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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Cybernated Automation Corporation

**File:** B-242511.3

**Date:** September 26, 1991

Joel R. Feidelman, Esq., and Daniel I. Gordon, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. Laura K. Meeker, Esq., Department of the Army, for the agency. John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Under request for proposals which required offerors to provide detailed technical proposals describing their approach to meeting the agency's requirements and which stated that those proposals would be evaluated under various specified technical evaluation criteria, offerors were on notice that qualitative distinctions would be made among the proposals in the evaluation of offers.

2. Disparity in technical scoring among individual evaluators does not by itself cast doubt on the validity of evaluation panel's final conclusions with respect to technical merits of a proposal since it is not unusual for individual evaluators to reach disparate conclusions when judging proposals, as both objective and subjective judgments are involved.

### DECISION

Cybernated Automation Corporation protests the award of a contract to Munck Automation Technology under request for proposals (RFP) No. DACA56-90-R-0014, issued by the Army Corps of Engineers for an automatic storage and retrieval system which will be used for radioactive components.

We deny the protest in part and dismiss it in part.

### BACKGROUND

The RFP sought proposals to design, build, install, and debug a turn-key automatic storage and retrieval system. The solicitation included detailed technical specifications and other requirements for the system and required offerors to

describe by drawings, text or other means the equipment proposed. The solicitation designated some features of the system as "mandatory," and stated that these requirements "must be met." Other features were designated "desirable" or "high want" features and, according to the solicitation, an offeror's final ranking was to reflect the degree to which an offer fulfilled these requirements.

Under the RFP, award was to be made to the offeror whose proposal was technically acceptable and most advantageous to the government, price and other factors considered. The solicitation stated that technical considerations would be more important than price and included the following technical evaluation factors:

1. Compliance with all mandatory items identified in the solicitation.
2. Acceptance testing performed on a fully operational system.
3. Manual backup for conveyor system.
4. Automatic lubrication system.
5. Descriptive materials and references from similar projects.
6. Vendors acceptance test forms.
7. System control for the conveyors and cranes.
8. Applications software.

The solicitation listed these factors in descending order of importance with factors 2, 3 and 4 having equal weight and factors 5, 6 and 7 having equal weight.

Three firms submitted proposals. After the initial technical evaluation, discussions and receipt of best and final offers (BAFO), the three members of the evaluation panel individually evaluated and scored each of the proposals. Then, the three evaluators met and agreed to a consensus evaluation and consensus total score for each of the three proposals. The consensus scores and proposed prices were as follows:

<u>Offeror</u>	<u>Score</u>	<u>Price</u>
Munck	3,300	\$ 2,375,881
Eaton-Kenway, Inc.	3,100	\$ 2,885,994
Cybernated	2,600	\$ 2,170,671

The Army concluded that Munck's proposal was the most advantageous to the government and, therefore, awarded the contract to Munck despite the fact that its price was slightly higher than that offered by Cybernated.

Cybernated received the lowest technical score as a result of numerous concerns about its technical proposal. The agency's final technical evaluation report listed five major areas of concern. The first area involved the statement in Cybernated's proposal that its pneumatic elevators would consume air in the facility at 180 cubic feet per minute (cfm), a rate considered by the evaluators to be excessive. Second, Cybernated proposed commercial grade computer equipment, which the evaluators believed could result in significant system downtime. Further, in this regard, the agency evaluators were concerned that Cybernated proposed software that could not be modified by the user.<sup>1/</sup> Third, the evaluators stated that in spite of the fact that solicitation amendment No. 0002 called for the use of cables for closed circuit television transmissions (CCTV) on the system, Cybernated proposed the use of laser transmission. The fourth area concerned the evaluators' view that the protester did not intend to test the complete system before its installation while the fifth and final area concerned Cybernated's proposal to place its maintenance control station in a position that would require personnel to enter the retrieval system vault, resulting in exposure to radiation.

#### PROTEST ALLEGATIONS

Cybernated argues that the agency misapplied the RFP evaluation criteria and deducted points from the firm's proposal for alleged deficiencies that were not included among the solicitation requirements. The protester also argues that in performing the evaluation under the first technical evaluation factor, related to compliance with the mandatory requirements, the evaluators were simply to determine whether an offeror's proposed approach met the requirements. According to the protester, the evaluation scheme set out in the solicitation did not permit the agency to make qualitative distinctions among offerors with respect to those mandatory requirements.

