

DECISION



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

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FILE: P-191756

DATE: March 6, 1979

MATTER OF: Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture

DUG 01081

DUG 01082

DIGEST:

[Protest of Contract Award By EPA]

1. Protester's contention that awardee's technical proposal was nonresponsive is inappropriate in context of negotiated procurement. Federal Procurement Regulations (FPR) provide that discussions shall be conducted with all responsible offerors submitting proposals within competitive range, price and other factors considered. GAO has held term "other factors" includes technical acceptability of proposals.
2. In view of fact that it is not GAO function to make determination as to acceptability of technical proposals, GAO will review record of procurement to determine whether judgment of contracting agency was clearly without reasonable basis. Record reveals that contracting agency had reasonable basis in finding awardee's proposal technically acceptable. EPA properly found that awardee satisfied overall technical guideline in RFP that offered mobile pyrolysis system be based on proven, previously developed technology.
3. GAO is unable to conclude that awardee's proposal did not comply with general technical requirement contained in RFP. In GAO's opinion it is clear that offeror's proven, previously developed technology need not have been proven, previously developed mobile pyrolysis technology. Rather, RFP required an existing, proven technology capable of being modified to point where it could become mobile pyrolysis technology. Awardee's mobile pyrolysis system was based on fluidized bed technology which had been proven combustion technology for some time.

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4. GAO has consistently stated that Government is not required to equalize competition in particular procurement by considering competitive advantage accruing to firms from award of prior contracts. Test to be applied is whether competitive advantage enjoyed by particular firm would be result of preference or unfair action by Government.
5. Contrary to protester's assertions, possible competitive advantage enjoyed by awardee because of prior contract is not result of preference or unfair action by contracting agency. There was no need to disclose any results of prior contract work performed by awardee because no performance criteria in RFP was based on this prior work. Further, initial compilation of data generated under prior contract was not received by contracting agency until after RFP was issued. Moreover, when Government provides performance specifications offerors are expected to use their own ingenuity in devising approaches that will meet performance requirements.
6. Record shows no evidence that awardee was improperly preselected by contracting agency. Awardee did not gain superior technical rating under RFP from having done prior work. Other technically acceptable offerors received high evaluation scores for their prior experience.
7. Fact that EPA stated in procurement record that data gathered under prior contract by awardee verified viability of fluidized bed in mobile pyrolysis mode was taken out of context by protester. Contracting agency stated that technical acceptability was based solely on what was contained in each offeror's proposal. Moreover, GAO finds nothing in record to indicate agency gave awardee evaluation points simply because of data it gathered under prior contract. Finally, regardless of EPA's general verification of fluidized bed system for mobile pyrolysis, EPA considered fluidized bed to be proven technology.

8. GAO has no basis to conclude that there was improper influence in evaluation process even though one technical reviewer had been project officer for awardee's prior contract. There is no evidence in record that this reviewer had any impact on other reviewers. Moreover, there is no indication that this reviewer had any bias in favor of awardee.
9. Record shows that protester was not eliminated from final competition because of any technical advantage accruing to awardee. Protester was eliminated because best and final offer was significantly higher in terms of cost than other offerors in competitive range. When proposals are essentially equal technically price becomes determinative factor even where price is of lesser importance in overall evaluation scheme than other criteria.
10. Drafting of specifications to meet Government's minimum needs is properly function of procuring agency. However, where issue of whether RFP specifications overstated contracting agency's minimum needs centers around interpretation of RFP provision, resolution of issue requires, in event ambiguity exists, determination by GAO as to whether agency's interpretation of this provision is reasonable.
11. Viewing RFP as whole, it is clear that no particular technology was required. RFP provided that contractor was to design and fabricate mobile pyrolysis system capable of meeting or exceeding certain established performance criteria. As to technical level of unit meeting RFP performance criteria, GAO finds no ambiguity in language of particular RFP provision. Prohibition against new research work refers to technology which is to be modified in order to meet mobile pyrolysis criteria not to technology after such modification.

Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, a joint venture (Wismer), protests the award of a contract under request for proposals (RFP) CI770213 issued by the Environmental Protection Agency (EPA). The RFP solicited proposals for a system of production of clean fuels from agricultural and forestry residues.

Wismer protests on the following grounds:

(1) The system proposed by Energy Resources Company, Inc. (ERCO), the awardee, is not "existing, proven, previously developed" technology and, therefore, is not responsive to the RFP requirements.

