J. Cunningham
Proc I

DECISION

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

5812

FILE: B-190611

DATE: September 22, 1978

MATTER OF: E. I. du Pont de Nemours & Company; Ionics, Incorporated; Dow Chemical Company-Permutit Company, Inc.

DIGEST:

1. Notwithstanding possible untimeliness of protests under Bid Protest Procedures, protests will be considered on merits where presiding judge in litigation related to protests has signed stipulations expressing interest in GAO decision on protest.

2. Protester has not met burden of affirmatively proving version of disputed facts where conflicting statements of protester and contracting agency constitute only evidence. Consequently, protester's decision to reduce permeator stack height must be viewed as competitive response rather than as response to RFP change.

3. GAO concludes procuring agency negotiated "pipe wall" change in question with protester in good faith without complaint based on best engineering judgment.

4. There is no evidence in record to rebut Interior's position that RFP warranty requirements and each offeror's warranty were discussed and clarified to each offeror's satisfaction. Moreover, protester admits it understood warranty provisions prior to best and final offers so that protester was in position of correcting supposed penalty stemming from early reading of provisions prior to final offer date.

5. Allegation of lack of uniform warranty evaluation is made largely in abstract. Moreover, to extent protester was concerned with lack of time for considering final offers in view of alleged changes in warranty provisions, it could have requested additional time, but did not.

6. Based on review of conflicting technical positions regarding pH controversy stemming from testing of membrane desalting unit, GAO cannot question reasonableness of Interior's technical conclusion that small accumulated testing time involving pH excursions below 4.5 makes it extremely questionable that serious degradation of permeator component was caused by low pH of feedwater.

7. Under facts that protester realized 1 ppm of tin compound--asserted to be troublesome element--was present in feedwater prior to final offer and that protester never identified compound as troublesome despite Interior request to identify troublesome compounds when testing was started, GAO must conclude protester was not seriously concerned about tin presence. Moreover, protester stated (albeit allegedly inadvertently) in final offer that calcium rather than tin caused permeator degradation in issue.

8. GAO cannot question reasonableness of agency's views that eliminating proposal scoring attributed to productivity loss caused by permeator degradation does not affect selection of proposed awardees and that protester's alleged technical measurement involving "salt rejection, TDS and recovery" is "not accepted measure of technical perform-ance."

9. Whatever might have been improper about Interior's original proposal scoring technique, fact that re-scoring of proposals under so-called normalized scoring method has not altered relative position of offerors requires rejection of protest ground even considering asserted defects in rescoring.

10. Colorado River Basin Salinity Control Act requires use of "advanced commercial technology" for meeting desalting objectives at "lowest overall cost to United States" neither of which standard requires state-of-art demonstration. Moreover, review of legislative history of act does not support supposed requirement for state-of-art demonstration of desalting technology.

11. Contrary to argument advanced by protester, RFP did not require split awards of certain sizes for at least two desalting processes to extent awards were "impractical" as to prices and quantities.

12. Under relevant dictionary definitions of word "impractical" as used in context of RFP provision, word means considered wisdom of putting award intention into effect under actual conditions of proposed quantities and prices.

13. Given subjective character of agency decision contemplated by "impractical" exception to agency's stated award intention, view is rejected that practicality of executing award intention was to be limited to concept that so long as proposal was in competitive range impractical exception could not be justified.

14. Although host of objections have been raised against wisdom of agency's decision to make split awards for only one membrane desalting process, one award of which exceeds intended 60-percent capacity limit, decision does not lack rational support. Although Interior was prepared to incur additional expense to make multiprocess awards within intended capacity limit, ultimate expense of carrying out intent was excessive.

15. Although protesters insist they could have offered lower prices by adjusting proposed desalting capacities had they known of agency's ultimate decision to exceed intended maximum capacity

award limit, there is nothing in record to indicate that price reductions would have affected evaluated ranking. Moreover, reasonably cautious offerors should have realized, under stated contingency, that percentage capacity limit might not be adhered to and, therefore, should have offered alternate offer above limit if perceived competitive pricing advantage might be obtained.

16. Based on review of technical objections to single technology awards for desalting membrane concerning alleged obsolescence of selected membrane material, vulnerability of material to high temperatures and bacterial counts, and lack of proper operating experience of selected concerns for single technology awards, GAO cannot conclude that agency's judgment on techical intricacies and merits of competing membranes lacks rational support. Moreover, GAO audit shows agency considered many of objections raised during evaluation process, but nevertheless considered selected offerors to rank highest on technical score.

17. GAO cannot question procuring agency's implicit judgment that competing desalting experiences reasonably indicate evaluated strengths and weaknesses of ranked proposals notwithstanding criticisms advanced.

18. Neither national nor worldwide competitive balance of desalting industry is proper factor to affect selection of awardees for membrane desalting equipment.

19. Even if public ranking of offerors for membrane desalting equipment violated regulations, fact remains that release of information in no way affected validity of selection of proposed awardees, since release took place after awardees' selections. Consequently, GAO cannot recommend that award selection be reconsidered.

20. Electrodialysis desalting offeror has not pointed to any specific deficiencies in agency's evaluation of its warranty proposal or that of any other warranty proposals to demonstrate its conclusion that warranty provisions were not uniformly applied other than protester's overall proposal ranking which is not necessarily inconsistent with specific merit accorded to protester's longer warranty.

21. Agency's position that acceptance of proposed additional "rack allowance" modification--even though not expressly prohibited by RFP--would have contravened warranty provisions is not subject to question. Moreover, protester did not complain about denied modification during negotiations.

22. Importance given to "high recovery" factor in proposal evaluation was not out of line with proportionate weight assigned factor in RFP. Moreover, merit assigned to proposal which permitted operation up to "plugging factor" of 65 percent was reasonable.

Table of Contents

I. Background

In 1973, Minute No. 242 of the International Boundary and Water Commission became effective. This minute requires that the United States take certain steps to control the salinity of the Colorado River water being delivered to Mexico. Desalting plant contruction to control the river's salinity was authorized in 1974.

The Bureau of Reclamation, Department of the Interior, was given the responsibility to select manufacturers and desalting processes to be installed in the Yuma Desalting Plant to be built near Yuma, Arizona, as a first step in controlling the river's salinity. The Yuma Desalting Test Facility was constructed to test membrane desalting equipment potentially to be supplied for the desalting plant. Thereafter, several manufacturers of membrane desalting equipment began testing operations at the test facility.

Interior has informed us that many of the materials evidencing the precise details of the procurement process--especially in regard to the ultimate selection of the proposed awardees--are considered to be "privileged" and not for release. It is our policy to accept these agency-imposed restrictions and permit interested parties to seek release of the documents through appropriate non-GAO forums. Nevertheless, we have reviewed all documents concerning the procurement.

II. Procurement History

A. RFP

In March 1976, the Bureau issued request for proposals (RFP) No. DS-7186 for membrane desalting equipment to be installed under a firm fixed-price or fixed-price with escalation contract. (The actual installation work is done under a separate contract.)

The RFP described eight items of needs under "basic schedules." A basic schedule was defined as consisting of items 1, 2, and 4, or items 5, 6, and 8, for furnishing one "proof" test unit, one desalting unit (20-million-gallon-per-day (Mgal/d)), and training for Government employees. Item 2 described a "membrane" process. Item 6 described an "electrodialysis" process. In addition to "basic schedule" awards, the RFP informed offerors of the possibility of awards for additional "block size increments" of desalting capacity as to which offerors were instructed to offer incremental prices under items 3 and 7.

1. Award Provisions

The PFP further informed offerors:

> "* * * The Government reserves the right to determine the number of additional increments to be awarded, at the appropriate [price]. The desire of the Government is to award a contract or contracts which include at least two processes. Further, the Government will, as best serves the interests of the Government, award contracts for the total 104-Mgal/d plant capacity to one or to more than one offeror."

Paragraph 2.4.2.c. of the RFP also provided:

> "The Government desires that not all the membrane desalting equipment be supplied by one manufacturer and that it not all be one process. The intent is to procure a minimum of 20 percent and a maximum of 60 percent of the effective installed capacity from any one manufacturer. The intent is to award contracts to assure a minimum of two and a maximum of three manufacturers, and to obtain a minimum of two and a maximum of three processes. Hollow fine fiber, spiral wound, and tubular reverse osmosis systems as well as sheet flow and tortuous path ED

(electrodialysis) systems are considered separate processes. This is not meant to be an inclusive list of processes to be used in the plant, but the Government reserves the right to determine whether other systems proposed shall be considered separate processes. This is stated as an intention since equipment may be offered in such quantity and at such prices as to make implementing this intention impractical. No portion of the plant has been allocated to any particular process or to any particular manufacturer."

2. Technical Evaluation Criteria

The RFP informed offerors generally of the requirement for technical proposals and of the criteria (listed in descending order of importance) which would be used in evaluating technical proposals as follows:

"3.1.1. SUBMISSION FORM

The technical proposal shall contain a description of the equipment proposed, supplementary data, and procedures for providing technical assistance. This proposal will be evaluated in accordance with the criteria outlined in Section 3.2. * * *

"SECTION 3.2-EVALUATION CRITERIA

3.2.1. EVALUATION CRITERIA

"An evaluation procedure has been developed which includes standards of performance or compliance against which each proposal will be evaluated. For many factors, particularly those in which the Government must place substantial reliance on offerors' statements, the evaluation will be heavily weighed by the detail and quality of supporting documentation and data. The following is

a list of the elements to be evaluated in descending order of importance, and of the major factors which comprise these evaluation elements. The first nine elements in this list (Subparagraphs a. through i.) comprise approximately two-thirds of the total evaluation weight. However, all evaluation elements and factors are significant and shall be considered in the offerors' proposal. The factors of highest importance within each element are followed by an asterisk (*).

"a. Process design.-The integration of the separate parts of the plant into a complete high-quality system and the capability of the desalting equipment to operate over the design range of variables. Major variables are temperature, feed salinity, inlet feed rate, and product water recovery. Factors include overall process quality*, efficiency*, ability to operate over the design range*, optimization of design based on lowest annual cost*, applicability, simplicity of module arrangement and flow pattern, and additional flexibility.

"b. Membrane characteristics.-Data from the Yuma Desalting Test Facility and other applications will be used to substantiate design characteristics. Factors include the operational properties of product flux* and salt rejection for reverse osmosis and current efficiency* and electrical resistance for electrodialysis.

"c. Warranties.-Warranties on membrane elements*, desalting equipment productivity*, mechanical equipment, and chemical usage. These warranties will be considered primarily in terms of their adequacy in protecting the Government and of producing accurate cost estimates and a conservative plant design.

"d. Testing and experience.-The manufacturer's testing at the Yuma Desalting Test Facility*. Previous desalting experience, and all aspects of plant design, construction, and operation for the plants the offeror describes. The

membrane manufacturer's overall capabilities for manufacturing the proposed membrane equipment within the time limits imposed. Factors include qualifications of project personnel*, quality control procedures*, equipment production capabilities, and offeror's program for training operating personnel.

"e. Membrane element characteristics.- Membrane element design and components other than the membrane itself. Factors include membrane element design, mechanical and chemical durability of components, susceptibility to fouling and scaling, weight of the membrane elements, and the adaptability for state-of-the-art improvements.

"f. Change of membrane properties.-Degradation of membrane properties with time. Factors include average performance*, biological fouling or attack, chemical stability, and service life.

"g. Desalting unit maintenance. * * *.

"h. Operation, startup, and shutdown. * * *.

"i. No load or minimal operation. * * *.

"j. Mechanical features of vessels and stacks. * * *.

"k. Piping for reverse osmosis units. * * *.

"l. Electrodialysis rectifiers, piping, and accessory equipment. * * *.

"m. Proof test unit. * * *.

"n. Membrane supply and storage.
* * *.

"o. Pretreatment and posttreatment.
* * *.

"p. Hazards.
* * *.

"q. Cleaning.
* * *.

"r. Corrosion mitigation and effects.
* * *.

"s. Instrumentation.
* * *.

"t. Structural supports for vessel and stacks.
* * *.

"u. Equipment other than membrane elements.
* * *."

(Technical requirements, including requirements for warranties, were set forth at length elsewhere in the RFP.)

3. Cost Evaluation Criterion

As to evaluation of proposed costs, the RFP provided:

"While proposed costs will not be point scored in the evaluation of proposals, the costs proposed for the requirements will be used as an aid to determine the offeror's understanding of these requirements. The relative importance between costs and technical quality is approximately equal. Contracts will be awarded to the offerors whose proposals are most advantageous to the Government, price and other factors considered. However, the Government reserves the right to accept

other than the lowest cost proposals and to reject any or all proposals."

To correct errors in the RFP and to make changes as a result of comments received at a March 30, 1976, preproposal conference, several amendments to the RFP were issued.

