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DECISION



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

FILE: B-211082.3 **DATE:** February 11, 1985

MATTER OF: Corvus Systems Inc.

2/11/85

DIGEST:

1. Protest against proposed sole-source award, filed after closing date for receipt of proposals, is timely where agency invites protester to submit information showing that it can meet solicitation requirements before closing date and protest is filed within 10 working days of date when agency notifies protester that it does not meet requirements.
2. Protest alleging undue restrictiveness of requirement for "working model" antenna, included in a solicitation, is untimely when filed after closing date for receipt of proposals.
3. Protest alleging that test to assess whether protester's equipment can meet agency requirements was not fair and that sufficient data was not provided to protester, filed after the test, is untimely, since protester knew protest basis prior to test. However, protest against agency's analysis of test results is timely when filed within 10 working days of when protester is advised of such results. Doubts as to timeliness of protest concerning test of proposed sole-source awardee's equipment are resolved in protester's favor.
4. Protest alleging that certain work specified in sole-source solicitation should have been procured competitively is untimely when filed after closing date for receipt of proposals.

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5. Sole-source award of contract to supply prototype antenna system is reasonable where proposed antenna is the only one tested that can meet agency requirements; awardee owns data rights; and protester's offer to supply derivative of existing antenna does not meet solicitation requirements, including one for a "working model" antenna.
6. If potential suppliers are not treated fairly when government is ascertaining its requirements through testing, this may reflect on the reasonableness of the agency's determination of its actual needs. However, GAO will deny a protest alleging that offerors were subjected to different tests when tests on equipment being offered were comparable.

Corvus Systems Inc. protests the noncompetitive award of a contract to Eyring Research Institute Inc., under request for proposals (RFP) No. FD2020-83-23744, issued by the Ogden Air Logistics Center, Hill Air Force Base, Utah. The contract, Phase I of the Minuteman High Frequency Antenna Replacement System (MHFARS) program, calls for production, installation, and testing of a prototype antenna. This antenna will be one component of the Minuteman weapons system and will be integrated with state-of-the-art transceivers (an ARC 190 radio system and other elements) to allow proper functioning of the system.

We dismiss the protest in part and deny the remainder.

Background:

On January 28, 1983, the Air Force issued the RFP to Eyring with a closing date of March 1, 1983. Corvus was informed by letter of January 26, 1983, of the noncompetitive nature of the procurement. Paragraph M-200 of the RFP stated that it was for a replacement antenna and required the offeror to have a "working model" of the antenna. Corvus' ability to supply such a model is the primary question raised here.

By letter dated February 7, 1983, Corvus informed the Air Force that it had a "working model" antenna that met RFP requirements and expressed surprise at the proposed sole-source award. After some discussions, Corvus, by letter dated February 24, 1983, provided the Air Force with data purporting to show that it could provide an antenna that met RFP requirements.

By letter dated March 2, 1983 (after the closing date for receipt of proposals), the Air Force advised Corvus that its analysis of this data showed that the offer to provide what Corvus characterized as a simplified version of an antenna that had been designed for another Air Force project would not meet the "working model" and several other RFP requirements.

Corvus' Initial Protest:

By letter dated March 10, 1983, Corvus protested to our Office, alleging that there was no basis for the proposed sole-source award to Eyring. Corvus indicated that it could perform the work and had a "working model" which met the important elements of the solicitation and which could be easily modified to meet remaining requirements. By letter dated March 23, 1983, Corvus provided us with detailed technical support and added a new basis of protest--that the "working model" requirement was unduly restrictive.

On May 23, 1983, the Air Force and Corvus reached a tentative agreement under which the agency was to test and evaluate Corvus' antenna; if the results showed that it met Air Force needs, the agency agreed that it would open the procurement to competition. Consequently, on May 25, 1983, our Office closed its file on this matter without action. Testing was performed on July 6 and 7, 1983, at Corvus' facilities, but, by letter dated July 27, 1983, the Air Force informed Corvus that its antenna had met only two of seven minimum requirements. Subsequently, on August 4, 1983, the Air Force awarded the contract to Eyring.