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<sup>1/</sup> Although the concern regarding Cybernated's proposed software was not mentioned in the source-selection statement, it was referred to as a weakness in the consensus evaluation report prepared by the evaluation panel after discussions and therefore appears to have played a role in the selection decision. The other weaknesses described here were mentioned in both the consensus evaluation report and the source-selection document.

Cybernated also maintains that in numerous instances one or more of the three agency evaluators misinterpreted Cybernated's proposal or applied requirements not spelled out in the solicitation with the result that points were deducted from its score when they should not have been. Finally, Cybernated argues that the agency failed to afford it meaningful discussions since a number of alleged proposal deficiencies that resulted in the loss of evaluation points were not raised during discussions.

## ANALYSIS

### The Evaluation

The protest argues that under the first evaluation factor, "Compliance with all the mandatory items identified in the solicitation," the evaluators simply were to determine whether a proposal met the mandatory requirements and were not to make qualitative distinctions among the various proposals. While that approach is a typical one where the contract is to be awarded essentially on the basis of price to the offeror meeting minimum specification requirement, we do not think the agency limited itself to performing that type of evaluation here. See National Test Pilot School, B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238. Where detailed technical proposals are sought and technical evaluation criteria are used to enable the agency to make comparative judgments about the relative merits of competing proposals, offerors are on notice that qualitative distinctions among the technical proposals will be made under the various evaluation factors. Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88; Mutual of Omaha Ins. Co., B-203338.2, Sept. 24, 1982, 82-2 CPD ¶ 268. We see nothing in the record that suggests the protester was or should have been misled by the agency's statement of the evaluation criteria to be used for this procurement.

Cybernated also asserts that it should not have been criticized or downgraded in any of the five major areas in which the agency had concerns. 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. Therefore, our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the agency evaluation to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Litton Sys., Inc.; Varian Assocs., Inc., B-229921 et al., May 10, 1988, 88-1 CPD ¶ 448. Mere disagreement with the agency does not render the evaluation unreasonable and a clear

showing of unreasonableness is particularly necessary where the procurement concerns sophisticated technical hardware. Id. For the reasons set forth below, we think that the agency's judgment was reasonable and consistent with the RFP evaluation factors.

#### Air consumption

Cybernated argues that its proposal should not have been criticized for "excessive air consumption" because the solicitation did not list a maximum air consumption rate or otherwise indicate that points could be deducted for this matter. Cybernated maintains that, in any event, the 180 cfm air consumption level listed in its proposal was an error; its system's actual consumption level during normal operation is within the agency's required range of 40 to 60 cfm.

Amendment No. 0002 informed offerors that both electric and pneumatic elevators were acceptable and requested that proposals state the total air consumption of proposed systems. Cybernated proposed pneumatic elevators and, as the protester now concedes, in response to the amendment, the firm listed an erroneous total air consumption figure without calculations or analysis. The agency argues that it cannot be responsible for the erroneous information provided by Cybernated during discussions and cannot now allow correction of the error. Also, the agency maintains that although there was no mandatory air consumption level in the solicitation, this was a proper factor in the evaluation since the excessive level indicated by Cybernated would require the agency to install an additional air compressor for the facility at a cost of \$100,000 and was thus a weakness relative to the approaches offered by the other firms.

We do not think that the absence of a mandatory air consumption level in the solicitation prevented the agency from making qualitative distinctions among offerors with respect to each firm's proposed elevator system. In this regard, it should have been clear to the offerors that the agency would consider air consumption in its evaluation when it requested the information in amendment No. 0002. The record shows that the agency considered the pneumatic elevators proposed by Cybernated to be acceptable although, given the excessive air consumption related to the particular pneumatic elevators Cybernated proposed, the agency considered that approach to be a weakness. We have no basis upon which to object to the agency's conclusion that the air consumption rate proposed by Cybernated constituted a weakness in its proposal.

