, and other amounts recovered from persons liable to the government under the act. Id. Congress appropriates fixed sums from

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[1]Some courts have concluded that, under certain circumstances, individual PRPs may avoid joint-and-several liability, essentially by proving which portions of the damage are attributable to their actions. Cf., e.g., Bell Petroleum Services, Inc. v. Sequa Corp., No. 91-8080 (5th Cir., Sept. 28, 1993).

[2]State regulatory bodies and Indian tribes may apply to the President to enter into agreements to allow them to implement and enforce CERCLA, as well. 42 U.S.C. § 9604(d). In addition, private parties, including both citizens and PRPs, are authorized to bring lawsuits to compel compliance with the act. 42 U.S.C. §§ 9613(f)(1), 9659.

this fund for use by EPA to implement CERCLA. 26 U.S.C. § 9507(c)(1); 42 U.S.C. § 9611(a) (authorization). See also, e.g., Pub. L. No. 102-389, 100 Stat. 1571, 1598-99 (1992) (appropriation). EPA deposits amounts recovered from PRPs in reimbursement of its response costs directly into the Superfund; EPA may not re-use those amounts without further appropriation action. See 42 U.S.C. § 9507(b)(2), (c)(1).

PRPs can also be held liable under CERCLA for the assessment and restoration of damage to and destruction of "natural resources." 42 U.S.C. § 9607(a)(4)(C), (f)(1). Under CERCLA, natural resource damage awards may only be collected by "trustees," which are presidentially-designated units of federal or state government, or Indian tribes. 42 U.S.C. § 9607(f). The trustees are authorized to retain and use, without further appropriation, any recoveries they make under CERCLA, in order to restore, replace, or acquire the equivalent of any natural resources lost on account of the improper disposal of hazardous waste. 42 U.S.C. § 9607(f)(1).

With certain exceptions not relevant here, CERCLA provides that federal departments, agencies, and instrumentalities of the United States are subject to and must comply with the act's requirements, "both procedurally and substantively" the same as other, non-governmental PRPs. 42 U.S.C. §§ 9607(g), 9620(a)(1), (a)(3), (j). This waiver of sovereign immunity specifically includes liability for monetary awards (with interest) for response costs and natural resource damages. Id. The government's CERCLA liability can arise under administrative orders or agreements, under judicial orders, or under compromise settlements negotiated by the Justice Department in lieu of actual or imminent litigation. Claims against federal agencies (as PRPs) may be pursued by private citizens, state governments, Indian tribes, EPA (as the primary CERCLA enforcer), or by natural resource trustees. Liability frequently arises as a result of claims filed by other PRPs for contribution. As would be expected under a scheme of joint-and-several liability, PRPs held liable for costs and damages under the act, including damages to natural resources, retain the right to seek "contribution" from other PRPs in order to spread the liability proportionately amongst the responsible parties. 42 U.S.C. § 9613(f)(1).

DISCUSSION

There is no discussion anywhere in CERCLA or its legislative history concerning the source from which to cover the federal government's liability for the cleanup of past disposal of hazardous waste by the United States and its agencies and instrumentabilities. The Justice Department

suggests that most of these sums should be paid from the Judgment Fund. The Judgment Fund is a permanent, indefinite appropriation which is generally available to pay amounts owed by the United States under judgments, Justice Department compromise settlements, and certain specified administrative awards. Generally speaking, before payment may be made from this fund, this Office must certify that an award satisfies four basic criteria. 31 U.S.C. § 1304(a)(2). First, the award must be final. 31 U.S.C. § 1304(a). Second, it must provide monetary, rather than injunctive, relief. E.g., 70 Comp. Gen. 225, 228 (1991). Third, the award must have been made under one of the authorities specified in 31 U.S.C. § 1304(a)(3), which include, but are not limited to, 28 U.S.C. § 2414 (United States District court judgments and compromise settlements negotiated by the Justice Department to dispose of actual or imminent litigation) and 28 U.S.C. § 2517 (Court of Federal Claims judgments). Fourth, payment of the award must not be "otherwise provided for." 31 U.S.C. § 1304(a).

This decision addresses the fourth criterion. To be "otherwise provided for" means that there is some source of funds other than the Judgment Fund which is legally available to pay the award. E.g., 66 Comp. Gen. 157, 160 (1986). Justice asserts that, as a general matter, there is no other source of payment for amounts owed by the government as a result of CERCLA litigation. We agree.

Agency appropriations are not available to pay litigative awards, unless provided for by law. The Judgment Fund was created to provide a source of payment for many, if not most, of the litigative awards against the United States. E.g., B-251061.2, Feb. 10, 1993. The Judgment Fund legislation specifies that those judgments and awards which are "otherwise provided for" may not be paid out of the Judgment Fund. Consequently, subject to certain exceptions not relevant here, it would take an affirmative act of the Congress, for example, language in CERCLA, to render these awards payable from some source other than the Judgment Fund.

We have found nothing in CERCLA's language or its legislative history specifying the source of payment for contribution judgments or compromise settlements. Nor does the act or its legislative history make the Superfund or any other appropriation (including the appropriations of the agencies responsible for either implementing or complying with the act) legally available to pay such awards.

Congress is normally presumed to be aware of existing law.[3] Accordingly, we view Congress' silence in this regard as an acceptance of the application of the same statutes and rules of appropriations law (including those relating to the Judgment Fund) which would ordinarily apply to the payment of claims and judgments against the government in other contexts. Thus, so long as the criteria normally applied are otherwise satisfied with respect to particular CERCLA contribution judgments and Justice Department compromise settlements, those awards will normally be payable from the Judgment Fund.

As is evident from the nature of the criteria, certification of specific awards can be made only on a case-by-case basis. For example, by its very nature, "finality" cannot exist in any given case until the government has either determined not to seek further judicial review of the award, the time for seeking that review has expired, or the appellate possibilities have been exhausted. E.g., B-129227, Dec. 22, 1960. Similarly, it is not possible to determine whether payment of an award is "otherwise provided for," except by review, on a case-by-case basis, of such things as the nature of the defendant agency, the type of judgment, or the funding scheme applicable to the agency or the program involved. The Judgment Fund is not available, for example, where the particular agency has received an appropriation which is specifically available to pay judgments and compromise settlements against it. However, we can find nothing in the language or legislative history of CERCLA to indicate that, by their nature, judgments or Justice

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[3]Albernaz v. United States, 450 U.S. 333, 341-42 (1981):

> "Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we [the Supreme Court] have previously noted, Congress is 'predominantly a lawyer's body,' . . . and it is appropriate for us 'to assume that our elected representatives . . . know the law.' . . . As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the [established] rule and legislated with it in mind. It is not a function of this Court to presume that 'Congress was unaware of what it accomplished . . . .'" (Citations omitted.)

Department compromise settlements of actual or imminent litigation for claims against federal agencies for contribution of response costs or natural resource damages are inherently uncertifiable for payment from the Judgment Fund.

Shelton J. Bowen

for Comptroller General
of the United States