Corvus' Supplemental Protest:

On August 12, 1983, Corvus supplemented its protest, alleging that the award to Eyring violated organizational conflict of interest proscriptions because Eyring had

developed specifications for the work that it would perform under the contract, and that the Air Force had improperly prequalified sources, in that the tests on Corvus' antenna were not properly or fairly conducted. In this regard, Corvus argued that the Air Force had (1) reneged on an agreement to furnish necessary data on the ARC 190 radio which would have allowed Corvus to fine tune its antenna configuration; (2) not permitted Corvus to use a tuner (electromechanical device to adjust antenna performance characteristics) in its configuration; (3) imposed new requirements on Corvus related to the Minuteman system, but not specified in the RFP, shortly before the test; and (4) breached its agreement by failing to submit the test results to an independent government observer.

Corvus also asserted that Eyring's "working model" antenna had not been subjected to comparable testing. According to Corvus, the only test on Eyring's antenna was at Little Mountain, Utah, in 1981. This test was allegedly not comparable because "flyovers" (recording tests from aircraft) had been permitted, while the Corvus test was at a negative elevation (from the ground) which distorted results. Corvus also alleged that in the Little Mountain test, Eyring failed to meet some of the Air Force's requirements and that some performance characteristics were not tested.

Finally, Corvus alleged that the award violated Defense Acquisition Regulation (DAR) § 2-407.8, reprinted in 32 C.F.R. pts. 1-39 (1984), because it had been made while a protest was still pending with our Office.

Corvus' Second Supplemental Protest:

On February 7, 1984, after receiving documents pursuant to a Freedom of Information Act request, Corvus again supplemented its protest, further attempting to show that Eyring's antenna could not meet Air Force requirements. Corvus also expanded its protest against the sole-source award, alleging that the Eyring contract actually is for research and development work, which belies the Air Force's sole-source justification that only Eyring had a "proven," "existing," "working model" antenna. Corvus also argued that the Air Force had improperly assumed that Eyring still owns data rights in the antenna, because these rights

appeared to have been purchased under previous contracts; this also would belie the sole-source justification. In addition, Corvus asserted that the Air Force should have procured the interface portion of the work competitively, instead of permitting Eyring to subcontract it. Finally, Corvus alleged that in administering the contract, the Air Force has permitted a delay in submission of certain data until the production contract (Phase II) is awarded, which will guarantee Eyring follow-on work valued at \$29,000,000.

Timeliness of Protest:

The Air Force asserts that virtually all of Corvus' protest is untimely. With regard to the initial protest of March 10, 1983, against the proposed award to Eyring, the agency argues that it is untimely because the RFP clearly designated Eyring as the single source, yet Corvus did not protest before the closing date for receipt of proposals. A protest by this time is required for defects that are apparent on the face of a solicitation under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984).

We find, however, that Corvus indicated an intent to protest if it was unable to persuade the Air Force that it could provide a "working model" antenna meeting RFP requirements. The Air Force invited Corvus to show that it could meet these requirements before the closing date, which Corvus attempted to do. When the Air Force notified Corvus that it did not consider the proffered antenna to be a "working model," this, in our opinion, constituted initial adverse agency action. Since Corvus protested to our Office within 10 days thereafter, its protest against the sole-source award is timely. See 4 C.F.R. § 21(b)(2); Detroit Broach and Machine--Reconsideration, B-213643.2, July 12, 1984, 84-2 C.P.D. ¶ 43. For the same reasons, Corvus' protest that it can meet the "working model" requirement is also timely. Corvus' protest that the requirement itself is unduly restrictive, however, is untimely, since this is an alleged defect in the solicitation and, therefore, should have been protested before the closing date for receipt of proposals. See 4 C.F.R. § 21.2(b)(1); Martin Widerker Ing., B-213557, June 25, 1984, 84-1 C.P.D. ¶ 664.

We find Corvus' supplemental protest, filed on August 12, 1983, alleging that the award violated organizational conflict of interest proscriptions, untimely, since Corvus was admittedly aware as early as February 1983 of previous contract work performed by Eyring. See 4 C.F.R. § 21.1(b)(2); Compucorp, B-212533, May 22, 1984, 84-1 C.P.D. ¶ 536.

Corvus' August 12, 1983, supplemental protest against allegedly improper prequalification also is untimely, insofar as it concerns test procedures and/or data provided to Corvus before the July 6 and 7 test. Cf. Federal Data Corporation, B-208237, Apr. 19, 1983, 83-1 C.P.D. ¶ 422 (protest against known requirements to be imposed in a benchmark test for automatic data processing equipment, not filed until the date of the benchmark, is untimely).

