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DECISION

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

12371

FILE: B-195268 DATE: December 21, 1979

MATTER OF: Bell Helicopter Textron D 3520

DIGEST:

1. Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. § 10a-d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in RFP. However, addition of differential would not have changed order in which offerors stand.

2. Although solicitation required that proposed helicopter be directly derived from helicopter submitted for flight evaluation, provision in which requirement is included when read as whole indicates that intention was that flight-tested aircraft have potential to meet agency's mission and performance requirements.

3. Protest against agency's technical evaluation of proposals is reviewed against GAO standard that judgment of procuring agency officials based on solicitation's evaluation criteria as to technical adequacy of proposals will not be questioned unless shown to be unreasonable, abuse of discretion or in violation of procurement statutes and regulations. Standard is not found to have been violated.

4. Ordinarily GAO does not review protests against affirmative determinations of responsibility

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[Protest of Fixed-Price Contract Award]

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officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not allege fraud, protester has failed to meet standard for review by GAO or courts.

5. Fact that price adjustment percentages to be used in economic price adjustment clauses are to be based on domestic indexes instead of French economy where some costs will be incurred is determined to be irrelevant.

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Bell Helicopter Textron (Bell) protests the Department of Transportation, United States Coast Guard (DOT), award of contract No. DOT-CG-80513-A on a firm fixed-price basis to Aerospatiale Helicopter Corporation (AHC) for 90 short range recovery (SRR) helicopters, logistics support, training and warranties. The award was made under request for proposals (RFP) No. CG-80513-A, issued on March 17, 1978, which contemplated the award of a multiyear contract to replace Sikorsky HH-52A helicopters currently used to perform the Coast Guard's SRR responsibilities, missions executed within the maritime region extending to 150 nautical miles seaward of the shoreline.

As part of the evaluation of proposals submitted in response to the RFP, DOT conducted a flight evaluation program under a separate contract. The flight evaluation program and the solicitation for it were included in the RFP as Attachment VIII. Each offeror which intended to submit a written proposal in response to the RFP was required to provide a helicopter for the flight evaluation program. DOT awarded flight evaluation contracts to Bell, AHC and Sikorsky Aircraft, Division of United Technologies Corporation (Sikorsky), and flight evaluations were conducted in May and June 1978.

Initial technical and cost proposals under the subject RFP were received on June 19 and July 31, 1978, respectively. DOT conducted technical discussions with the offerors from October 25 to October 30, 1978, and cost discussions from November 27 to November 30, 1978. The offerors submitted their revised technical proposals on December 7, 1978, and revised cost proposals on March 5, 1979. Sikorsky, however, withdrew its proposal from the competition on March 26, 1979. Bell and AHC submitted their best and final offers on May 25, 1979, and the contract was awarded to AHC on June 14, 1979.

Bell was given a debriefing on June 20, 1979, and filed its protest with our Office on June 22, 1979. The protester essentially contends that DOT improperly evaluated the firms' proposals, that the contract awarded to AHC is invalid, and that DOT should resolicit its requirements. More specifically, Bell asserts that:

1. DOT erroneously determined that AHC offered only domestic source end products and therefore failed to evaluate the firms's proposal in accordance with the Buy American Act.

2. The award to AHC contravened the requirement of the RFP and the Flight Evaluation Program under contract No. DOT-CG-828572-A that the flight-tested helicopter "must be one from which the proposed SRR helicopter is directly derived."

3. DOT erred in its technical evaluation of the firms' proposals, failed to apply evaluation criteria consistently, and thus erroneously determined that AHC's proposal and proposed helicopter were technically superior.

4. DOT had no reasonable basis to determine AHC was a responsible prospective contractor; considering the firm's limited net worth, facilities and workforce,

the determination constituted an abuse of discretion and the award was made in violation of Federal procurement law and regulations.

5. To the extent AHC's helicopter components are of foreign origin, Economic Price Adjustment Clauses which were included in the firm's contract bear no relation to the costs AHC will actually incur, will result in an improper expenditure of appropriated funds and invalidate the contract.

On July 6, 1979, Bell filed suit in the United States District Court for the District of Columbia (Textron Inc., Bell Helicopter Textron Division v. Adams, Civil Action No. 79-1749) seeking an order setting aside the contract, requiring reevaluation of the proposals, and requesting that our decision on the protest be transmitted to the court. By order dated July 27, 1979, the court requested our decision "with respect to the merits of all issues set forth in the plaintiff's protest." See 4 C.F.R. § 20.10 (1979).

AHC contends that Bell's protest on grounds 2 and 3 above are untimely. Assuming that is correct, we will still consider those grounds because of the court's request for our decision on the issues. Sound Refining Inc., B-193863, May 3, 1979, 79-1 CPD 308.

Upon consideration of the issues, we deny the protest for the reasons which follow.

BUY AMERICAN ACT DETERMINATION

A. JURISDICTION

DOT and AHC point out that AHC certified in its offer that it will furnish a domestic source end product and contend that whether AHC will comply with the certification is a matter of contract administration for resolution by the procuring activity and the

contractor rather than this Office. See, e.g., Lanier Business Products, Inc., B-193204, December 12, 1978, 78-2 CPD 407; Thorsen Tool Company, B-188271, March 1, 1977, 77-1 CPD 154. However, since notwithstanding the certification, DOT requested information from AHC to determine whether a domestic source end product is being offered, the question is whether DOT properly evaluated the proposal in light of the information received. Where prior to award an offeror furnishes information to a contracting agency bearing upon whether the offered product is domestic, we have considered the matter. New Britain Hand Tools Division, Litton Industrial Products, Inc., 58 Comp. Gen. 49 (1978), 78-2 CPD 312. We conclude that the issue properly is before us.

B. SUMMARY

The application of the 6-percent Buy American Act differential to AHC's offer would not change the order in which the offerors stand in this case. This is because, even though the addition of the differential would make AHC's cost proposal higher than Bell's cost proposal, the technical advantage in AHC's proposal under the evaluation provided in the request for proposals outweighed the cost advantage. However, in order that an understanding will exist as to how the Buy American Act must be applied in a procurement like this, we are providing our analysis, first, as to the way in which the differential is to be applied where a technical factor is a dominant criterion and, second, as to the articles, materials and supplies to which the Buy American Act differential is to be applied.

The Buy American Act requires that only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use, unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a (1976). Executive Order No. 10582, December 17, 1954, as amended, which establishes uniform procedures

for determinations, provides that materials (including articles and supplies) shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used therein. The order further provides that the price of domestic articles is unreasonable if it exceeds the cost of like foreign articles plus a differential. The differential prescribed for the instant situation is 6 percent.