(2) ERCO had an unfair advantage over all other competitors in developing a proposal because the proprietary data generated by ERCO on an earlier research contract had not been made public.

(3) The RFP specifications were overrestrictive of competition in that the offerors were not made aware of EPA's actual requirements and instead bid against much more restrictive criteria than actually needed by EPA for performance of the contract.

In June 1974 the EPA awarded Georgia Tech University a contract to investigate the operational limits of a mobile waste conversion system based on a "partial oxidation pyrolysis" process. EPA later supplemented this initial contract with a grant to do further studies of operational parameters using the existing Georgia Tech system and modifying certain devices within it for better use. During the period of the grant, an independent study was made of the Georgia Tech concept. The study, coupled with the data generated from actual use, indicated that the Georgia Tech system was technically and economically viable as a method for converting agricultural and forestry wastes to usable fuel products.

The protested RFP was issued on August 3, 1977, with a closing date for receipt of proposals of September 21, 1977. The RFP called for proposals for the development of a prototype system for production of clean fuels from waste materials using a "mobile pyrolysis" concept. Because of a mutual interest, EPA and the California Solid Waste Management Board jointly funded the development

of the prototype mobile pyrolysis system. The EPA award to ERCO was for 63 percent of the projected development costs. California awarded a separate contract to ERCO for 37 percent of the costs. Both contracts contained the same statement of work, delivery schedule, and inspection and acceptance requirements.

Originally, the EPA had intended to utilize the Georgia Tech system itself for the prototype. However, because of difficulties with rights to proprietary data and because of pending patent applications, the EPA decided to abandon utilization of the existing Georgia Tech system. Consequently, the EPA stipulated in the RFP that (1) no proprietary positions would be protected and all rights to any technology developed with Federal and State of California funds would remain the property of the Federal and State of California governments; (2) no new research project was being solicited; and, (3) based on the performance data generated from use of the Georgia Tech system, certain performance criteria would have to be met.

The ERCO Fluidized Bed System

The EPA states that the RFP clearly shows that the Georgia Tech work provides the basic performance criteria and that any technology meeting or exceeding that criteria would receive consideration. In this regard, paragraph 401 in the scope of work portion provided as follows:

Phase 1: Conceptual Design (2 months)

"This phase consists of taking an existing 'stationary' technology and modifying it to the point that it will meet the afore-mentioned criteria for the mobile pyrolysis concept. This shall be based on previously developed and proven technology and shall not include any new research work. The product of this effort should be: (1) An artist's sketch of the system; (2) Process flow diagrams and Piping and Instrument diagrams; (3) Material balances; (4) Energy balances; (5) A component list identifying major pieces of all equipment to be utilized in

the total prototype mobile pyrolysis system; (6) process/equipment design specifications and generalized drawings depicting overall dimensions of major pieces of equipment; (7) An economic analysis of the proposed unit. The economic analysis shall include a complete calculation of the cost to design, fabricate and operate the proposed system, including substantiating calculations and assumptions; (8) A complete narrative describing the unit, including operating conditions; and quantification of external energy and water requirements, air emission, waste water discharges and non-fuel residues; (9) A complete field testing plan including a description of the testing program with a proposed schedule and a sampling and analytical schedule, indicating number of personnel, respective work schedules and per diem expenses anticipated." (Emphasis added.)

While admitting that the RFP allows for equivalent or better technology than Georgia Tech's, Wismer, nevertheless, emphasizes that any technology proposed must be existing, stationary, previously developed technology and not new research work. Wismer contends that in order to qualify as existing technology, the technology should be in the public domain, such as technical journals, where the technology's value will be subject to independent review. Moreover, the physical scale of the experimental system upon which the technology is based should be close to that of the system to which it will ultimately be applied.

Wismer also believes that the ERCO fluidized bed technology for mobile pyrolysis was originally conceived by the EPA which then granted ERCO a contract to develop the concept. Wismer states that the only available source of information concerning the fluidized bed technology is a March 1978 EPA paper entitled "EPA's R and K Program in Pyrolytic Conversion of Wastes to Fuel Products." According to Wismer, this paper, published approximately 7 months after the protested RFP, describes the ERCO system as a fluidized bed on a "sub-pilot plant" scale within the design capacity of a full scale system. Furthermore, the EPA paper refers to the ERCO work as "research and development," being

an "investigation of basic reaction kinetics." Since the ERCO work was classified as research in March 1978, it must also have been research in August 1977 when the RFP was issued. Therefore, Wismer contends that the fluidized bed system offered by ERCO was not existing, proven, previously developed technology as specified by the terms of the RFP.

