



The Comptroller General
of the United States

Washington, D.C. 20548

Ashen

135779

Decision

Matter of: Litton Systems, Inc.; Varian Associates, Inc.
File: B-229921; B-229921.2; B-229921.3; B-229921.4;
B-229921.5
Date: May 10, 1988

DIGEST

1. Contracting agency has no duty to provide offerors technical data available to the incumbent that was not reasonably available to the agency during the competition.
2. Where solicitation specifically provided for multiple awards only if best value offeror could not meet the required delivery schedule, contracting agency was not required to make less than a complete award to offeror whose proposal was most advantageous under the stated evaluation criteria in order to enhance future competition or strengthen the industrial mobilization base.
3. Allegation that prior award was made orally to the protester is not supported by the record and, in any event, is irrelevant to the protest issue of whether there was a reasonable basis for a written award to competing offeror.
4. Contracting agency did not act unreasonably in selecting for award the proposal of the contractor most experienced in supplying night vision devices where: (1) the awardee had undertaken corrective measures to overcome prior production shortfalls; (2) one competitor, although offering slightly lower prices, proposed significantly reduced quality assurance inspection sampling; and (3) other competitor's proposal offered an evaluated cost more than 10 percent higher than that of the awardee, without also offering any significant offsetting technical advantages.
5. Discussion of protester's technical proposal during preaward survey did not require the reopening of negotiations and a request for an additional round of best and final offers where protester's technical proposal already had been found to be acceptable and the evaluation of proposals had been completed, and information obtained during the survey was used for responsibility determination.

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DECISION

Litton Systems, Inc., and Varian Associates, Inc., protest the award of a contract to ITT Corporation under request for proposals RFP No. DAAB07-87-R-F039, issued by the U.S. Army Communications-Electronics Command (CECOM) of the Army Materiel Command (AMC) for night vision devices for aviation use. The protesters maintain that the selection of ITT was inconsistent with both the solicitation evaluation criteria and the agency's stated aim of maintaining long-term competition. We deny the protests.

The RFP solicited proposals from known domestic manufacturers of image intensifier tubes--devices for amplifying light so as to enhance vision at night and under low light conditions--for a fixed-price contract for a variety of night vision devices, including the AN/AVS-6 Aviators Night Vision Imaging System, a binocular assembly mounted on a helicopter pilot's helmet. The solicitation generally provided that the government intended to make from one to three awards to offerors whose proposals represented the best value, with the quantity awarded to each offeror being determined by best value. The RFP specifically indicated that the requirement for the AN/AVS-6 might be divided between two contracts "if two competitive 'best value' offers are received and the evaluation team is not completely satisfied that one offeror can meet the delivery schedule."

The solicitation provided for the determination of best value to be based upon five evaluation criteria, listed in descending order of importance as: (1) system performance and operational suitability, (2) cost/price, (3) product assurance and testing, (4) integrated logistics support, and (5) production capability and program management. Of particular importance for this protest, the solicitation also provided elsewhere that offerors' past performance would be considered as an evaluation factor for award in addition to any evaluation of past performance as an element in determining a prospective contractor's responsibility. Section M of the solicitation, entitled "Evaluation Factors for Award," listed "research and development and production history" as the fifth subcriterion under the evaluation factor for production capability and program management; elsewhere in the solicitation, offerors were instructed to provide a corporate history of experience in the research, development and production of night vision devices.

CECOM conducted oral and written discussions with all four offerors--ITT, Varian, Litton, and Varo Corporation. Based upon its evaluation of the final technical proposals

submitted by each offeror, the agency concluded that all proposals were acceptable. As provided for in the solicitation, the agency's subsequent request for best and final offers (BAFOs) was limited to soliciting price proposals only.