The act as implemented by Executive order and Federal Procurement Regulations (FPR) § 1-6.104 (1964 ed. circ. 1) imposes two determinative requirements: that manufactured articles, materials or supplies must be manufactured both (1) in the United States and (2) substantially all from "components" mined, produced or manufactured in the United States. If these requirements are not met, the end product is considered foreign and a specified percentage factor or differential (generally 6 percent) must be added to offers of foreign end products for the purpose of proposal evaluation in order to give the required preference to domestic offers. FPR § 1-6.104-4(b) (1964 ed. circ. 1); Cincinnati Electronics Corporation, et al., 55 Comp. Gen. 1479, 1494 (1976), 76-2 CPD 286.

C. DIFFERENTIAL APPLICATION

Bell's first assertion is that DOT failed to implement the requirements of the Buy American Act. We agree that DOT erred in its determination that AHC was supplying a "domestic" item. But for the reasons set forth below, we do not consider DOT's error to have been prejudicial to Bell in terms of ultimate entitlement to award. DOT's failure to implement the Buy American Act, therefore, is not critical to resolution of Bell's protest.

(1) GAO

Ordinarily, in a procurement against precisely stated specifications where all offerors are offering the "same" product, the reasonableness of domestic product cost is determined by comparing it with

foreign product cost after the addition of a differential, a rather straightforward procedure where price is the sole determining factor in making the award. If the cost of the foreign product plus the added differential remains lower, the domestic product cost is considered unreasonable and foreign purchase is authorized. FPR § 1-6.104-4 (1964 ed. circ. 1).

A different situation is involved, however, where the procurement is negotiated on the basis of technical merit as well as cost and each proposer offers a different product. In that circumstance, if the foreign offer is evaluated as the higher priced offer after application of the differential, but is determined to be the best offer considering the combination of price, differential and technical approach, then an award based on the foreign offer should be made.

The reason for this is best explained by example. Assume a situation where there are three offers as follows, technical proposals are rated on a scale of 100 points, and cost is evaluated equal to technical merit:

Offeror	Price	Technical Score
A (foreign)	$100,000	95
B (domestic)	105,000	80
C (domestic)	108,000	95

If the Buy American differential of 6 percent were applied to A's offer, it would clearly be out of contention with regard to B's offer if price were the sole criterion. Yet if A's foreign offer is not considered, C's domestic offer not B's would clearly win the competition considering both price and technical scoring. But, closing the circle, C's proposal would not win over A's with the differential added. The dilemma posed by the example shows that the only way to properly evaluate foreign offers where both price and technical merit are to be evaluated is to apply the Buy American differential to the price portion and evaluate the total proposal on the basis of the

price as thus adjusted. In other words, the foreign product offered by A as evaluated with the differential is more advantageous considering the technical superiority over the domestic product offered by B and the technical equality of the domestic product offered by C.

Keeping this in mind, let us examine the evaluation procedure set forth in DOT's RFP. Clause D-1 of the RFP advised prospective offerors that award would be made on the basis of the proposal most advantageous to the Government, price and other factors considered, and cautioned that, because factors other than price would be given paramount consideration, neither the lowest fixed-price proposal nor a proposal meeting minimum requirements with the lowest price would necessarily be chosen if a higher priced proposal contained sufficiently greater technical merit to justify the additional expediture. Clause D-2 listed the following three principle evaluation factors and their subfactors in descending order of importance: a) Technical/Program Suitability (Mission Capability, Design Quality, Logistic Support and Test, Demonstration and Qualification Program), b) Cost (Contract Price, Relative Life Cycle Cost) and c) Management.

DOT's Source Evaluation Board (SEB) verbally rated the offerors' technical proposals for the evaluation criteria listed above and made an oral and written report of its findings to the Source Selection Advisory Council (SSAC), which applied numerical weighting factors to evaluate the offerors' proposals according to the evaluation criteria and subcriteria. Although the SEB and SSAC final reports and the SSAC members' evaluation scores were furnished to us in camera, we feel it necessary to state that in the SSAC evaluations the maximum possible score for "Contract Price" was 20 percent of the entire evaluation score possible. In other words, technical merit was accorded significantly greater importance than proposal price under the evaluation procedure established in the RFP.

"Contract Price" was scored by the SSAC members in a subjective manner. The assignment of numerical scores or ratings to proposals is an attempt to

quantify what is essentially a subjective judgment. Didactic Systems, Inc., B-190507, June 7, 1978, 78-1 CPD 418; 52 Comp. Gen. 198, 209 (1972). Neither of the offerors was accorded the maximum points possible for the "Contract Price" subcriterion by the entire SSAC, although AHC whose proposal cost was lower was consistently awarded a higher score than Bell and several of the members gave AHC the maximum points. However, to insure that the 6-percent differential required to be assessed against a foreign offer carries its due weight in the consideration of proposals, we believe that an objective evaluation of cost with differential is required. Usually the "normalization" value system is the method used in the price evaluation process. Under this method, the lowest price proposal is assigned the maximum point rating and the remaining price proposals are converted to normalized point ratings by a formula in which the lowest price is divided by the other offeror's price and the quotient is multiplied by the maximum possible points. See, e.g., 52 Comp. Gen. 382, 387 (1972); Francis & Jackson, Associates, 57 id. 245 (1978), 78-1 CPD 79. If the offerors' prices in this case are normalized after the application of the Buy American differential, Bell's net increase of 2 points is not enough to change the standing of the offerors in view of the difference between the AHC and Bell total evaluation scores.

Stated another way, the addition of the 6-percent differential for a subcriterion worth 20 percent of the entire evaluation range would not be sufficient to overcome the difference in scores largely attributable to technical considerations.

D. END PRODUCT

Now we turn to the "end product" question. Bell contends that the helicopters, not the entire contract, are the "end products" and that they are manufactured in France.

We agree with the protester that the entire contract is not the appropriate end product for the purpose of the determinations required by the act.

The process of training personnel to operate and maintain aircraft cannot in our opinion be considered "manufacturing;" although materials and supplies may be used in providing training, they are merely tools used in performing training services rather than a result or product which can be directly incorporated into an end product. Acquisition of maintenance training, instructor pilot training and the services of the contractor's employees constitutes the procurement of services which is not subject to the Buy American Act. Blodgett Keypunching Company, 56 Comp. Gen. 18, 19-20 (1976), 76-2 CPD 331. Similarly, a reliability assurance warranty, the contractor's guarantee of the reliability of the products and responsibility for repair or replacement of parts, is basically an agreement to furnish necessary maintenance and repair services. See Curtiss-Wright Corporation v. McLucas, 381 F. Supp. 657 (D.N.J. 1974); B. B. Saxon Company, Inc., 57 Comp. Gen. 502 (1978), 78-1 CPD 410; 53 Comp. Gen. 412 (1973) (Department of Labor determinations that contracts for aircraft engine overhaul and maintenance and aircraft modification and depot maintenance were contracts principally for the purpose of furnishing services). Because services are not subject to the act, the SRR helicopter system or entire contract, comprised of the SRR helicopter and these services line items, cannot be considered the "end product" for purposes of the Buy American Act and the cost of these items must be excluded from consideration in determining whether AHC is offering a foreign or domestic end product.

