

DECISION

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

*Carter
PL-I*

31436

FILE: B-218143 **DATE:** June 12, 1985

MATTER OF: Lockheed California Company

DIGEST:

1. Protest after rejection of proposal that evaluation criteria were vague, ambiguous and not meaningful is untimely where the evaluation method and lack of detail were apparent on face of solicitation. Where solicitation fails to specify relative weights of criteria, offerors may assume they are equally weighted.
2. Contention that provisions of Competition in Contracting Act of 1984, Title VII of Pub. L. 98 - 369, should be applied to procurement initiated with solicitation issued in September 1984 is denied where Act applies only to procurements for which solicitations are issued after March 31, 1985.
3. Rejection of proposal as unacceptable under step one of two-step advertised procurement is reasonable where evaluation shows that proposed missile transporter would require major redesign to satisfy requirements of request for technical proposals.

Lockheed California Company (Lockheed) protests the rejection of its technical proposal under a two-step formally advertised procurement conducted by the Air Force under request for technical proposals (RFTP) No. F42600-84-R-1437. The protest is denied in part and dismissed in part.

Two-step formal advertising is a hybrid method of procurement combining the benefits of formal advertising with the flexibility of negotiation. The step one procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with formal advertising procedures, with the exception that the competition is

032287

limited to those firms that submitted acceptable proposals under step one. See, e.g., Essex Electro Engineers, Inc., B-213892, Apr. 17, 1984, 84-1 CPD ¶ 434.

The Air Force issued this RFTP on September 4, 1984, seeking technical proposals for a quantity of "Minuteman Transportation Handling Systems" (MTHS), railcar tiedown kits, and technical data. The MTHS is basically a large tractor-trailer combination with the added capability to lift the trailer body to a vertical position to load/unload Minuteman missiles. The RFTP contained numerous functional and design requirements, but advised only that proposals would be evaluated as "acceptable, susceptible to being made acceptable, and unacceptable." The RFTP also advised offerors to submit initial proposals that were fully acceptable because the government might determine acceptability on the basis of initial proposals and proceed directly to step two of the procurement without conducting discussions, with the caveat that the government might seek information to supplement or clarify--but not basically change--proposals reasonably susceptible to being made acceptable.

The Air Force held a pre-proposal conference on September 20, 1984, during which the the Air Force was asked when a list of evaluation factors would be provided. The Air Force responded that proposals would be evaluated as (1) acceptable, (2) marginally acceptable, and (3) unacceptable. In response to another question, the Air Force advised that it did not anticipate discussions with offerors unless they fell within the marginally acceptable range and the Air Force needed clarifications. The questions asked at the conference and the Air Force's responses were incorporated into the RFTP by amendment.

The RFTP closed on November 14, 1984. By letter dated January 18, 1985, received by Lockheed on January 24, the Air Force apprised Lockheed that the Air Force had found Lockheed's proposal to be unacceptable. This notice included a list of 61 specific deficiencies/unacceptable conditions which the Air Force noted in Lockheed's proposal, as well as two design characteristics which the Air Force considered unsafe. Lockheed met with the Air Force on February 7, 1985, and provided the Air Force with a point-by-point response to the deficiencies which the Air Force found in its proposal. In a letter dated February 19, after this protest was filed, the Air Force advised Lockheed that it had reviewed Lockheed's response to the list of deficiencies and still found Lockheed's proposal to be

unacceptable. More than one proposal remains in the competition.

Lockheed's protest is basically threefold: First, Lockheed contends that the proposal evaluation criteria were vague, ambiguous and not meaningful; second, Lockheed asserts that the Competition in Contracting Act of 1984 (CICA), Title VII of Pub. L. 98-369, 98 Stat. 1175 (1984), should be applied to this procurement as a matter of policy; and, last, that the Air Force was arbitrary and capricious in its issuance of the RFTP and its evaluation of Lockheed's proposal. We will discuss these questions in the order stated.

Lockheed's challenge to the evaluation criteria is untimely under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which require that protests against alleged improprieties apparent on the face of a solicitation be filed prior to the closing date for receipt of proposals or bid opening. 4 C.F.R. § 21.2(a)(1). The evaluation criteria--and the accompanying lack of detail--were both apparent on the face of the solicitation, yet Lockheed chose to continue participating in this procurement without protest until its proposal was rejected. In these circumstances, Lockheed's protest is not only untimely, but Lockheed may be considered to have waived this objection. Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD ¶ 195. Moreover, even if we were to consider the question about evaluation criteria raised in the pre-proposal conference to be a timely raising of this issue, as suggested by Lockheed, the present protest would still be untimely because it was not filed within 10 working days of initial adverse agency action--receipt of initial proposals without correction or elucidation of the evaluation criteria--as required under our regulations. 4 C.F.R. § 21.2(a)(3). This portion of Lockheed's protest is dismissed.