In its final ranking of offerors, the Source Selection Evaluation Board (SSEB) concluded that ITT's proposal offered the best value to the government. Proposals were evaluated for each evaluation category by assigning a numerical ranking from 1 (high) to 4 (low). ITT received high rankings under three evaluation factors, those for system performance and operational suitability, product assurance and testing, and integrated logistics support. Varian's proposal was found to offer the second best value to the government, receiving high rankings under the evaluation factors for system performance and operational suitability, and for production capability and program management. Litton's proposal, on other hand, received a high ranking under the evaluation factor for cost/price. The offerors proposed prices that varied with the percentage of the AN/AVS-6 requirement they might be awarded; Litton's proposal for a 100-percent award offered an evaluated cost 2.7 percent lower than ITT's evaluated cost and 12.5 percent less than Varian's evaluated cost. Nevertheless, since Litton's proposal did not receive a high ranking under any of the other evaluation factors and, moreover, was found to contain a major weakness--an inadequate level of quality assurance inspection sampling--Litton's proposal was considered to offer the least value to the government.

The SSEB determined that the technical superiority of the ITT and Varian proposals offset their higher prices. Noting that technical difficulties had previously been encountered in production of the AN/AVS-6, the SSEB recommended that neither offeror be awarded more than 60 percent of the requirement so as to minimize the risk to the government from delinquencies in the performance of any one contractor. We note in this regard that both ITT and Varian had experienced production problems under contracts for the AN/AVS-6 awarded in 1982; although Varian's performance became acceptable after its contract had been extended for a third time because of problems arising during performance, ITT's performance was considered poor and its deliveries were sporadic. Moreover, the delivery schedule under a multi-year contract for the AN/AVS-6 awarded in 1985 to ITT, in a joint venture with Varo, had been extended twice and a third extension currently was being negotiated. Accordingly, the SSEB recommended that, instead of a complete

award to ITT, an award for 60 percent of the requirement be made to ITT on the basis of its lower price and that the remainder be awarded to Varian.

The contracting officer, the program manager for night vision devices, and several members of the SSEB, however, expressed grave concern at making an award to ITT. In response to this concern, formal preaward surveys (PASs) were conducted on all offerors, and an independent evaluation team, the Red Team, was formed to provide an additional assessment of each offeror's production capability for use in the determination of responsibility. Based on an on-site survey of ITT facilities, the PAS team found that the quality of the AN/AVS-6 systems delivered by ITT was acceptable and that the firm had undertaken corrective action to eliminate production shortfalls, including an expansion of capacity and an increase in yield (the percentage of image intensifier tubes, a major component, passing all tests). The PAS team concluded that ITT had the technical capability and the facilities needed to produce up to 100 percent of the solicitation requirement for the AN/AVS-6. The PAS team recognized that ITT, as a joint venturer, was responsible for any shortfall on Varo's part under the earlier contract, but, with this reservation noted, recommended a complete award to ITT.

At the same time, the Red Team likewise found that ITT's quality assurance program exceeded requirements and that the firm had increased the overall yield of its manufacturing process such that the team expected that a high percentage of manufactured image intensifier tubes would pass all tests. The Red Team noted that ITT was in the forefront of production experience in the manufacture of the current generation of image intensifier tubes, having produced approximately 66 percent of the tubes procured by the government. The Red Team determined that ITT had established the capability to produce 100 percent of the AN/AVS-6 requirement subject to one condition: if Varo, which had not yet qualified an AN/AVS-6 system, met no more than 50 percent of its joint venture commitment and ITT did not receive at least 9 months advance notice of the need to further increase its own production capability, then ITT could not supply all of the AN/AVS-6 systems required to be delivered in 1989 under the new contract. Since all of the offerors still had commitments under prior contracts for night vision devices, and since it appeared that even the best of manufacturers would continue periodically to encounter severe problems in the production of image intensifier tubes, the Red Team concluded that prudence dictated that the government make more than one award for AN/AVS-6 systems.

Pursuant to provisions of the AMC Federal Acquisition Regulation (FAR) Supplement then in effect, the procurement was submitted to AMC for business clearance review. The CECOM program manager for night vision devices, notwithstanding the PAS and Red Team reports, contended in his presentation to AMC that ITT could supply only 60 percent of the AN/AVS-6 requirement. Based upon more recent data on actual ITT production, however, and after the correction of several mistakes in the program manager's calculations (including the double-counting of the number of tubes likely to be eliminated because of a particular manufacturing defect), AMC concluded that ITT could meet its obligations under the 1985 contract and also supply 100 percent of the AN/AVS-6 requirement in the current solicitation, even if Varo's performance under the prior contract was as poor as CECOM's most pessimistic projections. The contracting officer, as the source selection authority, subsequently made a 100-percent award for the AN/AVS-6 to ITT on the basis of his final determination that ITT could supply 100 percent of the requirement and the fact that a complete award to ITT (at \$54,671,136) would save \$5,949,776 over a 60/40 ITT/Varian split award (at \$60,620,912). Litton and Varian thereupon filed these protests with our Office.