DOT and AHC rely in their further analyses on the Contract Work Breakdown Structure (CWBS) (RFP, Attachment II "Cost Proposal Instructions," Appendix 1), a table breaking down 5 levels of items, tasks and services to be produced or performed with reference to the proposed contract line items, from which the offerors cost proposals were to be derived. DOT argues alternatively that if the CWBS level 1 SRR helicopter is the relevant "end product," its components are the CWBS level 2 items: the air vehicle, system test and evaluation, data and integrated logistics support (ILS). The "end product," DOT concludes, is domestic

because the cost of the air vehicle, which will be manufactured in Texas, will exceed 50 percent of the cost of all components.

We cannot concur in DOT's position that CWBS level 2 items are manufactured or directly incorporated in the SRR helicopter. First, "system test and evaluation," as defined in the CWBS Appendix, refers to the use of hardware to gather or validate engineering data on the performance of the air vehicle. Although the data generated from such operations is eventually reduced and reports exclusive of those required under "data" may be delivered to DOT, neither the testing operations nor any reports resulting from them are directly incorporated in or made a part of the helicopter. Second, "data" summarizes the preparation, assembly and delivery of non-ILS management and engineering data; the former includes data required for configuration management, cost and schedule control, data management and SRR helicopter planning and control, while the latter refers to engineering drawings, associated lists, specifications and documentation. Although the data constitutes a product, it is not directly incorporated into the SRR helicopter and cannot therefore be considered a component of the helicopter. "Integrated Logistics Support" refers to the tasks and associated costs involved in determining and integrating all support considerations necessary to assure effective, economical support of the SRR air vehicle for its entire life cycle. The "support" involved consists mainly of services necessary to identify and determine the needs of the maintenance and provisioning programs required for the helicopters and includes the reliability assurance warranty program. Again, any products resulting from ILS activities will not be directly incorporated into the SRR helicopter. We note that the procuring activity did not list "system engineering/management (non-ILS)," another CWBS level 2 item, among the "components;" we believe the item refers to management and engineering services which cannot properly be considered as a component. We conclude, therefore, that the "SRR helicopter" defined by DOT to include the CWBS level 2 items set forth above is not the appropriate end product

upon which to base the required Buy American analysis because the level 2 items are not directly incoporated in and consequently not "components" of the helicopter.

Finally, DOT asserts that, if the CWBS level 2 "air vehicle" is the relevant "end product," the components are the CWBS level 3 items: the airframe, the propulsion system, the avionics integration/installation and the avionics software programs. DOT states that the airframe is the only component which will include substantial foreign articles, materials and supplies, but concludes that the airframe is domestically manufactured. The airframes will be assembled at Aerospatiale Division Helicopter (A/DH) in France with "slave" equipment for initial certification. Following certification, the airframe is partially disassembled for shipment and the "slave" equipment is removed and retained for use on subsequent airframes. AHC terms the airframe shipped to Texas a "green" airframe, which consists of the aircraft structure and flight systems separated into cabin, tail boom, rotor head, rotor blades and other equipment detached from the airframe in France. In DOT's judgment the integration, modification and assembly work to be done on the "green" airframe by AHC in Texas to manufacture a deliverable aircraft constitutes manufacturing for the purpose of the act, citing Hamilton Watch Company, Incorporated, B-179939, June 4, 1974, 74-1 CPD 306; and Dubie-Clark Company, et al., B-189642, February 28, 1978, 78-1 CPD 161. DOT concludes that the air vehicle is a "domestic source end product" because the cost of the airframe represents more than 50 percent of the cost of all other CWBS level 3 components.

It is our opinion that the "air vehicle" (helicopter in common parlance) is the "end product" being procured under the RFP in question. We agree that the airframe is a manufactured article which is directly incorporated into and properly a component of the air vehicle. We have not dealt with whether any of the other level 3 components are part of the end product.

For reasons which follow, the airframe is a foreign product. Paragraph 6.3.1.2 of AHC's manufacturing plan

contained in Volume 20 of the firm's proposal provides the following summary of the responsibilities of A/DH with regard to the airframe:

> "A/DH-Airframe Manufacturer
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> "A/DH will be the subcontractor for the SRR 'green' airframe and will perform primary flight testing of the air vehicle in Marignane, France. These tests will be conducted using slave engines, gear, and other equipment supplied by AHC. After tests are completed for each aircraft, A/DH will remove the slave items for use on subsequent airframes. The 'green' airframe will be separated into two sections (cabin and tail boom) and shipped with the rotor head and blades to AHC for completion of the manufacturing process. The SRR airframe is basically the same as the production model parent SA 365N airframe. Accordingly, A/DH will manufacture both SA 365N and SA 366 airframes with only minor differences in tooling or manufacturing lines." (Emphasis added.)

Similarly, paragraph 6.3.3.1 provides in pertinent part:

> "After the ground test and flight test are completed and standard FAA airworthiness obtained for the 'green' aircraft as discussed in para. 6.3.1.1, all slave units are removed. The slave units are U.S. manufactured systems (including engines, main gear box, landing gear) which must be installed for issuance of the Export Airworthiness Certification and are then removed before the SA 366 is shipped to AHC. The 'green' airframe is then separated in two major airframe sections * * *, crated and shipped with the blades,

> rotor head and other miscellaneous equipment to AHC for manufacture of the air vehicle." (Emphasis added.)

Notwithstanding DOT's position to the contrary, materials furnished to us in camera by the agency also indicated that it was the DOT SEB's opinion that the air vehicle was to be manufactured, tested and certified at A/DH in Marignane, France. We note, too, that the term "airworthy" means that an aircraft is fit to be flown.

Nevertheless, we find that the aircraft sections delivered to AHC's Texas facility, without more, do not constitute a deliverable helicopter. If we follow the CWBS as both DOT and AHC have suggested, we note that CWBS level 4 does not list the "green" airframe. Instead, CWBS level 4 items include the fuselage, landing gear, drive system (transmission), rotor system, engine, communications system, engine/fuel management system, navigation subsystem, flight guidance subsystem equipment and radar.

We believe it sufficient, however, for the purpose of the analysis required by the act to concentrate upon the airframe. Although we have held that assembly in the United States of articles from foreign-manufactured articles or components may constitute domestic manufacture of "components" or "end products," the meaning and application of those terms are considered in light of the particular facts of each case. Cincinnati Electronics Corporation, et al., supra, at 1495. While many separate processes or operations may be used to manufacture an item, each manufacturing operation does not necessarily manufacture a basically new or different article, material or supply. B-166613, May 26, 1969. In this case, the airframe is manufactured, tested and certified in France. The "slave" equipment that is used for testing and certification of the airframe is removed and the airframe is disassembled for the purpose of shipment to Texas. The airframe is reassembled by AHC in Texas in the process of completing manufacture of the "air vehicle." The reassembly in Texas is no more than

that and the operation cannot detract from the fact that the airframe is manufactured in France. Therefore, the airframe is a foreign-manufactured component of the "air vehicle."