The EPA, however, states that the purpose of the work performed by ERCO was not the development per se of a fluidized bed technology, but rather the acquisition of model chemical kinetic data from the pyrolysis of various solid wastes under varying operating conditions. A pilot-scale fluidized bed reactor was chosen to collect this data due to the degree of temperature/retention time control achievable with such a device. The EPA further points out that the project referred to in the March 1978 paper as "research" concerned merely the collection and interpretation of the kinetic data itself and not to the fluidized bed technology used to generate such data.

With regard to the fluidized bed system itself, the EPA asserts that it is a well-established method of technology. The EPA states that fluidized bed reactors have been in existence since the 1920's as heat transfer and media mixing devices. While recognizing that the fluidized bed has been used principally in the "combustion field," the EPA, nevertheless, declares that in order for this technology to be utilized in a partial oxidation or pyrolysis process merely requires that the oxygen input into the reactors be nearly eliminated. Consequently, rather than being research, the fluidized bed is established technology.

Overall, the EPA believes that all offerors had an equal opportunity to submit proposals that would meet the RFP's performance criteria. Every offeror could propose any type of reduced-to-practice technology it chose as long as the technology equaled or bettered the RFP's Georgia Tech based performance criteria. The "existing stationary technology" limitation was intended only to preclude from consideration any offeror's "paper" ideas. The EPA states that Wismer's narrow interpretation of "existing, proven technology" would, in effect, have

eliminated all competition because only one company has in actual operation, as a mobile pyrolysis technology, the system described in Georgia Tech reports.

In response, Wismer states that it is quite cognizant of the fact that the fluidized bed is an established combustion technology. However, Wismer argues that, contrary to the EPA's position, there is a significant technological difference between fluidized bed combustion and fluidized bed pyrolysis. Wismer alleges that the fluidized bed pyrolysis system includes a more complex assortment of equipment than the relatively simple fluidized bed combustion system. Moreover, Wismer argues that combustion is a very different process than pyrolysis. Wismer states that combustion is basically a chemical reaction in which organic material interacts with oxygen or air to form gases such as carbon dioxide and water. Pyrolysis, on the other hand, is the thermal degradation of plant material through the application of heat to form charcoal, oil and a combustible gas. In simpler terms, combustion involves reconvertng heat from matter while pyrolysis involves converting matter into other forms through the application of heat.

With regard to the EPA's position regarding the ERCO work using a fluidized bed method of pyrolysis, Wismer contends that the very fact that a private organization was engaged to gather new information using a new and untried test apparatus indicates that research is involved. In Wismer's opinion, the ERCO work involved unproven and unavailable technology. Moreover, Wismer alleges that ERCO admitted in a draft report on its work that considerable difficulties were encountered in getting the system to operate properly. ERCO's draft indicates that a problem in the off-gas cleanup system developed and that a new condenser was being designed. Wismer believes it is obvious that ERCO's system was not a standard one operating in a routine manner. Therefore, the EPA should have considered ERCO's system well outside the bounds of existing, proven, previously developed technology.

ERCO states with regard to Wismer's allegation that the system it proposed was not responsive to the RFP and that there is no statement or information contained in its proposal which would intimate anything other than an

unequivocal and unqualified offer to perform in accordance with the terms in the RFP. ERCO refers to our decision in 49 Comp. Gen. 443 (1970) in which we stated that unless something on the face of the bid, or specifically made a part thereof, either limits, reduces, or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation, the bid is responsive. ERCO, then, contends that EPA's acceptance of its proposal will bind it to perform in accordance with all terms and conditions of the RFP upon which it is based.

In response to ERCO's argument, Wismer contends that ERCO did not in fact submit a responsive offer. Wismer alleges that there was a limitation on the face of ERCO's bid which modified its obligation to perform in accordance with the terms of the RFP; namely, the proposed technology was noted previously developed technology as required by the RFP.

