**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Raytheon Company--Reconsideration

**File:** B-240333.2

**Date:** March 28, 1991

James J. McCullough, Esq., and Richard D. Lieberman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
James J. Regan, Esq., Robert M. Halperin, Esq., and Stephanie B. N. Renzi, Esq., Crowell & Moring, for CAE-Link Tactical Simulation Division, an interested party.
Margaret A. Olsen, Esq., Department of the Navy, for the agency.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Request for reconsideration of decision holding that agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make an award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government is denied where protester fails to show that prior decision contained either errors of fact or law warranting reversal or modification.

**DECISION**

Raytheon Company, Submarine Signal Division, requests reconsideration of our decision, Raytheon Co., B-240333, Nov. 9, 1990, 70 Comp. Gen. ___, 90-2 CPD ¶ 384, denying its protest against the award of a contract to CAE-Link Tactical Simulation Division under request for proposals (RFP) No. N00019-89-R-0123, issued by the Department of the Navy for the design, fabrication, test and installation of an Update IV operator and maintenance trainer for the P-3C aircraft. The protester had contended that the agency improperly made award on the basis of initial proposals.

We deny the request for reconsideration.

On July 10, 1987, the agency awarded to Boeing Corporation a prime contract for the Update IV avionics system; as part of its prime contract, Boeing was to award a subcontract for a trainer. Boeing twice requested proposals for the trainer,

but in both instances the offers received exceeded the agency's available funding, and the agency decided to procure the trainer by a separate prime contract.

The agency prepared a justification and approval (J&A) dated October 17, 1989, for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988). The J&A authorized the acquisition of P-3C Update IV operator and maintenance trainers, with associated products and services, citing the authority of 10 U.S.C. § 2304(c)(2), which allows the head of a military agency to use other than competitive procedures when the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

The J&A stated that the agency estimated that the development period for the trainers would encompass 48 months and that the trainers had to be available by August 1992, to allow training of the crews in time for deployment in January 1993. The J&A evidenced the agency's intention to limit competition to the two potential offerors that Boeing had identified as technically acceptable, based on its subcontracting attempts. The J&A advised the approval authority that, in the opinion of the contracting officer, the limited competition between the two producers identified by Boeing would ensure a fair and reasonable cost, but that the agency would evaluate all costs prior to award.

On March 1, 1990, the agency issued the RFP for a fixed-price incentive contract, including numerous option items exercisable in subsequent years, with competition limited to the protester and to CAE-Link, the two firms that Boeing had recommended. The RFP contained the standard clause, Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 84-40), providing for award to the responsible offeror whose offer was most advantageous to the government, cost or price and other factors considered, and reserving for the government the right to make award on the basis of initial offers, without discussions. The solicitation set forth the evaluation and award factors as follows: technical and price, equal in value but more important than the combined value of the other two factors, which were management/schedule and integrated logistics support.

The agency received initial proposals on March 16, 1990. As a result of our decision, Ferranti Int'l Defense Sys., Inc., B-237760, Mar. 22, 1990, 90-1 CPD ¶ 317, the agency allowed a third offeror an additional period, until April 10, to submit a proposal. On May 4, the agency's procurement review board

recommended award to CAE-Link, the low, technically acceptable offeror, as most advantageous to the government, even though the protester's proposal offered a slight technical superiority. On May 31, the agency awarded a contract to CAE-Link. The agency provided a debriefing for the protester on June 26, at which agency personnel stated that although Raytheon's proposal was otherwise technically acceptable, the agency could not have accepted it without discussions, even if the proposal had been low, since, as Raytheon was aware, it had not offered a firm price for option items.1/ Raytheon's protest followed.

In its protest, Raytheon argued that the agency was precluded from awarding a contract on the basis of initial proposals unless full and open competition or prior cost experience demonstrated that acceptance of the initial proposal would result in the lowest overall cost to the government. The protester's argument relied upon the former language of CICA, 10 U.S.C. § 2305(b)(4)(A), which limited the authority of agencies utilizing competitive negotiation to make award without discussions, as follows:

> "(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract--
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> (i) After discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or
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> (ii) Without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal

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1/ Raytheon had reserved for itself in its initial proposal the right to adjust its prices if the agency exercised the options for anything less than the full stated quantities; after submission of initial offers, the protester submitted a letter dated May 15, withdrawing its reservation. Despite the protester's contingent pricing, the awardee submitted a substantially lower price. The third offeror, Ferranti, was found to be technically unacceptable.

without discussions would result in the lowest overall cost to the United States."2/

The protester contended that absent "accurate prior cost experience," the agency had no basis to conclude that acceptance of the awardee's initial proposal would result in the lowest overall cost to the United States, because, the protester argued, the receipt of only one acceptable offer did not constitute "full and open competition."

In our previous decision, we stated that the CICA provision, quoted above, upon which the protester relied applied by its terms only to the evaluation of "competitive proposals" under competitive procedures. Such procedures are those by which the head of an agency enters into a contract pursuant to full and open competition, which in turn means that all responsible sources are permitted to submit competitive proposals. 10 U.S.C. § 2302(2); 41 U.S.C. §§ 403(6) and (7). The instant solicitation, by contrast, involved a situation where the agency had specifically justified a decision to employ noncompetitive procedures based on urgency. Our decision stated that where an agency employs the urgency exception to CICA requirements for full and open competition, it may not only limit the number of sources from which it solicits proposals but may in fact restrict competition to a sole-source, if that source is the only one that can properly perform in a timely manner. See Forster Enters., Inc., B-237910, Apr. 5, 1990, 90-1 CPD ¶ 363. It followed that if the agency could dispense with competition altogether, it

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2/ As amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 802(d)(3)(A), 104 Stat. 1485, 1589 (1990), the section now reads:

"(4)(A) The head of an agency shall evaluate competitive proposals . . . and may award a contract--

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary."

could certainly dispense with discussions under the same exception, by awarding to the most advantageous offeror on the basis of initial proposals whether or not award to that offeror represented the lowest overall cost to the government.

The protester believes that our previous decision was erroneous as a matter of law and argues, contrary to its position in the earlier case, that the agency conducted a substantially competitive procurement since an agency limiting competition based on urgency must pursue the maximum practicable competition. The protester argues that for such competition to be meaningful, an agency must abide by CICA rules pertaining to competitive negotiation even when using noncompetitive procedures.

Our decision was based on the plain language of CICA and the FAR, which distinguish between competitive and noncompetitive procedures, referred to in the statute as "other than competitive procedures." See FAR § 15.101; 10 U.S.C. § 2304.3/ As stated above, the head of an agency may use other than competitive procedures, where, as here, the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. See 10 U.S.C. § 2304(c)(2). Underlying this policy is the simple fact that the government often needs to procure items quickly and urgently to meet its compelling military needs in the interest of the national defense. To require an agency to follow the same procedures in an urgent circumstance as during a non-urgent procurement would, in our view, undermine the purpose of the urgency exception. We remain convinced that an agency that can limit competition in urgent circumstances to a single source should also have freedom to dispense with

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3/ FAR § 15.610, upon which the protester relied and which prescribes specific circumstances in which an agency may award a contract without discussions, is similarly restricted in its application to situations where agencies employ "competitive" negotiations. See FAR § 15.600.

discussions, regardless of whether the successful initial proposal represents the "lowest overall cost to the United States."

The request for reconsideration is denied.

for James F. Hinchman
General Counsel