As noted above, DOT reported to us that the cost of the airframe represented more than 50 percent of the cost of all components of the air vehicle. DOT's statement, presumably, was based on its view that the airframe was manufactured in Texas. As pointed out above, we conclude that the airframe was manufactured in France, not in Texas. Our reliance on DOT's conclusion that the cost of the airframe represents more than 50 percent of the cost of all components would not be altered by the consideration of any costs of assembly in Texas. Labor, administration and overhead, and other costs incurred after delivery of the airframe to AHC's Texas facility must be deducted from the proposal price in computing the component's cost for comparison with the cost of domestic components. Similarly, costs related to combining the airframe with domestic components or testing combinations thereof must be excluded from the proposal price in determining whether the offer is foreign or domestic. 35 Comp. Gen. 7, 9 (1955). We do not know what cost DOT considered to arrive at the 50-percent determination.

DIRECT DERIVATION FROM FLIGHT-TESTED HELICOPTER

Bell contends that the SA 366 SRR helicopter offered by AHC was not a direct derivative of the SA 365C helicopter which the firm offered for flight testing as required by the RFP, citing our decision in System Development Corporation, 58 Comp. Gen. 475 (1979), 79-1 CPD 303. The protester's argument is twofold: 1) that AHC did not comply with the requirements of the RFP and 2) that data obtained from the flight evaluation was an inadequate and unreliable basis from which to project the performance capabilities of AHC's SRR candidate.

Section 1.1, Attachment VIII, "Flight Evaluation Specification," of the RFP explains the scope of the Flight Evaluation Program in pertinent part as follows:

> "* * * The helicopter made available [for flight evalution] must be one from which the proposed SRR helicopter is directly derived. This evalution helicopter need not be configured so as to be capable of meeting the stated Coast Guard mission and performance requirements, but must be judged as having the potential to meet those mission and design requirements listed as required in the SRR Helicopter Type Specification [Attachment III]. Each offeror offering a helicopter which is judged as having the potential to meet required mission and design requirements will be required to enter into a contract for the conduct of a flight evaluation program.
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> "The data and evaluations resulting from this flight program will be incorporated directly into the formal SRR helicopter proposal evaluation system. * * *."

Paragraph 2(a) of the Forward to Attachment III further provides:

> "The U.S. Coast Guard intends to procure an SRR helicopter that will be in production in time to meet the delivery schedule requirements of (the) RFP. The Coast Guard recognizes that the helicopter offered must be well beyond a preliminary design stage, at the time of SRR helicopter proposal submittal, * * * and, therefore, * * * does not expect that the basic design of the aircraft offered will be significantly changed except to meet those requirements designated as 'Required' in this Type Specification."

On the basis of these provisions, Bell contends that the RFP established a requirement that the helicopter furnished to DOT under the contract be directly derived from a model in commercial production, flight-tested by the procuring activity, and modified only as necessary to meet the Coast Guard's special requirements. Bell believes that AHC's Model SA 365C was flight-tested, but that the Model SA 366 offered under the contract is directly derived from the firm's Model SA 365N which is a newly designed model that differs in major respects from the flight-tested SA 365C. These differences, Bell asserts, undermine the purpose of the flight evaluation, contravene the terms of the RFP, render the test data on which DOT based its proposal evaluation significantly less reliable than the RFP contemplated and result in disparate treatment of the offerors.

DOT argues that pursuant to paragraph 1.1 of the Flight Evaluation Specification, quoted above, the agency entered into flight evaluation contracts with the three potential offerors after having judged that the helicopters they offered for evaluation had the potential to meet the SRR helicopter specifications. None of the flight-tested helicopters was the same as the offeror's proposed SRR candidate nor were they required to be; there were numerous changes between all flight-tested and proposed helicopters and the evaluators considered those changes for both Bell and AHC. The adequacy and utility of the flight-test data from which performance of the proposed helicopters were predicted were corroborated by the close correlation between the Government's and the offerors' performance estimates. DOT concludes that assessment of the flight-tested helicopters' potential adaptability to meet the RFP specifications was a technical matter for its evaluators to decide, that their determination that the offerors' helicopters were aircraft from which their proposed helicopters could be "directly derived" was reasonable and should not be disturbed, citing our decisions in John M. Cockerham & Associates, Inc., et al., B-193124, March 14, 1979, 79-1 CPD 180, and Struthers Electronics Corporation, B-186002, September 10, 1976, 76-2 CPD 231.

AHC takes the position that Bell's reliance on System Development Coporation, supra, is misplaced because the RFP in that case, unlike DOT's solicitation, expressly required the testing of a production model or an operational prototype to establish the ability of the offerors' equipment to satisfy the specifications and did not contemplate that the equipment tested would require any modification in order to meet the specifications. Because the solicitation was significantly more restrictive than DOT's RFP, AHC concludes that the case is not applicable to the facts of this protest.

Athough AHC's management plan, quoted beginning p. 13, supra, states that the SA 365N is the parent of the SA 366, the RFP does not require that the "parent" of the proposed helicopter be flight tested. We believe that the language of the above-quoted Flight Evaluation Specification provision must be taken as a whole and, when so read, states that the purpose for flight evaluation is the agency's need to assess the proffered aircraft's potential to meet the Coast Guard's mission and performance requirements.

Clearly the SRR helicopters were not expected to be identical to those flight tested. Rather DOT was to project the changes required in the flight-tested aircraft to render its potential a reality in the proposed SRR helicopter. The fact that those changes may have been developed or perfected via an intermediary aircraft should not have affected the agency's ability to predict the effect of changes between the flight-tested and proposed SRR helicopters, provided that DOT first assured itself that the flight-tested aircraft had the requisite potential.

The Forward of the Type Specification to which the protester refers clearly pertains to the proposed SRR helicopters rather than to the helicopters submitted for flight evaluation. Contrary to Bell's interpretation, we believe it indicates that, while DOT did not desire a major design and development effort, the proposed SRR helicopter might be a preproduction model at the time proposals were submitted

as long as it would be in production in sufficient time to comply with the RFP delivery schedule.

We believe that the determination that AHC's SA 365C had the potential to meet the agency's needs, like the evaluation of proposals, is the responsibility of the procuring activity. We will not substitute our judgment for that of the contracting officials or question their expert technical determination absent a clear showing that it was unreasonable. See RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99; 46 Comp. Gen. 606, 608 (1967). Bell has not made such a showing and the fact that it disagrees with the judgment of the contracting agency does not make it unreasonable. See John M. Cockerham & Associates, Inc., et al., supra; Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87.