Lockheed also contends that the Air Force's "new explanation" of the evaluation criteria in response to Lockheed's protest--that they were applied to each element of the system requirements and that all elements were weighted equally--amounts to the imposition of new criteria. Lockheed asserts that vendors could not have known of those criteria and argues that the Air Force breached its obligation to disclose the evaluation criteria and their relative weights.

We find no merit in this contention. In the analogous context of negotiated procurements, we have held that where the solicitation fails to indicate the relative importance of

evaluation criteria, offerors may properly assume that all are equally important. Lingtec, Inc., B-208777, Aug. 30, 1983, 83-2 CPD ¶ 279; New Jersey Association on Correction, B-199680, Apr. 9, 1981, 81-1 CPD ¶ 272. Here, the RFTP, as we noted above, contained numerous technical requirements and indicated only that proposals would be evaluated as "acceptable, reasonably susceptible to being made acceptable, and unacceptable." Contrary to Lockheed's view, we believe the Air Force's explanation reflects the only reasonable interpretation of these criteria. In this connection, we note also that Lockheed has suggested no alternative interpretation under which Lockheed may have labored to its prejudice. This aspect of Lockheed's protest is denied.

Lockheed contends that we should apply the CICA to this procurement and judge the Air Force's actions against the "full and open competition" standard imposed by CICA. Although the sections of CICA governing protests apply to protests filed after January 14, 1985, see CICA, § 2751(b), 98 Stat. 1203, including this protest, the procurement provisions of the Act apply to solicitations issued after March 31, 1985. CICA, § 2751, 98 Stat. 1203. This solicitation was issued on September 4, 1984, more than 6 months prior to that effective date. Lockheed suggests no authority by which we might give the Act retroactive effect.

Although Lockheed's last basis of protest is couched in terms of arbitrary and capricious issuance of the solicitation and evaluation of Lockheed's proposal, Lockheed discusses only the Air Force's evaluation of its proposal and the Air Force's failure to conduct discussions with Lockheed. We believe the latter two objections--and not the Air Force's issuance of the RFTP--are the real focus of Lockheed's complaint and, therefore, will discuss only these questions.

Lockheed's objections in this area are premised on the related contentions that the Air Force's evaluation of its proposal was flawed and identified only easily remediable deficiencies and that the Air Force was therefore obligated to take reasonable steps--through discussions--to qualify Lockheed's proposal for participation in the second round of the competition. In support of these assertions, Lockheed cites Angstrom, Inc., 59 Comp. Gen. 588 (1980), 80-2 CPD ¶ 20 and Wiltron Co., B-213135, Sept. 14, 1984, 84-2 CPD ¶ 293, and other cases, expressing our general view that, consistent with the goal of maximizing competition, initial technical proposals submitted in step one of a two-step formally advertised procurement need comply only with the basic or essential requirements, but

not all of the details of the specifications, and that step one contemplates the qualification of as many of these proposals as possible through negotiation procedures involving the conduct of discussions and modification of proposals. Lockheed argues that its proposal fell within the range contemplated by these decisions, and that the Air Force should therefore have held discussions with Lockheed and afforded it an opportunity to submit a revised proposal.

The Air Force states that the same evaluation criteria and approach were applied to all proposals and that only those which would require a redesign of the system were declared unacceptable. Those proposals in which the basic design was adequate and which met the minimum specifications, but which required some clarification to determine acceptability, were classified as susceptible to being made acceptable. The Air Force indicates that, in the latter cases, clarification was obtained and the proposals were then classified as either acceptable or unacceptable. The Air Force notes that although Lockheed's proposal was initially unacceptable, the Air Force nonetheless considered Lockheed's response, delivered in the February 7 meeting to which we referred above, to the deficiencies in its proposal and still found Lockheed's proposal to be unacceptable because it failed to meet mandatory requirements and would have required a major redesign to be acceptable.

The Air Force analogizes the situation here to that in Burroughs Corp., B-211511, Dec. 27, 1983, 84-1 CPD ¶ 24, in which we found the agency's rejection of a proposal in the first step of a two-step procurement to be reasonable because the proposal offered software which failed to satisfy requirements stated in the solicitation. The Air Force contends that under this standard, its rejection of Lockheed's proposal was proper.

