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Comptroller General
of the United States
Washington, D.C. 20548

2511212

Decision

Matter of: Magnavox Electronic Systems Company

File: B-258037; B-258037.2

Date: December 8, 1994

Alfred J. Verdi, Esq., Magnavox Electronic Systems Company; David A. Gerber, Esq., and Jonathan Fraser Light, Esq., Nordman, Cormany, Hair & Compton; William J. Spriggs, Esq., and Catherine R. Baumer, Esq., Spriggs & Hollingsworth; and Walter G. Birkel, Esq., and Eric L. Lipman, Esq., Griffin, Birkel & Murphy, for the protester.
Alan R. Yuspeh, Esq., Jerone C. Cecelic, Esq., and Ronald B. Vogt, Esq., Howrey & Simon, for Rockwell International Corporation, an interested party.
Gregory H. Petkoff, Esq., and Wayne A. Warner, Esq., Department of the Air Force, for the agency.
Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably justified "bundling" of a guidance system and the missile it serves in one procurement based on the need for complete integration of the overall system and the risk to the reliability of the missile if the guidance component were separately procured.

DECISION

Magnavox Electronic Systems Company protests the decision of the Department of the Air Force to procure mid-course guidance systems for certain missiles on a sole-source basis through modifications to contracts F08635-91-C-0069 and F08626-93-C-0011, previously awarded by the Air Force to Rockwell International Corporation.

We deny the protest.

The two contracts at issue concern the AGM-130 missile, a guided bomb that includes a rocket propulsion system. The AGM-130 was developed by Rockwell under a prior contract; these two contracts include developmental work as well as the actual manufacture of various lots of missiles. The focus of the dispute here is the procurement of a mid-course

guidance system to steer the missile between the time of initial release by the delivery aircraft and the time at which visual contact with the target is established.

The protester was aware of the Air Force's need for a mid-course guidance system for the AGM-130 missiles as a result of the firm's performance of a contract involving another aspect of the AGM-130 effort. At its own initiative, Magnavox provided the agency with a "white paper" in November 1992, followed by a January 13, 1993 briefing, on an approach that Magnavox proposed for the mid-course guidance system. The Air Force had concerns about both technical and cost aspects of the Magnavox approach, notwithstanding the protester's representation that its approach was technologically superior and likely to produce significant cost savings for the Air Force.

Shortly after Magnavox's briefing, and prior to the Air Force's reaching a formal determination about the practicality of that firm's approach, the Air Force issued a notice in the Commerce Business Daily (CBD) on January 19, 1993, stating that the agency anticipated awarding a "sole-source contract [to] Rockwell International Corporation . . . to integrate mid-course guidance capability into the AGM 130 Weapon System." The notice stated that "[o]nly [Rockwell] is sufficiently familiar with the AGM 130 Weapon System to successfully design and integrate mid-course guidance capability into the production baseline without a validated reprocurement package." The notice further stated that "adequate reprocurement data is not available and the substantial duplication of cost to the government which is likely to result from development of a new source is not expected to be recovered through competition." The notice included Note 22, stating that any responsible source could submit a statement of capability, which would be considered.

Neither Magnavox nor any other firm submitted a statement of capability or otherwise responded to the CBD notice.[1] The Air Force therefore proceeded with plans to have Rockwell perform the work related to the AGM-130 mid-course guidance system. Although the agency initially intended to issue a

[1]Although Magnavox's initial protest asserted that the firm had responded to the CBD notice, the Air Force's report to our Office denied having received a response from Magnavox. Magnavox did not reply to the agency report in this respect, nor did its initial protest provide any evidence of having responded to the CBD notice (or details such as the date of the response, the name of the sender or recipient, or a description of the response's contents). On this record, we conclude that Magnavox did not respond to the CBD notice.

new contract to cover that work, it determined in February 1993 that the work was within the scope of the AGM-130 contract, No. F08635-91-C-0069, which had already been awarded to Rockwell and that no new contract was needed. Accordingly, the existing contract was modified in April 1993 to include the mid-course guidance work. In August 1993, the justification and approval that had been previously documented for the sole-source procurement of the AGM-130 system from Rockwell was modified to incorporate the addition of the mid-course guidance system, as well as other changes, such as a reduction in the number of missiles to be acquired from 4,048 to 2,300.[2]

In September 1993, the Air Force awarded contract No. F08626-93-C-0011 to Rockwell and published notice of the award in the CBD. That contract covered manufacture of the quantity of AGM-130 missiles referred to as "Lot 4." Lot 5 was included in the contract as an option quantity.

Magnavox was aware, through its participation in an interface control working group established to coordinate the various aspects of the AGM-130 program, that the Air Force had decided against pursuing the firm's alternative approach. In May 1994, however, Magnavox approached the Air Force in an effort to persuade the agency to "revisit" its decision to have Rockwell perform the mid-course guidance system work. Magnavox argued that the reduction in the number of missiles being procured would result in Magnavox's approach being significantly less costly than Rockwell's, while also causing less disruption to the program schedule. The Air Force was not persuaded, and it so advised Magnavox in a July 8 letter rejecting the firm's approach both because the cost savings were overstated and because of concerns about "program executability" if Magnavox were to do the mid-course guidance work while Rockwell performed the bulk of the AGM-130 work.

On July 14, the Air Force exercised the option for the Lot 5 quantity by issuing a modification to Rockwell's contract; notice of the modification was published in the CBD on July 20. On July 29, the contract was further modified to add the mid-course guidance system to the Lot 5 work.

On July 29, Magnavox filed a protest with our Office alleging that the Air Force had failed to publish its requirement for the mid-course guidance system for the AGM-130 in the CBD and was acquiring that system without full and open competition. Magnavox also argued that the

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[2]In September 1993, a decision was reached to reduce the number of missiles being acquired to 502, and that quantity was reduced to 400 in June 1994.

agency was improperly "bundling" the mid-course guidance system with other AGM-130 work. At the time it filed its initial protest, Magnavox apparently did not realize that the July 14 action was limited to the exercise of an option. Upon learning that, the firm filed a supplemental protest on August 19 contending that the option was not exercised properly. Magnavox did not specifically protest the July 29 contract modification adding the mid-course guidance system to Rockwell's contract.

Before considering the substance of the protest, we address the question of the admission of one of Magnavox's attorneys to the protective order issued by our Office in this protest. After consideration of the application of that attorney, who is in-house counsel at Magnavox, and the opposition to the application, as well as a further submission by Magnavox, we concluded that, due to a number of specific factual circumstances, there was an unacceptable risk of inadvertent disclosure of protected information, and we denied the application. Our Office did admit a number of other attorneys on behalf of Magnavox to the protective order, including attorneys from multiple law firms.

We examine any application for admission to a protective order individually in order to determine whether the applicant is involved in competitive decision-making or there is otherwise an unacceptable risk of inadvertent disclosure of the protected material. Applicants are neither automatically admitted because they are outside counsel nor automatically denied access because they are in-house counsel; that is, consistent with the holding in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), our Office has no per se rule in this regard.

Instead, in reviewing each application, our Office considers the entire factual context, including the applicant's responsibilities and activities (for example, whether the applicant reviews bids or proposals), the physical layout of the facility where protected material may be placed, the nature and sensitivity of the material sought to be protected, and the presence (or absence) of opposition expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. See Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134; Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227. Cf. Matsushita Elec. Indus. Co., Ltd. v. United States, 929 F.2d 1577 (Fed. Cir. 1991); U.S. Steel Corp. v. United States, supra.

On the basis of such an assessment, we denied the application for access of Magnavox's in-house counsel. That applicant, whose admission was opposed by Rockwell, disclosed in his submissions that he is the only in-house

attorney providing legal support to the Magnavox facility involved in this procurement; his office is located in the suite of executive offices at that facility; and he reports directly to a corporate officer (the Senior Vice President and General Manager). He also disclosed that he is "involve[d] with the technical data" in conjunction with providing legal advice with respect to proprietary disclosure agreements, teaming agreements, licenses, and export matters; and he reviews "non-routine proposals."

Magnavox's supplemental submission clarified its earlier representations in ways suggesting that its in-house counsel's role is narrowly defined. The applicant explained that, with respect to proprietary disclosure agreements, teaming agreements, licenses, and export matters, he merely reviews documents "in the abstract," for "proper wording, boiler plate legal requirements, such as conflict of law clauses and the like, and compatibility of those contract provisions with relevant legal requirements." Similarly, the applicant explained his earlier statement that he reviews "non-routine proposals" by stating that "the focus of [my] advice is the proper interpretation of solicitation clauses" and "their applicability to [Magnavox's] standard commercial product marketing procedures or whether circumstances giving rise to potential bid protests exist"; i.e., the review only of clauses in public solicitations. We found these supplemental representations unconvincing because they were substantially in conflict with the applicant's initial representations.