Bell takes the position that the data which the SEB developed to rate the technical qualifications of the proposed helicopters was neither adequate to define true differences between the helicopters nor sufficiently reliable for the selection process. However, DOT states that the data was obtained and correlated under procedures developed and refined over many years and that the procedures provided satisfactory results in the past. Moreover, DOT states that the accuracy of the evaluation data was corroborated by the close correlation between the agency's and the offerors' performance estimates. Thus, it was reasonable for DOT to use the same procedures for the immediate procurement as it used before and to rely upon the data generated.

TECHNICAL PROPOSAL EVALUATION

Bell disagrees with DOT's evaluation of the Bell and AHC helicopter proposals.

The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency which enjoys a reasonable range of discretion in the evaluation of proposals. Since determinations as to the needs of the Government are the responsibility

of the procuring activity concerned, the judgment of such activity's specialists and technicians as to the technical adequacy of proposals submitted in response to the agency's statement of its needs ordinarily will be accepted by our Office. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of the procurement statutes and regulations. Struthers Electronics Corporation, supra.

With these ground rules in mind, we will review each of Bell's contentions against the technical evaluations.

SRR MISSION SUITABILITY

OPERATIONS AT SEA

Bell contends that DOT failed to consider that the AHC helicopter is not suitable for shipboard use in rough seas. There is agreement that the AHC helicopter can operate from ships at sea. The disagreement between Bell and DOT centers around the amount of time the AHC helicopter will be able to be used under rough sea conditions. However, the RFP does not specify that the helicopter must operate under any particular sea condition. Moreover, DOT had indicated that it recognized in its evaluations that the Bell helicopter was more compatible to heavy sea conditions than the AHC helicopter. We are unable to conclude in the circumstances that DOT acted unreasonably in its consideration of the AHC helicopter for sea operations.

RADIUS OF ACTION

Paragraph 3.1.2.1 of the Type Specification requires guaranteed performance for the Short Range Search and Rescue Mission (paragraph 1.2.1.1), the helicopter's primary mission, of a radius of action (ROA) of not less than 150 nautical miles and an ROA of not less than 300 nautical miles (400 desired) for the Maximum Range Mission (paragraph 1.2.2.1.2). DOT states that the Bell 222C's ROA for the primary and

maximum range missions were 151 and 371 nautical miles, respectively, and those for AHC's SA 366 were 165 and 421 nautical miles, respectively.

A. HARPOON MECHANISM

Bell takes exception to DOT's ROA calculations contending that the agency failed to consider the effects of a harpoon or similar device which Bell alleges must be added to the SA 366 to enable it to operate aboard ships during the heavy winter seas. The protester asserts that in order for performance comparisons to be meaningful 50 pounds must be added to the SA 366's weight or deducted from its fuel load to compensate for the addition of the mechanism to the aircraft. Such a reduction in fuel would, in Bell's opinion, reduce the helicopter's primary mission ROA by 5 nautical miles. Bell also asserts that the cost of the harpoon must be added to AHC's proposal price.

As indicated above, the RFP did not provide for the helicopter being evaluated under special sea conditions. Furthermore, most of the flying is from shore bases where sea state is not a consideration. Therefore, it was not unreasonable for DOT to evaluate AHC's ROA without the addition of the harpoon mechanism which Bell indicates is necessary only under shipboard use in rough sea conditions.

B. HOVER-THRUST MARGIN

Bell states that AHC did not provide a margin of power and hover thrust to ensure the operational capability and safety of the helicopter. The protester asserts that evaluation of the SA 366 using the hover-thrust margin provided in the 222C would reduce AHC's primary mission ROA to 154 nautical miles. However, the RFP did not require the offerors to allow such a margin at takeoff and DOT was not required to evaluate the SA 366 as if the RFP did.

C. FUEL EXPANSION ALLOWANCE

The Bell 222C and the AHC SA 366 provided fuel expansion space of 3.6 percent and 2 percent, respectively. The RFP only required the offerors to describe

the fuel expansion space design; the minimum requirement was compliance with FAA certification requirements, a 2-percent fuel expansion space. Bell contends that the SA 366 ROA should be computed using the same fuel expansion space proposed by Bell with a resultant 3-nautical mile reduction in the SA 366 primary mission ROA. However, the 2-percent fuel expansion proposed by AHC met the RFP requirements. Therefore, it was reasonable to evaluate the SA 366 on the basis proposed.

D. FUEL CAPACITY

DOT assigned the SA 366 a maximum fuel quantity of 1,976 pounds, which the protester argues can only be achieved by gravity rather than pressure refueling. Bell believes that the Coast Guard ships use pressure refueling, that hover in-flight refueling (HIFR) from ships requires pressure refueling, and that the Coast Guard may operate at other locations where only pressure refueling is available. Bell therefore concludes that because the SA 366 will be able to load only 1,922 pounds of fuel with pressure refueling (a 54-pound reduction) during many operations, its primary mission ROA should have been determined on the basis of the minimum fuel load it may carry, reducing the ROA by 6 nautical miles. DOT and AHC, in contrast, assert that the RFP did not require ROA calculation on the basis of pressure refueling and that gravity refueling is the normal method used by the Coast Guard aboard ship and at most land bases.

While paragraph 3.13.9.13.3, "Off-Deck Refueling," of the Type Specification requires that offerors provide an HIFR system capable of receiving fuel at a rate to completely refuel the aircraft within 5 minutes at 55 PSIG (pounds per square inch gauge) at the aircraft HIFR nozzle (indicating pressure refueling), the HIFR operation was not included in the primary mission. We note that section 5.3 of AHC's proposal (Vol. 17, p. 5-16) summarizing ship based fueling, states that gravity, pressure and HIFR refueling are provided but that "(g)ravity refueling on USCG cutters is not planned because [sic] the risk of fuel spillage on the deck." However, notwithstanding the statement in AHC's proposal, it appears to be the intention of

the Coast Guard to make gravity fueling the usual method of fueling. While there may be conditions under which the Coast Guard may have to use pressure fueling, it is apparent from its statement that it does not contemplate that will be the normal situation. Thus, it was reasonable for DOT to make its evaluation on the gravity fueling basis.

E. ENVIRONMENTAL CONTROL UNIT OPERATION

The protester states that due to limited power the SA 366's environmental control unit (ECU) (air conditioning) must be turned off during critical hover operations and while the door is open and that the engine-activated automatic ECU shutoff AHC proposed is a safety hazard. Bell asserts that AHC's proposal must be evaluated in accordance with paragraph 3.1.2.1, Note 8, of the Type Specification which requires that the helicopter's fuel consumption be determined with the air conditioning operating.

DOT responds that, contrary to the protester's assertions, the SA 366 ECU does not have to be shut off when the door is open, the aircraft door is open during the hover portion of rescue missions and largely negates ECU cooling effect, AHC's ROA was computed on the basis that the ECU was operating as the RFP required and AHC's automatic ECU shutoff device and proposal were judged acceptable. Therefore, no basis exists for us to object to the evaluation of this item.