ADEQUACY OF SPECIFICATIONS

Varian alleges that the agency improperly failed to disclose certain relevant information to all offerors. In this regard, the solicitation required that the new AN/AVS-6 parts be interchangeable with parts of previously-procured AN/AVS-6 systems; by amendment the agency modified the RFP specifications concerning one area where interchangeability would be needed--the required minimum level of protection against electromagnetic interference (EMI)--to provide that "drawings and procedures" of a qualified EMI system would be provided to the contractor only after award. The record indicates that the agency so amended the RFP because it had not received and approved the drawings that were being developed under ITT's prior contract. Five weeks after the closing date for receipt of BAFOs, ITT did submit preliminary drawings and procedures for EMI enhancements. Varian alleges that the agency should not have proceeded with the procurement until it was in a position to furnish the information to all competitors; according to the protester, without the information offerors other than ITT were left to price their proposals very conservatively to account for the unknown expense of assuring interchangeability in the EMI area.

We find no merit to Varian's contention here. The drawings and procedures were not delivered to the government until well after the closing date for receipt of BAFOs and the

verification and final approval of the drawings and procedures still were not completed five months later. We do not believe that the agency was required to delay the procurement until the information was available. CECOM had determined that any delays in this procurement would significantly delay the delivery of critically needed additional night vision devices and would result in either the suspension of important night helicopter missions, or, if the missions continued without the devices, in an increase in accidents and fatalities. Moreover, there is no evidence of record that the agency's approach had any significant impact on price. In this regard, we note that while Varian's price was higher than ITT's, Litton's was lower.

ONE AWARD

Long-Term Competition

Litton and Varian allege that making award to ITT for the entire AN/AVS-6 requirement was inconsistent with both prior AMC statements indicating that multiple awards were contemplated, and with the statement in the solicitation that the government intended to "preserve effective long-term competition." The protesters argue that a single award to ITT would eliminate long-term competition by conferring upon ITT an overwhelming share of the market for advanced night vision devices; they maintain that the resulting volume of work will permit ITT to advance further along the learning curve than any of its competitors, thereby reducing its costs such that it will have an insurmountable advantage when a new competition for night vision devices is conducted in 1991. The protesters suggest this is contrary to the Competition in Contracting Act of 1984 (CICA), and will erode the industrial mobilization base of the United States.

This argument is without merit. The solicitation was not issued as a mobilization base procurement (see 10 U.S.C. § 2304(c)(3) (Supp. III 1985)), nor was the enhancement or the preservation of the industrial mobilization base listed as an evaluation factor or otherwise set forth in the solicitation as a basis for making more than one award. On the contrary, the solicitation specifically provided for the division of the AN/AVS-6 requirement between two contractors only in the event that two competitive best value offers were received and the government was not completely satisfied that one offeror could meet the required delivery schedule. CICA nowhere requires a contracting agency to make less than a complete award to the offeror whose

proposal is most advantageous to the government under the stated evaluation criteria. See Action Mfg. Co., B-221607.2, July 7, 1986, 86-2 CPD ¶ 35.

Oral Award

Varian further questions the complete award to ITT on the basis that the contracting officer already had made an oral award of 40 percent of the requirement to Varian during a telephone conversation, almost 6 weeks prior to the December 23 award to ITT. The contracting officer denies that she made an oral award to Varian. According to the agency, the contracting officer only advised Varian that its proposal was still being evaluated and that submission of Varian's plan for subcontracting with small and disadvantaged businesses was required. As evidence that no award had been made, the agency points to a letter dated November 20, advising Varian that the "government is currently evaluating all proposals."

