



Comptroller General
of the United States

Washington, D.C. 20548

1410038

Decision

Matter of: Dataproducts New England, Inc.; Allied
Signal, Inc.; and ITT Corporation

File: B-246149.3; B-246149.4; B-246149.5

Date: February 26, 1992

John S. Pachter, Esq., and Arthur I. Leaderman, Esq., Smith, Pachter, McWhorter & D'Ambrosio for Dataproducts New England, Inc.; George W. Holliday, Esq., and Richard J. Luebke, Esq., for Allied-Signal, Inc., Bendix Communications Division; and Wilsie H. Adams, Esq. and Alexander J. Brittin, Esq., McKenna & Cuneo, for ITT Corporation, ITT Aerospace/Communications Division, the protesters. Stuart B. Nibley, Esq., and Steven L. Briggerman, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for E-Systems, Inc., an interested party.

Debra Buck Haworth, Esq., Department of the Navy, for the agency.

M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Access to documents under a protective order will be denied where, due to applicants' position and duties as in-house counsel, there is unacceptable risk that protected materials could be inadvertently disclosed.

2. Protest that procuring agency improperly determined protesters' proposals technically unacceptable based on alleged unstated solicitation requirement for interchangeability of piece parts of offered equipment with piece parts of existing equipment is denied where protesters' interpretation of requirement is inconsistent with solicitation read as a whole.

3. Protest that agency improperly failed to waive first article testing for portion of offered equipment is denied where agency reasonably determined that waiver was inappropriate for piece of equipment protester had not previously furnished as government prime contractor.

4. Where agency determined that, notwithstanding protester's slightly higher overall technical/cost score, awardee's lower cost made its initial proposal more

favorable to the government, award without discussions was proper and consistent with solicitation provision reserving agency's right to select for award the most favorable initial proposal resulting in the lowest overall cost to the government.

5. Under multi-year contract which included both firm and option quantities, protest that awardee's offered first year firm and option quantity prices were unbalanced is denied where there is no doubt that awardee's offer will result in lowest ultimate cost to the government.

6. Where solicitation for multi-year contract did not require level pricing between contract years, awardee's offer of unlevel prices was not basis for rejecting proposal; there is no basis for reading level pricing provision into solicitation even if, as protester asserts, it was mandatory regulatory requirement.

7. Agency reasonably determined that discrepancy in delivery term in a summary bar graph chart furnished with proposal, which was inconsistent with agreement in text of proposal to comply with delivery requirements, was a correctable typographical-type error.

8. Allegation that awardee may have acquired proprietary information from former employee of incumbent contractor involves a dispute between private parties which does not provide a basis for protest to the General Accounting Office.

DECISION

Dataproducts New England, Inc.; Allied Signal, Inc.; and ITT Corporation protest the award of a contract to E-Systems, Inc. by the Department of the Navy, Space and Naval Warfare Command (SPAWAR) for Advanced Narrow Band Digital Voice Terminals (ANDVT), under Request for Proposals (RFP) No. N00039-91-R-0095(Q). Dataproducts and Allied-Signal/Bendix primarily argue that SPAWAR improperly rejected their proposals on the basis of an unstated solicitation requirement for interchangeability of piece parts of offered equipment with previously produced equipment. ITT argues that SPAWAR improperly evaluated the firm's price proposal without allowing a waiver of first article testing (FAT); challenges SPAWAR's decision to award a contract on the basis of initial proposals without discussions; and contends that the awardee's prices were unbalanced and unlevel, and that the awardee's delivery schedule was not in compliance with that required.

We deny the protests in part and dismiss them in part.

BACKGROUND

The ANDVT is a cryptographic system which allows for the secure transmission of voice, data, and/or signaling information by radio, satellite link, and/or launch lines. The RFP contemplated award of a firm, fixed-price, 3-year multi-year requirements contract with base and option quantities. The solicited ANVDT system is comprised of a tactical terminal (the CV-3591), and a communications security module (the KYV-5). The statement of work (SOW) required offerors to fabricate the CV-3591 in accordance with military specification MIL-C-28883A, as amended, together with an unvalidated drawing package.¹ For the KYV-5, the solicitation required a "build-to-print" effort based on a validated drawing package provided to offerors. The RFP here succeeds two previous SPAWAR production contracts for ANDVT systems. ITT performed both prior contracts, fabricating the CV-3591 units and using KYV-5 units built by General Electric and provided as government furnished equipment.