F. CHANGES AND WEIGHT PENALTIES

Bell alleges that DOT assessed inconsistent and unreasonable weight penalties in evaluating changes between the offerors' flight-tested and proposed SRR helicopters. Fuselage changes for AHC affected 5,168 pounds and those for Bell affected only 2,506 pounds, yet AHC was penalized only 26 pounds (0.5 percent of the weight affected) while Bell was penalized 54 pounds (2.2 percent of the affected weight). The protester states that not only were actual weights used for the 79.4 percent of the parts common to its flight-tested and proposed models, but that during the course of proposal revisions the firm added a total of 185 pounds as a contingency factor to its weight estimate.

DOT explains that the weight increases in excess of the protester's estimate are attributable to changes made from the Model 222 to the Model 222C, and that the reason for the greater percentage weight increase in Bell's case was because Bell's weight estimates were inadequate for its design--the avionics system, for example, was underestimated by 50 pounds. As Bell indicates, any change in weight affects a helicopter's ROA. Because DOT considered Bell's weight estimate inadequate, it increased the empty weight estimate. The evaluation result about which the protester complains, however, arose because Bell's original mission gross weight (the empty weight plus that of the crew, fuel and equipment) was also the FAA certification weight. The mission gross weight therefore could not be increased because it would exceed the certification weight so DOT had to reduce the 222C's estimated fuel load, which reduced the helicopter's ROA for the various missions. The action of DOT appears to have been reasonable in the circumstances.

DEISGN QUALITY

STRUCTURAL INTEGRITY

In Bell's opinion, the basic structural load factor of the SA 366 is 2.59 g's at a gross weight of 8,400 pounds, which means that the helicopter was designed for a vertical limit load of 21,756 pounds with an ultimate design load of 32,634 pounds (limit load x 1.5). In contrast, Bell states that the 222C design has a structural load factor of 3.14 g's at a gross weight of 8,260 pounds, a limit load of 25,936 pounds and an ultimate design load of 38,904 pounds. Bell concludes therefore that the 222C is capable of withstanding more thrust load than the SA 366, has greater structural integrity than AHC's design, and DOT's conclusion to the contrary is incorrect.

DOT states that in its calculations Bell has used structural and design load data from Volume 7 of the proposals which was not included in the SRR contract and was not contractually binding on the offerors. DOT relied upon the Detail Specification, Volume 2 of

the proposal, because it was contractually binding on the offerors. Paragraph 3.4.1 of Bell's Detail Specification provides a structural load factor of 2.40 (0.19 lower than AHC's 2.59 factor), which DOT used in its structural integrity determination. Finally, DOT states that the load factor alone was not the sole structural characteristic considered; in determining the helicopters' structural integrity, the agency included many other factors, a few of which were fatigue criteria and life, component and landing gear strength and vibration and damage tolerance, and AHC was equal or better than Bell in all those areas.

Bell, however, argues that the 2.40 load factor used by DOT is the load factor for the 222C rotor and that paragraph 3.4.1.1.11.1 of the protester's Detail Specification clearly states that the airframe design load factor is 3.5 at a gross weight of 7,415 pounds. Bell states that when the airframe design load factor is used to calculate the structural load factor at the FAA certification weight (8,260 pounds) the structural load factor is 3.14. However, even if the correct load factor should be 3.5 or 3.14, we cannot conclude that DOT's determination based on the totality of factors considered in assessing the helicopters' relative structural integrity was unreasonable.

CRASHWORTHINESS

Bell objects to the procuring activity's conclusion that the SA 366 design was safer and more crashworthy than that of the 222C, contending that crash load factors do not suffice to define or evaluate the crashworthiness of an aircraft and that DOT failed to consider the helicopter's ability to absorb the energy of a crash, egress during a crash at sea and the location of the helicopter's pressure refueling receptacle.

Contrary to the protester's assertions, DOT states that it considered not only crash load factors but also other factors including energy absorption, emergency evacuation and fuel system safety in assessing the crashworthiness of the offerors' designs. DOT notes

that the evacuation design proposed by AHC, incorporated in prior Coast Guard helicopters, provides acceptable egress even when the aircraft is under water, but to its knowledge Bell's design system has not been tested under water or credited by the FAA for commercial helicopter use. DOT observes that, while the SA 366 pressure refueling receptacle for HIFR from a ship is located inside the cabin, its ground refueling receptacle is externally located on the fuselage. DOT recognized Bell's HIFR design advantage. However, notwithstanding the fact that the protester's design was judged superior in some respects, we do not find DOT's conclusion based on the overall crashworthiness of the designs unreasonable.

CABIN VOLUME AND FIELD OF VIEW

DOT concluded that the AHC design provided larger cabin volume and a better field of view (visibility range from inside the helicopter). Bell states that the former conclusion is contrary to the opinion of Coast Guard personnel whose consensus was that the Model 222's smaller size would not impede performance of SRR missions. We agree with DOT that Bell's survey results are irrelevant to the agency's evaluation. The protester's survey solicited information about the firm's Model 222 rather than the 222C from DOT personnel other than the evaluators prior to the issuance of the RFP and the comparison was made in relation to the Sikorsky HH-52A helicopter rather than to the design features of the SA 366. DOT found the cabin volume which Bell proposed was acceptable, but determined that the larger cabin volume afforded by AHC's design was better. We find DOT's conclusion reasonable, particularly in light of the mission demands on cabin space.

On the basis of field-of-view plots included in the offerors' proposals and Bell's use of bubble windows which allegedly provide greater aft and downward visibility, Bell also contends that DOT erred in concluding that the SA 366 design affords better visibility than the 222C. DOT states that its visibility determination was based primarily on pilot and crew observations during flight evaluations and review of

the SRR airframe mockups rather than the field-of-view diagrams. Although we agree with the protester that observations made during the flight test pertained to visibility from the flight-tested aircraft rather than the SRR helicopters, DOT asserts that fields of view of the SA 365C and the SA 366 do not differ significantly. We believe that the agency's conclusion based on flight evaluations, mockups and diagrams that the SA 366 provides better overall visibility from the cabin and cockpit was not unreasonable.

ELECTRICAL POWER

The protester objects to DOT's determination that the SA 366 design providing excess electrical power was superior to Bell's design which provided the minimum electrical power required. Bell asserts that AHC's electrical capacity which exceeds the minimum power requirement by 700 percent constitutes an excessive cost design and that Bell's design which meets the mission power requirements with all necessary margins is cost efficient and therefore superior.