Concerning his position as the only in-house attorney and his reporting directly to a corporate officer at his facility, the applicant "clarified" his affidavit by stating that legal advice is provided by attorneys at another Magnavox facility in his absence or where advice is needed in a specialized area, such as environmental law. This clarification did not eliminate our Office's concern in this regard. The fact that his client turns to another attorney only when he is away or when a legal issue arises for which a specialist is needed underscored the applicant's position as the attorney of first resort for the facility in which he works.[3]

In sum, the applicant's submissions established that his position and job responsibilities are such that he routinely provides advice and assistance to his company's competitive strategists regarding competition-sensitive matters. If the

[3]Similarly, the applicant's statement that he is "accountable" to Magnavox's general counsel at another site, in addition to his reporting to a corporate officer at his facility, did not reduce the risk of inadvertent disclosure.

applicant were given access to a competitor's proprietary information, he would need to be continuously aware of and to mentally compartmentalize the potentially relevant information he now possessed that would be nondisclosable to his Magnavox colleagues. Accordingly, on the basis of the entire record before us, our Office was unable to conclude that the risk of inadvertent disclosure of protected material was sufficiently small to warrant his admission to the protective order. Consequently, the application was denied.[4]

In its report to our Office, the Air Force presented evidence that it had published in the CBD its requirement for the mid-course guidance system for the AGM-130 and its intention to award that work to Rockwell without competition. In its comments on the agency report, the protester failed to address these issues. Accordingly, we view Magnavox as having abandoned its allegation that the agency did not provide notice of its intended action in the CBD.[5] See Hampton Rds. Leasing, Inc., 71 Comp. Gen. 90, (1991), 91-2 CPD ¶ 490.

As noted above, Magnavox has not rebutted the agency's contention that the protester did not respond to the January 19, 1993, CBD notice. Where a CBD notice concerning intent to award a sole-source contract includes Note 22 giving potential sources 45 days to submit expressions of interest showing their ability to meet the agency's stated requirements, a protester must respond to the CBD notice with a timely expression of interest in fulfilling the agency's requirement and must receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the agency's sole-source decision to diligent potential offerors.

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[4]Magnavox filed suit in the United States District Court for the District of Columbia, where it sought to have the court direct our Office to admit its in-house counsel to the protective order. Civil Action No. 94-1999. The court denied Magnavox's motions for a temporary restraining order and a preliminary injunction, and granted our Office's motion for summary judgment.

[5]Similarly, we consider Magnavox to have abandoned its allegation that the option was not exercised properly on July 14, 1994, because the protester failed to comment on the agency report on this issue.

Fraser-Volpe Corp., B-240499; et al., Nov. 14, 1990, 90-2 CPD ¶ 397. Because Magnavox failed to respond to the January 19 CBD notice, our Office normally would not consider the merits of its protest of the decision to have Rockwell perform the mid-course guidance work on a sole-source basis.[6] However, in view of Magnavox's expression of interest immediately prior to the CBD notice, as well as the lack of formal notification by the Air Force until July 1994 that Magnavox's approach had been rejected, we will address the merits here.

While the Air Force offers a number of justifications for procuring the mid-course guidance system on a sole-source basis from Rockwell, the question of "bundling" is dispositive. If the agency reasonably found that it needed to have the manufacturer of the AGM-130 missiles supply the mid-course guidance system as well, it could limit the procurement to Rockwell even if Magnavox were able to manufacture the mid-course guidance system (a subject of considerable dispute in this protest). Magnavox challenges the Air Force's decision to "bundle" the mid-course guidance system with other AGM-130 work.

Our Office recognizes that bundled procurements, which combine multiple requirements into one contract, have the potential for restricting competition by excluding firms that can only furnish a portion of the requirement, and we review challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency's minimum needs. See National Customer Eng'g, 72 Comp. Gen. 132 (1993), 93-1 CPD ¶ 225. We uphold the bundling of requirements only where agencies have provided a reasonable basis for using such an approach. See, e.g., LaQue Center for Corrosion Technology, Inc., B-245296, Dec. 23, 1991, 91-2 CPD ¶ 577.

Here, the agency has offered a reasonable basis for bundling its requirements for the AGM-130 missile and their mid-course guidance system. In response to the protester's contention that some component systems of the AGM-130 have been separately competed, the agency points out that, while other subsystems were procured separately wherever possible, separate procurement of the guidance system would create undue risk, since integration of the guidance system is critical to the accurate functioning of the missile. The

[6]We also note that Magnavox did not protest, either in its initial protest or the August 19 supplemental submission, the July 29 contract modification adding the mid-course guidance system to Rockwell's contract, nor did it protest the April 1993 modification of contract No. F08635-91-C-0069 adding the mid-course guidance work to that contract.

agency views the mid-course guidance system as a nonseverable part of the AGM-130 missile system because of the central role that the mid-course guidance mechanism plays in ensuring that the target will be in the field of view once the missile is close enough for visual contact to be established. Accordingly, the Air Force advises that the reliability of the entire system would be called into question if the guidance system were separately procured. We view the need to reduce risk of the failure of an integrated weapons system as a reasonable basis for using a consolidated procurement, as the Air Force has done here. See Titan Dynamics Simulations, Inc., B-257559, Oct. 13, 1994, 94-2 CPD ¶ 139.

Magnavox insists that its approach would lead to cost savings, particularly in light of the reduced quantities of missiles being procured, and that the agency should not have integrated the mid-course guidance work into Lot 5, but has not rebutted the agency's documentation that separate procurement of the guidance system would create undue risk. While Magnavox plainly disagrees with the agency's assessment of risk, the record provides no basis to conclude that the agency's assessment in this area is unreasonable.

The protest is denied.

for Paul Lieberman
Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

5211512

Decision

Matter of: Telos Field Engineering

File: B-253492.6

Date: December 15, 1994

Timothy Sullivan, Esq., and Martin R. Fischer, Esq., Dykema Gossett, for the protester.
Charlotte Rothenberg Rosen, Esq., and Susan Morley Olson, Esq., McGuire Woods Battle & Boothe, for Concept Automation Inc., an interested party.
Michael L. Wills, Esq., Tennessee Valley Authority, for the agency.
Katherine I. Riback, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's technical evaluation of proposals is sustained where the evaluation was neither reasonable nor consistent with the solicitation, and the errors in the evaluation affected the outcome of the competition.

DECISION

Telos Field Engineering protests the award of a contract to Concept Automation, Inc. (CAI) under request for proposals (RFP) No. YJ-93525E, issued by the Tennessee Valley Authority (TVA). Telos challenges the contracting agency's evaluation of proposals and the conduct of discussions.

We sustain the protest.

This is the second protested award under this RFP. Telos had earlier protested TVA's award of a contract to Employee Owned Maintenance Company, Inc. (EOMC). We sustained that protest because the agency improperly failed to request BAFOs at the conclusion of discussions. Telos Field Eng'g, 73 Comp. Gen. 39 (1993), 93-2 CPD ¶ 275. After receiving our decision, TVA requested BAFOs, performed an evaluation, and recommended that award be made to CAI. The present protest challenges the agency actions leading up to the selection of CAI.

BACKGROUND

TVA issued the underlying RFP on September 3, 1992, seeking proposals for a time-and-materials contract to provide maintenance services for 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.

To implement the RFP award criteria, the agency established a 930-point scheme, 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.

After receiving initial proposals in November 1992, the agency sent offerors letters, dated December 9, seeking further information. Based on the initial proposals and the offerors' responses to the agency's December 1992 letters, the evaluators assigned point scores to each technical and cost proposal. Without requesting BAFOs, the agency totaled the technical and cost points, determined that, since EOMC's initial proposal received the highest combined point score, it was the most advantageous to the agency, and recommended that award be made to EOMC. Telos's initial protest followed.

In our decision on that protest, we concluded that Telos was prejudiced by the agency's failure to request BAFOs. We recommended that TVA reopen negotiations with all offerors whose proposals were in the competitive range and then request BAFOs.

In January 1994, in response to our recommendation, TVA requested BAFOs from 11 offerors, including Telos.[1] CAI and Telos proposed practically identical prices, which were

[1]TVA did not conduct discussions prior to requesting BAFOs because it determined that offerors had been adequately apprised of deficiencies in their offers by the December 1992 letters.

lower than any other offeror's. Accordingly, both received the maximum cost score. Overall the two firms' BAFOs were evaluated as follows:

	Technical Score	Cost Score	Total
Telos	428	465	893
CAI	445	465	910

The agency determined that, since CAI's proposal received the highest combined point score, it was the most advantageous to the agency. The TVA Board approved the award to CAI on July 20.

Upon notification of TVA's determination, Telos filed the present protest with our Office, and then Telos filed a supplemental protest following a July 25 debriefing. After deciding that urgent and compelling circumstances necessitated an award notwithstanding the protest, the agency awarded a contract to CAI on August 19, and issued a notice to proceed on the same date.

TECHNICAL EVALUATION OF PROPOSALS

The evaluation of technical proposals is primarily the responsibility of the contracting agency. Our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the record to ensure that the agency's evaluation was reasonable and consistent with the stated evaluation criteria. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

We have reviewed Telos's allegations regarding the technical evaluation and, as set forth below, we find that there were several proposal evaluation deficiencies, the correction of which would result in Telos's proposal receiving the highest score under the evaluation formula.[2]

EVALUATION OF TELOS'S PROPOSAL

Local Stocking Warehouses

Section M of the RFP required offerors to respond to the following: "Dedicated repair parts inventory with local stocking warehouses. Where and how many?" An offeror was

[2]TVA is subject to the bid protest provisions of the Competition in Contracting Act because it falls within the definition of "federal agency" to which those provisions apply. 31 U.S.C. § 3551(1) (1988); 40 U.S.C. §§ 472(a) and (b) (Supp. V 1993). See also Telos Field Eng'g, B-257747, Nov. 3, 1994, 94-2 CPD ¶ 172.

credited under this evaluation factor with 4 points for each specified local stocking warehouse, at up to a maximum of five locations (20 points), and 4 points for a parts inventory dedicated to this contract, for a possible total of 24 points.