However, insofar as the protest concerns the Air Force's analysis of the test results, showing that the antenna failed to meet five of seven requirements, we find it timely, since this information apparently was first communicated to Corvus by letter of July 27, 1983. Allowing a reasonable time (5 days) for delivery of this letter, we find this basis of protest filed on August 12, 1983, timely raised within the requisite 10 days after initial adverse agency action.

As for the allegedly different testing to which Eyring's antenna was subjected, the Air Force has provided no documentation or made any assertions concerning when Corvus became aware of the procedures used or the results of the 1981 test at Little Mountain, Utah. Consequently, we will resolve any doubt as to the timeliness of this portion of the protest in Corvus' favor. See Builders Security Hardware, Inc., B-213599.2, Feb. 15, 1984, 84-1 C.P.D. ¶ 207; Memorex Corporation, 57 Comp. Gen. 865, 867 (1978) 78-2 C.P.D. ¶ 236.

With regard to Corvus' second supplement to its protest, dated February 7, 1984, we will consider the further arguments concerning the sole-source award as within the scope of the original, timely protest. However, we will not consider whether the Air Force should have competed the interface portion of the contract, because this work was set forth in the RFP. Any protest on this basis, therefore, was

required to be filed before the closing date for receipt of proposals. See 4 C.F.R. § 21.2(b)(1). All of the bases of protest that we have found untimely are dismissed.

Finally, Corvus' allegations concerning waiver of requirements for submissions of data under the Eyring contract concern contract administration, which our Office will not consider. Medi Coach Inc., B-214034, May 2, 1984, 84-1 C.P.D. ¶ 501. In any case, we understand that Phase II of the MHFARS has been canceled, so Eyring has not gained any advantage as a result of the alleged waiver.

GAO Analysis:

A. Validity of the Sole-Source Award

Agency determinations to make sole-source awards are subject to close scrutiny by our Office in view of legal requirements mandating maximum competition consistent with the nature of the supplies or services being procured. 10 U.S.C. § 2304(g) (1982); International Harvester Co., 61 Comp. Gen. 388 (1982), 82-1 C.P.D. ¶ 459. However, the law does not require that the government's needs be compromised in order to obtain competition. International Harvester Co., 61 Comp. Gen., supra.; Maremont Corp., 55 Comp. Gen. 1362, 1376 (1976), 76-2 CPD ¶ 181.

The Air Force in this case justified the sole-source award to Eyring on grounds that the firm

--is the prime contractor for development of this antenna modification;

--owns the patent rights to the antenna, which it developed at its own expense, as well as the engineering data necessary to provide the total modification package; and

--has not yet delivered this engineering data to the Air Force (although it will do so at the same time as it delivers the modification data and technical manual changes).

In addition, according to the Air Force, the present system is no longer maintainable, and lack of an adequate replacement for this antenna has caused 80 of 100 Minuteman sites to be decommissioned since 1970. Further, Headquarters, Strategic Air Command, requires that all 100 sites be equipped with a hardened antenna. The Air Force therefore concluded that the only antenna which will meet the needs of the Minuteman system is the Eyring Buried Wide Band Antenna.

We do not believe that Corvus has met its burden of proving that this justification is invalid, either because its own antenna can meet Air Force requirements or because Eyring's cannot.

The specific requirements for the "working model" antenna are set forth in paragraph 5.b.(4) of the RFP statement of work:

". . . The antenna shall be designed to be capable of radiating an input of 5KW [kilowatt] Peak Envelope Power with a voltage standing wave ratio [VSWR] of 1.6 to 1. The antenna shall be designed to operate across the range of 2 to 30 megahertz with not more than 3db [decibel] loss of effective radiated power. The input impedance shall be 50 ohms and the basis component of the output will be vertically polarized. The antenna shall normally operate in the omnidirection mode."

Corvus states that a "simplified derivative" of a more sophisticated antenna which it has already developed for an Air Force program at Rome Air Development Center can meet these requirements. We agree with the Air Force, however, that a derivative of another antenna does not satisfy the "working model" requirement of the RFP.

Specifically, the Air Force found during the July 1983 test that Corvus' antenna did not meet requirements (1) for a 1.6-to-1 VSWR (an antenna performance measurement); (2) that there be no more than a 3-decibel loss of effective radiated power over the entire range of 2 to 30 megahertz (broadband capabilities); (3) that there be 50 ohms

resistive input impedance (an antenna performance measurement); and (4) that the antenna be omnidirectional (radiate in all directions). In addition, Corvus did not meet a Minuteman requirement (not in the RFP) that there be no more than a 2-decibel loss. Corvus does not disagree with these results, but rather asserts that an independent government observer should have been utilized to analyze the test data.