At the outset, we believe it would be inappropriate to discuss the compliance of ERCO's technical proposal with the RFP in terms of responsiveness. The concept of responsiveness, which applies to bids submitted in formally advertised procurements, is not directly applicable to negotiated procurements. Computer Network Corporation; Tymshare, Inc., B-186858, January 14, 1977, 77-1 CPD 31. Federal Procurement Regulations (FPR) § 1-3.805-1(a) (1964 ed. amend. 52) provides that after receipt of initial proposals discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and "other factors" considered. We have held that the term "other factors" includes the technical acceptability of proposals. See TM Systems, Inc., B-187367, January 26, 1977, 77-1 CPD 61.

It is not the function of our Office to make determinations as to the acceptability or relative merits of technical proposals. Instead, we will examine the record of each procurement to determine whether the judgment of the contracting agency was clearly without a reasonable basis. See Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458, and cases cited therein. Unless such a finding is made by us, or there is an abuse of discretion, or a violation of procurement statutes or regulations, the contracting

agency's judgment will not be disturbed. Struthers Electronics Corporation, B-186002, September 10, 1976, 76-2 CPD 231. Otherwise, the contracting agency must bear the burden of any difficulties resulting from a defective evaluation. Macmillian Oil Company, B-189725, January 17, 1978, 78-1 CPD 37.

From our review of the record, we are unable to conclude that the EPA's determination that ERCO's proposal was technically acceptable was unreasonable or a violation of applicable statutes or regulations. The EPA found that ERCO satisfied the overall technical guideline in the RFP that the offered mobile pyrolysis system be based on existing, proven, and previously developed technology. Based upon its experience with ERCO's system under a prior contract and based on the extensive research that had been done with fluidized beds in the combustion and coal gasification areas, the EPA determined that ERCO's fluidized bed reactor was not research. Furthermore, there were extensive reviews by various chemical, mechanical, and sanitary engineers in reaching the conclusion that ERCO satisfied all the technical objectives of the RFP.

Despite the fact that Wismer has provided detailed technical arguments to support its contention that ERCO's proposal was not based on existing, proven, previously developed technology, we are also unable to conclude that ERCO's proposal failed to comply with the terms of paragraph 401 of the RFP's scope of work section. This section, we believe, makes it clear that an offeror's existing, proven, previously developed technology need not have been existing, proven, previously developed mobile pyrolysis technology. Rather, this section of the RFP required that there be an existing, proven technology capable of being modified to the point where it could become a mobile pyrolysis technology. While the mobile pyrolysis system proposed by ERCO was not in itself proven technology, it is quite obvious from the record that the fluidized bed technology upon which it was based had been developed combustion technology for some time.

We recognize that the EPA relied to a certain extent on ERCO's prior work in determining that ERCO's proposal under the RFP was technically acceptable. The EPA concluded that the quality of the data collected by

ERCO under this prior work "verified" the potential use of the fluidized bed technology in a pyrolysis mode. Nevertheless, we do not believe that this particular use by the EPA of ERCO's prior work affected the validity of the determination that ERCO's proposed system was based on existing, proven technology. The EPA points out that a fluidized bed combustion reactor can easily be purchased commercially from many vendors. The prior ERCO work merely showed that oxygen could be successfully eliminated from the standard fluidized bed reactor in order to make it into a pyrolysis unit. Consequently, we agree with the EPA conclusion that the pyrolysis system proposed by ERCO was based on a proven technology.

The Prior ERCO Work

Wisner alleges that the technology upon which ERCO's proposal was based was produced at public expense. Since at the time the RFP was issued, ERCO alone had access to this technology, Wisner argues that ERCO had an unfair advantage over all other offerors during the course of negotiations. In order to be fair, Wisner contends that the data generated under the EPA supported project should have been made public either prior to the issuance of the RFP or at least at the same time.

The EPA states that the ultimate purpose of the ERCO work was not to develop a mobile pyrolysis system based on the fluidized bed reactor, but rather to develop a model to predict reaction products through the control of certain operating parameters. The EPA desired research on the kinetics of partial oxidation and pyrolysis reactions. EPA funds, then, were used to build a highly instrumented, small scale unit with which to collect the data generated by these oxidation and pyrolysis reactions. More specifically, a fluidized bed unit was used for the data collection because of its "versatility." According to the EPA, the fluidized bed reactor provided a high degree of temperature/retention time control.