The agency credited Telos with four points for one local stocking warehouse, and four points because Telos's BAFO stated that the parts would be dedicated to this contract. Telos argues that the agency improperly scored its proposal under this evaluation factor because it "unambiguously listed seven locations where it would store its spare inventory of $1,000,000."

TVA acknowledges that Telos stated that it would provide seven dedicated local repair parts facilities, but argues that Telos's proposal, when read as a whole, was ambiguous regarding the number of local stocking warehouses that it was proposing. TVA points to the following language from Telos's BAFO as evidence of the ambiguity regarding this matter:

> "Telos will concentrate its assigned personnel and parts inventories at the main TVA locations in Chattanooga and Knoxville, with additional technical personnel and spares located at Sequoyah, Browns Ferry, Watts Barr, Bellafonte, and Muscle Shoals. The proposed 'on-site' Telos inventory of approximately $1,000,000 will be assigned at these facilities on a rata basis to the equipment types and models listed by TVA."

The agency interpreted this statement to mean that Telos was proposing local stocking warehouses at the main TVA locations in Chattanooga and Knoxville, with spares located at other locations, and that the parts would be dedicated to TVA. Transcript (Tr.) at 104.[3] The agency concedes that Telos should have received 8 points for proposing two local stocking warehouses, and 4 points for dedicating the parts to this contract, for a total of 12 points. Tr. at 106 and 158. The agency did not interpret Telos's intention to stock spares at five locations to mean that those five locations were local stocking warehouses. Tr. at 121. Regarding spare parts, one evaluator noted that, "A spare part to me could mean one hard drive. . . ." Tr. at 120.

We find that the imprecise language in Telos's BAFO reasonably led the agency to conclude that Telos was committing to provide only two local stocking warehouses,

[3]Transcript citations refer to the transcript of the hearing conducted by our Office in connection with this protest.

even though some spare parts might be located at the additional five facilities. Since we agree that Telos's proposal was ambiguous regarding its commitment to provide more than two stocking warehouses, and the agency's interpretation was reasonable, we find the agency's evaluation under this criterion unobjectionable, except for the four-point error conceded by the agency.[4]

Service Contract Sales

Under this criterion, evaluators examined the number and type of contracts that offerors had performed. TVA's internal evaluation plan, which was not disclosed to offerors, reserved 2 of the available 28 points to proposals where prior work was performed on-site. Telos received only 26 out of the possible 28 points because the agency determined that none of Telos's previous contracts were performed on-site.

Telos points out that its proposal explicitly stated that Telos had provided on-site maintenance at Letterkenny Army Depot and Blue Grass Army Depot. Our review confirms that Telos's proposal stated that it had provided "on-site maintenance services" at those two locations, and TVA has provided no basis to discount this information. Accordingly, under TVA's evaluation scheme, Telos should have been credited with two points for listing on-site contracts in its proposal.

Warranty Service

Under this criterion, evaluators were to consider the offeror's ability to provide warranty service. In this regard, an offeror was credited with four points for each manufacturer listed in its proposal for which it was authorized to provide warranty service, with a maximum of 40 points available.

Telos listed nine manufacturers for which it provides warranty service, and received 36 points. Telos argues that it should have received an additional four points because its proposal included a list of 125 vendors "supported by Telos." The agency responded that Telos was not credited

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[4]CAI's BAFO was evaluated similarly. CAI was given four points for proposing one local stocking warehouse and four points for stating that the parts would be dedicated to this contract. CAI received no credit for its proposed plan to equip each field engineer with a spare parts kit based on the equipment being maintained at the assigned TVA location. Tr. at 22.

with an additional four points for listing manufacturers that it supported, because Telos did not indicate in its proposal that it provided warranty service for these manufacturers. Tr. at 93.

We find that TVA reasonably credited Telos only for the nine manufacturers listed in its proposal for which it stated that it provided warranty service. The agency properly did not credit Telos for "supporting" additional vendors since, as TVA argues, supporting a particular vendor does not necessarily mean receiving the authorization generally needed from the manufacturer to provide warranty service for its products. Tr. at 93. We conclude that there is no basis to question this aspect of the evaluation.[5]

Demonstrated Success With Customers

Under this evaluation factor, evaluators examined each offeror's demonstrated success with hardware service and support provided to customers similar to TVA. An offeror was credited with 4 points for each such customer listed in its proposal, up to a possible total of 40 points.

Telos listed 15 contracts with nine customers similar to TVA. Based on Telos having nine such customers, its proposal received 36 points. Telos contends that it deserved full credit under this criterion because it listed 15 contracts. In support of its argument, Telos notes that, according to the agency's internal evaluation plan, an offeror was to receive four points for each "contract/customer."

We disagree. It is clear that this evaluation criterion was included in the RFP to examine each offeror's success with customers, particularly customers similar to TVA. To the extent that Telos relies on language in the TVA internal evaluation plan to support its argument that TVA was required to evaluate an offeror's contracts, its reliance is misplaced. Evaluation plans are internal agency instructions and as such do not give outside parties any rights. Aerospace Design, Inc., B-247793, July 9, 1992, 92-2 CPD ¶ 11. The agency is required to follow the evaluation scheme set forth in the RFP. Id. In this case, the RFP evaluation scheme specifically referred to "customers equivalent to TVA." Accordingly, counting customers rather then contracts was consistent with the RFP,

[5]CAI's proposal received the entire 40 points under this evaluation criterion because it listed 38 manufacturers for which it currently provides warranty service.

and we find the agency's evaluation under this criterion unobjectionable.[6]

Total Quality Program

Offerors under this evaluation criterion were required to show a company-wide commitment to quality, including an active total quality management (TQM) program, a supplier quality assurance program, a statistical quality management program, and a reference to ISO 9001 standard. This evaluation criterion had a maximum score of seven points, and, under the agency's undisclosed evaluation plan, was scored on an all-or-nothing basis.

Telos's proposal received zero points under this evaluation criterion. TVA noted that Telos's proposal exhibited a "company-wide commitment to quality" and referenced the ISO 9001 standard. Tr. at 66 and 127-128. However, TVA also noted that Telos proposed a quality control (QC) program in which TVA's only participation would consist of Telos's customer visits (that is, visits by Telos to TVA) apparently in response to problems that arose. One evaluator stated, "[Telos] said there would be customer visits but it was for service and not so much for customer satisfaction." Tr. at 113. TVA viewed Telos's proposed customer visits as involving TVA later in the process than would be the case with a TQM program, where the customer would be involved as part of a quality council convened regularly throughout the contract period.

In contrast, CAI's proposed TQM program included a quality council. While TVA was impressed by CAI's customer-driven response to this evaluation factor, it did acknowledge that CAI's proposal did not provide a supplier quality assurance program and did not reference ISO 9001. Tr. at 132-133. Nonetheless, CAI's proposal received the full seven points under this evaluation factor.

We find that TVA had a reasonable basis for finding CAI's proposal superior under this factor. CAI's proposal evidenced a TQM program that involved TVA early in the process in the context of a quality council, while Telos proposed a QC program with TVA's involvement apparently limited to customer visits. TVA has not provided a reasonable basis to assign the full seven points to CAI, whose proposal did not meet all the requirements of this

[6]CAI received the full 40 points for this evaluation criterion, because it listed contracts with 10 customers that were similar to TVA.

factor and zero points to Telos, whose proposal satisfied some of those requirements. In this regard, TVA appears to have given the use of TQM methodology weight in excess of that indicated to the offerors by the RFP evaluation criteria. Whatever point differential could be justified by the evaluated difference in the merits of the two proposals, the record provides no reasonable basis for a seven-point difference in scores.

EVALUATION OF CAI'S PROPOSAL

One Number Calling

Under the "one number calling" factor, proposals could receive 30 points for offering a single point of contact for all support services and 20 points for offering remote diagnostic capability. Telos argues that, upon receipt of BAFOs, TVA unreasonably increased CAI's score by 20 points under this evaluation factor, even though CAI made no relevant changes to its technical proposal in its BAFO.

TVA explains that in its initial evaluation it gave CAI credit for one number calling (30 points), but none for remote diagnostic capability. TVA states that, upon receipt of BAFOs, it reexamined the initial proposals as well as the BAFOs. Tr. at 59. In reviewing CAI's initial proposal, TVA concluded that CAI had demonstrated remote diagnostic capability, and CAI's score was raised accordingly. Telos contends that the Dispatch-1 System offered by CAI is no more than a telephone hotline with access to an automated data base, and does not have remote diagnostic capability.

Section M of the RFP required offerors to demonstrate "automated procedures such as remote diagnostic capability." While our review confirms that CAI's proposal included a reference to "multiple level structure of decision support information (including technical data) for solving customer problems by phone," we see no basis to conclude that this or other references in the proposal could reasonably be interpreted as demonstrating remote diagnostic capability, as TVA found, or any other relevant automated procedure.[7] Accordingly, we find no basis for the 20-point increase in CAI's score at BAFO.

[7]In contrast, Telos proposed a single point of contact for all support services and the capability for remote diagnostics through a dial-up modem, and therefore properly received the full 50 points under this evaluation criterion.