B. Negotiation Process

Seven offerors submitted proposals, including E. I. du Pont de Nemours & Company (du Pont), Dow Chemical Company-Permutit Company, Inc. (D-P), and Ionics, Incorporated. Initial technical proposals were evaluated by three evaluators for each category. Then so-called "consensus evaluations" were determined. Cost evaluation was done separately. Technical and cost evaluations were then reviewed, approved and given "cost per technical point" ratings. (This technique was followed, Interior reports, so as to give cost and technical factors approximately equal weight.)

1. Initial Evaluation of Proposals

Based on evaluation of costs and technical scores, all seven offers received were determined to be in the competitive range for the procurement. Offerors were informed of this conclusion in late November 1976.

2. Negotiations with Offerors

After the competitive range was established, negotiations were conducted with all offerors. Each offeror was requested to make a 1- to 2-hour presentation at the beginning of the initial negotiation meeting. Additionally, negotiators and technical advisors visited each offeror's and subcontractor's manufacturing plant and applicable operating plant to determine the responsibility of each offeror.

Technical evaluators were present as advisors during initial negotiations pertaining to areas which they evaluated and were called upon from time to time during subsequent negotiations. Cost evaluators were present during cost evaluation discussions and were called upon to present cost evaluations to offerors who

requested them. The contracting officer did not attend negotiations, but was kept informed of the proceedings and gave negotiators guidance as needed and requested.

As to the events regarding negotiation, Interior states:

> "* * * In addition to the formal negotiation sessions at meetings, telephone negotiations were conducted to discuss or clarify specific points raised during the meetings or as they occurred. Government participation in these negotiations was limited to the designated negotiators with technical and cost evaluation participants, as necessary. No formal minutes were prepared of these telephone negotiations.
>
> "Offerors were advised that negotiations would be conducted, in part, on the basis of deficiencies in proposed equipment and proposal documents noted in evaluating initial proposals and subsequent modifications to the proposals. Offerors were sent letters dated between November 24 through November 30, 1976, detailing items to be discussed during initial negotiations * * *. Offerors were requested to modify their proposals based on the deficiencies discussed and to submit an amendment covering applicable portions of their proposals for Government review prior to the next negotiation session. However, numerous modifications were made to some best and final proposals in conflict with the recommendations made by the Government during negotiations, and additional modifications were made which had never been discussed. Modifications to the cost proposal prior to submittal of best and final offers were only requested for items which would have a significant impact on the cost evaluation.
>
> "In addition to negotiations with the offerors, the test programs and results were discussed in detail in December 1976, with those offerors who had units on test

at the Government's Yuma Desalting Test Facility as requested by the contracting officer for the no cost contracts under which testing was being performed * * *. While these discussions were not part of the formal negotiations, they did relate to the overall effort of the offerors.

"The Panel of Consultants reviewed the initial technical proposals in order to identify any deficiencies which may have been initially overlooked. Their report dated June 1, 1977, * * * raised some questions which were discussed separately with the various offerors.

"The solicitation was modified to make warranty provisions nonenforceable against their surety or sureties * * *.

"Copies of appropriate portions of the audit reports were furnished to the audited firm or subcontractor upon request. No audit, or portion thereof, of an offeror or subcontractor was furnished to the other party, i.e., potential contractors were not furnished subcontractor's audits or portions of their own audit relating to subcontractors, nor were subcontractors furnished portions of the offeror's audit relating to the subcontractor.

"Costs questioned by the auditor and non-allowable costs were discussed with each offeror. Those offerors whose evaluated costs (annual equivalent costs) in the initial proposals were considered high were advised that their costs would need to be reduced to be competitive in the best and final offer; however, no dollar amount was quoted.

"The initial proposal cost evaluations were only discussed and presented to those offerors who requested it. * * *

"Price negotiations were more limited than might otherwise be anticipated since adequate price competition existed for the procurement. Cost evaluation was based on annual equivalent costs rather than bid prices to provide least cost to the Government. Since cost evaluation and technical evaluation were given approximately equal weight, it was necessary for each offeror to submit a proposal with a competitive annual equivalent cost, and hence a competitive price.

"Manufacturing plant visits were made and data on the manufacturing capability of each offeror were combined with data acquired through the audit reports to determine that all prospective contractors were responsible within the meaning of 41 CFR 1-1.12.

"As noted above, detailed discussions covering deficiencies noted by the Government were held with each offeror. Amendment items to the solicitation after the competitive range had been established were discussed with all offerors prior to issuing the amendment (No. 8), as noted in the minutes. All firms which made an initial offer were within the competitive range. Warranty provisions were extensively discussed with each offeror and changes in most proposals resulted. The warranty requirements and definitions were revised and clarified in Amendment No. 8 as a result of the discussions. The Government considered modifying progress payment provisions in accordance with new directives which were discussed with several offerors who voiced a preference for the initial provisions. No revision in progress payment provisions was made. Other major items were discussed with each offeror * * *.

"No oral or written negotiations were conducted between the Government and any offeror between the time of receipt of best and final offers and proposed award of contract. * * *

> "Negotiations were terminated and best and final proposals were due May 16, 1977, by letter from the Director of Design and Construction dated April 1, 1977 * * *. Due to Hydranautics revoking their withdrawal on May 6, 1977, the negotiations were continued and receipt date of best and final proposals was delayed to July 11, 1977, by letter from the Director of Design and Construction dated May 12, 1977 * * *."

3. Evaluation of Best and Final Offers

Regarding the evaluation of best and final proposals, Interior states:

> "Under the same procedures established for initial proposals, best and final proposals were evaluated by three independent evaluators for each category, who, together with the team leader, arrived at a consensus evaluation * * *. The cost evaluation was also again prepared by the cost evaluation team. * * * Similarly, the Panel of Consultants reviewed the best and final technical proposals prior to selecting offers for award. Their report * * * raised several questions. Pertinent items were considered by the Review Board in the review of the evaluations. Technical and cost evaluations were reviewed and amended by the Review Board * * * and the final evaluations prepared."

C. Analysis Leading to Proposed Awards

Thereafter, in September 1977, Interior's Review Board decided on the award of two contracts under the RFP. The Review Board wrote of its decision as follows:

> "The solicitation proposal schedule and subparagraph 2.4.1.c. of the solicitation state in part: 'Proposals will be considered for award on either or both of the following basic schedules (as defined below), but no

proposal will be considered for award for less than a basic schedule, nor will a proposal be considered for award in which prices are not stated on the individual items within a basic schedule.' * * * 'Further, the Government will, as best serves the interests of the Government, award contracts for approximately 96-Mgal/d total plant capacity to one or to more than one offeror.' * * * 'The intent is to procure a minimum of 20 percent and a maximum of 60 percent of the effective installed capacity from any one manufacturer. The intent is to award contracts to assure a minimum of two and a maximum of three manufacturers, and to obtain a minimum of two and a maximum of three processes' and 'This is stated as an intention since equipment may be offered in such quantity and at such prices as to make implementing this intention impractical.'

"In accordance with the above statements, the Review Board recommends award of two contracts for the required approximately 96 Mgal/d total effective capacity as follows: Hydranautics 21.6 Mgal/d (15 control blocks) and Fluid Systems Div., of Universal Oil Products (UOP) 73.1 Mgal/d (66 control blocks). The total nameplate plant capacity will be 95.67 Mgal/d (94.70 Mgal/d effective capacity), approximately the 96 Mgal/d effective capacity stated in the solicitation proposal schedule.

"The recommendation for award to Hydranautics is based on the highest overall [technical and cost] evaluation and the maximum quantity offered by the firm.

The recommendation for award to Fluid Systems Div., UOP, is based on the second highest overall [technical and cost] evaluation, low cost for additional increments of capacity, and offer of sufficient additional capacity."

III. du Pont's Protest

On learning of Interior's late September 1977 decision to award to UOP and Hydranautics, du Pont filed an October 13, 1977, protest against the awards with Interior. Having received no response to its protest, du Pont filed a November 1, 1977, protest with our Office. By complaint dated November 2, 1977, du Pont filed suit in the U.S. District Court for the District of Columbia, Civil Action No. 77-1894, requesting, among other things, "injunctive relief * * * pending final determination of DuPont's protest to the Comptroller General of any award under the instant solicitation." By stipulation filed November 14, 1977, Interior agreed that it would not award the contracts in question until after our decision on the protest.

The du Pont protest, as amended, to our Office is summarized in the following paragraphs.

A. Improper Changes in RFP

Important RFP specifications were changed during the course of negotiations which improperly affected only du Pont and were not the subject of appropriate RFP amendment. These changes caused du Pont to increase its proposed costs by 40 percent. These changes were:

1. Permeator Stack Height

In response to Interior's advice during negotiations that in order to be competitive the company's stack height must be reduced to 10 feet, du Pont made the reduction. This advice was also accompanied by Interior's statement that the additional costs associated with the height change would be "worth more" in technical points than associated costs. This direct mandate effectively changed the stack height specification as far as du Pont was concerned to its pricing detriment--increasing du Pont's capital costs by almost 40 percent. Using Interior's evaluation formula, du Pont's technical score would have had to increase substantially to offset the cost penalty--yet a comparison of initial and final ranking of submitted proposals shows the opposite was true.

Further, as to the argument that the RFP provided a vertical height penalty ($1 per square foot per foot) for all proposals with stack heights above 12 feet, du Pont points out that this penalty was less than the stipulated penalty of $125 for every square foot of horizontal floor space occupied by the unit. Using the reduced stack height, the du Pont system required between 2-1/2 to three times as much floor space as the high stacks required.

2. Change in Pipe Walls

The thickness of certain pipe walls proposed by du Pont was required to be increased and it was not permitted to use certain types of flanges. Additionally, du Pont was requir to add unnecessary valves to each of 1,960 permeators. These requirements were not in the RFP.

B. Ambiguity in Warranty Provisions

Ambiguity in warranty provisions resulted from Interior's failures to define adequately such terms as "warranty period" and "service life." Interior failed to honor du Pont's request to define these terms, but instead proceeded with decisions leading to new interpretations of the warranty requirements only 5 days prior to the date for final proposals. These new interpretations of requirements were more rigorous and hence more costly than warranty requirements imposed on other companies. Moreover, the 5-day notice period was insufficient for offerors to review and comprehend these changes.

On this issue, du Pont explained its position in detail as follows:

> "When this solicitation was originally issued all bidders were required to offer fixed replacement rate warranties. In late March, 1977, through amendment 8, the Bureau offered bidders the opportunity to base their proposals on either the fixed replacement rate warranty or a prorated

(battery type) warranty similar to that normally offered by the two companies that ultimately were selected for contract awards. In order to use the battery type warranty, a bidder had to warrant its product for six years. Those companies that would not extend the warranty to six years were required to bid with the fixed replacement rate warranty. DuPont offered a five year warranty and was in this group.

"Section 2.7.1. of the RFP, as finally amended, required that all proposals have a three year 'service life.' Section 1.2.2 defined service life as 'the weighted average life of elements based on replacement in accordance with the replacement schedule.' (Emphasis added). The calculation of the replacement schedule required the use of the explanation and examples in section 1.4.5(c) (pages 25 and 25a of the RFP) [which contained errors.]

* * * * *

"After DuPont had spent months attempting to calculate a replacement schedule based on this provision of the solicitation and after it had orally complained to the agency about this problem on numerous occasions, the Bureau admitted in late June that the RFP was in error. No amendment was issued and it is impossible to determine whether all offerors were given the same information regarding the correction.

"This error may not have affected the UOP and Hydranautics proposals since they probably bid on the alternate battery type warranty. It had a critical impact, however, on several of the other bidders. Its effects on DuPont can be measured by the Bureau's own account of the January 10, 1977, telephone conference with DuPont * * *. The Bureau there stated that approximately one-third of DuPont's total annual costs was made up of permeator replacements."

Although Interior argues that the admitted error in the RFP's replacement schedule "had no effect upon DuPont's evaluated membrane replacement cost," Interior misses the point. The error made it impossible for offerors to understand a critical part of the RFP, thereby preventing the possibility of uniform responses as well as possibly preventing du Pont from offering a 6-year, battery-type warranty at significant savings.

C. Improper Agency Direction of Membrane Testing

Interior improperly downgraded du Pont's technical and cost proposal because the "Government failed to properly conduct certain tests." du Pont specifically told Interior that the pH of the feedwater for the test unit was to be maintained at 5.5; however, data on the pH of the feedwater shows that it reached levels of less than 4 during certain time periods. Moreover, the production of desalted water during the course of the tests of du Pont's unit fell significantly on two occasions due to fouling of the permeators by tin oxide caused by Interior's failure to maintain the stated pH level.

The evidence to support du Pont's conclusion, the company says, is as follows:

> "1) The autopsies of the permeators revealed that the fouling was caused by tin oxide;
>
> "2) The bronze pump, when removed and inspected, showed acid-caused corrosion;
>
> "3) There was no other way for tin to have gotten into the system (the pretreatment of feedwater removes any tin naturally occurring in the supply water); and
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> "4) The periods when productivity dropped due to the fouling corresponded with those times when the Government allowed the feedwater to become too acidic."