The RFP provided for award to the offeror whose proposal was considered most advantageous to the government, price and other factors considered. The government reserved the right to award a contract to other than the lowest offeror. The award provisions included a statement that the government reserved the right to select for award the most favorable initial proposal that would result in the lowest cost to the government; elsewhere, the RFP advised that the agency intended to evaluate proposals and award a contract on the basis of initial proposals without discussions, unless discussions were determined to be necessary. For this reason, the RFP warned offerors that initial proposals should contain the offeror's best technical and price terms.

The RFP listed the following evaluation factors in descending order of importance: price, technical, and management; price was of greater importance than technical and management combined. Price was to be evaluated in terms of the total 3-year cost, inclusive of option quantities. The solicitation further advised that if a proposal contained a major deficiency under any evaluation criterion,

¹In this regard, offerors were provided with an unvalidated drawing package, i.e., the drawings had not been validated by a contractor other than the originator to build the system successfully. The drawings were provided for information purposes only and were not warranted for accuracy or suitability for building the equipment to the requirements of the solicitation.

the proposal would be determined unacceptable despite an overall acceptable numerical score.

The RFP made several references to "interchangeability," which is in issue here. The SOW's technical requirement for "interchangeability" was as follows:

"All corresponding parts furnished with and for the equipment shall be interchangeable physically and electrically in accordance with design, fit, assembly and performance requirements of the government specification unless otherwise deemed desirable by the government and authorized under the 'Changes' clause of this contract."

The specification identified interchangeability at three levels: equipment, subassembly and piece parts. Equipment assemblies are the largest units of the ANVDT, i.e., the CV-3591 and KYV-5. Subassemblies are mid-level units of these assemblies, such as circuit card assemblies. Piece parts are the single components which make up the subassemblies, such as the circuit card itself, resistors or capacitors. Section 3.7.4 of the specification required interchangeability "at all item levels down to and including piece parts." Section 3.7.1 of the specification provided that "parts and materials used in the follow-on production equipment shall be one-for-one equivalents with the parts and materials used in the initial production equipment" and that the selected parts "shall have no impact on the interchange ability . . . with initial production equipment."

The solicitation elsewhere stated that offerors were to establish interchangeability of their proposed items with existing agency equipment. The solicitation instructed that proposed changes in a technical proposal from the "existing design" (i.e., the specification) were to be described in terms of their impact on the "interchangeability . . . with previous production equipment. . . ." One of the subfactors under the technical factor, technical approach, included subcriteria aimed at determining the extent to which the offeror had demonstrated "an understanding of maintaining technical compliance with previously produced equipment requirements. . . ."; "clearly described the advantages/disadvantages of any changes from the existing design in terms of productivity, performance, [etc.];" and "justified that the implementation of such [design] changes will have no negative impact on maintaining interchangeability, interoperability, and backward compatibility with the previous production equipment, its documentation, its software/firmware, its support or test equipment, its TPS'

[test program sets] and its maintenance procedures." Under another technical subfactor, risk control, the RFP instructed that:

"[t]he offeror shall discuss any special activities and analyses that have or that will be performed to ensure that all production equipment delivered to the government will satisfy all specified requirements and will be fully interchangeable, interoperable, and backward compatible with previous ANVDT Terminal Set AN/USC-43(V) production equipment [i.e., CV-3591]."

The agency received five initial proposals, including those of the awardee (E-Systems) and the three protesters. The agency's technical evaluation board (TEB) evaluated the initial technical and management proposals with unweighted scores, supported by written explanations of specific strengths and weaknesses of each offeror's proposal. These raw scores and findings were then reported to the Contract Award Review Panel (CARP). E-Systems and ITT received acceptable ratings from the TEB, which were concurred in by the CARP. E-Systems had offered substantially the same equipment currently provided by the incumbent, ITT.