Experience

Similarly, Telos argues that TVA improperly increased CAI's score at BAFO by 30 points under the experience evaluation factor, even though CAI had made no relevant changes to its proposal. Under this factor, an offeror was credited with 10 points for each year of experience with similar contracts beyond the 3 required years, up to 100 points. Accordingly, an offeror with 12 years experience would receive 90 points (10 points for each of the 9 years beyond the required 3), while one with 13 or more years would receive 100 points.

In the initial evaluation, CAI's proposal was awarded 70 points for this evaluation factor. Upon reexamination of CAI's initial proposal after submission of BAFOs, TVA determined that CAI had listed "at least" 13 years of experience with similar contracts and raised its score to 100 points. We find no reasonable basis for this determination.

The earliest contract that CAI listed in its proposal began on April 5, 1982, and the proposal listed contracts that CAI performed up through the time that BAFOs were received and evaluated in February 1994. Therefore, at the time that BAFOs were submitted, and assuming all CAI's contracts were relevant, CAI had 11 years and 11 months of experience. TVA explains that it credited CAI with an entire year of experience for 1982, even though CAI claimed only 9 months of experience in that year, and for each year up to and including all of 1994, even though BAFOs were submitted in February, totaling 13 years.

While TVA could reasonably round CAI's 11 years and 11 months of experience up to 12 years (which would give CAI 90 points out of the total 100) it was unreasonable for TVA to credit CAI with experience which it never claimed and is not supported by its proposal. We therefore conclude that the 10 points for the 13th year were added to CAI's score without a rational basis.

CONCLUSION

There were many irregularities throughout the source selection in this procurement. The scoring methodology, as implemented by TVA, was not consistent throughout the RFP, and the methodology used in some instances was inconsistent with the RFP evaluation criteria. Additionally, TVA's evaluation of technical proposals was poorly documented at best, and at times not documented at all. Agencies are required, in order to protect the integrity of the public procurement process, to document their evaluation of proposals and their selection decisions so as to show the relative differences between proposals, their weaknesses and

risks, and the basis and reasons for the selection decision. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447. In several instances in the course of this protest, TVA provided our Office with after-the-fact explanations for the technical scoring, where the record was bereft of any contemporaneous narrative or analysis.

Finally, as detailed above, there were several instances in which the evaluation of proposals was based on plain error or was otherwise unreasonable. The net result of the deficiencies in the evaluation of proposals was that Telos's proposal was improperly denied four points for stocking warehouses (an error conceded by the agency), two points for "on-site" contracts (apparently due to an oversight), and several points due to the way in which TVA applied the all-or-nothing scoring method for the total quality program factor. In addition, CAI was improperly credited with 10 points for experience not claimed in its proposal, 20 points for a remote diagnostic capability which it did not offer, and several points for its total quality program. The correction of these scoring errors raises Telos's technical score from 428 to at least 434, and lowers CAI's technical score from 445 to no more than 415.[8] We conclude that, but for TVA's evaluation errors, Telos's total score would have substantially exceeded CAI's (as noted above, the two proposals' cost scores were identical).

When point scores are used, they typically are not controlling, but are used as guidance by the source selection officials. Grey Advertising, Inc., 55 Comp.

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[8]Telos also contends that TVA failed to conduct meaningful discussions with offerors before the request for BAFOs was made. Telos points to our November 16, 1993, decision, which recommended that TVA reopen discussions with all offerors whose proposals were in the competitive range, before requesting BAFOs. As noted above, after receipt of our decision, TVA determined not to conduct further discussions prior to requesting BAFOs. It does appear that certain of the evaluation deficiencies might well have been ameliorated if, prior to the request for BAFOs, offerors had been afforded meaningful discussions regarding aspects of their proposal which were unclear; for example, discussions could have corrected the agency's apparent misreading of Telos's on-site service contract experience and may have led the agency to give Telos credit for more local stocking warehouses. We need not address this issue, however, because the effect of the extensive pleadings in this protest, as reflected in our recommendation, has been to provide the agency with essentially all the information that it would have learned if discussions had been held.

Gen. 1111 (1975), 76-1 CPD ¶ 325. These officials have broad discretion to determine the manner and extent to which they will make use of point scores, as well as other elements of technical and cost evaluation results. Dyncorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69. Thus, TVA could have made award to CAI notwithstanding Telos's proposal receiving a higher score, if the agency reached a documented determination, based on a reasoned analysis of the relative merits of the proposals, that the evaluated optional features which CAI offered in its proposal were, in fact, superior to those offered by Telos.

In this procurement, however, TVA twice appears to have based its award decision entirely on the total point score, as a result of which the errors noted in our decision were determinative. In view of TVA's insistence on this mechanical award determination formula, Telos's proposal should have been selected. Secure Servs. Technology, Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421.

Since it is relatively early in the contract performance period, we recommend that TVA terminate CAI's contract for the convenience of the government and make award to Telos, if otherwise eligible, unless TVA reaches a reasonable, documented determination that CAI's proposal is the most advantageous to the government. In any event, TVA should reimburse Telos for its reasonable costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Telos's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

for James F. Hinchman
Comptroller General
of the United States

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Hughes Missile Systems Company

File: B-257627.2

Date: December 21, 1994

Thomas P. Barletta, Esq., Robert D. Wallick, Esq., and Mark A. Barnett, Esq., Steptoe & Johnson, for the protester.
Charles D. Ablard, Esq., Faegre & Benson, for Marconi Dynamics, Inc.; and Clayton S. Marsh, Esq., Ropes & Gray, for Raytheon Company, interested parties.
Gregory H. Petkoff, Esq., and Clifford A. Carlisle, Esq., Department of the Air Force, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that agency improperly accepted two offerors' technical proposals submitted in response to the first step of a two-step negotiated procurement is denied where the record shows that the agency reasonably concluded that the technical proposals met all of the essential requirements of the solicitation.

2. Protester's challenge that the request for price proposals issued as the second step of a two-step negotiated procurement is flawed for failure to include a cost realism review and for choosing not to consider transition costs to the government as part of the agency's evaluation of prices is denied where the agency reasonably concluded that the presence of adequate price competition precluded the need for a cost realism review, and decided that the effect of considering transition costs would favor the previous incumbent and would hinder competition.

DECISION

Hughes Missile Systems Company protests the decision of the Department of the Air Force that Marconi Dynamics, Inc. and Raytheon Company submitted acceptable technical proposals in response to request for technical proposals (RFTP) No. F42630-93-R-27074, issued for follow-on engineering services, called Weapon System Support (WSS), for the AGM-65D, AGM-65F, and AGM-65G Maverick Missiles. Hughes argues that only it can perform these services, and that the agency's conclusion that Marconi and Raytheon submitted acceptable technical proposals is unreasonable.

Hughes also challenges certain solicitation provisions included in the step-two price competition.

We deny the protest.

BACKGROUND

This protest is the second review of this procurement by our Office. In the earlier case, Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475, our Office sustained a protest by Marconi challenging the Air Force's decision to procure these services sole-source from Hughes, without permitting other potential offerors to compete for the opportunity to perform the work. In holding that the agency should convene at least a limited competition for these services, our prior decision concluded that neither Hughes proprietary data, special equipment or facilities, nor the estimated time of the remaining contract, justified forgoing the benefits of competition.

Specifically, with respect to proprietary data, our decision concluded that: (1) the amount of Hughes proprietary data needed to service the Maverick missiles was overstated by the agency; (2) Marconi made a substantial, detailed and well-reasoned showing that it would be able to perform these services without using any Hughes proprietary data; and (3) Marconi cast substantial doubt on both the validity of Hughes's claim to proprietary rights for this data, and the Air Force's claimed cost of purchasing such data from Hughes, if needed.

With respect to facilities and equipment, our decision concluded that Marconi provided convincing evidence, including the views of Air Force technical personnel, that its own capabilities, combined with certain equipment at the Guided Weapons Evaluation Facility at Eglin Air Force Base, would permit Marconi to perform the needed services. Finally, our decision rejected the agency's contention that the remaining time for performance of these services--estimated as a matter of months--would not justify the cost of a competition.[1]

In response to our decision in Marconi, the Air Force decided to hold a competition for these services, and structured its competition in the form of a two-step negotiated procurement.[2] Included in the RFTP issued

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[1]For the record, we note that the RFTP at issue now is for 1 base year and 2 option years.

[2]This form of procurement is a negotiated variation of two-step sealed bidding. See Federal Acquisition Regulation (FAR) subpart 14.5; Infotec Dev., Inc., B-235568, Sept. 6,

(continued...)

on March 1, 1994, for step one of the procurement was a document entitled, "Statement of Work for the Weapon System Support for the Infrared Maverick Weapon System, WS-319." As explained in our prior decision, the Infrared (IR) Maverick is the last variation in a series of Maverick Missiles produced for the Air Force over the last 25 years. Previous versions of the missile included the Television (TV) Maverick, and the Laser Maverick.

The statement of work (SOW) defined the effort for the D, F, and G versions of the missile--the IR versions--to include "systems engineering, systems safety, configuration management, aircraft integration, on-call technical support, and logistical and technical support of Air Force, Navy and Foreign Military Sales operations units." Offerors were also required to manage the product baselines for these missiles. SOW ¶ 1.1. In addition to the IR missiles, the SOW anticipated certain specified technical support for the A, B, and E versions of the missile--the TV and Laser versions--and for two other missiles, the GBU-15 and the SLAM.