We find, however, that the test results were consistent with the Air Force's March 2, 1983, analysis of the data which Corvus had previously submitted in response to the RFP. The Air Force found that this data showed Corvus' proposal of its "simplified derivative" antenna did not meet the same paragraph 5.b.(4) requirements that the July 6 and 7, 1983, tests showed that it did not meet. Under these circumstances, we cannot conclude that the Corvus antenna passed the test or that it is capable of meeting Minuteman requirements.

As for whether Eyring's antenna meets the requirements of paragraph 5.b.(4), Corvus challenges the results of the Little Mountain, Utah, tests, alleging that the Eyring antenna achieved a decibel loss of "7 to 12" and "a VSWR of 2 to 1" and that other mandatory requirements were not tested.

The Air Force, however, indicates that at Little Mountain, only a segment of the completely configured Eyring antenna was tested and that full gain (a performance capability related to decibel loss) meeting the same requirements imposed in the Corvus test (e.g., 2-db loss and 1.6 to 1 VSWR) would be realized when all segments were connected. The Air Force also indicates that on this test, the VSWR averaged a value that was well below the 2 to 1 alleged by Corvus.

The Air Force also states that in addition to the Little Mountain tests, certain other classified tests conducted in 1982 and a test at the White Sands Missile Range in 1983 show Eyring's compliance with RFP requirements. Although Corvus casts doubts on the existence of these tests, given the Air Force's statements, we cannot conclude that the firm has met its burden of proof as to their results. This is the case when, in the absence of additional evidence, the agency and a protester provide our Office with conflicting statements.

Corvus also attacks the sole-source award by alleging that this contract is really for research and development, as is evidenced by certain data deliverables. We do not find this argument persuasive. The RFP clearly called for a particular, existing antenna to be prototyped and tested for integration into the Minuteman system, with a production contract to follow.

Corvus also asserts that the Air Force based its sole-source justification on the false assumption that Eyring owns data rights for the antenna. However, the record shows that although the Air Force previously contracted with Eyring, it has not yet acquired rights to data, which Eyring developed at its own expense and effort.

In view of the foregoing, we believe that the Air Force sole-source award to Eyring was justified.

B. Testing of the Corvus Antenna:

Corvus alleges that Eyring's antenna was not subjected to the same test that was performed on its antenna. In this regard, we have held that potential suppliers should be treated fairly when the government is ascertaining its requirements through testing; otherwise, it may reflect on the reasonableness of the agency determination of its actual needs. Maremont Corp., 55 Comp. Gen., supra at 1379.

Corvus states, for example, that it was not permitted to add segments to its antenna configuration to increase gain although the Little Mountain test was done only to a segment of Eyring's antenna. The Air Force's stated reasons for not permitting additional segments to be added to the Corvus antenna during the test were (1) area constraints for the Minuteman system (the antenna must fit in a 250-by-250-foot area) and (2) that to permit such additional segments would decrease the performance characteristics of the Corvus antenna, including increasing the VSWR to an unacceptable level. Corvus has not shown that this is not the case.

Corvus also indicates that "flyovers" were permitted on Eyring's Little Mountain test, but not during its own. The Air Force responds that Eyring (not the Air Force) conducted the "flyovers," that Corvus had the same option, and that Corvus chose the elevation for the test at its facility.

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Moreover, in the Air Force's engineering judgment, the elevation did not distort the results of the Corvus test.

In view of the foregoing, we believe the Eyring tests, although not identical, were comparable to the Corvus tests. Therefore, those tests do not adversely reflect on the reasonableness of either the test of the Corvus antenna or the Air Force's definition of its needs.

C. Award Notwithstanding Protest:

Finally, Corvus protests that the Air Force violated DAR § 2-407.8 in making an award despite its pending protest. As discussed above, our Office closed its file without action because the Air Force had agreed to test Corvus' antenna. While the file may have been subject to reopening without prejudice, there was not an active protest on August 3, 1983, and, consequently, the Air Force was entitled to make an award. In any case, we have held that this type of procedural deficiency does not affect the validity of an otherwise proper award. Squibb Vitatek, Inc., B-208153, Mar. 29, 1983, 83-1 C.P.D. ¶ 320.

Corvus' protest is denied.

Harry R. Van Cleave
for Comptroller General
of the United States