The EPA further states that the data gathered under the prior ERCO work was not in itself relevant to the actual development of the mobile pyrolysis concept. Consequently, the EPA believes there was no need to reference any of the results of this particular project

in the protested RFP. With regard to the reports of the Georgia Tech work that were included with the RFP, these reports were strictly informational so that all offerors would be cognizant of the source of the performance criteria set forth in the RFP. Finally, the results and data from the prior ERCO work had no effect on the EPA's evaluation of proposals under the RFP. The EPA indicates that except for the project officer, who was also the project officer for the ERCO work, none of the eight-member Technical Review Panel members had seen the data generated under the ERCO project.

Wisner, however, contends that where new equipment must be built and operated in a unique manner using process materials that have not been utilized before, then research is being conducted on the total program and not merely the data production itself. According to Wisner, this means that irrespective of the intended purpose of the unreported, EPA supported ERCO work, actual research was involved in the development and operation of the hardware which produced the data. Wisner argues that the difficulties ERCO encountered in modifying the test apparatus so that it would operate properly indicates that the ERCO work did involve considerable effort toward developing the test equipment itself. Thus, Wisner challenges the EPA's assertions to the effect that no research was involved in the test apparatus which generated the data sought by EPA.

With respect to the relevance the ERCO data had to the protested RFP, Wisner emphasizes the fact that the EPA has indicated that the data does demonstrate the viability of the fluidized bed method of mobile pyrolysis. Wisner states that the EPA has admitted that the ERCO data verified that the fluidized bed was a viable technology in the same manner that the Georgia Tech data verified that the Georgia Tech system was a viable technology. Wisner argues that if the ERCO data was indeed significant in establishing the technical viability of the system itself, then in spite of EPA's denials to the contrary, this data must have been fundamentally important to the protested procurement. Wisner contends that it is logically impossible for the EPA to state on one hand that the ERCO data was irrelevant when on the other hand it states that the data was used to establish the viability of the fluidized bed technology.

Furthermore, because the EPA has acknowledged that the ERCO data established the viability of fluidized bed technology for mobile pyrolysis, Wismer disputes the EPA's statement that only one person on the eight-member Technical Review Panel had seen the ERCO data. Wismer alleges that the EPA relied on and accepted unpublished, unverified data as the basis for making an award under the RFP to ERCO. Wismer contends that such reliance violates the specific provision in the RFP which indicated that only available, proven, previously developed technology would be considered by the contracting agency.

Finally, Wismer contends that if the Georgia Tech reports and data established the viability of that technology for mobile pyrolysis, then the inclusion of these reports and data with the RFP must have been for something much more than merely "informational." Since no other reports or data were referred to in the RFP, Wismer concludes that, whether intentionally or not, the EPA did mislead the competition into believing that the Georgia Tech approach was favored.

ERCO argues that if Wismer is alleging that the documentation of its work provided the basis for the protested RFP's performance requirements, it is quite clear that such an allegation is erroneous because the first compilation of the data was not received by the EPA until September 1977. The RFP for the pyrolysis system was released approximately 6 months earlier. ERCO therefore contends that the data it developed could not possibly have served either as the basis for the RFP or have provided ERCO with an unfair advantage over all other competitors.

Moreover, assuming, arguendo, that its work did play a role in either formulation of the RFP or in the negotiations under it, ERCO contends that this particular ground for protest should still be denied. Citing our decision in ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34, ERCO points out that we have held that the Government is not required to equalize competition in particular circumstances, including the award of other contracts. ERCO argues that although a competitive advantage may exist, the real test of the propriety or legality of the award is whether the competitive advantage enjoyed by a particular offeror

is the result of a preference or unfair action by the Government. See Price Waterhouse and Co., B-186779, November 15, 1976, 76-2 CPD 412.

ERCO states with regard to the protested RFP that although it may have benefitted from having participated in the earlier Government contract, such benefit did not provide the sole basis for the award in the instant procurement. ERCO points to the contracting officer's memorandum of findings, conclusions and recommendations which indicates that the offeror having the highest technical rating also offered the same mobile pyrolysis process as Wismer. ERCO alleges that the deciding factor in this procurement was price rather than technical capability, and that Wismer's price put it outside the competitive range.

We have consistently stated that the Government is not required to equalize competition on a particular procurement by considering the competitive advantage accruing to firms because of incumbency or their own particular circumstances, including the award of other contracts. See National Motors Corporation; Die Mesh Corporation; Fuel Propulsion Corporation, B-189933, June 7, 1978, 78-1 CPD 416, and the cases cited therein. Indeed, we have long recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances or as a result of Federal or other public programs. See ENSEC Service Corporation, *supra*. As stated by ERCO, the test to be applied is whether the competitive advantage enjoyed by a particular firm resulted from a preference or unfair action by the Government. See Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD 235, and the cases cited therein.