The RFTP identified seven evaluation factors, each of which was equal in weight. These were: (1) systems/project management; (2) systems engineering; (3) interface support; (4) engineering change technical support; (5) aircraft integration; (6) training and live launch support; and (7) technical support. Offerors were advised that for each evaluation factor, the agency would assess compliance with requirements, soundness of approach, and understanding the requirement.

The RFTP further advised that the agency would attempt to resolve proposal inadequacies by issuing clarification requests (CRs) and deficiency reports (DRs). CRs were to be used to request more information about a specified topic, while DRs were to be used to notify an offeror of an unacceptable or inadequate element of the proposal. The RFTP anticipated that offerors would be allowed to attempt to address deficiencies and propose corrective solutions where needed.

In response to the RFTP, the Air Force received technical proposals from Hughes, Marconi, and Raytheon; convened an evaluation panel to review the proposals; and prepared CRs and DRs for each offeror. The proposal of Marconi clearly

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[2](...continued)
1989, 89-2 CPD ¶ 215. In this approach, the agency requests technical proposals, without prices, in step one, and requires the submission of pricing information in response to a request for pricing proposals in step two. For purposes of the challenge to the step-one evaluations here, we see no essential difference between the two methods. Id.

concerned the evaluators--they issued approximately 54 CRs and 10 DRs, to each of which Marconi provided a written response. The proposal of Raytheon triggered approximately 27 CRs, to which Raytheon responded.[3] After reviewing the responses of Marconi and Raytheon to the areas of agency concern, the Air Force decided that both had submitted acceptable technical proposals.

On June 2, the Air Force notified Hughes that its proposal was acceptable and provided Hughes with the request for price proposals (RFP). The RFP sought price proposals by July 6 for 1 base year followed by two 1-year options. The RFP requests fixed prices for the system engineering, data/configuration management effort and program management effort, and time-and-materials (T&M) prices for various "on call engineering support tasks." The RFP advises that award will be made to the lowest-priced offeror based on the sum of the proposed prices for the fixed-price and T&M portions of the contract for the base year and both option years. This protest followed.

PROTESTER'S CONTENTIONS AND TIMELINESS

In its initial protest, Hughes argues that no offeror other than Hughes can perform these support services, and that the Air Force unreasonably concluded that Marconi and Raytheon submitted acceptable proposals. Hughes also argues that the RFP governing the submission of step-two price proposals improperly fails to consider transition costs to the government associated with selecting a new contractor, includes T&M provisions which Hughes claims are impermissible in a two-step procurement, and lacks procedures for a cost realism analysis of the proposals.

The agency and Raytheon requested that our Office dismiss as untimely Hughes's protest issues related to the ability of Marconi and Raytheon to perform these services. Both argue that any challenge to the ability of other offerors to perform these services should have been raised in response to Marconi's protest against the agency sole-source decision, in which Hughes participated as an interested party. See 4 C.F.R. § 21.2(a)(2) (1994).

While we agree with the agency and Raytheon that many of the issues raised by Hughes were discussed in our previous decision--i.e., whether any offeror could perform these services without Hughes proprietary data, and whether any offeror would have the necessary facilities to perform these services--the issue now is not whether the Air Force

[3]Hughes's proposal triggered nine CRs, however, we will assume there was never any overriding concern on the part of the agency that Hughes would be unable to provide these services.

adequately justified a sole-source procurement. Rather, the essence of Hughes's challenge is whether the Air Force properly determined that Marconi and Raytheon submitted acceptable technical proposals given the particular requirements and evaluation criteria set forth in the RFTP.[4] In our view, Hughes's challenge to the evaluation assessments made here is timely and will be considered on the merits. Likewise, we see nothing untimely in Hughes's challenges to the provisions in the step-two RFP, which were filed prior to the time for submission of step-two price proposals. See 4 C.F.R. § 21.2(a)(1).

EVALUATION OF TECHNICAL PROPOSALS

As stated above, the Air Force here has adopted a negotiated variation of two-step sealed bidding. Compare FAR subpart 14.5 with FAR § 15.609(d); Infotec Dev., Inc., supra. In furtherance of the goal of maximized competition, the first step contemplates the qualification of as many technical proposals as possible under negotiation procedures. See 50 Comp. Gen. 346, 354 (1970); Shughart & Assocs., Inc., B-226970, July 17, 1987, 87-2 CPD ¶ 56. This procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 53 Comp. Gen. 47 (1973); 50 Comp. Gen. 337 (1970); Trans-Dyn Control Sys., Inc., B-221838; B-221838.2, May 22, 1986, 86-1 CPD ¶ 478. Thus, the acceptability of a step-one technical proposal should not be affected by its failure to meet all specification details "if the procuring agency is satisfied that the essential requirements of the specification will be met." 50 Comp. Gen. 337, 339, supra.

Our review of an agency's technical evaluation under an RFTP is limited to whether the evaluation was reasonable. Kay and Assocs., Inc., B-234509, June 16, 1989, 89-1 CPD ¶ 567. Where technical supplies or services are involved, the contracting agency's technical judgments are entitled to great weight; we will not substitute our judgment for the contracting agency's unless its conclusions are shown to be arbitrary or otherwise unreasonable. Chemical Waste Mgmt., Inc., B-232276, Dec. 13, 1988, 88-2 CPD ¶ 590. Although an agency should seek to qualify as many step-one technical proposals as possible, Sytek, Inc., B-231789.2, Dec. 7,

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[4]We agree with the agency to the extent that any particular Hughes challenge that fails to focus on a requirement in the RFTP, and argues instead that no other offeror could perform these services, should have been raised either during the Marconi protest, in a reconsideration request, or prior to the submission of technical proposals in this procurement. However, we did not agree that the protest, as a whole, could be seen in this light.

1988, 88-2 CPD ¶ 568, it may reject any proposal that fails to meet essential requirements.

For the reasons stated below, and based on our review of the RFTP requirements, the Marconi and Raytheon proposals, the CRs and DRs prepared by the agency and answered by the offerors, and the materials provided by the evaluators--including the evaluator who disagreed with the agency's assessment of the Marconi and Raytheon proposals--we conclude that the Air Force reasonably considered these proposals acceptable, and reasonably invited both offerors to submit price proposals along with Hughes.

Marconi's Proposal

The majority of Hughes's protest focuses on the alleged unacceptability of the technical proposal submitted by Marconi. According to Hughes, the Air Force unreasonably concluded that Marconi could perform the services required by the RFTP because, in Hughes's view, Marconi lacked: (1) several elements of the necessary computer simulation software; (2) in-depth knowledge of certain Maverick components available only in documents which Hughes claims are proprietary; and (3) knowledgeable personnel without improper reliance on former Hughes employees, that Hughes says are barred by post-employment agreements from assisting Marconi in performing these services.

Computer simulation capability

In its challenge to the agency's assessment of Marconi's simulation capabilities, Hughes complains that Marconi lacks the 6-Degrees of Freedom (6-DOF) Software Model, has no "Hardware in the Loop" simulation capability, has insufficient "All-Up Round (AUR) Tear Down/Build Up and Test Capability," and has a high-risk Sub-Assembly Test Station for testing circuit cards. While we will not set forth here every Hughes challenge to each of these capabilities, we have considered each challenge in detail and have concluded that none of them states a basis for concluding that the agency acted unreasonably in deciding that Marconi's technical proposal was acceptable.

For example, Marconi's ability to develop a 6-DOF model for the IR Maverick system was a concern both in this protest and in the earlier case. The 6-DOF is a computer tool used to predict the movement and/or trajectory of a missile during launch and free flight across the entire range of possible motions. To do this, the 6-DOF models portions of the missile's seeker, autopilot, and control surfaces which guide the missile from its launch to its intended target.

In response to the requirement in the SOW at 3.3.1 directing offerors to propose capability to perform computer simulation of Maverick missile performance, Marconi

acknowledged that it lacked existing 6-DOF capability but proposed to develop and validate that capability within 3-1/2 months after award. In reviewing the proposed approach, the Air Force issued two DRs addressing Marconi's 6-DOF capability. The first, DR-4, expressed concern about the amount of government furnished information (GFI) Marconi identified in its proposal as necessary to develop its 6-DOF capability. The second, DR-5, stated that the time period for developing the capability was too long.

In reviewing Marconi's response to DR-4, the Air Force stated that Marconi provided a detailed approach to the problem of developing 6-DOF capability by planning several contingencies for performing without GFI. The agency also noted that a great deal of GFI was available for use, even if the GFI was not comprehensive. Based on this response, the Air Force concluded that Marconi would be able to develop this capability even without the GFI, but reasoned that the GFI that is available would assist Marconi. Likewise, in reviewing Marconi's response to DR-5, the Air Force concluded that the 3-1/2 month development time would be acceptable since recent past experience showed infrequent use of 6-DOF simulation to solve problems, and since the Air Force was unaware of any current known task requiring the immediate use of 6-DOF capability.[5]

According to Hughes, the Air Force decision that the Marconi proposal was acceptable in this area was unreasonable. Regarding this issue, and others, Hughes argues that our Office should consider instead a dissenting memorandum in the record prepared by one of the evaluators.[6] With respect to the issue of 6-DOF capability, the evaluator concluded that the responses of Marconi should not be viewed as adequate to overcome the deficiencies identified in DRs 4 and 5. Hughes also argues that the agency evaluation materials on this point are insufficient to overcome the specific expressions of concern identified in the dissenting memorandum.

