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Comptroller General  
of the United States

317296

Washington, D.C. 20548

## Decision

**Matter of:** Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc.

**File:** B-252406; B-252406.2

**Date:** June 25, 1993

Richard L. Moorhouse, Esq., and Michael H. Ditton, Esq., Dunnells, Duvall & Porter, for Sci-Tec Gauging, Inc.; and Roland P. Piccone for Sarasota Measurements & Controls, Inc., the protesters.

Paul Shnitzer, Esq., Crowell & Moring, for ITT Barton; and Michael M. Patton for Engineering Design Group, the interested parties.

Gregory H. Petkoff, Esq., and Charles Felder, Esq., Department of the Air Force, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where a request for proposals for automatic tank gauging systems requires equipment covered by the statement of work to be commercial off-the-shelf (COTS) equipment the system itself need not be COTS, so long as the system equipment components are COTS.

2. Even though a former government employee who obtained confidential information pertaining to the protester's system is now employed as a consultant by the awardee, General Accounting Office has no basis to disagree with the procuring agency's determination that the awardee should not be excluded from the competition because of the alleged conflict of interest where the disclosure preceded the procurement and the awardee's employment of the consultant by 2 years and there is no evidence of improper disclosure to the awardee.

3. Agency's use of standards contained in a rating plan provided to evaluators to downgrade the protester's proposal was improper, where the standards were actually subfactors that were not evident from or disclosed in the solicitation, or otherwise to the offerors, particularly where the standards were not equally employed in evaluating the awardees' proposals.

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**DECISION**

Sci-Tec Gauging, Inc. and Sarasota Measurements & Controls, Inc. protest the awards to ITT Barton and Engineering Design Group under request for proposals (RFP) No. F41608-92-R-90658, issued by the Department of the Air Force for automatic tank gauging (ATG) systems for use on fuel storage tanks at various locations. Sci-Tec protests the award to ITT Barton, and Sarasota protests the awards to ITT Barton and Engineering Design.<sup>1</sup>

We sustain Sarasota's protest since the agency unfairly applied unstated criteria in evaluating the proposals. We deny Sci-Tec's protest.

The Air Force issued the RFP on July 22, 1992, contemplating the award of one or more firm, fixed-price requirements contracts for ATG systems for fuel storage tank types I, II, III, and IV.<sup>2</sup> The RFP contained a statement of work and purchase description that stated certain minimum requirements of the ATG systems. The RFP also contained price schedules divided into four groups--one for each tank type. Multiple awards were contemplated; the award for tank type IV was set aside for small business concerns.

Offerors were required to submit proposals consisting of the following five volumes: (I) Technical, (II) Installation, (III) Cost/price, (IV) Experience, and (V) Past performance. The RFP described a best value evaluation scheme, listing the following evaluation factors and subfactors:

"I. Technical

1. Reliability and Maintainability
  - a. Reliability
  - b. Maintainability
  - c. Warranty
  - d. Maintenance and Repair Plan
2. Technical Features
  - a. Level Accuracy
  - b. Temperature
  - c. Density
  - d. Water Measurement Method
  - e. Operating Environment

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<sup>1</sup>Since we sustain the protest and the record contains proprietary and source selection sensitive information, our discussion will necessarily be general.

<sup>2</sup>The tank type classification describes the size and physical location--e.g., above or below ground--of the fuel storage tanks.

### 3. Safety

#### "II. Installation

1. Method
2. Mission Impact
3. Installation Time
4. Environmental Impact

#### "III. Cost Price

#### "IV. Experience

1. Management
2. Production Planning and Capability."

The evaluation factors were listed in descending order of importance, and the subfactors and sub-subfactors for each factor were stated to be of equal importance. Each evaluation factor, except cost price, received a color/adjectival rating, a proposal risk rating and a performance risk rating. Performance risk was to assess the probability of the offeror successfully accomplishing the proposed effort based on the offeror's demonstrated present and past performance. The RFP stated that "the [g]overnment reserves the right to award to other than the lowest . . . [price] offeror."

The due date for receipt of initial proposals was September 29, by which time 12 offerors submitted proposals. The Air Force evaluated these proposals and determined that six proposals, including those of the protesters and awardees, were in the competitive range. After conducting discussions, the Air Force requested best and final offers (BAFO) from the offerors by January 21, 1993. The Air Force conducted follow-up evaluations and determined that ITT Barton's proposal offered the best overall value for tank types I, II, and III due to its evaluated superiority in technical and installation approaches, which were found to outweigh the fact that its price was not the lowest. Both protesters received the same or lower adjectival ratings for the technical and installation factors than did ITT Barton. Regarding tank type IV, the Air Force determined that Engineering Design's proposal offered the best overall value due to its technical superiority, which outweighed the fact that its price was not the lowest. Sarasota received lower technical and installation ratings than Engineering Design's ratings for this item. The protesters' prices for all items were either lower than or approximated the awardees' prices. The Air Force awarded contracts to ITT Barton and Engineering Design on February 10.