Our Office has had several cases in which allegations of unfair competitive advantage similar to Wismer's have been made. In Teledyne Ryan Aeronautical, 56 Comp. Gen. 635 (1977), 77-1 CPD 352, the successful offeror had performed a prior contract for a design study. However, we found no indication in the record that the procuring agency withheld any information from the other offerors regarding the requirements for the item being procured or that the proposal evaluators based their evaluation of the technical merits of the proposals on undisclosed information. In H. J. Hansen Company, B-181543,

March 28, 1975, 75-1 CPD 187, the awardee had drafted plans and made a preliminary study relevant to the work to be performed under the protested solicitation. In finding no unfair competitive advantage, we emphasized the fact that it was incumbent upon the Government to award the contract to the concern having the highest technical competence, and the fact that the Government may have previously financed such competence would not justify an award to a less qualified concern to the possible detriment of the Government.

Here, the EPA states that there was no need to disclose any of the results of the prior ERCO work because the data from this work was not pertinent to the mobile pyrolysis concept. Further, the Georgia Tech effort was the only prior effort that needed to be mentioned in the RFP since the performance criteria set forth in the RFP were based exclusively on the results derived from the Georgia Tech effort. As to the possibility of a preference for the Georgia Tech process, the EPA emphasizes that the RFP permitted any previously developed system to be offered that was the "equivalent [of] or better" than the Georgia Tech system. Thus, offerors were required to meet certain known performance criteria without being limited to any specific system or manufacturer.

We agree with the EPA. Where information such as performance and cost data can be disclosed and would be essential to or helpful in preparing an intelligent offer or bid, it should be made available to all offerors or bidders. See 49 Comp. Gen. 251 (1969). Here, however, it is clear that no performance criteria were based on the results of the prior ERCO work. As ERCO points out, the initial compilation of the ERCO data was not received by the EPA until well after the protested RFP was issued. Moreover, we have stated that when the Government provides performance specifications, as was the case here, the offerors are expected to use their own inventiveness and ingenuity in devising approaches that will meet the Government's performance requirements. See Auto-Trol Corporation, B-192025, September 5, 1978, 78-2 CPD 171, and the cases cited therein.

Furthermore, we find no evidence in the record that ERCO was improperly preselected for award. The RFP contained the following technical evaluation criteria:

	<u>Points</u>
A. 1. Response to RFP	700
2. Comprehension of Scope	600
3. Method and Approach	500
4. Schedule and Manpower	400
5. Organization and Management	300
B. 1. Specific Experience	1000
2. Stage of Development	600
3. Company Organization Facilities	500
4. Technical Management	<u>400</u>
Total	5000

The record reveals that Wismer received a large number of the 1,600 possible technical points for specific experience and stage of development. Also, Teknekron's score in this area was exactly the same as Wismer's. Although ERCO received a somewhat higher score for experience than Wismer and Teknekron, the difference was not substantial. Moreover, ERCO did not have the overall superior technical rating. Tech-Air, the company that developed the Georgia Tech process, received the highest technical rating and also received the largest number of technical points for prior experience as well. Consequently, we believe that the benefit that ERCO received from having performed the prior data collection work for the EPA had little impact on the differences in technical scores of those offerors that were in the competitive range.

Assuming, arguendo, that there was any preference here, we believe that it was for the Georgia Tech process rather than ERCO's fluidized bed. We note that Wismer and Teknekron made proposals utilizing Tech-Air's technology. ERCO, in offering basically the same system it used in the prior EPA contract, emphasized in its proposal the technical superiority of the fluidized bed over the Georgia Tech process. For example,

at one point in its proposal, ERCO stated that it could operate its pyrolyzer at a significantly lower temperature than the Georgia Tech system. According to ERCO, a lower operating temperature implied lower thermal loss, quicker startup, and less risk of generating fine particulates. In light of the foregoing, then, we cannot conclude that there was any demonstrated preference by the EPA for the ERCO fluidized bed system.