In any event, this aspect of the protest is irrelevant to the issue before us, which is the propriety of the award made in writing (as required by the solicitation) to ITT; even if an oral award had previously been made to Varian, this would not preclude us from finding that a subsequent award to ITT was proper. If Varian believes that an oral award was made to it and that the agency's subsequent action was inconsistent with that award, it should raise the matter in a contract disputes forum, not our Office. See 4 C.F.R. § 21.3(m)(1) (1988).

ITT's Past Performance and Future Production Capability

Litton and Varian contend that, in view of the delays under ITT's prior contracts for night vision devices, the award to ITT could only have resulted from a failure to evaluate past performance as required by the solicitation. Based upon ITT's prior performance history and its continuing responsibility for Varo's performance under the 1985 joint venture contract, the protesters at least question the conclusion that ITT can meet the delivery schedule for a 100-percent award, alleging that this determination was made only at the direction of AMC and that AMC's "interference" was improper under Army policy directives establishing a class of program executive officers to oversee areas of Army acquisition.

We find no merit to the protesters' position. The record establishes that the SSEB, the Red Team, and the PAS team all took past performance into account. First, as indicated above, the evaluation criteria in the solicitation included research and development and production history as a

subcriterion under the overall evaluation factor for production capability and program management. AMC has provided our Office with affidavits from members of the SSEB attesting to the fact that extensive discussions were held within the evaluation team as to the past performance of the offerors. Our review of the evaluation documents confirms that evaluators in fact considered ITT's history of producing advanced image intensifier tubes, including its prior manufacturing yield rates, as relevant to an evaluation of ITT's production capability.

Second, the PAS team specifically concluded that the prior production shortfalls were primarily caused by technical problems early in the program and a required massive expansion of facilities, and that both the government and the contractor contributed to the problem. Further, both the Red Team and AMC agree that even the best of manufacturers periodically encounter severe problems in producing night vision devices.^{1/}

In addition, the PAS team noted the measures ITT had undertaken to increase its production capability and maximize its manufacturing yield. Accordingly, the reports by the SSEB, PAS team, and Red Team all supported at least a 60-percent award to ITT and the latter two reports indicated that ITT could satisfactorily perform a 100-percent contract under certain circumstances. Further, AMC's conclusion that ITT was capable of performing a 100-percent contract was based on the assumption that ITT would achieve a manufacturing yield of 47.09 percent by the beginning of 1988, increasing to 60.02 percent by contract midpoint and 66.32 percent by June 1991, for an overall average yield of 60.02 percent; in fact, however, data supplied by the agency indicates that ITT's manufacturing yield had already increased to more than 54 percent by the end of 1987.

As for AMC's alleged "interference," AMC maintains that its input into the contracting officer's decision was advisory only and that the contracting officer, as the source selection authority, arrived at an independent determination to make a 100-percent award to ITT. There is nothing

^{1/} For instance, the contract awarded to Varian in 1982 was extended three times because of problems arising during performance, and the PAS team found that during the prior 12 months Litton had been issued 63 quality deficiency reports under its contracts with the government, including numerous deficiency reports for defective products which had been previously inspected and accepted by Litton.

improper in a contracting officer's seeking and accepting advice or recommendations from official sources before making a final award decision. Analytic Systems, Inc., B-179259, Feb. 14, 1974, 74-1 CPD ¶ 71; see FAR § 15.612(d) (FAC 84-5, Apr. 1, 1985) (contracting officer shall consider any requested recommendations from evaluation or advisory groups). Moreover, this procurement was referred to AMC pursuant to provisions of the AMC FAR Supplement, § 1.691, then in effect; as we have previously indicated, we generally see nothing improper in an agency requirement that a proposed award selection be reviewed by higher agency officials, since agency officials' authority to direct and supervise all agency functions necessarily encompasses the procurement operations (including the evaluation of proposals and the award of contracts) of lower echelon agency components. See AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419. In the absence of a specific statutory prohibition to the contrary, we see no basis upon which to question the input here by AMC officials.

EVALUATION OF LITTON'S PROPOSAL

Litton principally argues that all proposals were essentially equal from a technical standpoint and that, accordingly, award on the basis of best value could only mean award to the low-priced offeror. This argument is contradicted by the record; as set forth in the final SSEB report, agency evaluators concluded that Litton's somewhat lower prices were more than offset by Litton's proposal of a significantly reduced level of quality assurance inspection sampling of optical parts (the objective lens) supplied by a subcontractor to Litton.