Despite the fact that du Pont repeatedly told Interior that "excess acidity of the feedwater" explained the production drop, the "van Hoek" report* erroneously concluded that du Pont did not explain the cause of the fouling; the tin causing the fouling may have slipped through pretreatment; and the fouling resulted from sand infiltration. Finally, the report did not even mention the loss of pH control or the badly corroded bronze pump.

As to Interior's position that the tin fouling could not have been caused by excess acidity because of the lack of free oxygen in the water, du Pont states: (a) acid will corrode metal even without oxygen; (b) Interior never checked the amount of oxygen in the feedwater; (c) photographs show corrosion; and (d) even if acidity did not cause tin fouling, tin must have been present in the feedwater contrary to the RFP.

As to Interior's arguments that the manufacturer of du Pont's membrane pump recommended extreme pH ranges, du Pont states that the manufacturer has since discontinued making this pump. Anyway, Interior let the pH fall below 4 many times. Moreover, Interior's analysis of productivity declines

*According to Interior, the "van Hoek" report is one authored jointly by C. van Hoek, a Bureau of Reclamation employee, and J.D. Mavis, Jr., of the Burns and Roe Industrial Services Corporation. By contrast, a separate status report entitled "Operation, Maintenance, Development Testing of the Yuma Desalting Test Facility" was authored by Kenneth Trompeter, an Interior employee. It is the latter report which Interior uses to answer du Pont's technical arguments.

is faulty because it relies on only one of three relevant trial periods for which less accurate "daily data sheets" are available.,

It was improper, moreover, for Interior to single out du Pont's explanation on page 7 of its best and final proposal that calcium sulfate and/or calcium phosphate scaling was the cause of permeator degradation because du Pont's statement was inadvertent; Interior knew that the statement reflected du Pont's thinking prior to the examination of the pump; many times du Pont had insisted that corrosion of the bronze pump was the cause; and the summary was preceded by six pages explaining that corrosion caused the degradation in performance.

Further, it is pointless for Interior to insist that the van Hoek report was not the basis of the du Pont evaluation since the conclusions are consistent with the conclusions reached during the evaluation which show that du Pont was penalized for Interior's mishandling of tests in some of the evaluation criteria.

If the performance drop resulting from Interior's failure to maintain the pH of the feedwater is excluded and an overall performance index of the hours of testing is computed, du Pont's overall performance index is higher than the next highest ranking proposal. If the data resulting from Interior's failure is not excluded, du Pont is ranked fourth technically.

D. Technical Merit Not Scored Properly

Contrary to the RFP, technical merit was not accorded equal weight with cost consideration because Interior's own formula (selecting the successful offerors based on the lowest cost per technical point) does not afford equal weighting. Moreover, since Interior's studies showed that du Pont's unit operated longer and with better combination of salt rejection, TDS (total dissolved solids) and recovery than other offerors', du Pont should not have been ranked sixth out of seven competing concerns unless cost differences were given undue weight.

Interior's cost evaluation formula--prescribing the mathematical division of evaluated annual cost per million daily gallons delivered to the river by the technical score--does not result in equal weight being assigned to cost and technical factors under recognized statistical methods. As to Interior's purported recalculation of technical scores (cost scores may not even have been recomputed), du Pont has not seen the "after-the-fact" document furnished to GAO. GAO should carefully review the calculations. At a minimum, Interior should upgrade du Pont's technical score and use the correct formula to decide whether there was prejudice. Moreover, the recalculation error in assigning 1,000 points to the highest technical score rather than to a perfect score improperly minimizes cost importance.

E. Violation of "Plant Split" RFP

The proposed award to UOP for more than a maximum of 60 percent of the desalting capacity, as well as the awards to both UOP and Hydranautics for one desalting process, violates pertinent RFP provisions requiring no more than a maximum of 60-percent capacity award to any one manufacturer and awards for a minimum of two desalting processes. Interior has not in any way justified under the RFP clause in question that it is impractical to implement that intent. Had du Pont realized Interior would award almost 80 percent of the capacity to one manufacturer, it could have proposed economies of scale and thereby made its price more competitive. Moreover, the proposed award to UOP for 80-percent capacity suggests that UOP alone was told it could propose capacity in that amount.

Interior's argument that du Pont's offer of 62-percent capacity undercuts the protester's position that the 60-percent limit was considered firm overlooks that du Pont's 62-percent capacity offer was based on an early Interior capacity estimate later revised.

Moreover, Interior's "impractical" exception "merely preserved the right of Interior to award a contract to one company (such as DOW) for two different processes."

F. Improper Public Ranking of Offers

The public ranking of concerns on the results of the price/technical competition improperly damaged the business reputation of the unsuccessful offerors and violated pertinent procurement regulations. It is not sufficient for Interior to insist the disclosure was not prejudicial in view of the serious competitive damage caused by the release.

Interior Reply

Interior's reply is keyed below to the above grounds of du Pont's protest. (Before summarizing Interior's reply, we point out that Interior considers that most, if not all, of the grounds of protest filed by du Pont, Ionics and D-P are untimely under the GAO Bid Protest Procedures (4 C.F.R. part 20 (1978)). The "untimeliness" issue related to these three protests is discussed below under the "GAO Analysis" section concerning the du Pont protest.)

A. Improper Changes in RFP

1. Permeator Stack Height

During the first negotiation session, both du Pont and Interior stated that they were not satisfied with the proposed height. Although du Pont was informed that stacks higher than the RFP specified maximum crane hook height of 12 feet were undesirable, du Pont was not prohibited from proposing higher stacks although high stacks were subject to cost penalty as stated in the RFP. Specifically, du Pont was never told that the stacks could not be higher than 10 feet "in order to be competitive." It was told it could be "more competitive" with a stack height reduction.

Although du Pont said its costs would be increased substantially to shorten the stack height (which would necessitate many other related design changes), since this was a competitive negotiated procurement each offeror was free to make numerous decisions on whether to increase or change quantites, quality,

configuration or complexity of the equipment offered in view of the respective cost impact on its competitive position. The du Pont proposal as modified actually improved its combined technical and cost ranking. Specifically, du Pont's technical score was increased 60 points because of the decreased height and revised design which, when combined with the $2 million in increased cost caused by the change, led to an overall rating increase.

2. Change in Pipe Walls

Because of du Pont's selected design pressure, it was requested to propose Schedule 40 pipe, which it did in its best and final offer.

In its protest, du Pont does not provide any specific information on which flanges it was not permitted to use. The provisions of the RFP subsection 2.7.4 in regard to flanges were discussed during negotiations. Lacking further specifics on which valves du Pont is basing this portion of its protest, Interior can only surmise that it concerns the reject and product sample valves required in the piping for each permeator/ vessel, which situation should have been discussed during negotiations.

B. Ambiguity In Warranty Requirements

The RFP subsection 1.4.5 sets forth the warranty requirements. The warranty provisions contained in the RFP were designed to be applicable to offerors of both reverse osmosis and electrodialysis equipment and to allow each offeror to negotiate a warranty appropriate for its offered system and still provide adequate protection to the Government. In five of the six negotiating sessions held with du Pont over a 6-month period, discussions were held on the various aspects of the warranty requirements and the warranties offered by du Pont. There was obviously ample opportunity for du Pont to seek early clarification of the warranty requirements or definitions of terms involved in the

RFP. The warranty requirements imposed upon du Pont were no more rigorous than those imposed upon any other offeror.

The Government modified its warranty requirements in amendment No. 8 to the RFP in that it permitted a prorated price for all replacements as an alternate to no cost replacement for membrane elements required in excess of the replacement schedule proposed by each offeror. Also, in amendment No. 8, the definitions of warranted life, service life and warranty period were clarified in subsection 1.2.2 and the amendment provided in subsection 4.2.4 for evaluating cost on the basis of no replacement of membranes if the offeror warranted no membrane degradation during no-load operation. Despite du Pont's claim to having no membrane degradation during no-load operation, it elected not to warrant on this basis and, therefore, its cost was evaluated on the basis of replacing membranes during no-load operation.

Although the three numbers stated in the replacement schedule form of the RFP were incorrect, as du Pont alleges, the form was an example only and did not affect the RFP requirements for the warranty or the cost of the membrane replacement. Each offeror was free to propose whatever replacement schedule and rate of replacement suited the offeror's membranes. Moreover, du Pont was informed of the error.

The claim is made by du Pont that it received important new interpretations just 5 working days before the closing date for receipt of best and final offers and that it requested that a formal amendment to the RFP be issued to insure that all offerors would meet the same requirements. The RFP warranty requirements and each offeror's warranty had been discussed and clarified to each offeror's satisfaction. The clarifications provided to du Pont had also been provided to the other offerors. During the last negotiating session with du Pont, in late June of 1977, the warranty requirements of the RFP were discussed, but not modified. Therefore, an amendment to the RFP was not necessary and was not issued.

C. Improper Agency Direction of Membrane Testing

Interior's status report on the Yuma Desalting Test Facility (July 1977) generalizes about the operation of the various test units. While du Pont did not replace membranes in its unit, the productivity after 10 percent of the proposed life dropped to levels far below du Pont's proposed level of performance. The degradation in performance was discussed with du Pont on numerous occasions and led to a request for autopsy on two permeators in order to determine the cause of degradation in performance. Although du Pont tested high on recovery (ratio of product to feed volumes), it did not achieve the highest recovery of all the units on test.

Productivity is a function of the offeror's membrane flux (rate of product water transfer per unit area) and the membrane area in the test unit. The du Pont unit had the largest membrane area of any units on test and also the lowest flux. In its proposal, du Pont claimed a productivity in excess of that achieved in its testing at the Test Facility. The du Pont assertion that its process is superior in salt rejection is not a complete presentation of all of the facts required to evaluate its equipment. High salt rejection is only one of several parameters which must be considered. The technical evaluation of proposals involved 20 separate categories. The ratings du Pont received on all categories resulted in its final ranking.

pH Problem

The Government attempted to operate the Test Facility including the manufacturers' units in accordance with their instructions. It should be noted that control of feedwater pH is never so precise as to operate a system at a fixed point. Rather, some narrow range of + 0.3 to + 0.5 is more common. The RFP clearly shows a range of pH from 7 to 8 in the clearwell and does, in fact, indicate the pH will be above this range 0.5 percent of the time respectively. Continuous pH recording devices were not installed until after du Pont's unit had over 3,000 hours of operation. Prior to that time, operators checked the pH and recorded the value three times per day on the log sheet.

Exhibit 4 attached to du Pont's comments of April 28, 1978, is an operator's guide for operation of its test plant at the Yuma Test Facility. This guide was supplied to Interior in December 1974. On the first page of this exhibit, item 11, under the heading "Start-up Procedures," indicates that feed pH may be varied from 5.5 later in the test. On page 2 of this exhibit, under the heading "Daily Observations," item 1 requires a check of the feed pH and adjustments to acid feed rates as required (adjustment to acid feed will change pH of feed). On page 3 of this exhibit, under the heading "Automatic Shutdown," item 3 indicates that a pH higher than 6.5 or lower than 4.5 will shut the system down after a 5-minute time delay. These three items of du Pont's instructions for operation of its test plant clearly indicate that feed pH needed to be checked and adjusted only once a day since the instructions suggested that only a daily observation was required and that the plant would shut down automatically if the pH was higher than 6.5 or lower than 4.5. These limits were set by du Pont and presumably were based on a range which would not be detrimental to its membrane. To now argue that Interior should have controlled the pH to an exact value of 5.5 when only a once-a-day check was requested by duPont or that Interior should be responsible for low pH that may have corroded du Pont's pump when du Pont established an automatic shut-down limit of 4.5 is completely unreasonable.

Tin-Fouling

Additionally, du Pont never advised Interior that short excursions of pH below its recommended value would cause pump corrosion with a result of tin deposition on its membranes. Therefore, the Government cannot be held responsible for any such result. Interior does not and has not argued that du Pont's pumps were not corroded. This corrosion may be the source of tin observed in the autopsied permeators; however, this had not been established conclusively, since tin has been found in the feedwater and after pretreatment in the clear-well. This fouling could thus be an accumulation of tin from the feedwater.

When offerors were asked to identify chemical elements which might affect the operation of their test units, no offeror including du Pont identified tin as a potential problem. As such, no special steps were taken to identify tin in the feedwater. Accordingly, the feedwater was not routinely analyzed for tin prior to best and final offers. Such analysis was only performed after the problem was recognized.

It should be reiterated that du Pont was obligated by (its no cost Yuma testing) contract to assure itself that its unit was being properly operated and that adequate data was being collected. In spite of all the above background, Interior evaluated du Pont's proposal on the basis of statements made there. Scaling, tin, chlorine and biological fouling were discussed in the du Pont proposal. It also discussed these same items along with aluminum, phosphorous and silica on pages 3 through 6 of section 3.4.9 of its best and final proposal. The du Pont summary of the possible causes of productivity decline on page 7 concludes that calcium sulfate and/or calcium phosphate scale was the reason for the degradation in productivity.