With regard to the fact that the EPA acknowledges that the ERCO data under the prior contract did establish the viability of fluidized bed technology, we believe that Wismer has taken the EPA statements out of the context in which they were made. The EPA states that the technical acceptability was based solely on what was contained in each proposal. Moreover, from our review of the record, we find nothing to indicate that the EPA gave ERCO technical points simply for the data it generated under the prior contract. In the evaluation of ERCO's proposal, the EPA noted that the proposal contained a detailed step-by-step approach to satisfying the RFP objectives. Also, the EPA's proposal reviewers were favorably impressed with ERCO's proposal management system. The previous work listed by ERCO in its proposal showed experience in the design, fabrication, and evaluation of systems more complex than that required by the RFP. Finally, the EPA concluded that based on the information provided in ERCO's proposal, there was no doubt that the combination of companies proposed was qualified to undertake all the phases of work outlined in the RFP.

Basically, it appears that the ERCO data was used by the EPA as incidental support for its overall conclusion that the fluidized bed technology would be viable in a pyrolysis mode. The EPA states that this data verified that the fluidized bed was a viable technology in the same general manner that the Georgia Tech data verified that the technologies proposed by Wismer and Teknekron were viable technologies. However, regardless of this overall verification of the fluidized bed for a pyrolysis mode, the record reveals that the EPA considered the fluidized bed to be a "proven" technology. Consequently, we conclude that the data generated by ERCO under the prior EPA did not affect the technical review of ERCO's proposal for the purpose of assigning technical points in accordance with the RFP's evaluation criteria.

In reaching the above conclusion, we do note that one of the technical reviewers here had been the project officer for the prior ERCO contract and had seen at the time the RFP proposals were being evaluated the ERCO data. The record, however, does not reveal that this evaluator had any impact on the other evaluators. Thus, we have no basis to conclude that there was any improper influence in the evaluation process. See Macmillan Oil Company, supra. As to the evaluator himself, there is no indication that his knowledge of the ERCO data resulted in any bias in favor of ERCO. The EPA emphasizes that the ERCO data did not affect any proposal review and that technical acceptability was based only on what was in the proposals.

In the final analysis, Wismer was eliminated from the competition because of cost considerations. All of the technical evaluators found ERCO, Wismer, Teknekron and Tech-Air technically acceptable. Tech-Air was eliminated from the competitive range because of its extremely high cost proposal. The levels of effort of ERCO, Wismer, and Teknekron were essentially equivalent, although Wismer was rated somewhat lower technically. Consequently, the EPA's final selection was based on the "best buy" for the Government.

Cost cannot be ignored by an agency in any contractor selection process. See Westinghouse Electric Corporation, 57 Comp. Gen. 328 (1978), 78-1 CPD 181, and the cases cited therein. Further, we have held that where technical proposals are determined by the agency to be essentially equal, price or cost properly becomes the determinative factor in making an award. See SEMCOR, B-188807, November 28, 1977, 77-2 CPD 413. The record indicates that Wismer's final cost estimate was significantly higher than the \$1,275,427 at which a contract was awarded to ERCO. In view of the closeness of the technical evaluations, we conclude then that the EPA was reasonable in differentiating among the competitors on the basis of cost.

The RFP's Performance Specifications

Wismer alleges that the offerors under the RFP were not informed of the "true needs" of the Government.

According to Wismer, the offerors were misled by the terms of the RFP so that they submitted proposals based on an existing, proven, previously developed technology requirement. The EPA, however, awarded a contract to a company which submitted a proposal that contained new, unpublished research technology. Consequently, Wismer contends that the EPA obviously overstated its actual needs and, as a result, the offerors were required to submit proposals under much more restrictive criteria than was actually necessary. The offerors did not have the opportunity to bid on a system other than one based on existing, proven, previously developed technology.

The EPA asserts that the RFP very clearly defined its needs and requirements. The words "existing stationary technology" in the RFP were intended to eliminate "idea" technologies only. Pilot or reduced-to-actual-practice technologies were permitted. The EPA further argues that if Wismer's definition of existing stationary technology had been adopted during the evaluation of proposals, Wismer would also have been eliminated from consideration. The EPA states that Wismer proposed an untried modification to the Georgia Tech system. This untried modification involved using a completely different char discharge system than that used in the Georgia Tech system itself. The EPA points out that only Tech-Air had an actual reduced-to-practice mobile pyrolysis technology. Therefore, Tech-Air's proposal had the most proven technology known to the EPA for meeting the RFP's performance criteria.