DOT states that AHC offered more electrical capacity for the money and therefore presented a better electrical power design than Bell. While we agree that reserve electrical power appears to be more advantageous to the Government, we cannot agree that an excessive reserve would necessarily indicate a superior design. AHC, however, notes that the size of the reserve is attributable to electrical power necessary in the event of an alternator failure pursuant to paragraph 3.16.2.3 of the RFP Type Specification and to operate equipment which DOT intends to add to the aircraft at a later date. We cannot conclude therefore that DOT's evaluation in this regard was unreasonable.

HOIST SPEED

DOT found the hoist offered by AHC superior to Bell's because it is capable of handling a full load (600 pounds) at a speed of 200 feet per minute (f.p.m.) while Bell's hoist speed is 100 f.p.m. The protester,

however, asserts that cable speeds in excess of 100 f.p.m. could cause the rescue basket to spin, injuring the rescuee; thus its design resulted in cost and weight savings while meeting all RFP requirements. Bell states that its hoist can operate at the 200 f.p.m. speed with loads up to 300 pounds.

Bell's contentions, DOT suggests, overlook the fact that there are situations other than rescue operations in which higher hoist speed will be advantageous and that AHC's infinitely variable hoist speed control allows the operator to select any speed up to 200 f.p.m. appropriate for the particular operation. AHC's higher powered hoist also provides a design margin which the agency expects will reduce the frequency of breakdown and repairs.

Although the protester states that it also provides infinitely variable hoist control, Bell's hoist speed with the maximum load is still limited to 100 f.p.m. We are unable to conclude in the circumstances that DOT's evaluation was unreasonable.

ADVANCED TECHNOLOGY RISK

Bell complains that its design was deemed to involve greater risk than AHC's because its avionics system included a number of new technology items and the SA 366 uses state-of-the-art components. Bell asserts that the facts are actually reversed, that AHC proposed advanced composite materials for the rotor blades, horizontal stabilizer and lateral fins and that DOT's evaluation was inconsistent. Bell states that the technology used in the Flight Management System Computer, Control Display Units and Altitude Reference System included in the 222C avionics system has been developed and is in current use on the F-14, F-15, F-16 and F-18 fixed-wing aircraft and the AH-64 attack helicopter. According to Bell, the only difference between these elements and those proposed for the 222C are the additional features necessary to meet the SRR mission requirements, which the protester contends would be necessary for any existing avionics system.

DOT responds that AHC's state-of-the-art avionics components minimized the risk of developing and integrating the system in the SRR helicopter, that despite the protester's assertions to the contrary the procuring activity remains of the opinion that the system Bell proposed incorporated fundamental design concepts which have not been tried in service use, and that its evaluation of the relative risk involved in the avionics system designs was substantiated by the differences between the two systems. DOT did consider the risk associated with the composite materials AHC proposed to use in the aircraft structure, as well as those Bell proposed to use for the rotor blades, fuel cell cavities and transmission cowling, and determined that these uses were consistent with the state-of-the-art and did not pose a risk. We are unable to conclude that the procuring activity's assessment of the risks involved in the offerors' designs was either inconsistent or unreasonable.

YAW CONTROL

Bell pointed to a portion of AHC's proposal as indicating that the AHC helicopter will not meet the required sideward flight speed of 35 knots (RFP, Attachment IV, Table 3).

However, DOT assessed the yaw control of both offerors' designs and concluded that AHC offered acceptable yaw control on the basis of design assessment including the flight evaluation and AHC's contractual commitment to meet the RFP requirement. We believe the agency's determination on these bases was not unreasonable.

TAIL BUMPER DESIGN

The protester asserts, and DOT agrees, that the SA 366 tail bumper was designed to a sink speed of 8 feet per second (f.p.s.) while DOT required Bell's to be designed for sink speeds of 10 f.p.s. DOT, however, explains that the disparate sink speeds required were due to differences in the helicopters' landing

approach attitudes. AHC's tail bumper is higher off the ground than Bell's so a lower sink speed was appropriate for the SA 366 design. We believe that application of the same requirement to the offerors' different designs would have been unreasonable and that the use of ostensibly inconsistent sink speeds was appropriate.

AUTOROTATION

In Bell's opinion, the autorotation (power-off landing) of the 222C is much better than that of the SA 366. Bell notes that the SA 365C handbook prohibits intentional autorotation to a full landing and concludes that based on disc loading factors the SA 366 will have worse autorotation characteristics than the SA 365C. Bell states that the 222C permits pilots to practice full touch down emergency procedures, enhancing aircraft safety. Bell therefore believes that DOT failed to consider autorotation characteristics in its evaluation.

Unlike the SA 365C handbook prohibition, DOT states that there is no such restriction in the contract specifications for the SA 366. Full autorotations were made during the SA 365C flight evaluation and DOT's autorotation design evaluation was based in part on the flight evaluation data. Moreover, the procuring activity explains that the Coast Guard has not previously considered it necessary to practice autorotations to a full landing in two-engine helicopters. We cannot conclude that DOT's design evaluation in this regard was unreasonable.

ROTOR STOPPING

The RFP requires that rotor stopping be demonstrated under the contract in headwinds of 60 knots and in winds from any other direction of 45 knots. Bell points out that AHC did not cover the 45-knot requirement in its proposal. However, DOT has indicated that compliance with the 60-knot requirement provides a high probability of assurance of satisfactory capability in winds from any other direction. Bell says there is no assurance that there will be 60 knot winds during the demonstration period, since AHC has offered to demonstrate

under natural wind conditions, but DOT apparently believes the condition will exist. In the circumstances, it is not apparent that the AHC deviation is material and the determination to permit it does not appear to be unreasonable.

AIRCRAFT CERTIFICATION

Bell states that AHC has an advantage in being able to certify its aircraft in France. However, no advantage is apparent, since AHC also is required to obtain certification in the United States.

RESPONSIBILITY DETERMINATION

Ordinarily, we do not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which have not been met. New Haven Ambulance Service, Inc., 58 Comp. Gen. 361 (1978), 78-1 CPD 225. Our standard is much the same as that followed by the courts. They have taken the view that responsibility is a matter of discretion not subject to judicial review absent fraud or bad faith. Keco Industries, Inc., v. United States, 492 F.2d 1200 (Ct. Cl. 1974); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); O'Brien v. Carney, 6 F. Supp. 761 (D. Mass 1934). Since Bell does not allege fraud and essentially what is involved is a difference of opinion between Bell and DOT as to whether AHC is a responsible contractor, Bell has failed to meet the standard for review by us or the courts. Accordingly, notwithstanding the court's involvement in this case, we find it unnecessary to engage in any further consideration of the responsibility matter because of the limited judicial standard of review.