The du Pont argument that, even though its own conclusion of the test results at the Test Facility cited calcium sulfate and/or calcium phosphate as the cause of its permeator degradation, somehow Interior should have disregarded this conclusion and should have evaluated du Pont's proposal on the basis of discussions held before submittal of the best and final offer is patently untenable, since the best and final offer represents an offeror's final position. Prior positions discussed during the negotiation stage are subject to complete change in the best and final offer.

Finally, during early negotiations du Pont was fully aware of the drop in unit productivity at the Test Facility. It took no steps to correct the situation or to identify the cause. At that time, du Pont indicated it wanted to accumulate operating time. One of the purposes of the test facility was to determine if offerors could operate their units satisfactorily on feedwater pretreated similarly

to that proposed for the final plant. In order to demonstrate it could operate for a long period of time, du Pont elected not to replace the permeators.

Notwithstanding that Interior considers its analysis of du Pont's performance to be sound and that the resultant technical scores assigned to du Pont's proposal flowing from the testing to be similarly well-founded, Interior has reviewed its technical scoring analysis in light of du Pont's criticisms of the test experience. This examination shows that of the six categories in which testing at the facility was a consideration in the evaluation, du Pont scored 55.8 percent of the maximum possible points. Had du Pont scored the maximum possible points in the six categories (which is highly unlikely since only four perfect scores were given in all categories for all proposals), it would still have been ranked only fifth--having displaced D-P by only 1.8 percent of D-P's combined technical and cost score. This examination shows that anything less than a perfect score in all six categories would have still ranked du Pont in sixth place. In any event, performance data based on du Pont's unit at the Test Facility was only one of several sources of information used by the evaluators in arriving at technical scores. The du Pont unit productivity at the Test Facility was used in conjunction with product salinity in comparing unit performance offered to that demonstrated. It was only to this degree that Test Facility performance was germane to technical superiority. To support its technical superiority at the Test Facility, du Pont multiples salt rejection by TDS and recovery. This is not an accepted measure of technical performance. Productivity is a major consideration in performance which cannot be brushed aside.

Thus, even if Interior did mismanage the Test Facility operations, which is denied, it is clear that the test results, when placed in proper perspective, had a limited influence on the technical evaluation. Each proposal was evaluated on 20 separate categories. Experience was a consideration in 12 of the categories with Test Facility experience considered in 6 categories.

Further perspective is obtained by noting that experience was a consideration in 30 of the factors and Test Facility experience specifically referenced in only 9 factors. Thus, while experience was significant, the requirement for this experience to be specifically from the Test Facility was not that great. It should be noted that experience at the Test Facility can be used for experience, but this is not a requirement in the RFP.

In addition, it should be stated that any application of Test Facility results considered not only reports by the Yuma operations and maintenance contractor but also the offeror's interpretation of test results and judicious consideration of Test Facility operations. Interior believes that the test results were able to provide data to the offeror in making the proposal which could not be otherwise obtained.

In summary, it was the technical proposal being evaluated in accordance with the RFP evaluation categories that resulted in the final technical score. Test Facility test results only affected the evaluation in 9 of the 95 factors and in 6 of 20 categories. Furthermore, this data was considered only as to how well it supported statements and claims by the offeror, not in absolute terms.

D. Technical Merit Not Scored Properly

In its deliberations for determining contract award, Interior's Review Board did compute the ranking of proposals by utilizing the normalizing process requested by du Pont. Exhibit A1 (attached to one of Interior's reports) is a copy of a document prepared by Mr. E. L. Carden, who was a member of the Review Board, showing the ranking obtained by normalizing the technical scores and costs. This exhibit A1 was made by Mr. Carden before the Review Board's memorandum dated September 23, 1977, recommending selection for award, was written. In exhibit A1, Mr. Carden used the highest technical score for normalizing the technical scores, i.e., the highest technical score was assigned a value of 1,000 and all lower scores a lesser value using a formula exactly as suggested by du Pont.

It is important to note that the ranking obtained by the normalizing process in exhibit A1 is identical to the ranking obtained by using the quotient obtained by dividing the evaluated cost by the technical score. Based on this fact, the Review Board knew that ranking by the quotient obtained by dividing evaluated cost by technical score did give approximately equal importance between costs and technical quality as stated by paragraph 1.2.4 of the RFP and paragraph 9 of the Foreword to the RFP.

As further proof, Interior has prepared exhibit A2. This exhibit A2 compares the ranking of proposals obtained by dividing the evaluated cost by the technical score, as shown in the Review Board's memorandum dated September 23, 1977, to the ranking obtained by normalizing the evaluated costs and technical scores to a base of 1,000 exactly in accordance with the example labeled "weighting method" and equations shown by du Pont. This comparison shows that the ranking is identical regardless of which of the two methods is used.

E. Violation of "Plant Split" RFP Provision

It is Interior's position that the equipment was offered in such quantity and at such prices to practically prevent implementing its stated award intention regarding "plant split." Also, the RFP's bidding schedule contains the following:

> "* * * The desire of the Government is to award a contract or contracts which include at least two processes. Further, the Government will, as best serves the interests of the Government, award contracts for approximately 96-Mgal/d total plant capacity to one or to more than one offeror."

Once again the desires of the Government are cited. The bidding schedule clearly indicates that the Government may actually award only one contract in order to serve its best interests. The provisions of subsection 2.4.2.c. and the wording in the bidding schedule clearly indicated to offerors that the Government would award a contract or contracts

as best served its interest and that its desire to obtain more than one process may not be implemented. Therefore, the Government has not acted contrary to the provision of the RFP as claimed by du Pont.

Correspondence and the minutes of the December 17, 17, 1975, Open Manufacturers Meeting are cited by du Pont in support of its contention that the contract is to be let for a significantly greater quantity than provided in the RFP. The correspondence cited and the minutes of the meeting both predate the issue date of the RFP. Both are in harmony with the RFP in that the same intentions are stated along with the same statements concerning contract awards that are in the best interests of the Government and the possible impracticality of implementing those intentions.

While du Pont contends that, if it had known that Interior would consider awarding almost 80 percent of the capacity to one manufacturer, the economies of scale could have resulted in lower unit costs, the additional increments proposed by du Pont show no decrease in cost for any additional increment over the first additional increment, although the increment capacity offered by du Pont totaled twice the capacity of the basic 20-Mgal/d offer. It is, therefore, difficult to accept du Pont's argument that it would have incorporated more economies of scale.

Moreover, prior to issuance of the RFP, du Pont clearly indicated that it would be interested in roughly two-thirds, or a little over 60 percent, of plant capacity. In fact, du Pont proposed just that--62 percent of capacity.

Further, du Pont's allegation that Interior, after the negotiation period, improperly asked UOP to increase its proposal to more than 60 percent of the capacity is without basis and should be rejected as frivolous. UOP initially and in its best and final offered to furnish 100 percent of plant capacity.

F. Improper Public Ranking of Offers

The contracting officer's letter of September 30, 1977, does not violate the intent of the procurement regulations. The letter stated that Interior had completed the evaluations of the best and final offers, listed the firms in the order that their proposals ranked and named the firms to receive the award of a contract. Although the award of a contract had not been formalized on September 30, 1977, the only remaining administrative item was the preaward EEO clearance. Upon receipt of the EEO clearances, the award of contracts would have been made. The release of the information in no way affected the selection of the successful firms or prejudiced any offeror in regard to this procurement. The timing of the disclosure of information contained in the September 30, 1977, letter is not germane to the selection of the successful offerors.

GAO Analysis

A threshold question concerning the timeliness of du Pont's protest (as well as the protests of D-P and Tonics) has been raised by Interior and the proposed awardees concerning many of the grounds of protest raised by the three companies.

All of the protesters are active participants in the above-referenced litigation in which stipulations have been entered providing that Interior would not award the contracts in question until after our decision is issued on the protest. The stipulations have been signed by the presiding judge.

Generally, GAO will not decide the merits of a protest where the issues involved--as here--are likely to be disposed of in litigation unless the court expresses interest in reviewing our decision on the protest. Kleen-Rite Corporation, B-189458, September 28, 1977, 77-2 CPD 237. In Dynalectron Corporation, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341, we concluded that, when the presiding judge

signed a stipulation between the parties similar to those signed in the present case, there was an expression of court interest. Thus, both du Pont's and D-P's protests will be considered on the merits.

Although Ionics has not obtained a similarly signed stipulation, we view the court's granting Ionics the right to intervene in these particular circumstances as an expression of interest in obtaining the views of GAO on the Ionics' protest as well. Consequently, we will express our views on the issues raised in all protests.

A. Improper Changes in RFP

1. Permeator Stack Height

There is a factual dispute as to exactly what du Pont was told during negotiations about its stack height. Interior insists it told du Pont only that its proposal would be "more competitive" if stack height was reduced; du Pont, on the other hand, insists it was told that "to be competitive" the stack height must be reduced to 10 feet. The protester has not met the burden of affirmatively proving its version of the disputed facts where conflicting statements of the protester and the contracting agency constitute the only evidence. Reliable Maintenance Service, Inc., - request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337; Phelps Protection Systems Inc., B-181148, November 7, 1974, 74-2 CPD 244.

Under this view of the facts, du Pont's decision to reduce its stack height to be more competitive must be viewed simply as a response to competition rather than as a response to a mandatory requirement changing the specifications. Further, we agree with Interior that under this advice du Pont could have retained its original stack height, if it chose to.

Finally, although du Pont generally insists that its overall ranking declined as a result of its stack height change, we see nothing in the record to question Interior's position that there was a specific improvement in du Pont's technical/cost score caused by this change.

2. Change in Pipe Walls

We see nothing in the record to question Interior's position that it negotiated the changes in question in good faith without complaint based on its best engineering judgment.

B. Ambiguity in Warranty Provisions

The heart of du Pont's protest here relates to Interior's alleged failure to make clear its intent regarding warranty provisions until 5 days before final offers were due and to du Pont's belief that these clarified provisions put du Pont at a competitive disadvantage compared with the awardees. It is du Pont's belief that this clarified intent should have been put forth in a formal amendment released to all offerors.

There is no evidence in the record to rebut Interior's position that the warranty requirements and each offeror's warranty were discussed and clarified to each offeror's satisfaction. Moreover, du Pont admits, in effect, that it understood the warranty provisions prior to submission of best and final offers and that it knew an additional 19-percent "penalty" would be added to its costs pursuant to this understanding. Consequently, du Pont was in a position to remedy, to the extent deemed competitively feasible, the "penalty" attaching to its understanding of the warranty provisions before final proposals. Under this view, we see no reason why du Pont could not have offered a 6-year "battery type" warranty if it felt its "fixed replacement" warranty proposal was prejudiced by Interior's final clarification of warrancy requirements.

As to du Pont's suggestion that confusion stemming from interpretations of the warranty provisions prevented uniform responses and uniform evaluation, we note that the allegation is made largely in the abstract. Although du Pont notes that Ionics has also protested

Interior's treatment of warranty provisions, no other offeror has complained of this issue. Further, Ionics' equipment had a much longer warranted life and yet Ionics did not raise the "cost penalty" issue specifically advanced by du Pont.

Finally, we observe that, if du Pont was genuinely concerned about possible competitive prejudice stemming from the warranty provisions, it could have requested Interior to amend the RFP to provide additional time for offerors to consider the warranty provisions prior to submitting responses. The du Pont failure to request an amendment suggests it was not substantially concerned about prejudicial evaluation of the warranty provisions prior to the award announcement.

C. Improper Agency Direction of Membrane Testing

At the center of this disagreement are complex technical issues regarding the evaluation of du Pont's test unit and the reasons for the productivity decline found in the unit. Unless the agency's technical judgments on these issues are unreasonably founded, we accept those decisions. Union Carbide Corporation, B-188426, September 20, 1977, 77-2 CPD 204. Further, it is the procuring agency's responsibility, and not that of our Office, to evaluate proposals including the merits of varying technical approaches. Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206.

pH Controversy

Based on our review of the conflicting technical positions detailed at length above, we cannot question the reasonableness of Interior's technical conclusion that the "small accumulated time of pH excursions below 4.5 makes it extremely questionable" that "serious [permeator] degradation" was caused by pH feedwater.

Alternatively, du Pont has suggested that the permeator degradation was caused by tin in the plant feedwater. Further, du Pont suggests that, if tin was

in the feedwater, the RFP was deficient for not identifying this metal. On the other hand, Interior has pointed out that: (1) before du Pont submitted its best and final offer, the company realized (in July 1977) that 1 ppm of a tin compound was present in the feedwater; and (2) du Pont never identified tin as a troublesome element even though Interior specifically requested offerors to identify these elements when testing was started. Under this alternate position, du Pont should have brought the alleged troublesome tin presence to Interior's attention as soon as it was discovered--certainly before submission of best and final offers. The failure to complain supports a conclusion that du Pont was not seriously concerned about the presence of this compound. In any event, although du Pont has explained that its best and final proposal statement--which attributes permeator fouling to calcium rather then tin fouling--was inadvertent, the fact remains that the statement is present in the offer and otherwise undercuts the view that tin fouling caused the permeator loss of performance.