## Computer equipment

We also have no basis to challenge the agency's concern regarding Cybernated's proposed commercial grade computer equipment. Cybernated argues that the agency improperly downgraded its proposal since there was nothing in the solicitation to indicate a preference for industrial grade equipment over commercial grade. In addition, the protester argues that any difference in downtime is debatable and the equipment that it proposed was fully warranted.

The Army, on the other hand, argues that commercial grade equipment, although acceptable under the solicitation, was not as desirable as industrial grade equipment which performs better, lasts longer and has less repair downtime. Also, the agency argues that this matter was properly evaluated under sections 4.3.1.1 and 4.3.3.1 of the statement of work which concern system life and maintainability.

We think that the agency had a reasonable basis under the solicitation to consider the relative advantages and disadvantages of commercial grade computer equipment as opposed to industrial grade equipment. As explained above, the solicitation listed compliance with the mandatory specifications as the most important technical evaluation factor. Among the mandatory specifications was section 4.3.1.1, which required that the proposed system be designed to facilitate maintainability, and section 4.3.3.1, which required that the proposed system be designed to function 16 hours a day, 5 days a week for 10 years. Cybernated has presented no evidence to dispute the agency's view that industrial grade computer equipment is likely to last longer and to require less maintenance. We therefore have no basis to dispute the agency's evaluation of proposals in this respect.

We also believe that the Army reasonably downgraded Cybernated's proposal as a result of concerns that the software proposed by the firm could not be modified by the user. Although Cybernated argues that there was no requirement that an offeror propose software that the agency could modify, the solicitation stated as a mandatory requirement that source codes must be supplied for system software. We think the purpose of this requirement--to allow the agency to modify the software--should have been clear. Since Cybernated specifically took exception to the requirement that source codes be supplied, we think its proposal was properly downgraded.

## Television cable

We think that the agency reasonably criticized Cybernated's proposal for not including cable for CCTV transmissions. Amendment No. 0002 added the following to the specifications: "All transmission of CCTV system signals (Including pan, tilt, zoom, and focus) shall be done via cable." Also, in a discussion letter dated October 19, 1990, the agency instructed Cybernated that: "CCTV signals may not be transmitted by microwave or RF signals inside of this facility. Signals should be transmitted over cables. Please review and respond." In a letter dated November 1, Cybernated responded by stating that: "because of the unreliability of Festoon Systems and umbilical cords, [Cybernated] would recommend the transmission of the CCTV signals via laser, and the controls of camera via CAC Buss Bar Modem." Cybernated also indicated that it had deleted the transmission method included in its initial proposal and inserted laser transmission equipment.

Cybernated argues that it reasonably understood that there was no mandatory requirement for the use of cables and, under the circumstances, its proposal of lasers complied with amendment No. 0002. However, the agency clearly expressed a preference for cable transmission. Under the circumstances, the agency's criticism of Cybernated's proposal of laser transmission was reasonable.

## Testing

With respect to the criticism that Cybernated's proposed system would not be tested fully assembled, section 3.4.1 of the specifications set forth as a desirable feature that "[a]ll acceptance tests should be performed on a fully operational system." Cybernated states that it proposed tests on a fully operational system--using only one crane, instead of the four that would be used on the actual system--and argues that there was no requirement for tests on a fully assembled system.

Although the solicitation itself referred to a "fully operational system," the October 19 discussion letter asked Cybernated to clarify its proposal with respect to the fact that its "conveyors will not be tested in conjunction with the cranes." In the final evaluation report, the agency downgraded Cybernated's proposal for failing to propose to test its system fully assembled. According to the agency, since this was not a mandatory feature in the specifications, but only a desirable one, it was a relative weakness rather than a deficiency in Cybernated's proposal. We think the October 19 letter along with the RFP provision relating to testing reasonably placed Cybernated on notice that its proposed test

on a partially assembled, and therefore only partially operational, system would not receive full credit.