In reply to the EPA's arguments Wismer alleges that the EPA has misconstrued its position. Wismer states that it is not contending that the range of acceptable technologies was restricted but, instead, that the level of acceptable technologies was restricted. Wismer argues that the EPA demonstrated that it had overstated its needs in the specifications by requiring all competitors to submit proposals based on existing, proven, previously developed technology when an award was ultimately made to a company heavily involved in new, unpublished research. Furthermore, Wismer contends that the EPA has in effect admitted that its specifications were over-restrictive. In Wismer's opinion, the EPA statement

that the requirement for existing, stationary technology was to eliminate proposers submitting only paper ideas reveals, when compared with the actual RFP language, a very wide disparity in meaning. Wismer argues that the terms "existing, proven, previously developed technology" are very explicit and much more restrictive than the EPA intention to preclude proposals based on systems which had not advanced beyond the conceptual stage.

ERCO contends that neither the record of the protested procurement nor the material offered by Wismer gives any indication that the specifications of the RFP unduly restricted competition. ERCO refers to our decisions holding that the specifications of the contracting agency will not be questioned unless the protester shows by clear and convincing evidence that the specifications would by unduly restricting competition be a violation of law. In specific, ERCO cites the following language from our decision in The Ellis Company, B-189937, B-189390, January 27, 1978, 78-1 CPD 70:

"The responsibility for drafting proper specifications is primarily the responsibility of the contracting agency. Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. It is proper for a contracting agency to establish specifications reflective of its legitimate needs based on its actual experience, engineering analysis, logic, or similar rational basis. Bowers Reporting Company, B-187512, August 10, 1976, 76-1 CPD 144. Though specifications should be drawn so as to maximize competition, we will not substitute our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that a contract awarded on the basis of such specifications would by unduly restricting competition be a violation of law. Joe R. Stafford, B-184822, November 18, 1975, 75-2 CPD 324; Globe Air, Inc., B-183396, June 26, 1975, 75-1 CPD 389."

We agree that the drafting of specifications to meet the Government's minimum needs is properly the function of the procuring agency. See also 50 Comp. Gen. 193, 199 (1970). However, where the issue of whether the RFP specifications overstated the EPA's minimum needs centers around the interpretation of paragraph 401 of the scope of work section, a resolution of this particular issue requires, in the event an ambiguity exists, a determination by our Office as to whether the EPA's interpretation of this paragraph is reasonable. See Air, Inc., B-191665, September 11, 1978, 78-2 CPD 185.

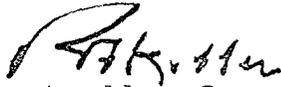
We believe that the crux of Wismer's protest is that the RFP requirement for a previously developed technology was worded in such a manner as to mislead the competition into thinking that only a technology as proven as the Georgia Tech technology was acceptable. Wismer, in interpreting the RFP, contends that the EPA restricted the technologies that could be offered to a certain level. Wismer argues that in order for any technology to reach the level of being existing, stationary, previously developed technology, the technology must first be in the public domain where it can be subject to independent technical review. Consequently, there is an enormous difference between the EPA's stated purpose of eliminating paper ideas or laboratory scale systems and the language of the RFP.

Looking at the RFP as a whole, we are unable to conclude with regard to the Georgia Tech technology itself that only that technology or modifications of it would be acceptable. Paragraph 100 of the scope of work section stated that the contractor was to design, fabricate, and field test a mobile pyrolysis system capable of meeting or exceeding the criteria established by the previous work done at Georgia Tech. Paragraph 300 of this section set forth specific performance criteria that any offered mobile pyrolysis unit had to meet.

With regard to the technical level of a unit meeting the RFP performance criteria, we believe that no ambiguity exists as to the meaning of paragraph 401 because Wismer's interpretation of the requirement for existing, proven, previously developed technology is inconsistent with the actual language of this paragraph. Wismer has emphasized the second sentence of this paragraph which states that

the offered unit shall be based on previously developed and proven technology and shall not include any new research work. The word "based," however, refers to the preceding sentence which provides that the design phase of the contract consists of taking an existing, stationary technology and modifying it to the point that it will meet the performance criteria for the mobile pyrolysis concept. Taking these two sentences together, then, it becomes clear that the prohibition against new research work directly refers to the offeror's original technology before modification to a mobile pyrolysis mode. Thus, ERCO's fluidized bed system met the foregoing requirement since the fluidized bed itself had been an established combustion technology for some period of time.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States