As an initial matter, we note that although Lockheed contends that the Air Force failed to hold discussions with it, the Air Force in fact did accept and consider Lockheed's rebuttal to the Air Force's list of deficiencies. In these circumstances, we think Lockheed was afforded an opportunity to address the deficiencies in its proposal, and we find this contention to be without merit.

With respect to the balance of Lockheed's protest, we point out that although Lockheed correctly states the general rules applicable to step one of two-step procurements, unacceptable proposals may, nonetheless, be rejected in step one. See, e.g., Burroughs Corp., supra. Our review of an

agency's technical evaluation under an RFTP is limited to the question of whether the evaluation is reasonable. Rapistan, A Division of Lear Siegler, Inc., B-215837, Nov. 23, 1984, 84-2 CPD ¶ 549. In making this assessment, we will ordinarily accept the considered judgment of the procuring activity unless it is shown to be erroneous, arbitrary or made in bad faith. Guardian Electric Mfg. Co., 58 Comp. Gen. 119 (1978), 78-2 CPD 376; Herblane Industries, Inc., B-215910, Feb. 8, 1985, 85-1 CPD ¶ 165. Moreover, we have consistently held that it is not the function of our Office to resolve technical disputes. Rapistan, A Division of Lear Siegler, Inc., supra. Under these criteria, we find the Air Force's evaluation of Lockheed's proposal to be reasonable.

Since, as we noted above, Lockheed was permitted to address the deficiencies in its proposal, we will focus on the Air Force's final assessment which included an evaluation of Lockheed's response and will limit our discussion to only those deficiencies which appear to require redesign to rectify. Because Lockheed considers this information proprietary, however, our comments will be general.

Three deficiencies stand out in the Air Force's evaluation of Lockheed's proposal: (1) Lockheed's axle placement; (2) Lockheed's location of the trailer kingpin (the pin is used to connect the trailer to the tractor at the so called "fifth-wheel" on the back of the tractor); and (3) the use of steerable axles on the trailer. We will discuss these in turn.

Lockheed contemplated the use of several axles on the trailer, with one of the axles just forward of the trailer's center of gravity when loaded. In ramping situations which the MTHS was required to be able to handle, this axle placement results in the rearmost tires lifting off the ground, putting what the Air Force calculated to be a load of more than 65,000 pounds on a single axle. The Air Force considered this an unsafe infringement into the suspension, axle and tire/wheel safety margins; Lockheed's proposal provided no engineering data to support this degree of axle loading.

Lockheed's design contemplated that the trailer kingpin would be substantially forward of its location on the current MTHS this procurement is intended to replace. As a consequence, Lockheed's trailer kingpin would not match up with the fixed "fifth wheel" mounted on the railcars used to transport the trailers, contrary to a requirement in the RFTP that the MTHS be compatible with current interfaces. The Air

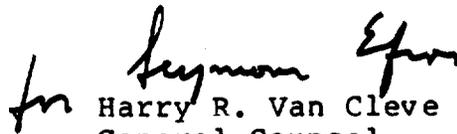
Force found Lockheed's explanation that it intended to use the current railcar locations as second kingpins to support trailer equipment to be inconsistent with Lockheed's drawings, which showed the equipment to be at a different location from the current kingpin.

The Air Force also found that the forward displacement of the kingpin, in combination with the axle placement, resulted in an inadequate distribution of the weight of the trailer. In this respect, the Air Force was of the view that Lockheed's design placed most of the weight on the trailer axles, with the result that insufficient weight was placed on the tractor to assure good traction under adverse conditions. As a consequence, the Air Force concluded that Lockheed's design could not be able to meet the RFTP's ramp climbing requirements under adverse conditions, such as wet pavement or snow. Graphs submitted by Lockheed show that the required coefficient of friction for its design exceeds that available on the required 12 percent grade for a portion of the ramp length in adverse (wet) conditions.

Although Lockheed offered a trailer with steerable rear wheels, the precise technology to be used to implement this feature was "under development." The Air Force considered this an inadequate response for a missile transportation system.

In our view, the Air Force was reasonable in its assessment of these deficiencies. Moreover, we share the Air Force's view that these deficiencies would have required significant redesign to correct, a position we think is supported by the complexity of the system involved, and the interplay of these deficiencies to produce yet others, as in the problem with weight distribution. In these circumstances, we conclude that the Air Force was reasonable in finding Lockheed's proposal to be unacceptable.

The protest is denied in part and dismissed in part.


for Harry R. Van Cleve
General Counsel