We consider reasonable and within its discretion the Air Force decision not to disqualify Marconi from the step-two price competition because of Marconi's approach to developing 6-DOF capability. As stated above, the purpose of conducting a two-step negotiated procurement is to

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[5]In addition, the Air Force explained that the 3-1/2 month period seemed less significant in light of the fact that the agency has had no contractor to perform these services since Hughes's contract expired in early 1994.

[6]We note that at least two other evaluators expressed concerns about the optimism and risk of Marconi's proposal, although these evaluators did not prepare a memorandum dissenting from the overall evaluation conclusion.

qualify as many potential competitors as possible, providing they meet the agency's essential requirements. See 50 Comp. Gen. 346, 354, supra. Here, the agency identified problems and appropriately labeled them as serious, but after requiring Marconi to elaborate on its approach and to prepare contingencies to work around the possibility that certain GFI might be unavailable, concluded that the overall response was acceptable. Similarly, after expressing concerns about the 3-1/2 month period Marconi proposed for developing 6-DOF capability, the Air Force reconsidered its view after focusing on the frequency of past use of this capability. Since the Air Force considered these issues in light of its actual needs, with an eye towards increasing competition, and did not abandon the essential requirements of its solicitation, we find that the decision was reasonable.

We also disagree that the evaluation materials were insufficient to support an agency decision contrary to the views of the dissenting evaluator. While we respect the healthy dissent of agency personnel, we note that it is not unusual for individual evaluators to have disparate, subjective judgments which are subject to reasonable differences of opinion. Unisys Corp., B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. The dissent in this case, while appropriate for consideration in the final decision-making, does not mandate a conclusion on our part that the agency acted improperly when it decided that the Marconi proposal was acceptable. Id.

With respect to the evaluation materials, we note that the agency here conducted an evaluation by exception--i.e., it identified through CRs and DRs the areas where the proposal needed additional attention. We have expressly recognized that the use of CRs and DRs is a valid method of evaluating technical proposals submitted in response to step one of a two-step procurement. Datron Sys., Inc., B-220423; B-220423.2, Mar. 18, 1986, 86-1 CPD ¶ 264. While the Air Force did not consolidate its views into one evaluation memorandum, the 54 CRs and 10 DRs issued to Marconi, and the breadth of the issues raised therein and responded to, shows that the Air Force, in fact, thoroughly reviewed Marconi's proposal. Further, the record includes a memorandum to the file expressly rejecting the views expressed in the dissenting memorandum, and Hughes has not succeeded in showing that this decision was unreasonable. See Unisys Corp., supra.

A second example of our conclusion regarding simulation capability concerns the "All-Up Round[7] (AUR) Tear Down/Build Up and Test Capability" and involves issues similar to those discussed above. In this area, section 7

[7]"All-up round" refers to a complete, ready-to-fire missile.

of the Technical Proposal Preparation Instructions advised potential offerors to "describe in detail the procedures and technical approach to be used in the event of a missile anomaly investigation that would require significant tear-down, analysis, build-up, and re-test of an AUR Maverick." If potential offerors were to rely in part on the use of government facilities, they were advised to identify the facilities and explain how they would be used.

In its proposal, Marconi stated that it would perform these tasks at a Navy facility in Fallbrook, California, but explained that the Fallbrook facility lacked the capability to separate and remove the warhead from the center-aft section of the missile. To address this issue, Marconi proposed to fabricate its own warhead extraction tool and train Fallbrook personnel to use the device. After reviewing the proposal, the agency concluded that the approach would work, and that the 3-month transition required to develop and validate the extraction tool should not cause the rejection of Marconi's technical proposal.

In its protest, Hughes argues again that the 3-month fabrication time is too long, and that the Air Force unreasonably rejected the views of its dissenting evaluator, who termed Marconi's approach inadequate and not convincing. In our view, the answer is the same as before. In concluding that the Marconi approach was acceptable, the Air Force apparently considered that only 10 missiles were torn down in the last 2 years of WSS performance. In addition, the Navy personnel at Fallbrook were already able to disassemble several components of the missile--such as the guidance and control section from the center-aft section--but had not previously needed to break the center aft section into its two major components: the warhead and the rear missile body. After reviewing Marconi's plan to supplement Fallbrook's current ability with a specially designed tool, and then training the Navy personnel to use the tool, the Air Force reasonably decided that Marconi would be able to perform the AUR services. As before, we also conclude that it was reasonable to consider the relatively infrequent need to tear down AUR missiles in reaching the conclusion that 3 months was an acceptable delay in complying with the solicitation requirement.

Availability of proprietary data

Hughes argues that the agency unreasonably concluded that Marconi (and Raytheon as well) would be able to perform the services required here without access to Hughes proprietary data.[8] In support, Hughes points to two specific

[8]The record in this case, and in the earlier one, shows that Hughes claims a proprietary interest in certain data used to (continued...)

admonitions in the Technical Proposal Preparation Instructions where offerors are advised to be sure that their proposals adequately set forth how they will meet the requirements of the RFTP without using such data. Instructions at c.(4) and c.(7).

Hughes's complaint in this regard--woven throughout its initial and subsequent protest pleadings--raises several distinct issues. To the extent that Hughes raises a general claim that the work here cannot be done without using Hughes proprietary data, this issue is untimely. In our prior decision on this procurement, wherein Hughes participated as an interested party, we considered in great detail the impediment to competition caused by unavailable Hughes proprietary data. Marconi Dynamics, Inc., supra at 5-10. While Hughes correctly argues that our prior decision reviewed the adequacy of the Air Force justification for a sole-source procurement, Hughes fails to acknowledge that the decision also reaches several conclusions regarding the need for Hughes proprietary data to perform these services.[9] Since Hughes participated in the earlier case, we conclude that any challenge to the general conclusion regarding the ability to perform these services without Hughes proprietary data, should have been filed as a request for reconsideration of the decision in Marconi. See 4 C.F.R. § 21.12(b).

The second issue is that Hughes's proprietary data claims are implicit throughout its specific challenges to the acceptability of the other two offerors' proposals. Although Hughes claims that the RFTP contains requirements regarding the nonuse of Hughes proprietary data, the references it cites are from the Technical Proposal Preparation Instructions, not the SOW. In our review of the

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[8](...continued)
produce this missile over the past 25 years. So far as we know, the Maverick missile has only been produced for the United States government, has been produced entirely with public funds, and has never been produced for a commercial purchaser. Under these circumstances, we expect the Air Force will carefully scrutinize Hughes's claims pursuant to the statutory framework for determining the government's rights in technical data. See 10 U.S.C. §§ 2320, 2321 (1988 and Supp. V 1993), and other statements of government policy on this subject.

[9]For example, the prior decision concluded that Marconi had made a "substantial, detailed, and well reasoned argument that it can perform these services" and that "the Air Force position that Hughes proprietary data blocks the agency ability to compete its requirement for WSS services--as presented and defended before our Office--is simply not supported by the record here." Id. at 9.

adequacy of Marconi's response to the SOW, set forth above, and Raytheon's response, set forth below, we consider whether the agency reasonably concluded that the proposal addresses the solicitation's technical requirements. Since our review of these specific challenges is grounded in the requirements of the RFTP, and since the RFTP is silent on the subject of Hughes proprietary data, we need not address this issue beyond our consideration of Hughes's specific challenges to the adequacy of the proposals.

There is also a third category of issues regarding Hughes proprietary data. In some instances, Hughes links its general complaint regarding the proprietary data to a provision in the SOW, but does not raise a specific substantive challenge to the offeror's approach, as it did with respect to computer simulation capability. For example, Hughes argues that the agency unreasonably accepted the offerors' claimed reliance on technical orders (and other sources of information) to perform services related to engineering change proposals. In response, the Air Force argues that Hughes has adopted an overly expansive view of the SOW, not supported by the document itself, in order to claim that the technical orders are insufficient to perform certain tasks.

Based on our review of the record, we agree with the agency on this issue. Hughes's complaints fail to acknowledge that the level of support here is differentiated between the infrared Maverick and the other two versions of the missile, and that the SOW requires only that contractors shall isolate faults and determine the most probable cause of the faults. Since Hughes's arguments regarding the adequacy of technical orders and other available information is based on its misreading of the SOW, and not on a specific and substantive challenge to the offerors' approaches--like the challenges Hughes raised to the 6-DOF, Hardware in the Loop, AUR Testing, and other computer simulation issues--we find no basis for its assertion that the evaluation was unreasonable.

Reliance on former Hughes employees

Related to its claim regarding unauthorized use of proprietary information, Hughes argues that Marconi will circumvent the need for such data by using former Hughes personnel. According to Hughes, these personnel were required to sign employment agreements which restrict their post-employment activities. Hughes explained that it intends to enforce these agreements in order to deprive Marconi of the expertise it will need to perform this contract. Hughes argues that since it will be successful in challenging Marconi's use of these former Hughes employees, the Air Force evaluation unreasonably permitted the expertise of these employees to contribute to the agency's assessment of Marconi's acceptability.