ECONOMIC PRICE ADJUSTMENT CLAUSES

Section J of AHC's contract provides for contract price adjustments, regardless of the actual changes in the cost of labor and materials during performance of the contract, based solely on changes in prescribed

labor and material indexes furnished by the Department of Labor (DOL). DOT will determine the semiannual upward or downward adjustments in the contract price depending on whether the net difference in the labor and material adjustments is a plus or minus factor, and will modify the contract accordingly. Sections J-1(d) and J-1(g) provide for contract price adjustment due to changes in airframe labor and material costs based, respectively, upon changes in the DOL "Gross Average Hourly Earnings of Production or Non-Supervisory Workers in the Aircraft Industry (SIC Code 3721)" and "Producer Price Index for Industrial Commodities." Similarly, section J-4 provides for adjustments in the prices of spare parts based on changes in DOL's "Producer Price Index for Industrial Commodities." The contract also contains price adjustment clauses pertaining to changes in the costs of labor and materials involved in the avionics, engines, reliablity assurance warranty, and training.

Bell believes that at least the AHC airframe and related spare parts will be produced in France and that components subject to other price adjustment clauses may also be foreign produced. The protester therefore contends that application of price indexes based upon United States labor and material costs to determine contract price adjustments bears no rational relationship to costs that AHC may actually incur, will result in improper expenditure of appropriated funds and renders the contract invalid.

The fixed-price contract with escalation is appropriate for use "where serious doubt exists as to the stability of market and labor conditions which will exist during an extended period of production and where contingencies which would otherwise be included in a firm fixed-price contract are identifiable and can be covered separately by escalation." FPR § 1-3.404-3(b) (1964 ed. circ. 1). DOT asserts that the use of the economic price adjustment clauses in AHC's contract was reasonable and lawful since it was needed for flexibility in assuring contract performance over a 7-1/2-year period. The clause used in AHC's contract was based on industry-wide indexes and was identical to the clause which would have been required in Bell's contract had Bell obtained the award.

Bell, however, contends that the escalation clauses could properly be included in AHC's contract only if DOT made the required findings with respect to the stability of market and labor conditions in France. Bell states that there is no evidence that DOT considered French market and labor conditions and the fact that American indexes were used in the contract demonstrates that no such findings were made. Furthermore, DOT does not indicate that domestic indexes would be appropriate for forecasting conditions in France.

DOT states that the economic price adjustment provisions used in the AHC contract are based on industry-wide indexes applied to the contract price according to the provisions of Armed Services Procurement Regulation (ASPR) (now Defense Acquisition Regulation) § 3-404.3(c)(3) (Defense Acquisition Circular No. 76-18, March 12, 1979). Although the Coast Guard derives its basic procurement authority from the Armed Services Procurement Act, 10 U.S.C. § 2303(a)(4), over the years it has relied primarily on the FPR and the procurment regulations of the departments of which it has been a component, but where those regulations have not covered a particular situation it has followed ASPR. Because the actual material and labor costs of all the offerors in this procurement were unknown, DOT decided to use an expenditure profile based on a predetermined rate of expenditure (expressed as the percentage of material or labor usage as it related to total contract price) in lieu of an actual cost method. The expenditure profile was developed from information solicited from all offerors in order that all companies would compete on an equal basis according to the applicable ASPR provisions. Based upon the fact that DOT wanted to treat all offerors equally, it decided to employ domestic labor and material indexes and the same escalation provisions were included in all solicitations. Finally, DOT takes the position that Bell cannot argue that its proposal was evaluated any differently or that it was adversely affected in any way by the inclusion of the escalation clauses used in AHC's contract. Because AHC contracted to provide and must provide a "domestic

source end product," DOT concludes that its determination to use an escalation clause based on industry-wide price indexes and to treat offerors equally was reasonable.

AHC concurs in the application of a clause relating domestic costs to a domestic end product and characterizes Bell's argument as requiring that DOT tailor escalation clauses to take into account economic conditions in every foreign country in which a potential prime or subcontractor might be located. AHC states that there is no statutory or regulatory basis for such a proposition which would impose a ludicrously untenable administrative burden on the Government. Selection of the type of contract to be used is, pursuant to FPR § 1-3.403(a), a matter for negotiation and requires the exercise of judgment. AHC asserts that because the escalation clauses in question were included in the RFP to all prospective offerors, including the protester, all offerors were therefore treated equally with respect to potential fluctuations in labor and material costs and possible disparities in the impact on individual offerors were not considered during source selection, citing Lockheed Propulsion Company et al., 53 Comp. Gen. 982 (1974), 74-1 CPD 339. AHC concludes that it is clear that there was no abuse of discretion in DOT's selection of the clauses and that, because the clauses had no impact on DOT's award decision, it is nonsensical to argue that the clauses somehow tainted the award process or injured the protester in any way.

Our Office has held agreements entered into by the Government providing for an adjustment of material and labor costs unobjectionable where it was administratively determined to be necessary or desirable in the interests of the Government because the evident purpose of the adjustment provision is to protect the Government in case of a decrease in the cost of labor or material and the contractor in the event of cost increases. 22 Comp. Gen. 95, 98 (1942); 20 id. 695, 697 (1941).

Bell, however, asserts that the purpose cannot be satisfied here because the contract clauses bear

no rational relationship to protection of the contractor. The protester suggests that French costs and United States indexes may fluctuate in opposing manner, resulting in the escalation clauses providing a windfall to or inadequately protecting AHC; the result will be wholly fortuitous, not predictable. Contrary to DOT's characterization, if AHC's proposal included escalation clauses based on French inflation, the two companies would have been treated comparably because neither offeror would have been advantaged by the clauses as compared to the other. Bell suggests rather that, as actually implemented, the clauses may create a windfall for AHC, that AHC may have set its proposal price with that outcome in mind to Bell's obvious detriment, and that this potential handicap plainly constitutes inequitable treatment. Regardless of the legal status of AHC's helicopters for the purpose of the Buy American Act, Bell takes the position that they will be manufactured in France where the labor and material costs governed by the price escalation clauses will be incurred and that AHC's certificate is therefore irrelevant to the propriety of the clauses used in the contract. Bell concludes that DOT has not responded to its argument that use of domestic price escalation clauses in the RFP and contract implies a requirement that American labor and materials be used to manufacture the helicopters.

In our opinion, it is irrelevant that price adjustment percentages are to be based on domestic factors. Although Bell contends that these percentages will not be based on the French economy and may therefore produce results in AHC's contract inconsistent with the intention of the economic adjustment clause, that is purely speculative as there is no evidence to establish that will be the case. In the circumstances, it is not apparent that the clause has resulted in dissimilar treatment to the offerors. Rather, the application of a consistent factor to both offerors virtually insures that the low offeror will remain low during the term of the contract, since both offers will vary by the same proportion. Moreover, while Bell complains that AHC stands to make a windfall or to be inadequately protected by an escalation based on United States inflation rates, the same result could occur under the escalation provision if Bell were the contractor

since the escalation clause provides for a price adjustment for changes in the economy without any regard for the actual cost a contractor experiences in performing the contract. Thus, AHC is in no different position than Bell.

As indicated above, the protest is denied.

Comptroller General
of the United States