More specifically, AMC reports that the solicitation performance specifications setting forth measurements for various lens characteristics (e.g., Concentricity and Stray Light) all establish key parameters affecting the performance of the AN/AVS-6 under low ambient light conditions. The solicitation did not establish a minimum percentage of lenses to be tested for conformance to the acceptable parameters for these and other characteristics, but Litton concedes that during oral discussions agency evaluators initially suggested that Litton adhere to stringent sampling requirements set forth in a purchase description of the AN/AVS-6 objective lens. The agency apparently did not continue to insist on these sampling levels, and later during discussions recommended substantially lower levels of sampling. However, the levels of sampling proposed by Litton in its final technical proposal were less than even these lower recommended levels.

The lower recommended levels called for 10 percent of the lenses to be tested for conformance to the T-Number (lens coating measurement) and Concentricity (lens shape) parameters, but Litton only proposed to test 4 percent of the lenses (ITT proposed to test 13 percent of the lenses for these characteristics). The lower recommended levels did not include any minimum percentage of lenses to be tested for measurements of resolution power or for Stray Light, two other characteristics, but we note that ITT proposed to sample 100 percent of the lenses for the former and 13 percent for the latter characteristic, while Litton proposed for both a sample of only 4 percent. Moreover, Litton proposed a further reduction in sampling for all four characteristics (to 2 percent) if no failures were detected for 6 consecutive months. The SSEB found that the reduction in sampling substantially increased the risk of the government receiving AN/AVS-6 systems that would not meet the performance specifications, and that Litton's proposal thus was less desirable than ITT's from a technical standpoint.

Litton challenges the agency's evaluation of the significance of the disparity between the proposed levels of sampling, arguing that significantly increasing the sampling level will not result in a commensurate increase in the detection of defects. Moreover, Litton claims, inspection at other stages (that is, by the subcontractor supplying the lenses and by Litton testing the completed AN/AVS-6 systems) will detect any defects that might otherwise escape notice and, in any case, any deviation from the specifications not detected would not be so gross as to affect actual performance.

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Accordingly, our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. The protester bears the burden of showing that the evaluation is unreasonable, and mere disagreement with the agency does not render the evaluation unreasonable. A clear showing of unreasonableness is particularly necessary where the procurement concerns sophisticated technical hardware. See GTE Government Systems Corp., B-222587, Sept. 9, 1986, 86-2 CPD ¶ 276.

Litton has not demonstrated that the agency's evaluation was unreasonable. It was the agency's conclusion, simply, that Litton's proposed level of sampling the objective lenses

would not provide the greatest assurance of detecting defects. AMC has provided our Office with calculations indicating that the level of sampling proposed by ITT substantially reduces the probability that a defective unit will be accepted, and even Litton's own calculations appear to indicate that the probability of accepting a lot with defective units under Litton's proposed levels of sampling could range from 30 percent to 612.2 percent more than the probability under ITT's proposed testing (depending upon the number of defects in the lot and the particular characteristic tested). Although Litton claims that sampling at other stages in the manufacturing process will detect defects, the agency maintains that nonconformance to some specifications will not be discovered during inspections of the assembled system. Moreover, we note that Litton has not cited any data in its proposal establishing the validity of its claims regarding reduced testing.

Finally, we consider significant the fact that the AN/AVS-6 system will be used by helicopter pilots flying at night at altitudes of less than 200 feet and at speeds of up to 150 knots; the inherent risks of such flights have been demonstrated by a series of fatal helicopter crashes involving the use of night vision devices. Although the precise cause of these crashes is unclear, in these circumstances, we do not believe that AMC was precluded from seeking the maximum possible assurance of product compliance with the specifications. See Alan Scott Industries, B-229663, Feb. 26, 1988, 88-1 CPD ¶ 201 (contracting agency's responsibility for determining its actual needs extends to determining type and amount of testing necessary to ensure product compliance with specifications).