Allied-Signal Signal/Bendix and Dataproducts received unacceptable ratings, also concurred in by the CARP. The evaluators determined that design changes proposed by Dataproducts and Allied-Signal/Bendix to the CV-3591 were technically unacceptable based on the absence of piece part interchangeability with existing ANVDTs, the level of interchangeability the agency believed was required by the RFP.² Some of the changes involved using a single different piece part for one currently used. For example, Dataproducts proposed to use a different capacitor. Other changes related to changing the number of piece parts. For example, Allied-Signal/Bendix proposed to consolidate various components (i.e., several piece parts) of the circuit card assemblies into one chip (i.e. one piece part).

The changes proposed were considered by the agency to be significant in terms of interchangeability. The TEB concluded that both firms appeared to have underestimated the amount of redesign work required and that neither

²The evaluators further determined that Dataproducts' proposed changes lacked interchangeability with existing ANVDT equipment at the subassembly level. For ease of discussion here, we will limit our discussion to piece part interchangeability.

offeror provided adequate explanations--as called for under the subcriteria under the technical approach subfactor, discussed above--of why their unproven redesigns benefited the government. Overall, the CARP considered Dataproducts' and Allied-Signal/Bendix's proposed changes to present a "very substantial risk" and a "substantial risk," respectively, due to unproven designs, and concluded none of the changes was acceptable because they precluded piece part interchangeability with the agency's existing ANVDTs.³ The final total (technical and price) scores were as follows:⁴

	Technical & Management	Price	Total
ITT	30.1	"A" 43.9 "B" 43.1 "C" 43.3 ⁵	73.2 74 73.4
E-Systems	26.9	45.9	72.8
Offeror "X"	24.5	40.8	65.3
Allied-Signal/Bendix	18.4	48.3	66.7
Dataproducts	17.0	51.0	68

³Additionally, the evaluators determined that design changes proposed by Allied-Signal/Bendix to the KYV-5 were noncompliant with the build-to-print requirement of the solicitation, and thus were unacceptable. While Allied-Signal/Bendix protests its rejection on this basis also, we need not decide this issue, since as we discuss, the rejection of the firm based on the evaluation of its proposed changes with regard to the interchangeability requirement was proper.

⁴The addition of the resulting total scores has been corrected here from that reported in the agency report, based on the reported technical, management and price scores.

⁵ITT, the incumbent ANVDT producer, made three price alternatives. Offer A included first article testing for both the CV-3541 and the KYV-5. Offer B included no first article testing of any items. ITT based its request for waiver for first article testing of the KYV-5 on its proposal to acquire the KYV-5 via subcontract from the incumbent producer of the equipment, GE. Offer C included complete first article testing for the KYV-5 and "modified" (undefined by ITT) first article testing for elements of the CV-3591. The agency determined that ITT's offer B was unacceptable, as ITT was not the incumbent producer of the KYV-5. Therefore, only ITT's offers A and C were considered as eligible for award.

In view of the agency's stated intent to make award without discussions, the CARP reviewed the evaluations of the offerors including the TEB findings, its own findings, and the weighted price and technical scores for each offeror. It concluded that the proposals of E-Systems and ITT were technically acceptable, and that the proposals of Allied-Signal/Bendix and Dataproducts were unacceptable on the basis that they would need to be completely rewritten to correct the design/piece part interchangeability problems found in the evaluation. The CARP went on to find that E-Systems was the technically acceptable offeror offering the best value to the government, and that its approximately \$5.1 million lower cost outweighed ITT's slightly higher overall score. Based on these findings, the CARP recommended award to E-Systems without discussions. The Source Selection Authority (SSA) accepted the CARP's recommendation, and made award to E-Systems on September 30, 1991.

ADMISSION TO PROTECTIVE ORDER

Pursuant to our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)), our Office issued a protective order covering material related to the offerors' proposals and the evaluation process.

Allied-Signal/Bendix submitted an application for access under the order from its in-house counsel, George W. Holliday, and Richard Luebke. After reviewing the applications, affidavits, and objections filed by E-Systems, we granted limited access to Allied-Signal/Bendix's in-house counsel, only for those materials concerning the evaluation of Allied-Signal/Bendix's own proposal.

We denied access to Allied-Signal/Bendix's in-house counsel for the remainder of the protected materials based on the individuals' positions and responsibilities. Messrs. Holliday and Luebke are general legal counsel to six operating units within Allied-Signal Aerospace Company, one of three corporate sectors of Allied-Signal, Inc. One of these operating units is Allied-Signal/Bendix. Messrs. Holliday and Luebke provide advice to Allied-Signal/Bendix personnel on, among other things, government contracting issues and are the only two attorneys employed in the office where they work. Both Messrs. Holliday and Luebke report to the general counsel of Allied-Signal, Inc., who is also a senior vice-president of the corporation. See TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160. Mr. Holliday is a corporate secretary and is on the board of directors of Bendix Field Engineering Corporation, another Allied-Signal division. See Earle Palmer Brown Cos., B-243544; B-243544.2, Aug. 7, 1991, 91-2 CPD ¶ 134. They acknowledged, moreover, that they provide legal counsel to

Allied-Signal/Bendix "regardless of the stage of the federal procurement process" and that "if a legal question arose during the procurement process [they] would certainly be available for legal assistance." See TRW, Inc., supra.

Based on these circumstances, we found that Messrs. Holliday and Luebke, while not competitive decisionmakers themselves, are sufficiently involved in competitive decisionmaking by virtue of their positions that the risk of inadvertent disclosure precluded granting them access to the protected documents other than those materials concerning the evaluation of Allied-Signal/Bendix's own proposal. See U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984); TRW, Inc., supra.

DATAPRODUCTS' AND ALLIED-SIGNAL/BENDIX'S PROTESTS

Interchangeability Requirement

Dataproducts and Allied-Signal/Bendix argue that the agency improperly rejected their lower priced proposals for failure to offer equipment interchangeable at the piece part level with the agency's existing ANVDT CV-3591 items furnished under prior contracts. The protesters interpret the specification requirement for piece part interchangeability as requiring piece part interchangeability only among items furnished under this contract, since it refers in one paragraph to interchangeability between "initial" and "follow-on" production equipment, and does not specifically reference the agency's existing equipment. The protesters then read the RFP instructions and evaluation subcriteria quoted above as requiring interchangeability with existing items only at the equipment (not piece part) level, since these provisions reference the agency's equipment and do not specifically reference piece part level interchangeability. The protesters assert that their offered equipment was acceptable since all equipment furnished under this contract would be piece part interchangeable among itself and would be interchangeable with the agency's existing items at the equipment level.

Where a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. To be reasonable, an interpretation must be consistent with the solicitation when read as whole and in a reasonable manner. Id.

We find that, although the RFP could have been more clearly written (indeed, the agency reports that it intended to make clarifications), the RFP was adequate to put offerors on notice that interchangeability with the agency's existing equipment was required on the piece part level.

As discussed above, the SOW required parts interchangeability in accordance with the requirements of the specification, and the specification, MIL-C-28883A, required piece part interchangeability. Although the specification did not also state that the piece parts were to be interchangeable with the piece parts of the agency's existing equipment, this was implicit, we think, in the other provisions quoted above. Specifically, the RFP instructions and evaluation subcriteria clearly stated that offers had to demonstrate that design changes would not negatively affect interchangeability with previous production equipment. Although these provisions do not refer to the piece part interchangeability level, neither do they state that some different interchangeability level would apply in this previous production equipment analysis. The term "previous production equipment" was merely a reference to the agency's existing equipment. It does not support a conclusion that the agency thereby intended to notify offerors that equipment level, rather than piece part, interchangeability would apply to existing equipment. If the protesters believed their interpretation of the specification required a conclusion that a second level of interchangeability must have been established, instead of proceeding on the basis of their assumption, they should have sought clarification from the agency or protested on the basis of an apparent solicitation ambiguity. See 4 C.F.R. § 21.2(a) (1991).

Taken by itself, we agree with Allied-Signal/Bendix that the specification references to "initial" and "follow-on" could in isolation confuse the issue. (The agency explains it intended to change the term "initial" to "previous" to clarify that it was referring to its existing equipment.) This possible confusion notwithstanding, however, the protester's interpretation was unwarranted, since it required the further unsupported assumption that the RFP instructions and evaluation subcriteria established a different interchangeability level, i.e., the equipment level, vis-a-vis previous production equipment. Again, there was nothing in the RFP indicating that the agency intended to do so.⁶

⁶The protesters also point to the absence of validated production drawings as reason to believe the agency did not intend piece part interchangeability with existing equipment; without adequate drawings the risk of achieving

We conclude that, read in light of the specification requirement for piece part interchangeability, the provisions referring to interchangeability with previous production equipment were sufficient to put offerors on notice that offered equipment had to be interchangeable with the agency's existing equipment on the piece part level. The protesters' contrary interpretation is based on what we consider to be unfounded assumptions, and therefore is unreasonable. Consequently, the agency's determination of the technical unacceptability of the firms' lower priced proposals based on the interchangeability requirement was proper.

ITT'S PROTEST

First Article Waiver

ITT argues that SPAWAR improperly denied waiver of FAT for the KYV-5 units ITT proposed to subcontract to General Electric--the incumbent manufacturer of the units which had been provided under ITT's contract as government furnished equipment (GFE)--resulting in a failure to evaluate ITT's lowest price proposal (offer "B"). Alternatively, the protester contends that the agency should have arrived at an evaluated price somewhere between ITT's offer "A," which included FAT, and offer "B," which included no FAT.

These arguments are without merit. First, the agency was not required to waive FAT. An agency's decision whether to waive FAT for a particular offeror is subject to question only where it is shown to be unreasonable. Whittaker Technical Prods., Inc., B-239428, Aug. 29, 1990, 90-2 CPD ¶ 174. Because the waiver clause does not confer upon offerors any right to a waiver, but is for the protection and benefit of the government, we generally are more demanding in our assessment of challenges to the denial of a waiver, requiring a clear showing of an abuse of discretion. Diemaster Tool, Inc., B-241239; B-241239.2, Jan. 30, 1991, 91-1 CPD ¶ 89.

SPAWAR declined to waive FAT on ITT's KYV-5 because, although the agency previously furnished this equipment to ITT as GFE, ITT has never previously furnished the KYV-5 to the government. This being the case, the agency decided it would be advisable to require FAT of ITT so it would have contractual recourse in the event nonconforming units were

interchangeability would be solely the contractor's. The agency reports it fully intended to impose any risks in this regard on the contractor. In any case, the presence of this risk did not justify a reading of the RFP that was not supported by its language.

furnished. This determination was consistent with the purpose of FAT and clearly reasonable.

We also agree with the agency that there was no basis for it to create an evaluated price for ITT other than one of the three ITT actually offered, as the firm suggests. The RFP required offerors to propose prices with and without FAT; it did not provide the agency the option of calculating different prices for offerors.

Award Without Discussions

ITT contends that SPAWAR improperly made award on the basis of initial proposals without discussions. The RFP stated that the government reserves the right to award without discussions "where acceptance of the most favorable initial proposal would result in the lowest overall cost to the government at a fair and reasonable price." The protester reads this language as precluding award without discussions in this case because E-Systems' proposal was not the "most favorable" one; ITT, not E-Systems, received the highest technical/price score, and its proposal, not E-Systems', thus is the "most favorable" one. Since no initial proposal was both most favorable and lowest cost, ITT concludes, discussions with all offerors were required.

This argument is without merit. The agency concluded that, notwithstanding ITT's slightly higher technical/price point score under the evaluation, E-Systems' proposal actually was the most favorable one to the government due to its significantly lower price. In making this determination, the SSA and the CARP, whose recommendation the SSA adopted, did give price more weight than it was accorded in the weighting scheme used to establish total offeror scores (51 percent). An agency may assign and revise the specific numerical weights accorded evaluation factors and subfactors as long as the agency is true to the relative weights provided to offerors in the RFP for use in proposal preparation. Air Tractor, Inc., B-228475, Feb. 5, 1988, 88-1 CPD ¶ 115. The solicitation here provided that price was to be the more important than the technical and management evaluation factors combined. The selection decision was fully in accordance with this evaluation scheme.

We also disagree with ITT's view that the "most favorable initial proposal" could only be the firm with the highest weighted score. In concluding that E-Systems' lower price made its proposal more favorable notwithstanding ITT's technical advantage--which the TEB and CARP reports show to be slight--the SSA reasonably exercised his discretion to determine that the point differentials do not accurately

reflect the merits of the proposals. Harrison Sys., Ltd., 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572. The RFP instructions state that the agency intended to evaluate proposals and award a contract on the basis of initial proposals without discussions, unless discussions were determined to be necessary.⁷ Since E-Systems also offered the lowest price, award without discussions was permissible.

Unbalanced Prices

ITT argues that E-System's offered prices were materially unbalanced due to a difference in prices between the first year firm and option quantities of 28 percent for the CV-3591 and 24 percent for the KYV-5 and that the firm's offer therefore should have been rejected under the RFP provision stating that "[a]ny proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as unacceptable."

E-Systems proposed the following unit prices for the CV-3591 firm and option quantities:

<u>Year</u>	<u>Firm Quantity</u>	<u>Price</u>	<u>Option Quantity</u>	<u>Price</u>	<u>Percentage Difference</u>
1991	2,256	\$7,962	2,100	\$5,759	28
1992	1,958	\$6,630	2,000	\$5,698	14
1993	2,113	\$6,449	2,000	\$5,719	11

For the KYV-5, E-Systems proposed the following prices:

<u>Year</u>	<u>Firm Quantity</u>	<u>Price</u>	<u>Option Quantity</u>	<u>Price</u>	<u>Percentage Difference</u>
1991	2,616	\$2,350	2,000	\$1,792	24
1992	1,958	\$2,060	2,000	\$1,808	12
1993	2,113	\$2,020	2,000	\$1,817	10

⁷This language is consistent with the current Federal Acquisition Regulation (FAR) provision, applicable to Department of Defense solicitations issued after March 1, 1991 (as here), which no longer limits awards without discussions to situations where the most favorable initial proposal will result in the lowest cost to the government. See 10 U.S.C. § 2305(b)(A)(ii) (Supp. II 1990); The National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 §§ 802(d)(3)(A) and 802(e); FAR § 15.610(a)(4); DOD FAR Supplement § 215.610(a); Honolulu Marine, Inc., B-245329, Dec. 27, 1991, 91-2 CPD ¶ 586.

ITT proposed level unit prices for each program year of \$6,858 for the firm and \$6,353 for the option quantities for the CV-3591, and \$2,353 for the firm and \$2,087 for the option quantities for the KYV-5. In comparing E-Systems' unit prices for the CV-3591 and the KYV-5, they are lower than ITT's for all firm and option quantities for all 3 program years, except the first year, where ITT's unit price for the firm quantity is lower than E-Systems'.

A bid is materially unbalanced when there is a reasonable doubt that acceptance of a mathematically unbalanced bid-- that is, one that contains understated prices for some items and overstated prices for others--will result in the lowest overall cost to the government. Sharp Constr. Co., Inc., B-244682, July 12, 1991.

Even if we agreed with ITT that the awardee's prices were mathematically unbalanced, they are not materially unbalanced. Although E-Systems' prices vary over the 3 contract years for both pieces of equipment, that firm's total price for all firm quantities for the 3 years is lower than ITT's (by \$105,184). At the same time, E-Systems' option prices for every year for both the CV-3591 and the KYV-5 are lower than ITT's option prices. Thus, no matter which or how many options ultimately are exercised, the combination of the options with the 3-year firm quantity will result in the lowest overall cost to the government.

Unlevel Prices

ITT further contends that E-Systems' unit prices are improperly unlevel, in that they are not the same for all program years. ITT maintains that unlevel pricing is prohibited under FAR § 17.103-2, which states, in relevant part, as follows:

"Solicitations for multi-year contracts shall reflect all the factors to be considered for evaluation, specifically including the following:

.

(e) A provision that the unit price of each item or service in the multi-year requirement shall be the same for all program years (level unit price) included."

ITT concludes that E-Systems' proposal should have been rejected.

The evaluation of proposals must be conducted in accordance with the ground rules set forth in the solicitation. See Cherokee Elecs. Corp., B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467. Here, the RFP did not provide for rejection of offers for unlevel pricing between contract years, and the agency therefore could not reject E-Systems' proposal on this basis.

ITT maintains that a level pricing provision is mandatory for multi-year contracts under FAR § 17.103-2(e), and that the requirement thus should be read into the RFP. While under a rule known as the "Christian doctrine," see G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963), mandatory contract clauses may be read into an otherwise properly awarded contract, this doctrine does not also stand for the proposition that mandatory provisions may or should be read into a solicitation, Mosler Sys. Div., Am. Standard Co., B-204316, Mar. 23, 1982, 82-1 CPD ¶ 273, and we find no other basis for doing so.

Delivery

ITT maintains that a contract between the government and E-Systems was not formed because the firm proposed delivery for a portion of the requirement--the fiscal year 1993 option for interim spares--1 month later than was required by the RFP. The agency regarded E-Systems' discrepant delivery term, which appeared in a summary bar graph chart, as a correctable typographical error; it corrected the discrepancy and awarded the contract to E-Systems on the basis of the RFP's minimum delivery schedule for offerors not granted waiver of FAT.

When a mistake is suspected before award in a negotiated procurement, the FAR contemplates that the mistake will be resolved through discussions. FAR §§ 15.607(a) and 15.610(b)(4). The thrust of the regulation is that correction of a mistake without conducting discussions is appropriate only where the existence of the mistake and the proposal actually intended can be clearly and convincingly established from the RFP and the proposal itself. Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9.

We find that the mistake and intended delivery were ascertainable from the proposal itself, based on four factors: (1) the discrepancy was present only in a bar graph presented to summarize the delivery times for numerous line items; (2) the discrepancy consisted of a bar graph line that extended 35 months instead of the required 34 months, a mistake that could be made inadvertently; (3) the proposal stated in the text that E-Systems would comply with the delivery requirements; and (4) the proposal nowhere else

took exception to the delivery requirements. We think the agency properly concluded that the discrepancy was essentially a typographical mistake that occurred inadvertently when the bar graph line was drawn, and that E-Systems did not intend to take exception to the delivery requirement.

Procurement Integrity

Finally, ITT claims that E-Systems may have improperly obtained proprietary information through two former ITT employees hired by E-Systems and used that information in its offer. Since the government took no part in the alleged acts of the employees, this matter essentially concerns a dispute between private parties about business practices and relationships that is beyond the scope of our bid protest function and is properly for resolution by the private parties through the courts, if necessary. DTM, Inc., B-241270.2, Feb. 15, 1991, 91-1 CPD ¶ 178. We note that the protester has produced no evidence that any specific aspect of E-Systems' proposal indicated the use of proprietary information, and the agency concluded from its review that there was no indication that E-Systems utilized any proprietary information in developing its technical approach.⁸

The protests are denied in part and dismissed in part.


for James F. Hinchman
General Counsel

⁸In any event, we note that SPAWAR asserts that it would be highly unlikely that any offeror would offer equipment significantly different from the equipment provided by ITT under the previous production contracts, given that the data provided to offerors included drawings prepared by ITT as the incumbent, and that offerors were to propose equipment in accordance with a specification to which ITT had provided input. We further note that the employees concerned had signed non-disclosure agreements.