We find that the agency neither overlooked this issue nor reached an unreasonable conclusion regarding its impact. As part of its evaluation of the Marconi proposal, the Air Force issued CR-49 to clarify whether the former Hughes employees had signed employment agreements with Hughes restricting their post-employment activities. CR-49 also asked what legal risks would be involved in accepting the planned use of the former Hughes employees. Marconi explained that none of the employees is covered by any current restriction--Marconi says all the restrictions have expired--and that it expects no negative technical or legal impact on its performance as a result of the use of these employees. In addition, in its response to this protest, Marconi explained that it had obtained signed statements from the employees in question stating that they would not use any Hughes proprietary information in performing this contract. Given these steps, we conclude that the Air Force adequately concluded that this issue did not render the Marconi technical proposal unacceptable.

To the extent that Hughes seeks a more detailed review of whether the former Hughes employees are able to impart proprietary information to Marconi, this is essentially a dispute between private parties, and will not be considered by our Office. See Unisys Corp., supra.

Raytheon's Proposal

Hughes argues that Raytheon's technical proposal is unacceptable in the area of computer simulation because Raytheon admittedly lacks 6-DOF software for the F and G versions of the Maverick Missile. Because 6-DOF software is a component of "Hardware in the Loop" simulation capabilities, Hughes argues that the proposal is unacceptable in this area as well. In addition, Hughes contends that Raytheon's proposal fails to comply with the requirement that all work required to perform WSS shall be included under the fixed-price portion of the contract.

With respect to Raytheon's ability to perform computer simulation for these services,[10] we note that its proposal explains that it has developed 6-DOF software applicable to the D version of the missile, but that it will need to modify the software to make it applicable to the F and G versions. As part of its review, the Air Force prepared a

[10]We note that Raytheon has built more than 10,000 Maverick missiles as a result of having been developed as a second source to Hughes for this system. While Raytheon, as any other offeror, must have its acceptability determined by whether its proposal meets the RFTP requirements, it seems unlikely that an offeror who has built a substantial number of the missiles at issue here would lack the capability to service them.

CR for Raytheon, CR-24, in which it sought information regarding how and whether Raytheon would be able to extend its 6-DOF capability for the D missile, to the F and G versions of the missile. Based on its review of Raytheon's response, which explained that the software modification was straightforward and would be added to the existing capability if needed, the Air Force concluded that Raytheon could provide this capability.

In our view, there was nothing unreasonable in the Air Force decision to accept Raytheon's explanation of the required modification to the 6-DOF software. As Raytheon explained, it currently has a 3-DOF model and other simulation capability that will meet most of the agency's need for these services. Since Raytheon has already reviewed the modification necessary to adapt the current 6-DOF to the other required missile versions, there appears to be little reason for rejecting Raytheon's proposal on this basis. In addition, we find nothing in the record--even from the evaluator with strong views regarding Marconi's acceptability--to suggest that Raytheon should have been considered unacceptable for this reason.

With respect to Hughes's challenge to Raytheon's approach to pricing its proposal, Hughes complains that Raytheon will attempt to bill the Air Force for the modifications to its simulation software under the T&M portion of the contract, rather than under the fixed-price portion reserved for these services. In response, the Air Force states that Raytheon never suggested that it would bill for such a modification to its existing software under the T&M portion of the contract, and that if it tried, the Air Force would not allow Raytheon to do so.

We think that the Air Force response settles the matter. There is nothing in Raytheon's proposal to support Hughes interpretation of what Raytheon might do, nor is there any such indication in the clarification response addressing how Raytheon would modify its 6-DOF software if needed. In addition, the Air Force response has put Raytheon on notice that such costs will not be permitted under the T&M portion of the contract. Given no showing of any such intent, we will not assume that an offeror will propose one course of action, and pursue another, in a bad faith attempt to shift costs from a fixed account to a reimbursable one. See Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202.

Finally, as with its challenge to Marconi's proposal, Hughes complains that the Raytheon proposal does not adequately demonstrate how Raytheon will perform these services without using Hughes proprietary data. In our view, the answer remains the same. Just as Hughes claimed in its response to the agency request for dismissal, Hughes is permitted to challenge the reasonableness of the agency's conclusions regarding specific solicitation provisions. To the extent

it raises such challenges, we have considered them. To the extent it raises general challenges about the capability of these offerors to perform without Hughes proprietary data, its protest is untimely.[11] 4 C.F.R. § 21.12(b).

CHALLENGE TO STEP-TWO SOLICITATION

Hughes complains that the RFP for the step-two price competition is flawed because it does not anticipate a cost realism review on the T&M portion of offerors' proposals, and because the final version of the RFP deletes the consideration of transition costs to the government.[12]

According to Hughes, the agency must perform a cost realism analysis here to assure that the proposed fixed and T&M prices are reasonable, that the government will obtain the services at the lowest overall price, and that the agency's assessment of lowest overall price will consider contractor efficiencies. We disagree. First, as we explained in Research Mgmt. Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352, the requirement to perform a cost analysis is linked to the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988 and Supp V 1993). The Act requires the submission of cost data for all negotiated contracts in excess of $500,000 except in certain circumstances. When such data is required

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[11]In this regard, we agree with the Air Force that it need not respond to Hughes's examples of problems where Hughes found it necessary to consult its proprietary data to troubleshoot the Maverick missile. As the agency explains, Hughes's examples show only that Hughes needed to use such data, not that another offeror would need to do so. In addition, Hughes is not permitted to supplement the RFTP here with its own list of sample tasks against which it will evaluate its competitors. It also appears that Hughes's complaints regarding the need for its proprietary data are based in part on an expansive view of the scope of work not shared by the agency, which is in the position to best define its own needs. Mine Safety Appliances Co., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506.

[12]In its initial protest filing, Hughes complained that the Air Force could not properly include contract line items (CLIN) based on T&M prices, as opposed to fixed prices, in a two-step acquisition. Hughes based its claim on the provision in FAR § 14.502 which states that the two-step sealed bid acquisition procedure may only be used when "[a] firm fixed-price contract or a fixed-price contract with economic price adjustment will be used." In response, the Air Force amended the RFP to advise offerors that this procurement was a negotiated two-step procurement conducted under FAR § 15.609(d). Part 15 of the FAR does not contain a similar restriction addressing the types of contracts that may be used with this procedure.

under the Act, a contracting officer must perform a cost analysis. FAR § 15.805-1(b); Research Mgmt. Corp., supra. However, the Act (and the FAR provisions implementing the requirements of the Act) specifically exempt contracts awarded with "adequate price competition" from the data submission requirement. See 10 U.S.C. § 2306a(b)(1)(A); FAR § 15.804-3(a). Since the procurement here falls squarely within the definition of a procurement for which an agency has received adequate price competition, FAR § 15.804-3(b), we see nothing unreasonable about the Air Force decision not to request cost data or to plan on a cost realism review.

To the extent that Hughes suggests that such a review might be desirable anyway because offerors might attempt to shift costs between the fixed-price and T&M portions of the contract, or because the agency might otherwise fail to recognize efficiencies between the two offerors, we again disagree. The Air Force has prepared government estimates for evaluating proposals under the T&M portions of the contract. These include estimates for labor hours, amount of subcontractor materials, and travel and computer service dollars. By applying each offeror's hourly labor rates, and other rates, the Air Force will evaluate all offerors on the same basis. In addition, as discussed with respect to the Raytheon proposal, the Air Force has explained that all costs of developing capabilities related to the basic services must be included in the fixed-price portion of the contract, and that in administering the contract the agency will not permit offerors to shift costs related to providing basic services to any of the special tasks covered by the T&M portions of the contract. In our view, there is nothing unreasonable about this approach.

With respect to whether the contract method used here will cause the agency to fail to appreciate relative differences in efficiency between the offerors, we conclude that Hughes's protest is untimely. From the time the Air Force selected the approach of using a two-step procurement, Hughes was on notice that the final step of the procurement would be a competition based on price. In our view, Hughes's knowledge of the import of this decision is demonstrated by its unsuccessful lobbying efforts to convince the agency to procure these services using a negotiated "best value" procurement. Since the Air Force will be evaluating the T&M portion of the proposals using government estimates, and thus assuring that all offerors are treated equally, and since Hughes has been on notice for nearly a year that the Air Force would be procuring these services using a two-step procurement, we consider this basis of protest untimely.

Hughes also protests the agency's decision not to consider transition costs to the government in evaluating price proposals. According to the Air Force, although it initially considered applying an additional cost to the

proposal of any offeror other than Hughes in order to attempt to evaluate the cost to the government of selecting a new contractor, it has decided not to consider such costs in its evaluation in order to "foster competition" for these services. According to Hughes, this decision is unreasonable.

Based on our review of the pleadings, and a consideration of the relative positions of the offerors in this procurement, we conclude that the Air Force acted reasonably in deciding not to consider additional costs to the government in evaluating the price proposals submitted here. First, the Air Force explains that these costs--such as the cost of providing available data, and the cost of shipping government-furnished equipment--are highly speculative. In addition, since the Air Force apparently concluded that consideration of these costs would only benefit Hughes, it decided that it would instead prefer to foster competition, not hinder it. Hughes is in no way harmed by this decision; rather, the decision creates more of a level field for the competition. Since the purpose of our bid protest function is to ensure that agencies obtain full and open competition to the maximum extent practicable, we will generally favor otherwise proper actions--like this one--which are taken to increase competition. Sea Containers America, Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45.