On February 19, Sci-Tec protested to our Office the award to ITT Barton. Sci-Tec alleges that the RFP required the ATG system to be a commercial off-the-shelf (COTS) product and asserts that ITT Barton's proposal was unacceptable because it did not offer a COTS ATG system. Sci-Tec also alleges that it offered a lower price than ITT Barton and challenges the source selection decision to award to a higher priced offeror, given ITT Barton's alleged inexperience in producing ATG systems and its asserted proposal of a non-COTS system.

On February 22, Sarasota protested to our Office the awards to ITT Barton and to Engineering Design. Sarasota asserts that ITT Barton should be excluded because of an alleged conflict of interest involving a former government employee, who is now employed by ITT Barton. Sarasota challenges the award to Engineering Design on the basis that it is ultimately offering the product of a large business. Sarasota finally protests the Air Force's evaluation because it was based on unstated criteria, on which basis we sustain the protest.

#### SCI-TEC'S PROTEST

Sci-Tec alleges that ITT Barton's proposal is technically unacceptable because it does not meet the RFP's alleged requirement for a COTS system. We do not agree that the RFP requires COTS "systems." The purchase description in the RFP did include the following requirement on which Sci-Tec bases its contention:

"Equipment covered by this [purchase description] shall be [COTS] equipment."

This requirement refers only to COTS "equipment" and, therefore, is not a requirement that the ATG "systems," as defined by the entire purchase description, be a COTS product.<sup>1</sup> See Contel Fed. Sys., 71 Comp. Gen. 11 (1991), 91-2 CPD ¶ 325 (nature of COTS requirement should be determined from reading the solicitation as a whole). We think that this requirement for COTS equipment may be satisfied with COTS components comprising the proposed ATG system. Compare Sony Corp. of Am., B-224373.2, Mar. 10, 1987, 87-1 CPD ¶ 267 (requirement for COTS "equipment" can be satisfied by COTS components comprising the system being procured) with Tektronix, Inc., B-244958; B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516 (requirement for COTS "system"

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<sup>1</sup>It does not appear from the record that ITT Barton proposed a COTS system, and neither the agency nor ITT Barton argues that ITT Barton's ATG system would satisfy a requirement for a COTS "system."

cannot be satisfied by COTS components). While Sci-Tec also asserts that "it would be highly dubious to suggest that the components utilized by ITT Barton . . . meet the COTS requirement," Sci-Tec has produced no evidence to support its contentions in this regard, even though its attorney was provided access to ITT Barton's proposal and the Air Force's corresponding evaluation documents under a General Accounting Office protective order; in any case, from our review, we find no evidence that ITT Barton's proposal did not comply with the COTS requirement.

Sci-Tec also asserts that the Air Force's evaluation and decision to award to ITT Barton at a higher price than Sci-Tec's was unreasonable because the agency concluded that ITT Barton was superior on non-price evaluation factors, even though ITT Barton allegedly did not have any prior experience in contracts specifically for ATG systems and was not offering a COTS system.<sup>1</sup> Here, the RFP, as stated above, did not require the ATG system to be a COTS system, or that the offeror have specific ATG system contracting experience. The RFP did provide that past performance on prior contracts would be considered in a performance risk assessment of the proposals, in response to which ITT Barton's proposal included numerous references for contracts for fluid level measurement systems, including systems for petroleum products, of similar size and scope to this procurement. The Air Force received satisfactory and exceptional assessments from these prior customers; no marginal or unsatisfactory comments were submitted by any of ITT Barton's references. From this review of past performance, the agency determined that ITT Barton merited a low performance risk rating, a rating that Sci-Tec has not shown to be unreasonable. In addition, ITT Barton's proposal was rated "acceptable" under the "experience" factor since that firm was found to possess acceptable management and production planning experience. While, for the reasons stated below, the

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<sup>1</sup>The Air Force's original evaluation failed to consider a discount offered in Sci-Tec's BAFO and thus considered Sci-Tec to have proposed a higher price than ITT Barton. This oversight was uncovered as a result of Sci-Tec's protest and the Air Force requested the Source Selection Authority (SSA) to reconsider the award determination in light of Sci-Tec's lower price. The amended determination by the SSA concluded that the evaluated superiority of ITT Barton on non-price factors outweighed Sci-Tec's lower price and confirmed the previous determination to award to ITT Barton. Sci-Tec has not challenged this reevaluation.