Litton objects to the fact that the perceived deficiency concerning its proposed level of inspection sampling was discussed in the SSEB report under the evaluation factor for system performance and operational suitability, the most important factor, rather than under the factor for product assurance and testing, the third most important factor, and the one under which the deficiency properly falls. This discrepancy in the evaluation was immaterial. Regardless of the criterion under which Litton's approach to quality assurance is properly evaluated, it was viewed as a more significant weakness than was ITT's prior performance. This is consistent with the evaluation criteria since inspection sampling/quality control was proper for consideration under the third most important evaluation factor while prior performance was covered by the least important evaluation factor. See Aydin Vector Division of Aydin Corp., B-229569, Mar. 11, 1988, 88-1 CPD ¶ 253.

EVALUATION OF VARIAN'S PROPOSAL

Varian challenges the evaluation on the ground that the agency improperly failed to accord the appropriate weight to certain advantageous aspects of its offer, including (1) an accelerated delivery schedule, (2) the use of domestic optics as early as the first production unit, (3) a unibody design for the optical housing (rather than a bonded assembly), and (4) a 25-millimeter eyepiece (rather than the standard 15-millimeter eyepiece). Further, Varian disputes the Red Team's conclusion that it was capable of producing no more than approximately 50 percent of the AN/AVS-6 requirement.

Our review of the evaluation records indicates that the SSEB did in fact take into consideration the advantages of the accelerated delivery schedule and earlier use of domestic optics when it gave Varian a high rating under the evaluation factor for production capability and program management. The agency also considered Varian's proposed unibody design and 25-millimeter eyepiece, but concluded that the unibody design was required to correct prior defects and would not perform significantly better than a bonded design, and that the advantages of the 25-millimeter eyepiece would be substantially offset by difficulties in accommodating the change within the AN/AVS-6 system. We find no basis for disturbing these conclusions. Further, the challenge to the Red Team's evaluation of Varian's production capability is irrelevant since the award to ITT ultimately was based, not on Varian's deficiencies, but upon ITT's substantially lower price (*i.e.*, lower than Varian's), high technical rating, and ITT's capability to supply 100 percent of the AN/AVS-6 requirement. We think selection of ITT's lower-cost proposal on this basis was reasonable.

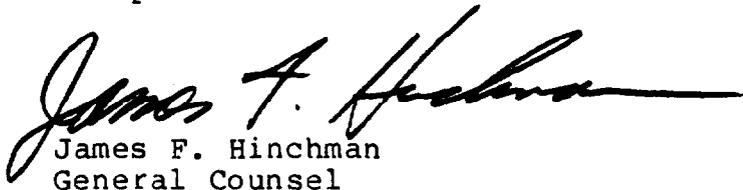
POST-BAFO DISCUSSIONS

Varian alleges that when the PAS team and Red Team visited the Varian facilities, they requested information concerning Varian's technical approach, cost, quality control and management. Varian maintains that this information had a significant bearing on the evaluation of proposals, that the communications therefore constituted discussions, and that, accordingly, the agency was required to request an additional round of BAFOs. AMC reports, however, that Varian itself raised the question of its technical approach, and that any information obtained was used only in considering responsibility and had no impact on the evaluation of proposals, which already had been completed by the SSEB on September 22. Under these circumstances, Varian's allegation provides no basis upon which to question the award. See IBIS Corp., B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136.

REQUESTS FOR FACT FINDING CONFERENCE

In their protests, Varian and Litton requested that we conduct fact finding conferences on several issues, as provided for in recent revisions to our Bid Protest Regulations, 4 C.F.R. § 21.5(b), pursuant to which a fact finding conference may, at the discretion of our Office, be held to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the written record. We denied the requests because the issues raised did not meet this test. For example, Litton requested a conference on the question of whether the award was contrary to the facts. We consider this to be the legal issue underlying the entire protest, and not a specific factual issue. Varian's conference requests included the question of whether an oral award had been made to it. As discussed above, since a finding of an oral award to Varian would not preclude us from finding that a subsequent award to ITT was proper, the resolution of this issue was not essential to the resolution of the protest, and thus was not suitable for a fact finding conference.

The protests are denied.



James F. Hinchman
General Counsel