Finally, we cannot question the reasonableness of Interior's alternate position that--assuming it, rather than du Pont, should be held liable for the company's productivity loss--giving du Pont's proposal the maximum points in the six categories affected by the Yuma testing, this still does not affect selection of the proposed awardees. Although du Pont disagrees with this assessment by insisting that other technical and cost categories were also affected and that the better measurement of technical performance is shown by "multiplying salt rejection by TDS and recovery," we see no basis to question the reasonableness of Interior's position, especially since the test results were stated to be used only to verify and substantiate statements and claims made by offerors and not to be the subject of ranking in absolute terms. Nor can we question Interior's technical judgment that the multiplication formula advanced by du Pont is "not an accepted measure of technical performance." Consequently, du Pont's objections to the technical ranking of its offer are rejected.

D. Technical Merit Not Scored Properly

Whatever might have been improper about Interior's original scoring technique, the fact that the rescoring--done under a so-called normalized scoring method--has not altered the relative position of offerors requires us to reject this basis of protest which is also repeated by Ionics below. Moreover, although du Pont alleged that there are some defects present in the recalculation, based on our review of the record, we must conclude that the asserted defect does not affect the relative ranking of offerors.

Finally, we reject the argument that the recalculation is suspect merely because it has been made after the selection of awardees. The recalculation was made on the basis of the proposal scores compiled as of the time of the original award selection. Hence, the recalculation was not objectionable.

E. Violation of "Plant Split" RFP Provision

Because this issue is common to the three protests, all grounds of protest raised by the three protesters under this issue will be considered in this section of the decision and referenced in the sections of the decision dealing with the other protests.

Does the Colorado River Basin Salinity Control Act (P.L. 93-320) under which the contracts are being awarded require split awards of certain sizes for at least two desalting processes to demonstrate the desalting "state-of-the-art"? (This subissue is exclusively argued by Ionics, whose detailed arguments are summarized below.)

The Colorado River Basin Salinity Control Act (designed to resolve the salinity problem of the Colorado River waters) does not contain any provisions that would require contracts awarded under the authority of the act to demonstrate the art of desalting through use of more than one type of technology. As Interior has pointed out, the act merely requires the use of "advanced commercial technology" for meeting the desalting objectives at the "lowest overall cost to the United States"--neither of which standard, obviously, would require a state-of-the-art demonstration.

As to the history of the act, we note the Executive branch sent to the Congress two bills (H.R. 12834 and S.3094) which incorporated certain of the 1972 recommendations of Herbert Brownell (the President's (Nixon) Special Representative for Resolution of the Salinity Problem with Mexico) concerning the construction of the desalting plant. There was no language in either bill which approved use of the proposed plant for demonstrating the state-of-the-art. On the contrary, the bills incorporated Mr. Brownell's concern that costs be kept at minimum. Moreover, although the 1972 Brownell recommendations which are relied on by Ionics (repeated in Senate Report No. 93-906, June 7, 1974) also stated that the "plant itself would materially assist in the development of desalting technology * * * [and] information * * * gathered through it would be of value in solving salinity problems * * * elsewhere in the United States and Mexico * * *," these statements were never carried into the act itself nor referred to by the Congress in its discussion of the proposed legislation. These statements, in our view, simply evidence Mr. Brownell's belief that the experience obtained--without regard to the demonstration of one or more processes--would be useful in solving future problems. In any evert, since the statements did not find expression in the act and were not mentioned with apparent approval (although printed in the relevant Senate report), they fall short of being an official pronouncement of the Senate committee involved. See section 48.06, "Reports of Standing Committees," Sutherland Statutory Construction; MacDonald v. Best, 186 F. Supp. 217, 221 (ND Cal. 1960). Moreover, the section-by-section analysis of S. 3094 submitted with the bill by the Departments of State and Interior speaks of the Yuma plant using "advanced technology commercially available," but does not mention state-of-the-art as a goal. Further, representatives of these Departments stated in a joint letter that S. 3094 was intended to provide for "the minimum works and other measures necessary for this purpose"--a stated intent which undercuts the notion of demonstrating state-of-the-art. Nowhere in the legislative history of the act is there any reference to the technological structure proposed by Ionics whereby more than one type of

technology would be adopted for use at the plant in order to demonstrate the state-of-the art. Instead, emphasis is repeatedly placed upon the state-of-the-art being advanced simply by the existence of the plant. The idea is that the experience gained through years of observing the process used and results achieved at the Yuma plant will serve to increase the fund of information on desalting upon which planners of future plants can draw, not that several technologies should be adopted at Yuma so their functioning and results can be observed. Consequently, we reject Ionics' argument about the intent of the act.

Does the RFP require split awards of certain sizes for at least two desalting processes?

Having concluded that the cited act does not support the supposed requirement for multiprocess awards, we turn to the RFP itself. We recognize the extended grammatical analysis, noted below, Ionics has made of the plant split-process provision (2.4.2.c. of the RFP). The end result of the company's argument, however, is to direct the reader from obtaining meaning from a plain reading of the provision.

The provision, as reasonably read, states two express intents: one, to procure a maximum of 60 percent of capacity from any one manufacturer, and, two, to award contracts to assure a minimum of two processes. Next, in two sentences following these expressed intents, Interior lists specific processes as well as a reserved right to determine whether other proposed processes are indeed separate processes. In our view, the next key sentence involving the impracticality (because of proposed quantities and prices) of implementing "this intention" refers to the two express intents and not to the reserved right to further determine separate processes.

First of all, the reserved right has nothing to do with an intent, but merely stipulates a present fact. Second, "this intention" is grammatically linked with the expressed intents mentioned two sentences earlier notwithstanding that the phrase is singular. "This intention" means no more than Interior's "award intention" as to

which concept percentage capacity and technological process are the components. We think this meaning is reasonably clear and did not require further clarification from the agency.

Under our analysis, it is clear that Interior clearly informed all offerors that it might not award for a maximum of 60-percent capacity and for a minimum of two processes if quantities and prices rendered this award intention "impractical." As to the meaning of "impractical," Ionics has advanced one dictionary definition (Fowler's Dictionary of Modern English Usage (1965 ed.)) which defines the word "practical" as meaning "adapted to actual conditions." We note that the first-listed definition of "impractical" in Webster's New Collegiate Dictionary (1975 ed.) is "not wise to put into or keep in practice or effect." Thus, the decision to carry out Interior's stated award intention depended--under the cited definitions--on the wisdom of putting the intention into effect considering the adaptability of proposals to "actual conditions"--namely, the quantities and prices proposed by the offerors.

Was the carrying out of Interior's award intention "impractical"?

Under the extremely broad connotations of the word "impractical," Interior reserved the right to determine tne adaptability of proposals to its stated award intention. It should have been obvious to all offerors that the decision ultimately reached under this provision would be subjective. Nevertheless, not one offeror complained, prior to submitting proposals and the announcement of the successful offerors, that the definition should be narrowed.

Given the subjective nature of the authority Interior was to exercise in determining whether prices and quantities proposed were impractical so far as intended capacity and process awards limits were

concerned, we reject Ionics' suggestion that impracticality was to be determined by Interior's determination of competitive range and that, once offered prices and processes were determined to be in the competitive range, it would thus be practical to carry out the award intention. In our view, the broad authority vested in Interior under this reservation was more than the right to determine mere "workability" (still a broad concept) in the sense of determining competitive range only, but rather, also, the wisdom of carrying out the intended awards given the proposed prices and quantities of otherwise basically workable, that is, competitive, proposals.

Although a host of objections has been levied against the wisdom of Interior's decision, we find none that, under scrutiny, render the decision as completely without rational support. Moreover, based on our review of the range of prices and quantities, we cannot question Interior's "impractical" decision, namely: although Interior was prepared to incur some additional expense to carry out its announced intention, the ultimate expense of doing this was excessive.

We offer the following comments to other specific objections noted below.

(a) (Ionics' argument) The letter Interior sent to Congress 1 week before the award decision was announced proposing waiver of solids recovery limits to make electrodialysis proposers more competitive apparently shows either that award to Ionics was practical as of that date or that Interior was preparing evidence to show lack of prejudice toward Ionics' method.

GAO comment:

Although we have no reply from Interior on this issue, GAO cannot question the ultimate analysis of cost and quantities supporting the proposed awards even if the decision was reached after the date of the letter in question.

(b) (Ionics' argument) The Burns and Roe consultants and certain presolicitation statements supported multiprocess awards.

GAO comment:

The consultants were merely advising the Department as to their opinion, but Interior properly reserved the right to ultimately select the awardees under the stated provision and criteria. Based on our review, the consultant's advice does not allow us to question the award.

Moreover, the cited presolicitation statements also support the view that economic considerations might prevent multiprocess awards.

(c) Prejudice to du Pont and Ionics allegedly flowed from the failure to propose on quantities higher than 60 percent.

GAO comment:

Although du Pont insists that it could have proposed greater reductions for quantities greater than 60 percent had it known proposals for more than 60 percent would be considered, there is nothing in the description of du Pont's average pricing scheme which lends support to the view that high enough pricing reductions would have resulted to affect its evaluated ranking. There is also nothing in the record to support Ionics' claim of sufficient reductions to offset the financial advantages in the proposed awards. Further, even though Ionics had the opportunity to price on the basis of 60-percent capacity, Ionics proposed on only 42-percent capacity, thereby apparently foregoing the pricing advantage accruing to offerors proposing greater capacities. Moreover, as to both du Pont and Ionics, we believe reasonably cautious offerors should have realized that it might be impractical for Interior to stay within the 60-percent capacity limit for award and hence alternate offers for greater than 60-percent capacity should have also been submitted. Under this view, UOP's over-60-percent offer was merely a reasonable reaction to an RFP contingency.

(d) Prejudice to Ionics stemming from preparing a technically advanced proposal in reliance on the plant split provision.

GAO comment:

In our view, the RFP was reasonably clear about the importance of technical and cost criteria and offerors willingly responded without complaint. Moreover, to the extent that the stated importance of the technical and cost criteria might have been overridden in the award process through a deliberate splitting (under Interior's intended award provision) of capacity to insure multi-process awards irrespective of technical or cost merits, it is clear that the present proposed awards to the top-ranked offerors (cost and technical equally weighted under a normalized scoring method) prevent an arbitrary split.

(e) Selection of one process is allegedly improper on numerous technical grounds, including alleged obsolescence of the selected membrane material, vulnerability of the material to high temperatures and bacterial counts, and lack of proper operating experience of the selected concerns.

GAO comment:

We have reviewed these objections as detailed above. Based on this review, we cannot conclude that Interior's judgment on the technical intricacies and merits of the competing offers lacks rational support notwithstanding Ionics' objections to the contrary. Specifically, our factual audit, as detailed below, shows that Interior considered many of these objections in its evaluation process. Notwithstanding these objections, the Department's best technical judgment was that the process should still be selected--a judgment that we are unable to question.

As to Ionics' citation of Ionics Incorporated, B-179087, June 5, 1974, 74-1 CPD 302, that decision merely noted observations of technical judgments about certain membrane equipment offered by a company other than one of the selectees here for a "water treatment

plant" to be constructed in Utah. In view of the differences between the suppliers then and now and the locations and uses of the water, we cannot conclude that the decision is for application here. Even if the decision were to be applied, we cannot conclude that it necessarily would overrule Interior's technical position to the contrary in view of the claimed weaknesses in the competing technology. Similarly, we cannot conclude that the alleged experience of the State of Arizona with the offered equipment overrules Interior's technical judgment.

Furthermore, although Ionics has questioned Interior's evaluation of competing operating experiences--both as to selectees and the protesters--we cannot question Interior's judgment that the competing experiences are reasonably indicative of the evaluated strengths and weakness of the ranked proposals notwithstanding the criticisms advanced as to alleged bias and the like.

Finally, as to Interior's suggestion that there is a simple solution to a performance difficulty exhibited by the selected equipment, we cannot contest Interior's technical judgment that this can be accomplished even though the outline of the solution has not been advanced for purposes of this protest. Alternatively, there does not seem to be a sufficient basis to question the ranked technical positions even considering that the outline of the solution has not been advanced.

(f) D-P and Ionics suggest that the one process awards will allegedly disturb the national and worldwide competitive balance of the industry and will otherwise harm the technological evolution of the desalting industry.

GAO comment:

We agree with Interior's position that neither of these factors was properly for consideration in selecting the awardees.