#### Maintenance control station

We think that the agency reasonably downgraded Cybernated's proposal because of the placement of its maintenance control station/end of aisle terminals. The protester's placement would, according to the agency, require personnel to enter the vault which could result in radiation exposure. At section 4.3.13.1, the solicitation specified as a mandatory requirement hand-held devices to be used as terminals at the ends of aisles in the system. Offerors were required to supply one end-of-aisle terminal junction box and connector for each aisle. The October 19 discussion letter to Cybernated referenced section 4.3.13.1 and stated "[t]he local S/R machine controls shall be connected via a junction box in the maintenance bay. The controller must be outside of the vault to insure personnel safety. Please review and respond."

In its November 1 response, Cybernated stated that in "an Emergency condition or loss of communications between 'MCS' and Crane, a maintenance person could enter the vault area and manually move the crane into the maintenance bay." Although Cybernated argues that its proposal should not have been downgraded, contrary to the advice it was given during discussions the firm's response speaks in terms of personnel entering the vault. In our view, neither the protester nor the agency makes the matter particularly clear. Nevertheless, based upon the protester's response to the discussion question, which did not assure the agency that personnel will always remain outside the vault, we have no basis upon which to object to the agency's judgment in downgrading Cybernated's proposed approach.

#### Other factors

Aside from the proposal weaknesses addressed above, all of which were set out in the consensus evaluation report prepared by the evaluation panel, Cybernated argues that the evaluation score sheets prepared by members of the technical evaluation panel show that the individual evaluators inconsistently evaluated and scored Cybernated's proposal in a number of instances and misapplied the evaluation criteria. For example, Cybernated notes that individual evaluators deducted points from Cybernated's scores because it did not propose a COHU camera, which was not a mandatory requirement, and because it did not meet a requirement relating to detection of pallet obstructions that had been removed from the solicitation. Cybernated also argues that in their individual score sheets the three evaluators each assigned different scores to the protester's proposed automatic lubrication system and

only one of the three evaluators deducted points on his individual score sheet under the subfactor "System control for the conveyors and cranes." Cybernated argues that these differences in scoring among the individual evaluators exemplify the lack of a reasonable basis for the technical evaluation.

We do not agree. First, it is not unusual for individual evaluators to reach different conclusions when judging competing proposals, since both objective and subjective judgments are involved. Morrison-Knudsen Co., Inc., B-237800.2, May 2, 1990, 90-1 CPD ¶ 443. Thus, the fact that members of the evaluation panel individually evaluated and scored the proposals differently does not mean that the overall evaluation was flawed. After individually evaluating the proposals, the evaluators met as a panel and arrived at a consensus evaluation of each of the proposals. That consensus evaluation, on which the Army based the award decision, included no criticism of Cybernated's proposed camera, its method of detecting pallet obstructions or its automatic lubrication system. In addition, the consensus evaluation did not criticize Cybernated's proposal under the subfactor "System control for the conveyors and cranes." Under the circumstances, it is our view that none of these alleged errors by the individual evaluators had an impact on the selection decision, which was based on the consensus evaluation.<sup>2/</sup>

In sum, after a careful review of the evaluation record in the context of the protester's contentions, we can find no legal basis upon which to interfere with the agency's judgment in evaluating the proposals and selecting Munck as the awardee.

#### Discussions

Cybernated argues that the agency failed to conduct adequate discussions with it concerning the testing of the system, modification of the software, use of commercial grade equipment and the use of other than a COHU camera.

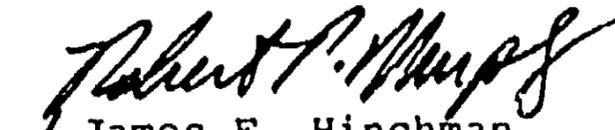
We will not consider this issue. First, all of the matters raised by the protester except that concerning the COHU camera were either raised with the protester in the agency's February 1 debriefing letter or in the initial March 21 protest report. If the protester believed that it had been downgraded in these areas without the benefit of proper discussions, it had to raise the argument within 10 days of

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<sup>2/</sup> Similarly, the source-selection statement contained no reference to these matters.

learning of the nature of the deficiencies. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1991). Cybernated did not complain about the alleged lack of discussions until it filed its May 17 protest comments well beyond the 10-day limit. Next, as discussed above concerning the camera, it had no impact on the selection so no useful purpose would be served by considering whether it was the subject of adequate discussions.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel