



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Earth Resources Corporation  
**File:** B-248662.2, B-248662.4, B-248662.6  
**Date:** November 5, 1992

Ronald K. Henry, Esq., Jeffrey A. Stonerock, Esq., and Sue Ann Dilts, Esq., Baker & Botts, for the protester. Cynthia S. Guill, Esq., Howard B. Rein, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the protester. M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Evaluation of protester's proposal as not satisfying all solicitation requirements was reasonable where solicitation specifically required offerors to propose own utilities, but protester proposed tying into activity's electric power.
2. Where awardee proposed mobilizing equipment early in contract, and protester did not, agency properly rated awardee's proposal superior to protester's in this respect, even though early mobilization of the equipment was not required by the solicitation.
3. Protest against evaluation of awardee's offer on the basis of noncompliance with alleged solicitation requirements is without merit where solicitation in fact did not establish firm requirements in questioned areas, but only established a basis for a comparative evaluation of proposals.

### DECISION

Earth Resources Corporation (ERC) protests the award of a contract to Waste Abatement Technology (WATEC) under request for proposals (RFP) No. N62472-92-R-0001, issued by the Department of the Navy for clean-up of a former cylinder disposal site at the Philadelphia Naval Base in Pennsylvania. ERC primarily argues that the Navy improperly evaluated the proposals.

We deny the protests.<sup>1</sup>

<sup>1</sup>Protests B-248662.5 and B-248662.7, also filed by ERC, remain pending with our Office.

The RFP requested offers for excavation, testing, and disposal of the cylinders, as well as refilling the excavated area. In this regard, performance specifications for the project were provided and prices were requested on a firm-fixed-unit-price basis for (1) excavation and refilling of the site based on estimated cubic yards, (2) excavation and disposal of the cylinders based on an estimated quantity of cylinders, and (3) all remaining required work.

Award was to be made to the offeror whose proposal was determined to represent the best value to the government, total evaluated cost and other factors considered. Technical and price factors were weighted equally. The technical evaluation was based on the following three equally weighted criteria: technical approach, management plan, and corporate experience. Offerors were to include in their technical proposals drawings and calculations, including those for the mechanical and electrical equipment to be used. Offerors were also to submit plans for (1) construction at the excavation site, (2) cylinder testing, and (3) safety/health/emergency response. Additionally, offerors were instructed to provide their proposed organizational structure, qualifications of key personnel, corporate experience, subcontracting plan, subcontractor experience, and schedule. Clean-up was to be completed within 210 calendar days after award, i.e., 7 months.

Three firms responded to the RFP, and after evaluation the technical proposals were rated in the following order: WATEC, Severson Construction Company, and ERC. The WATEC and Severson proposals were rated "acceptable" and "essentially the same," due to their similar removal plans and proposed use of the same cylinder treatment subcontractor. Of these two proposals, WATEC's proposal was "rated higher" due to two minor omissions from Severson's proposal. ERC's proposal was rated "not acceptable" due to "two major unacceptable items." First, the evaluators determined that ERC's plan to connect to the base electrical system was contrary to the RFP requirement that the successful contractor provide its own electrical power. Second, the evaluators determined that ERC's plan to mobilize the cylinder testing equipment only after cylinders were first located was unacceptable because mobilization of the equipment "could take a long period of time." In this regard, the evaluators noted that both WATEC and Severson proposed mobilizing their cylinder testing equipment at the beginning of the project. On the price proposals, WATEC's total estimated offered price of \$2,613,000 was the lowest submitted; Severson's price was slightly higher, and ERC's price was substantially higher than WATEC's.

After reviewing the evaluation of proposals, the source selection board (SSB) determined that, even if given the opportunity to upgrade its technical proposal, ERC could not conceivably reduce its proposed price by the \$2 million necessary to become competitive. The SSB agreed that the two remaining proposals were relatively equal technically and concluded that WATEC, with the lowest price, offered the best value to the government. Accordingly, on April 24, 1992, award was made to WATEC on the basis of initial proposals (as the RFP advised the agency might do); these protests by ERC ensued.

#### ERC's PROPOSAL

ERC argues that the agency improperly determined that the firm's proposal was unacceptable. It maintains that the agency misinterpreted the RFP's electrical power requirement as precluding ERC's approach, and improperly upgraded WATEC's rating while reducing ERC's, based on a nonexistent requirement for early mobilization of the cylinder testing equipment.<sup>2</sup>

The Navy, in its report on the protest to our Office, concedes that, because the RFP did not specify when cylinder testing equipment was to be mobilized, rejection of the firm's proposal on this basis was not warranted. However, the agency maintains that, whether or not ERC's proposal actually should have been rejected, the proposal nevertheless was properly rated lower than WATEC's proposal, as a result of ERC's failure to comply with the RFP's electrical power requirement and the benefit offered by WATEC of early mobilization of cylinder testing equipment. The Navy concludes that the selection of WATEC for award was proper.

The evaluation of technical proposals is primarily within the discretion of the procuring agency, not our Office. Consequently, we question an agency's technical evaluation only when the record shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203.

Our review of the record demonstrates that the evaluation of ERC's proposal was reasonable. First, we find no basis to question the agency's evaluation in the area of electrical power. In this regard, the RFP provided that:

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<sup>2</sup>Although ERC also complains that Severson's proposal suffered from the same deficiencies as WATEC's (because it was essentially the same as WATEC's), for ease of discussion, reference here will be made only to WATEC's proposal.

"The known utilities in the area are shown on the drawing. The contractor shall take all necessary precautions to avoid damage or disruption to any utility. The contractor shall provide utilities needed to do the work in this contract. No electrical or sewage facilities are available."  
(Emphasis added.)

Contrary to ERC's view that the Navy misinterpreted this provision as prohibiting contractor connection to the base electrical system, we think the only reasonable interpretation of the provision is the Navy's.<sup>3</sup> The RFP provision specifically states that the contractor "shall provide" the needed utilities and, even more specifically, that "no electrical . . . facilities are available." The language could not be much clearer; the contractor, not the agency, would be responsible for providing electricity for the work. Nothing else in the RFP provided otherwise. We agree with the Navy that ERC's proposal to connect to the base system did not satisfy this plain requirement.

Alternatively, ERC argues that its proposal to connect to the base electrical system was a minor deviation subject to correction without discussions (which were not held since award was based on initial proposals). We disagree. The required work, essentially a construction-type project, was dependent on the availability of electricity, and the RFP statement that "the contractor shall provide utilities" evidenced the agency's intent that the contractor provide the needed electricity. ERC's proposal was dependent upon the government's furnishing the electricity. A revision to ERC's proposal to reflect the RFP requirement would have involved a change to how ERC would accomplish the work and, as explained below, might well have necessitated a price change. We therefore conclude that ERC's failure to comply with the requirement rendered the firm's proposal unacceptable such that it could not be corrected unless

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<sup>3</sup>In resolving disputes concerning the interpretation of a solicitation, we read the solicitation as a whole and in a manner that gives effect to all solicitation provisions. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149.

competitive range discussions were held. Instruments S.A., Inc.; VG Instruments, Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476.<sup>4</sup>

Moreover, even if ERC had been given the opportunity to correct the deficiency, such a correction would not have changed the outcome. Correction of ERC's proposal would at best have brought the proposal up to the same level as WATEC's in this area. Even assuming that the proposals were otherwise equal (we find below that the agency reasonably determined that they were not), WATEC would have remained in line for the award based on its substantially lower price (which, as indicated above, carried the same evaluation weight as the technical factors). In this latter regard, moreover, the protester acknowledges that generator power (the alternative to connecting to the base system) is four times more expensive than the fixed power it proposed. Thus, it appears that any correction would have entailed an increase in ERC's already substantially higher price.<sup>5</sup>

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<sup>4</sup>Moreover, contrary to the protester's assertion in this regard, there is no indication in the record that the agency treated the electrical requirement as a minor matter in the evaluation of Severson's proposal and that offerors were thus treated unequally. Severson's drawing showed a portable electrical generator, although in the body of its proposal the firm did discuss the electrical generator. As the drawings required by the RFP were specifically to include "electrical details" and would become a part of any resulting contract, we believe that the agency properly determined Severson's proposal compliant with the electrical requirement based on the indication of the generator in the firm's drawing. Since Severson thus indicated compliance with the requirement and ERC made no provision either in its drawings or the text of its proposal for compliance with the electrical requirement, there is no indication of unequal treatment of offerors in this area.

<sup>5</sup>ERC further contends that when its representative visited the disposal site, the contracting officer did not object during a discussion on the possibility of running electrical service lines from nearby buildings. The firm complains that it was misled by this discussion into believing that its proposed use of base electricity would be acceptable. We find no merit to this complaint. It is well established that offerors who rely on oral advice that alters the written terms of the solicitation do so at their own risk. Kollmorgen Corp., 70 Comp. Gen. 551 (1991), 91-1 CPD ¶ 529.

The agency also properly considered the time frame for the mobilization of the cylinder testing equipment. An agency properly may rate one offeror higher than another for exceeding the requirements where, as here, 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. Under these circumstances, offerors are on notice that qualitative distinctions among the technical proposals will be made under the various evaluation factors. See Industrial Data Link Corp., B-248477.2, Sept. 14, 1992, 92-2 CPD ¶ 176. In making such distinctions, moreover, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated evaluation criteria. Cherry Hill Travel Agency, Inc., B-240386, Nov. 19, 1990, 90-2 CPD ¶ 403.

Here, the agency's consideration of the time frame for the mobilization of testing equipment was directly encompassed by the RFP's technical requirement to provide "a proposed project schedule which shows the sequencing of various aspects of the work and demonstrates an ability to complete the project within the allotted time." While no specific time frame for mobilization was required by the RFP, this requirement clearly put offerors on notice that the agency intended to consider factors--such as the mobilization time frame--that would affect an offeror's ability to complete the project on schedule. The agency considered the immediate mobilization of the cylinder testing equipment offered by WATEC a better means of minimizing potential delays than the delayed mobilization approach proposed by ERC. We thus have no basis to question the agency's evaluation of WATEC's proposal as superior in this regard.

#### WATEC's PROPOSAL

ERC argues that the agency improperly waived certain requirements in evaluating WATEC's proposal.<sup>6</sup> For example, the protester contends that the RFP requirement for drawing that completely depicted the project and for a description of "the facilities and procedure for testing the gas inside

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<sup>6</sup>The agency initially argues that the protester is not an interested party to protest the evaluation of WATEC's proposal (and also Severson's proposal). We disagree. Where, as here, if a protest were sustained, the appropriate remedy could be termination of the awardee's contract and resolicitation, under which the protester could compete, the protester is an interested party to protest to our Office. Automation Mgmt. Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

the cylinders" had the effect of requiring the use of proven and existing equipment for testing unknown gases in the excavated cylinders. Similarly, ERC argues that proven and existing experience for the same type of work as required here was required by virtue of the RFP requirement that offerors provide information on their own and proposed subcontractor records of "past performance with emphasis on related technical experience during the past five years and demonstrated ability to control safety, costs, schedule and quality." According to the protester, WATEC's proposal failed to show compliance with these requirements and thus could not be accepted for award. (At the heart of the protester's argument appears to be its belief that it alone holds the specialized technology necessary to properly test cylinders for unknown compressed gas contents.)

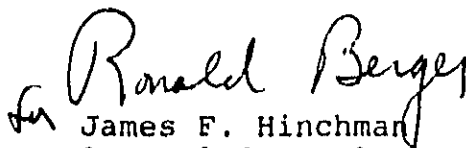
ERC's argument is without merit; ERC's interpretation reads requirements into the RFP that simply are not there. There is no language in the RFP that expressly prohibits offers of proven equipment or requires identical experience to be acceptable. The solicitation requirement for drawings that completely depict the project in no way required, or even suggested, that only existing equipment which had previously successfully completed testing of cylinders with unknown gas contents would be acceptable. Thus, the fact that WATEC apparently proposed newly developed equipment was not a basis for rejecting WATEC's proposal. Likewise, the solicitation requirements for "related experience" at the contractor and subcontractor levels simply does not equate with ERC's suggested reading that only identical experience was acceptable; had the agency intended to require identical experience, it could have clearly so stated. Thus, the fact that WATEC's experience was in the related, but not identical, area of disposal of cylinders with known gases, was not a basis for considering the proposal noncompliant with the RFP. We conclude that the alleged requirements on which this aspect of the protest is based in fact were not requirements, and that the agency did not waive any RFP requirements in evaluating WATEC's proposal.<sup>7</sup>

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<sup>7</sup>Moreover, we view this portion of ERC's protest as essentially arguing that the specifications should be read or applied in a more restrictive manner. Given that our role in resolving bid protests is to ensure that the statutory requirements for full and open competition have been met, a protester's presumable interest as a beneficiary of a more restrictive reading of specifications generally is not protestable under our Regulations. Container Prods. Corp., B-232953, Feb. 6, 1989, 89-1 CPD ¶ 117.

Finally, the protester argues that the agency's actual needs for the site clean-up are narrower than those stated in the RFP. The basis for this protest is a public statement by the agency after issuance of the RFP, discussing the possibility that no cylinders were buried at the site or, if buried, the probable types of gases contained in them, and the possibility that the cylinders are now empty due to dissipation of the contents over time. According to the protester, these additional pieces of information could have formed the basis for a reduced scope of work which would have resulted in a different competition. This argument is without merit. The uncertainties involved in the work were clearly stated in the RFP. For example, the RFP stated that cylinders were "allegedly" buried at the site, and that "the exact location, condition, and contents of the cylinders are unknown." Offerors therefore should have been aware of the uncertainties involved prior to issuance of the public statement. Contrary to an additional assertion by ERC, there is no evidence in the record showing that the evaluation was based on other than the requirement as defined by the RFP.<sup>1</sup>

We deny the protests.

  
for James F. Hinchman  
General Counsel

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<sup>1</sup>In comments on the protest, ERC for the first time argued that WATEC failed to comply with solicitation provisions requiring the submission of a detailed schedule and cost breakdown. These arguments are untimely. Under our Bid Protest Regulations, protests must be filed no later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.1(a)(2) (1992). The agency released WATEC's proposal (including the protested sections) to ERC on June 16, 1992, under a protective order issued by our Office. Since these arguments were not raised until July 9, more than 10 days later, they are untimely and will not be considered. See RRRS Enters., Inc., B-241512 et al., Feb. 12, 1991, 91-1 CPD ¶ 152.