F. Improper Public Ranking of Offers

All protesters have complained of Interior's release of the proposal ranking. Ionics especially has submitted detailed argument that one or more regulations were violated in the process of the release of this information.

Assuming that the cited regulations were in fact violated, the simple fact remains that the release of the information in no way affected the validity of the selection of the proposed awardees, because the release took place after the selection of the awardees. Consequently, even if we were to assume the regulations were violated, this assumption would not prompt us to recommend that the proposed selection be reconsidered. At most, a violation would prompt us to recommend that the circumstances giving rise to the violation be examined with the intent of preventing future violations. This recommendation would be the only "enforcement penalty" that our Office could consider.

Since it is the apparent position of the protesting parties that their interest in this issue is only to obtain a reconsideration of the award decision, we see no point in dealing with the propriety of the disclosure so far as future circumstances are concerned, especially since the litigation is only concerned with the present procurement.

Ionics' Protest

Ionics has also protested the award and intervened in the above-numbered civil action. The company's grounds of protest are discussed below.

A. Violation of "Plant Split" RFP Provision

Ionics insists that the word "impractical" as used in the RFP's "plant split" provision refers to Interior's reservations of the right to determine

whether "other systems" should be added to the five processes listed in the provision. This right was reserved, in Ionics' view, because Interior foresaw that, if as many as 10 other processes were considered as separate and added to the five listed in the RFP, it might involve such a quantity of equipment and such a price to the Government as to make implementing the intention to choose additional processes impractical. Ionics argues, moreover, that, if the "impractical" phrase did not mean a restriction on the number of "other systems," it is unclear as to which of the two earlier sentences (the "plant split" and "minimum of two processes" sentences) the qualification applies. Clearly, the word "this" would not have been used if it was to apply to both sentences as Interior now insists.

Further, since Interior insists the qualifier extends to cost considerations only, offerors who improved their technical proposals were unfairly treated. However, merely because a higher cost technically acceptable proposal is more expensive does not mean it is impractical. Moreover, if the solicitation is ambiguous, the ambiguity should be construed against Interior under well-accepted principles--not against the offerors who relied on a reasonable contrary interpretation to their detriment.

Further, as defined by Fowler's Dictionary of Modern English Usage, "impractical" means "not adapted to actual conditions." "Impractical" as used in the RFP, therefore, means that Interior could eliminate only those processes which could not be adapted to actual conditions, i.e., those that could not work. Thus, only if all processes but one were unworkable with respect to quantity and price could Interior choose just one process. However, Interior does not insist that all processes save one were unworkable. It found all offers in the competitive range and thus practical.

Further, Interior's September 22, 1977, letter to the Congress shows that 1 week prior to the announcement of the successful offerors the electrodialysis method was considered practical. This means that Interior's final decision excluding Ionics as impracticai had not been made. To accept this view, however, means Interior's

view on practicality abruptly changed. The other view is that Interior had made its decision to exclude the electrodialysis method and the letter was a mere cover to defend against protests stemming from bias built into both the law and the RFP for the reverse osmosis method of the selected awardees.

Ionics stresses that it was practical--contrary to Interior's assertion--to implement the "plant split" provision. To the contrary, Ionics insists, the Yuma Desalting Plant report written by Burns and Roe, the consultants hired by the Government, "evaluated a plant split based upon 33% electrodialysis, 33% hollow fiber reverse osmosis and 33% spiral wound reverse osmosis." Since Ionics is a worldwide supplier of electrodialysis equipment and since much of the consultant's report was based on Ionics' data, Ionics could not expect that its submission of an offer based on this method would be considered impractical. In fact, Interior has disregarded the consultants' advice that Ionics' method had an "operational advantage" making "inclusion as part of the final plant report desirable."

Ionics also insists the proposed awards for one technological process offended the stated public goals for the Yuma Project which include demonstration of the state-of-the-art for desalting processes nationally and worldwide. These goals were supported in the RFP by the statement concerning the approximately equal weight assigned to cost and technical merit as well as a September 1973 Interior report entitled "Colorado River International Salinity Control Project."

As to the stated public goals, Ionics argues that the author (former Attorney General Brownell) of the treaty under which the Salinity Control Act was enacted indicted that the desalting in the Yuma plant would be by membrane process and that the plant would assist in the development of desalting technology. Moreover, the demonstration of the "state-of-the-art" goal is consistent with Ionics' understanding of the present state-of-the-art in desalting technology in which the Yuma plant represents a level of evolution

of desalting technology as well as the best opportunity yet to construct a demonstration and evaluation of competitive technologies.

Since the project was for demonstration of the art, Ionics understood that companies' higher initial prices, such as proposed by Ionics, could be offset by technical considerations such as novelty of design, process reliability, company experience and other considerations. Although Ionics did not believe a new technical approach was necessary, the company spent a considerable portion of its effort to optimize a novel technical/cost approach. Had Ionics realized the Government would opt for a minimal technical advance, Ionics would have bid its standard line with no new technology and its lowest price. Moreover, if Ionics knew a more than 60-percent capacity offer would have been considered for award, it would have reduced its price accordingly.

Technical risk was enhanced by Interior's selection of concerns with very limited experience in terms of years in the business or number of operating installations and in choosing a process involving a membrane material which is unstable and disaster-prone, especially in the high temperature Yuma area. As to the reliability of this material, GAO has recognized the Air Force view in one procurement that the material "cannot operate efficiently." The State of Arizona has also questioned the selected membrane which is also vulnerable to varying pH levels, bacterial and particulate attack.

These defects are also shown in Interior's reports on Hydranautics' and UOP's current facilities which simply should not have merited any proposal consideration because of various difficulties whereas Ionics' experience was improperly downgraded.

Interior's bias is also shown by its statement that the solution to the degradation of UOP's membrane difficulties is rather "obvious and standard" without further explanation. Ionics insists there is no easy solution.

Moreover, Interior admits that Ionics' electrodialysis approach was not impractical to begin with. The fact that Ionics' initial proposal was considered in the competitive range shows that the proposal was considered practical at least up to the time for receipt of best and final offers. Ionics contends that, unless the final offers of all three processes were so varied in quantity and so high in price from their initial offers, at least one of the eliminated processes should have been chosen based on the statement.

B. Technical Merit Not Scored Properly

As to Interior's application of the equal weighting RFP scheme, Ionics prepared its offer with respect to the statement in the Salinity Control Act that obtaining the required services at the "lowest overall cost to the United States" meant the "lowest overall cost" connected with an appropriately high-quality technical proposal. Moreover, to the extent Interior now asserts that cost, and not demonstration of state-of-the-art, was the objective, Ionics insists that Interior improperly departed from the RFP's statement of the relative importance of cost and technical considerations.

As to Interior's suggestion that a scoring by the "normalization method" does not change the standings, this is mere "after the fact rationalization." Moreover, Interior's method of individually scoring each proposal by technical and cost merit without regard to process type was inconsistent with the RFP intention to award on an optimum combinatinon of processes.

C. Improper Treatment of Warranty Provisions

The warranty provisions of the RFP were misleading, vague and not applied uniformly. Since Ionics' membranes tend to fail over a longer lifetime than reverse osmosis membranes, Ionics could have been prejudiced by Interior's warranty evaluation procedure, especially since Interior never confirmed or accepted Ionics' understanding of the warranty and service life provisions.

Because of Ionics' objections about the prejudice it was suffering in the warranty provisions area, Interior permitted Ionics to prepare alternative warranty approaches finally resulting in a 7-year warranty period on a "cost pooling" of warranted items approach. Interior did not interpret the warranty as Ionics intended it to be interpreted. This is so because Interior improperly said Ionics "could have gained a cost and technical advantage by warranting the membranes for a longer time period." This statement can mean only that warranty requirements were not uniformly applied.

Notwithstanding that there were several meetings between Interior and Ionics personnel on warranty provisions, Ionics' concern about the warranty requirements pertaining to its longer-life (up to 20 years) electrodialysis membranes were never satisfied. The requirement "to warrant the life" of the original set of membranes tended to favor the reverse osmosis process (where membranes all tend to fail at a lifetime just in excess of that required by the RFP) in that Ionics was thus required to provide a much longer warranty than that required of the selected offerors.

D. ED Offerors Competitively Disadvantaged

Interior unfairly placed electrodialysis (ED) offerors at a competitive disadvantage relative to reverse osmosis offerors by requiring ED offerors to provide specialized rectifiers.

E. Improper Public Ranking of Offers

The action of Interior in public ranking of the final offer was contrary to procurement regulations and policy and has produced serious and perhaps unrepairable damage to Ionics' trade reputation. This action violated a pertinent procurement regulation. Although the award selection itself was not prejudiced, because the release of the ranking took place after the selection, real harm has been done to Ionics' competitive standing because of the release of this information.

F. Disclosure of Testing Information

Apart from Interior's unauthorized release of the offerors' ranking, Interior improperly released some of all offerors' test material to Dow Chemical Company in early 1978 after the selection was announced and protests filed. This disclosure was prejudicial to Ionics.

Interior Reply

A. Violation of "Plant Split" RFP Provision

As stated in the reply to du Pont's protest, Ionics was aware of Interior's reserved right not to implement its "two process award" intent if offered quantities and prices made the intent impractical. Interior could not determine whether this intent was practical until it completed evaluation of best and final offers. Note our reply in the du Pont protest as to the details for our impractical finding which was based on the "final rankings and the quantities and prices of offered equipment."

Further, the memo of the "Yuma Desalting Plant Open Manufacturers Meeting Minutes" (December 15, 1975) furnished to Ionics stated we would limit the amount spent to get a plant split and this would not be in the RFP.

Moreover, in the article in the April 1977 edition of Industrial Water Engineering (which first appeared in a paper presented at the First Desalination Congress of the American Continent, Mexico City, Mexico, October 1976), from which Ionics liberally quoted, the statement was made: "Also, since economic and technical considerations may dictate selection outside of this range, the solicitation stated the plant split between manufacturers and processes is an intent, with the contracting officer free to award as many contracts as best serves the Government's interest."

As to Ionics' grammatical analysis of the plant split provision, Interior considers the analysis illogical. The "save for impractical" qualifier does not apply to the list of processes in the two sentences prior to the qualifier (which are concerned with Interior's reserved right to determine other acceptable systems), but rather to the two intentions (regarding awarded capacity limits and awarded processes) found in the involved provision.

The language of the qualifying phrase implies that any determination of impracticality will come after best and final offers prior to award of any procurement, since an offeror might change its price or quantity in the best and final offer. Moreover, the fact that Ionics and other offerors were in the competitive range after initial proposals has no bearing on the impractical determination because of cost, technical and quantity changes finally proposed.

Concerning Ionics' charge that Interior has not justified its award decision under the qualifying phrase, Interior responds as follows. It is true that Interior stated the desire of a plant split between processes and between manufacturers to reduce the risks involved in having only one membrane supplier and to minimize risks regarding failure of equipment to produce the desired quantity at the desired salinity. Furthermore, Interior was prepared to incur some additional expense in order to reduce these risks. However, Interior was obviously limited in the amount of additional expense it could incur to be consistent with the legislative intent of least cost and good administrative practices, and it was for this reason that the "escape clause" regarding the intent was included in the RFP. The escape clause, "This is stated as an intention since equipment may be offered in such quantity and at such prices as to make implementing this intention impractical," limited the considerations to quantities and prices offered.

Ionics' final prices were considered impractical. Notwithstanding that the consultant found that inclusion of the ED process might be desirable, this did not mean that the process could be included. The fact is that Ionics' best and final proposal--technical and cost factors--did not rate high enough for award. Moreover, Ionics could not have been misled, since paragraph 2.4.2.c. of the RFP said "no portion of the plant has been allocated to any particular process or to any particular manufacturer."

Concerning Ionics' related complaint that Interior's impractical decision gave cost too much weight, Ionics has chosen to misread or ignore that RFP statement concerning the relative importance of quality and costs by insisting that technical merit should ultimately prevail over cost even though the RFP states technical is equal to cost.

During negotiations, Interior encouraged use of available advanced technology--that is consistent with the need that the process selected be efficient and up-to-date. It is not true that Interior encouraged offerors to propose novel designs. Although Ionics proposed its Government-funded "Mark IV Stack"--presumably in an effort to advance the state-of-the-art--as an alternate in its initial proposal, Ionics apparently made an early decision not to propose the "Mark IV Stack" in its best and final offer.

B. Technical Merit Not Scored Properly

Final offers were ranked in a weighting process which gives approximately equal weight to cost and technical factors. Interior's statement that overall cost was important was said in the context of the legislation and does not mean that in the actual weighting process cost was given undue weight. Moreover, in a reranking, using the so-called "normalizing" procedure, the selection is confirmed and shown to be identical to the result earlier produced.