The protest is denied.

for Ronald Berger

Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

11052912

Decision

Matter of: Reimbursement from Customs User Fee Collections for Inspectional Overtime Services in the Virgin Islands and Puerto Rico

File: B-253292

Date: December 30, 1994

DIGEST

User fees are not available under 19 U.S.C. § 58c(f)(3)(A)(i) to finance the costs of inspectional overtime services in the U.S. Virgin Islands. Because the Virgin Islands are not included in the customs territory of the United States, the fees are not assessed in the Virgin Islands. Consequently, the cost of inspectional overtime services in the Virgin Islands should be deducted from customs duties collected for the Virgin Islands. User fees are available under 19 U.S.C. § 58c(f)(3)(A)(i) to defray the costs of inspectional overtime services in the Commonwealth of Puerto Rico. Section 58c fees are assessed in Puerto Rico, a part of the U.S. customs territory.

DECISION

The Commissioner of the U.S. Customs Service has requested our opinion on whether user fees are the proper source of funds to finance inspectional overtime services in the Virgin Islands and Puerto Rico. If the user fees are not available, Customs would deduct the cost of overtime services from customs duties collected in the Virgin Islands and Puerto Rico. While the applicable statutes are not entirely clear, we believe that user fees are not available to reimburse such costs in the Virgin Islands but are available for that purpose in Puerto Rico.

The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, authorized Customs to collect user fees for various services, such as processing merchandise for entry into the country. Customs deposits all user fees it collects into a user fee fund, except those used to directly reimburse Customs appropriations for overtime inspectional and preclearance services.[1] The Omnibus Budget

[1]In certain locations Customs permits travelers to pay U.S. customs duties before leaving a foreign port to enter the United States. Because they have been precleared, when

(continued...)

Reconciliation Act of 1987 provided that the Secretary of the Treasury "shall directly reimburse, from the fees collected, . . . each appropriation for the amount paid out of that appropriation for the costs incurred by the Secretary in providing (I) inspectional overtime services, and (II) all preclearance services for which the recipients of such services are not required to reimburse the Secretary of the Treasury . . . ." Pub. L. No. 100-203, § 9501(a)(3), codified as amended at 19 U.S.C. § 58c (f)(3)(A)(i). It provided, further, that the reimbursements should be made at least quarterly, and could be made on the basis of estimates, with subsequent adjustments as necessary. 19 U.S.C. § 58c(f)(3)(B)(ii), (iii).

The Commissioner's question arises because of the laws governing the administration of customs laws in the Virgin Islands and Puerto Rico. Customs is responsible for the administration of customs laws in both locations. 48 U.S.C. §§ 1395, 1406i (the Virgin Islands); § 740 (Puerto Rico). (The U.S. Virgin Islands are an unincorporated territory of the United States and its residents are U.S. citizens. Puerto Rico is a commonwealth of the United States; its residents are also U.S. citizens.) Section 1406h provides that "the proceeds of customs duties, less the cost of collection, . . . shall be covered into the treasury of the Virgin Islands and held in account for the respective municipalities, and shall be expended for the benefit and government of said municipalities . . ."[2] Section 740, provides "The duties and taxes collected in Puerto Rico, . . . less the cost of collecting the same, . . . shall be paid into the treasury of Puerto Rico . . ."

Customs determined in 1987 that inspectional overtime for Customs employees in the Virgin Islands could be paid with the user fees collected under section 58c. The determination was made retroactive to November 1986. According to Customs, it also determined that inspectional

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[1](...continued)
these passengers arrive in the United States they are not subjected to another Customs inspection. Customs' question to us here concerns only payment for inspectional overtime, not preclearance, other than that portion of preclearance costs comprising overtime.

[2]48 U.S.C. § 1642a provides similarly: "Notwithstanding any other provision of law, the proceeds of customs duties collected in the Virgin Islands less the cost of collecting all said duties shall, effective for fiscal years beginning after September 30, 1979, be covered into the Treasury of the Virgin Islands, and shall be available for expenditure as the Legislator of the Virgin Islands may provide."

overtime costs for Customs employees in Puerto Rico could be paid with the fees. Customs is currently using the fees to fund inspectional overtime services in both the Virgin Islands and Puerto Rico.

Customs now questions whether this determination was correct. Customs suggests that inspectional overtime services in both locations should be considered "costs of collection" under sections 1406h and 740, to be subtracted from the duties paid into the treasuries of the Virgin Islands and Puerto Rico. In support of this interpretation, Customs cites a November 12, 1992, memorandum from the Customs Chief Counsel to the Customs Comptroller, noting that nothing in section 58c (authorizing use of the user fees) supersedes the provisions of section 1406h. Our analysis of the purpose of section 58c, however, and how it fits into the overall scheme of duties and fees imposed by the tariff laws of the United States leads us to conclude that the section 58c user fees are available to reimburse Customs costs incurred in providing overtime services in Puerto Rico, but not in the Virgin Islands.

The Customs Service, under the tariff laws, collects duties imposed on imports into the "customs territory of the United States." See generally 19 U.S.C. § 1202. In addition, section 58c(a) provided for the collection of user fees[3] in

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[3]Section 58c(a) provides: "In addition to any other fee authorized by law, the Secretary of the Treasury shall charge and collect the following fees for the provision of customs services in connection with the following:

(1) For the arrival of a commercial vessel of 100 net tons or more, $397.
(2) For the arrival of a commercial truck, $5.
(3) For the arrival of each railroad car carrying passengers or commercial freight, $7.50.
(4) For all arrivals made during a calendar year by a private vessel or private aircraft, $25.
(5)(A) For fiscal years 1994, 1995, 1996, and 1997, for the arrival of each passenger aboard a commercial vessel or commercial aircraft from outside the customs territory of the United States, $6.50.
(B) For the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States (other than a place referred to in subsection (b)(1)(A)) of this section, $5.
(6) For each item of dutiable mail for which a document is prepared by a customs officer, $5.

(continued...)

connection with entry into the customs territory of the United States to cover certain costs incurred by Customs in the collection of duties, including overtime processing of merchandise. The legislative history of section 58c reveals the purpose of that section.

> "Overtime inspectional and preclearance services are unique in requiring a high degree of responsiveness to the needs of carriers and others requesting such services. In the past, requestors reimbursed the Customs Service for such service, and the committee desires to maintain the same degree of responsiveness as existed when Customs was being directly reimbursed by private parties for such services. Accordingly, the committee has provided for direct reimbursement to the Customs appropriation of that portion of user fees required to cover the cost of providing inspectional overtime and preclearance services. It is the committee's intention that such costs be directly reimbursed out of user fees by the Secretary of the Treasury in the manner specified, and that such reimbursement not be subject to apportionment or other administrative limitation."

H. R. Rep. No. 391 (II), 100th Cong., 1st Sess. 973 (1987).

Section 58c generally prohibits charging any more than the statutorily-set fees for the services provided in order to protect entities that pay the fee from paying more than their share of the costs of processing.[4]

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[3](...continued)
(7) For each customs broker permit held by an individual, partnership, association, or corporate customs broker, $125 per year.
(8) For the arrival of a barge or other bulk carrier from Canada or Mexico, $100.
(9) For the processing of merchandise that is formerly entered or released during any fiscal year, a fee in an amount equal to 0.17 percent ad valorem . . . ."

[4]Section 58c(e)(6)(A)(i)(ii) provides: "Notwithstanding any other provision of law . . . , during a period when fees are authorized under subsection (a) of this section, no charges, other than such fees, may be collected for any cargo inspection, clearance, or other customs activity, expense, or service performed (regardless whether performed outside of normal business hours on an overtime basis), or customs personnel provided, in connection with the arrival or departure of any commercial vessel, vehicle, or aircraft, or
(continued...)

The Virgin Islands is not included within the United States customs territory, and section 58c user fees, which are collected in connection with entry into the customs territory of the United States, therefore, are not collected in the Virgin Islands. Under federal law, "[T]he term 'customs territory of the United States'. . . includes only the States, the District of Columbia, and Puerto Rico." See 19 U.S.C. § 1202, general note 2. The duties and fees that are levied on entries into the territory are set by the Legislature of the Virgin Islands. 48 U.S.C. § 1574(f).[5] The Customs Service, in collecting duties in the Virgin Islands, is acting on behalf of the Virgin Islands government to enforce the customs laws of the Virgin Islands' Legislature, not the United States customs laws. Accordingly, for the future, we believe that it would be inappropriate to continue to use the section 58c user fees to fund inspectional overtime in the Virgin Islands; costs incurred by Customs in this regard should be deducted from the total duties collected in the Virgin Islands. To hold otherwise would force entities who pay section 58c user fees to subsidize the cost of overtime in the Virgin Islands for entities that do not pay the fees, contrary to the notion, as articulated in the House Committee report, underlying the section 58c user fees. Because this issue is before our Office for the first time and because of the longstanding uncertainty within the Customs Service, our conclusion should have prospective application only.

Unlike the Virgin Islands, Puerto Rico is included within the customs territory of the United States, and section 58c user fees are assessed. 19 U.S.C. § 1202, general note 2. In Puerto Rico, the Customs Service is enforcing the customs laws of the United States and the user fees collected are used to reimburse Customs for the costs of overtime. Accordingly, the "fee-for-service" logic underlying section 58c is applicable. Consequently, consistent with the

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[4](...continued)
its passengers, crew, stores, material, or cargo, in the United States."

[5]However, the Legislature of the Virgin Islands is limited to imposing rates that do not exceed 6 percent ad valorem. 48 U.S.C. § 1574 (f).

purposes of section 58c, we think that overtime costs in Puerto Rico should be funded with user fees.

for James F. Hinchman
Comptroller General
of the United States

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