C. Improper Treatment of Warranty Provisions

As to its objections about evaluating the warranty provisions, Ionics should have sought clarifications about the meaning of these terms during negotiations and before the date for best and final offers. All offerors were treated the same in regard to warranty requirements which were discussed in all four negotiation sessions held with Ionics. If Ionics had longer-life membranes, then it could have gained a cost and technical advantage by warranting the membranes for a longer time period. Ionics initially proposed to pool the warranty for all items in a single cost pool. This pooling was undesirable to Interior and was discussed in negotiations. Ionics retained this pooling arrangement in its best and final offer.

Interior told Ionics, moreover, that its approach involving measuring the rate of membrane usage at the end of the 7-year warranty period was acceptable and that the cost of membrane replacement should reflect this provision. Ionics said that it would meet this requirement. Ionics indicated its warranties would be low in cost, meet Ionics' business considerations and be realistic regarding operation. Thus, the Government felt it had reached a meeting of the minds regarding this consideration. Statements in the contracting officer's report relative to additional cost and technical advantage by warranting the longer period were referring to Ionics' claimed 20-year life as opposed to the warranted life contained in the proposal, including the adjustment based on rate of usage. We believe the record will show Ionics was evaluated correctly in both the technical and cost evaluations.

Ionics' proposal involving measuring the rate of membrane usage at the end of the 7-year warranty period was acceptable to the Government, was in conformance with the RFP requirements and was evaluated as proposed. All other offerors' proposals were also in conformance with the RFP requirements and were evaluated as proposed. As such, the warranty requirements were evaluated uniformly.

D. ED Offerors Competitively Disadvantaged

Although Ionics claims that Interior prejudiced its position by requiring it to accept the warranty and performance risk of specialized rectifiers, Ionics did this at its own choice. It had the option under paragraph 2.6.1.c. of the RFP to allow Interior to furnish rectifiers of standard design. In any event, the proper time to have complained about this alleged unfairness was before the submission of final proposals.

E. Improper Public Ranking of Offers

Interior's basic position on the release of the ranking is that the release in no way prejudiced the selection for the awards or any offeror generally. The letter did not detail any aspect of the cost or technical evaluation. Moreover, any firm that participates in a competitive procurement must assume the risks associated with its offer not being identified as the most favorable offer.

F. Disclosure of Testing Information

As to Interior's release of proprietary information to Dow concerning other concerns' test performance, Interior did not knowingly release these documents to Dow. Interior informed the other offerors of the documents in Dow's possession, requested that the documents be kept confidential, and requested Dow to consider putting the documents in escrow with a disinterested third party.

GAO Analysis

A. Violation of "Plant Split" RFP Provision

B. Technical Merit Not Scored Properly

These issues (A. and B.) have been discussed above under the analysis of du Pont's protest.

C. Improper Treatment of Warranty Provisions

Ionics contends that Interior could not have understood its warranty approach because of Interior's statement that Ionics could have gained a cost and technical advantage by proposing a longer warranty. Interior's statement also shows, in Ionics' view, that warranty requirements were not uniformly applied.

Apart from Interior's statement--which we take to be a general statement that a longer proposed warranty would generally advance the competitive score of a proposal in comparison with a shorter warranty--Ionics has not pointed to any specific differences in Interior's evaluation of its warranty proposal or that of any offeror to demonstrate its ultimate conclusion that warranty provisions were not uniformly applied other than its observation that its ranking does not evidence a greater priority assigned to a longer warranty. The final ranking was based on many factors; however, Ionics' ranking is not necessarily inconsistent with specific merit accorded for a longer warranty. Furthermore, based on the review of the current record before us, we must conclude that Interior has reasonably evaluated proposal warranties.

As to Ionics' suggestion that the warranties proposed by the selected concerns may be worthless because of the allegedly defective material used, we note that Interior has considered these various alleged defects and its best technical judgment is contrary to Ionics' position. We cannot question this technical judgment.

Finally, as with the case of du Pont's objection to Interior's treatment of the warranty provisions, any complaint that Ionics might have had with regard to bias in the provisions or other perceived defects in the provisions should have been raised, at the latest, prior to submission of final proposals.

D. ED Offerors Competitively Disadvantaged

We agree with the Department's position that, since Ionics had the option under the RFP for rectifiers of standard design, the alleged bias could have been removed had Ionics properly brought this problem to Interior's attention prior to the submission of best and final offers.

E. Improper Public Ranking of Offers

F. Disclosure of Testing Information

See the discussion of these issues in the du Pont section of the decision.

As to Interior's inadvertent release of offerors' alleged proprietary materials to Dow Chemical Company, since this release was post-selection as well as inadvertent, it does not affect the propriety of the award.

Dow-Permutit Protest

Dow-Permutit (D-P) has also protested the proposed awards. D-P's grounds of protest are summarized in the following paragraphs.

A. Lack of Meaningful Discussions of Yuma Testing

D-P alleges that Interior failed to conduct meaningful discussions with it since D-P's final ranking shows that there must have been negotiable deficiencies in the proposal. For example, D-P requested copies of all 32 months of testing on the D-P unit; however, only 2 months' test reports were provided. The first time that D-P saw Interior's full interpretation of the test site data was in late May 1977 after D-P's best and final negotiations had been prepared. As a consequence, D-P received no information on what pretreatment experiments were

taking place. Any of the experiments could have influenced the interpretation of D-P's performance. Thus, Interior's failure to discuss the test performance prevented D-P from explaining or reacting to the interpretations of that performance.

Moreover, contrary to Interior's position, D-P's December 1975 and January 1976 requests for copies of test reports were acknowledged by Mr. Cohan of Interior. Mr. Cohan, in fact, promised that the requests would be honored. Moreover, contrary to Interior's position, D-P's requests "constituted continuing requests for the monthly summaries of performance."

Although some of the Interior reports promised in mid-March 1976 were received in May 1977, this was "too late to influence the negotiations" because the D-P proposal had been mainly completed prior to the initial closing date in April 1977. Even though some data was therefore received prior to the final closing date, Interior's failure to negotiate left D-P with no meaningful data analysis prior to the conclusion of negotiations.

Despite repeated requests, moreover, D-P was not given sufficient information on the Government's pretreatment experience which involved "frequent upsets." Thus, D-P was unaware of the Government's aluminum permanganate and ferric sulfate tests. Therefore, even if Interior discontinued these special treatments, the important point is that D-P was not told of all relevant facts as to its test experience so as to allow D-P to take needed corrective action.

Interior improperly failed to tell D-P of a negative interpretation of D-P's Yuma test performance. Thus, D-P had no reason to suspect a negative interpretation in view of D-P's competitive range ranking. Rather than engaging in meaningful discussions, Interior restricted its communications

to minor and relatively inconsequential points consisting of very few deficiencies in hardware and design interpretations. This led D-P to believe that no significant deficiencies existed in its proposal and precluded D-P from making adjustments where it now appears Interior perceived deficiencies.

Additionally, Interior improperly failed to hold meaningful cost discussions with D-P. The only point discussed with D-P was Interior's suggestion that D-P was a little high on cost and that adjustments could be made by having replacements without pressure vessels.

Because of the lack of meaningful discussions, certain errors in the consultant's analysis of D-P's performance were permitted to exist. For example, D-P's analysis of performance shows that the performance decline was well within the predicted decline for that system contrary to the consultant's position. Other errors are also present in the consultant's analysis.

B. Rack Allowance Problem

In March 1977, Interior improperly denied D-P an allowance for extra racks or space for extra racks which would have lowered D-P's cost proposal. This denial was improper because the RFP did not specifically prohibit this rack allowance. Moreover, the denial placed a large liability for guaranteed performance on D-P which had to be made up by increased costs for the warranted permeators, thus prejudicing D-P's competitive position.

C. Bias in Evaluation

The report of Interior's consultants suggests some lack of impartiality. Only the systems of D-P and Hydranautics were favorably described even prior to submission of best and final proposals.

Not only did Interior favor the selected spiral wound technology over other processes, but it deliberately adjusted its internal decisions and the RFP to permit Hydranautics to continue to participate in the procurement and to be selected. For example, Interior says that it relied on certain side-by-side tests of permeator and spiral modules which show spiral module testing superiority. Actually, the testing company has stated it never included spiral modules in the testing program and that the superiority conclusion was never drawn. This leads D-P to believe that Interior never considered the favorable performance of the D-P unit with respect to the plugging factor.

Moreover, Interior made some critical changes in the requirements for the procurment so as to permit Hydranautics to become successful. Those changes are: (1) reducing the amount of an efficiency bond originally required of Hydranautics and all other offerors without discussing this reduction with D-P; (2) allowing Hydranautics' unit to be tested at Government expense after the company withdrew its offer; (3) allowing Hydranautics to reenter competition after it had withdrawn its proposal; (4) postponing the date of best and final offers several times to accommodate Hydranautics' needs especially for "EEO clearance" and a required audit.

D. Violation of "Plant Split" Provisions

The proposed awards are inconsistent with relevant RFP provisions especially since Interior must have realized it would incur an extra cost penalty to award for two processes.

E. Size of Proposed Awards Destroys Competition

The size of the proposed awards destroys the competitive balance of developing technologies existing in the world market today.

F. Improper Evaluation Weight for High Recovery Capability

The evaluation weight Interior placed on a system's ability to operate at high recoveries exceeded the "average importance" rating assigned to this consideration in the RFP. D-P was never informed of the "recovery contest" that was being conducted by Interior. D-P operated within the safest ranges of recovery and never expected that its recovery might be a deficiency.

Moreover, although the RFP specified the treatment water's "plugging factor" to be not less than 65 percent for 98 percent of the testing time, D-P's performance was downgraded because of presumed superior resistance of spiral-wound membrane plugging. D-P's hollow-fiber membranes performed well, although the plugging factor of the feedwater frequently was worse--say up to 75 percent--than that specified. If a 75-percent plugging factor had been specified, D-P would have designed and proposed a design to meet that factor.

Interior Reply

A. Lack of Meaningful Discussions of Yuma Testing

Extensive discussions were conducted with D-P representatives because of the perceived obligation to discuss with the offeror the deficiencies in its proposal. The performance of D-P's test unit was extensively discussed during negotiations. All identified deficiencies were in fact discussed with D-P.

Moreover, contrary to the allegation that Interior did not hold meaningful discussions with D-P concerning its performance at the Test Facility, Interior requested such discussions which were held with Warren Hammond of D-P on December 21, 1976, at Interior's office in Denver. At that meeting, Interior questioned D-P extensively concerning the technical problem.

As to requests for data, all offerors testing equipment at the Test Facility were notified in the December 1975 meeting that portions of the operation and maintenance contractor's report pertaining to the pretreatment and respective offeror's test units would be supplied upon request. This information was in addition to the daily operations log sheet on their respective test units which was being forwarded and has continuously been forwarded. D-P's requests for data were primarily from its division handling electrodialysis and the requests were filed under that file. Therefore, in searching our files on its reverse osmosis equipment, we could not find the request. After reviewing the requests as attached to its comments, it is clear that the request was for data available up to that time, not on a continuing basis.

Since D-P and others had not requested these reports on a continuing basis, the no-cost contract with the offerors was revised in January 1977 to forward to them portions of the reports relating to their equipment. The pretreatment portions were only made available upon request by this modification; however, it was this action by the Government which led to the May 1977 transmittal of D-P's part of the summary reports, not any interest shown by D-P.

It is interesting to note that after receipt of these reports, D-P made a management decision not to revise its proposal since it had been printed and was ready to be submitted. In addition, no effort to discuss the interpretations in the reports was made by D-P.

D-P also refers to a July 1977 paper by C. van Hoek which discussed pretreatment experiments involving alum, permanganese and ferric sulfate which it states "could have influenced the interpretation of D-P's performance." Experiments involving alum and permanganese were discontinued in July 1974 and January 1975, respectively. D-P's first test

unit started operation on October 16, 1974, and, therefore, did not use water with alum pretreatment and could have only logged 1,400 hours maximum of operation with permanganese pretreatment. In fact, considerably less exposure is likely. Furthermore, due to numerous replacement of elements by D-P, the influence of this possible exposure to permanganese on D-P test results would be minimal. Lime pretreatment testing with intermittent use of ferric sulfate coagulant aid has been conducted since July 1974. This system has been the primary pretreatment system which was known or should have been known by D-P from Test Facility visits and other discussions. If D-P was concerned about the pretreatment tests, it was afforded the opportunity to obtain the pretreatment test data, which it declined to pursue.

Adequate cost discussions were also held contrary to D-P's criticism. Cost evaluation and the results of the Defense Contract Audit Agency (DCAA) audit were discussed in the first and second negotiation meetings. Interior informed the D-P negotiators that the D-P costs were high. Nevertheless, D-P's proposal was always considered in the competitive range. In view of the fact that this was a competitive negotiated procurement, Interior negotiators were precluded from using any indication of a price that had to be met for D-P to be competitive.

Although D-P insists that the van Hoek report misinterprets D-P's data, the paper was not used in the evaluation of proposals. Hence, D-P suffered no prejudice. In any event, data used in the van Hoek report was purposely modified to demonstrate typical test results. The curves and slopes of the curves reflect this modification. Since the data was purposely modified for use in the van Hoek report, D-P is totally incorrect in stating that the paper reflected inaccuracies in Interior's evaluation of D-P's data and that Interior was biased in favor of competitors' systems even before best and finals were submitted.

Further, D-P has stated:

"* * * However, on page 12 of the Bureau's February 24, 1978 response to the DuPont protest, the Bureau specifically refers to the Van Hoek report as 'The Bureau's status report, Operation, Maintenance, Development Testing of the Yuma Desalting Test Facility (July 1977),' and quotes liberally from that report in an attempt to refute DuPont statements on technical performance.* * *"

This report was prepared by Ken Trompeter, not Cornelis van Hoek. Furthermore, Interior merely identified the report content. The remainder of the paragraph in the contracting officer's report responding to du Pont's protest discusses the performance of du Pont's test unit and does not quote from either the Trompeter report or the van Hoek paper.

B. Rack Allowance Problem

Interior properly rejected D-P's request--and similar requests of other offerors--for additional rack and membranes when and if the warranted performance was not achieved by D-P's membrane equipment. Acceptance of this request would have contravened the RFP's warranty provision which requires the offeror to warrant that the equipment as supplied shall meet design conditions. Acceptance of the proposed modification would entail having Interior purchase and install additional equipment, control system capacity and other items related to increased membrane equipment. If D-P disagreed with the rejection, ample opportunity existed for filing a protest prior to submission of its best and final offer.

C. Bias in Evaluation

The quoted provisions of the van Hoek report which allegedly show bias toward the proposed awardees contain statements such as "fairly uniform and

slightly better" and "another satisfactory performance" in describing "figure 2" cited by D-P. In any event, the cited report says absolutely nothing about the awardees by name. The statement about scaling was that of an employee of another Interior office. Moreover, the statement was not considered during proposal evaluation.

As to D-P's further suggestions that Interior was biased in favor of the spiral-wound technology, Interior makes the following points below:

(1) Because Interior believed that the protection offered by the bond would not be worth the significantly higher costs associated with it, and not because of Hydranautics' complaint, Interior changed the requirement. Also, Hydranautics was not the only offeror having serious concerns regarding the bonding requirement. Further, the bonding requirement was having a "chilling effect" on all but the largest companies. Consequently, in order to increase competition and reduce cost, Interior issued an amendment to all offerors. Although the change benefited Hydranautics, it also benefited all offerors. If Interior had been as partial as alleged, a decision to amend the bonding requirement would have been made prior to or shortly after Hydranautics' withdrawal rather than 2 months later. Hydranautics was properly allowed to revive its offer under GAO precedent. (See, for example, Radionics, Incorporated, B-185597, April 14, 1976, 76-1 CPD 252.)

(2) D-P is fully aware that audits were requested on all offers and not just Hydranautics'. Therefore, a delay in submission of best and final offers to allow for the completion of Hydranautics' audit was appropriate.

(3) Although Interior does not deny that the time for best and final offers was extended, in part, to allow Hydranautics to submit its best and final offer, the extension was granted to allow all offerors to fully consider the bonding change and to modify their proposals.

D. Violation of "Plant Split" Provisions

See Interior's replies to du Pont's and Ionics' similar protests.

E. Size of Proposed Awards Destroys Competition.

See Interior's reply to Ionics' similar protest.

F. Improper Evaluation Weight for High Recovery Capability

It is obvious that the D-P proposal which limited operation of its equipment to a plugging factor of not greater than 60 percent when the Government's RFP requirement was for operation up to a plugging factor of 65 percent must be downgraded with respect to a proposal which permits operation up to a plugging factor of 65 percent.

GAO Analysis

A. Lack of Meaningful Discussions of Yuma Testing

Before turning to the individual issues involved under this heading, it should be noted that, as a general proposition, discussions must be meaningful in negotiated procurements to the extent that offerors are given information as to the areas in which their proposals are deficient. The content and extent of those discussions will not be questioned, however, absent an agency's failure to rationally justify the discussions actually undertaken. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. Further, so long as there is a real possibility of "technical transfusion" of one offeror's approach to another offeror via discussions, the area involving technical transfusion need not be discussed. Dynalectron Corporation, 55 Comp. Gen. 859 (1976), 76-1 CPD 167. Finally, to the extent that an offeror alleges lack of meaningful discussions largely in the abstract, the protest is for denial. GTE Sylvania, Inc., B-188272, November 30, 1977, 77-2 CPD 422.

(a) Was D-P sufficiently informed as to its test performance?

Despite the conflict over the question whether D-P requested test reports on a "continuing basis" or not, it is clear that D-P received extensive test data no later than May 1977 in addition to D-P's weekly receipt of daily logs containing data on the performance of its equipment at the Test Facility. Since best and final proposals were not received until July 1977, D-P obviously had a 2-month period to revise its offer or suggest to Interior that further discussions should be held to explore deficiencies related to the test data. D-P's failure to pursue either route on the grounds that it had already prepared its final offer as of May 1977 suggests that D-P was not substantially concerned about lack of discussions related to its test data.

(b) Did Interior properly conduct competitive discussions in areas relating to what D-P considers a "negative interpretation" of its test performance?

Although D-P insists that Interior's discussion of technical weaknesses involved relatively minor points, D-P has not specifically suggested where Interior failed to discuss serious deficiencies or weaknesses in the D-P proposal other than saying Interior failed to generally discuss its negative view of the D-P test performance. Based on these recitals, D-P is alleging lack of discussions largely in the abstract. In any event, we see no basis in the record to contest Interior's judgment as to the adequacy of technical discussions had with D-P.

(c) Were the cost discussions held with D-P adequate?

Since both Interior's cost evaluation and the DCAA's audit report were discussed with D-P and D-P was specially informed as to some cost deficiencies as well as a general cost objection, we cannot question Interior's judgment that adequate cost discussions were held with the company.

(d) Alleged misinterpretation of D-P's test data.

Based on our review of the opposing positions, we cannot question that the alleged errors in the van Hoek report were not prejudicial to D-P, since the paper was not used in the evaluation of the proposal because the data curves and slopes of curves used in the paper were purposely modified to demonstrate typical test results and not the performance of D-P. Moreover, we disagree with D-P's assertion that Interior's response to the du Pont protest demonstrates its reliance on the report by naming van Hoek as the author of Interior's status report. In our view, Interior rebutted this charge by noting that "Ken Trompeter, not Cornelis van Hoek," was the author of this report.

Consequently, D-P has not shown, in our view, how erroneous interpretation of its performance influenced consideration of its proposal.

Further, we cannot question Interior's position that the Yuma testing was not as critical as suggested since the relative strengths and weaknesses revealed by the testing were not to be scored in absolute terms but only indirectly insofar as testing confirmed or disapproved offerors' statements. To the extent D-P believes that the test results and this indirect scoring technique prejudiced consideration of its proposal, it has failed to specifically allege how ranking results would have changed had proper results and direct scoring prevailed.

Finally, although D-P alleges--as did du Pont--that Interior did not successfully complete the testing, our factual audit did find that Interior considered the vulnerability of desalting membranes to: (1) high temperature, (2) pH, (3) bacterial attack, and (4) particulate attack. To the extent Yuma testing was sufficiently rigorous in light of the above factors--even if "out-of-control" as

alleged by D-P--to demonstrate problems with some or all of the membranes, we believe--contrary to D-P's assertion--that this testing constituted beneficial knowledge for evaluation purposes under extreme conditions.

Consequently, we cannot question the proposed award under this aspect of the protest.

B. Rack Allowance Problem

We cannot question Interior's position that acceptance of D-P's proposal would have contravened warranty provisions that the equipment as supplied would meet design conditions even though the RFP did not expressly prohibit this allowance. Moreover, we agree with Interior's position that the appropriate time for D-P to have challenged Interior's position on this allowance was during negotiations, but, in any event, prior to final offers. Nevertheless, D-P did not complain.

C. Bias in Evaluation

As stated above, we cannot question Interior's position that the van Hoek report was not actually used in the evaluation. Moreover, the statements allegedly attributing superiority to other awardees are hardly terms of superiority as such but rather terms of mild preference, that is, "slightly better," "fairly uniform," and "satisfactory performance."

D-P also complains that Interior permitted Hydranautics to withdraw its proposal and then, pursuant to the inducement of a changed efficiency bond requirement, permitted Hydranautics to revive its offer.

An offeror may waive the expiration of its proposal acceptance period so as to receive award on the basis of the offer as submitted. Radionics, Incorporated, supra, and cases cited in the text. Since an offeror may waive the expiration of its

proposal and thereby reinstate its proposal for purposes of award, we see no bar to an offeror reviving its prior proposal for the purpose of increasing the competition in an on-going procurement. Thus, we see no impropriety in allowing Hydranautics' reentry into competition. Moreover, we cannot question Interior's position that the changed bonding requirement was responsive to complaints other than those of Hydranautics alone or that the modification was beneficial to all concerns.

Although we do not have a factual reply from Interior on the circumstances surrounding the alleged testing of Hydranautics' unit at Government expense during the period of withdrawal, we see no objection to this testing--assuming Interior's financial appropriation supporting the testing would otherwise allow payment--to the extent the Government reasonably believed the testing would further its store of desalting knowledge. In any event, there is no allegation that this testing period in itself put all other offerors at a competitive disadvantage, since it appears all units received extensive testing.

Finally, we cannot question the extension of best and final proposal dates pending the completion of an audit on Hydranautics. This additional time would have given all offerors further time to reflect on possible changes in their proposals, as well as permitting additional competition for the awards--both reasons clearly constituting, in our view, an extension in the best interest of the Government. Moreover, there is no evidence that D-P either questioned Interior about the reasons for the postponement of best and finals or that D-P protested these postponements at any time prior to the date of best and final proposals.

D. Violation of "Plant Split" Provisions

See our analysis under du Pont's section of this decision.

E. Size of Proposed Awards Destroys Competition

This factor is properly outside the scope of this procurement as is D-P's suggestion that further testing and analysis be conducted to take into account evolutionary developments in the state of desalting technology.

F. Improper Evaluation Weight for High Recovery Capability

Contrary to D-P's position, we see no evidence in the entire record of the evaluation leading to the proposed awards that the importance assigned to this factor was out of proportion to that conveyed in the RFP or that the spiral-wound membranes selected were improperly accorded merit for resistence to "plugging."

Nor can we question Interior's statement that a proposal permitting operation up to a "plugging factor" of 65 percent should achieve greater merit over one permitting operation up to 60 percent in view of the RFP's stipulation of a plugging factor of up to 65 percent.

Results of GAO Audit

As all parties to this protest are aware, GAO's Community and Economic Development Division (CED) made a factual audit of the circumstances of the proposed awards.

The questions reviewed and the conclusions reached by that audit are as follows:

1. Review the information supporting the Bureau of Reclamation's decision to award contracts for the Yuma desalting plant to two firms that will use the same membrane desalting process, instead of more than one process as initially contemplated.

2. Determine whether the Bureau's formula used to rank the bidders gave approximately equal weight to cost and technical factors, as stated in the request for proposal (RFP).

3. Ascertain whether the Bureau considered technological factors pertaining to the vulnerability of desalting membranes to: (1) high temperature, (2) pH, (3) bacterial attack, and (4) particulate attack.

CED reviewed the negotiation, proposal and contract files related to the subject procurement located at the Bureau's Engineering and Research Center, Denver, Colorado. CED found no data in addition to the information the Bureau had already provided that would affect the merits of the bid protest or adversely impact on the Bureau's decision to use only one membrane desalting process.

The cost and technical information supporting the Bureau's decision to go with only one membrane desalting process is clearly summarized in the September 23, 1977, memorandum containing the Bureau's Review Board's recommendations for award.

In their bid protests, du Pont and Ionics stated that the Bureau's formula of dividing evaluated cost by technical merit points yielding cost per technical point does not accomplish equal weighting of cost and technical points as provided by the RFP. It was suggested by du Pont that, to provide equal weights to the factors in this procurement, the Bureau should have normalized the evaluated costs and technical merit points and then added the two together to obtain the proper ranking of proposals.

Bureau officials agreed that the method of dividing cost by technical points may not always provide the same ranking as the du Pont method. However, these officials said that the Bureau's

Review Board during its deliberations did verify its ranking method by following the normalized process requested by du Pont and arrived at the same results.

CED reviewed the Bureau's computations and found that they were correct. CED also arrived at the same ranking as the Bureau following the method suggested by Ionics for providing approximately equal weight between cost and technical points.

In reviewing the Bureau's files and documents evaluating the various contract proposals, CED found that the Bureau did consider the vulnerability of desalting membranes to: (1) high temperature, (2) pH, (3) bacterial attack, and (4) particulate attack.

Conclusion

Based on our above analysis and the results of our audit, we deny the protests.

R. F. Keller

Acting Comptroller General
of the United States