ITT Barton awards were improper, Sci-Tec's protest raises no valid basis to overturn the award, and it is denied.<sup>5</sup>

#### SARASOTA'S PROTEST

We sustain Sarasota's protest of the awards because unannounced criteria were unfairly employed; Sarasota's other challenges of the awards lack merit. We discuss these latter challenges first.

Sarasota alleges that the employment of a consultant by ITT Barton created a conflict of interest, which should have led the Air Force to exclude ITT Barton from the competition because the consultant, a former employee of the Air Force, received proprietary pricing and technical data from Sarasota while serving as an Air Force technical advisor on issues related to the ATG system requirement. The Air Force conducted an investigation of this alleged conflict of interest and concluded that it had no basis to exclude ITT Barton, and the record contains no evidence that the former agency employee actually used or disclosed proprietary information in any way that may have improperly benefitted ITT Barton. The employee's access to proprietary information occurred before the preparation of the solicitation and about 2 years prior to his employment by ITT Barton. Thus, notwithstanding Sarasota's assertion that the consultant "was entirely too close" to the project to leave any doubt as to the existence of a conflict of interest, we find no basis to disagree with Air Force's conclusion given that the technical approaches of Sarasota and ITT Barton are fundamentally different and that the individual involved had access to Sarasota's pricing data well prior to his employment by ITT Barton. See General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196.

Sarasota also alleges that ITT Barton's proposal is technically unacceptable because it is based on the use of nitrogen gas technology, which Sarasota asserts is not an accepted technology within the ATG industry. The RFP did not include, either specifically or by reference, any industry standard which would have excluded the use of nitrogen gas technology in a proposed ATG system. To the contrary, the purchase description described requirements as they relate to various measurement technologies and specifically stated requirements of the ATG system that uniquely apply to

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<sup>5</sup>The similar contentions raised in Sarasota's protest that ITT Barton's experience was deficient are also denied.

proposals using "hydrostatic" technology.<sup>6</sup> Moreover, the Air Force issued amendment No. 0004 on December 22, 1992, which stated that "[i]f the proposed ATG system utilizes NITROGEN" (emphasis in original), the nitrogen would be government furnished equipment. Since the RFP clearly contemplated the possibility of a system that used nitrogen, the protester cannot now viably argue that a proposal based on nitrogen gas technology must be unacceptable. If Sarasota believed nitrogen use was inappropriate, it should have timely protested the RFP. See 4 C.F.R. § 21.2(a)(1) (1993).

Sarasota also protests the eligibility of Engineering Design to receive award because that firm assertedly sought to circumvent the small business regulations by using a third-tier subcontractor to supply a product manufactured by a non-small business concern. Engineering Design's proposal showed that a small business subcontractor was going to manufacture system components. Thus, Sarasota's allegation appears to be mere speculation and provides no basis to challenge the award. See Electra-Motion, Inc., B-229671, Dec. 10, 1987, 87-2 CPD ¶ 581.

Finally, Sarasota protests that the Air Force improperly evaluated its proposal based on requirements which the Air Force did not announce. Our review of the record shows that, in making its decision to award to ITT Barton and Engineering Design, the Air Force improperly relied upon and unequally applied unstated evaluation subfactors. We sustain Sarasota's protest on this basis.

It is fundamental that offerors must be advised of the bases upon which their proposals will be evaluated. H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 263; Republic Realty Servs., Inc., B-242629, May 7, 1991, 91-1 CPD ¶ 446. In particular, contracting agencies are required by the Competition in Contracting Act of 1984 (CICA) to set forth in the solicitation, at a minimum, all significant evaluation factors and significant subfactors and their relative importance. 10 U.S.C. § 2305(a)(2)(A) (Supp. IV 1992); FAR § 15.605(e) (FAC 90-7); H.J. Group Ventures, Inc., supra. While agencies are not required to specifically identify each element to be considered during the

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<sup>6</sup>Hydrostatic technology relates to the pressure of fluids. The nitrogen gas technology, which was one of the many technologies reviewed by the Air Force prior to the preparation of the purchase description for the RFP and which was proposed by both ITT Barton and Sci-Tec, is a hydrostatic technology in which nitrogen gas is used to measure the pressure of the fuel in the storage tanks in order to calculate the quantity of fuel.

course of the evaluation where a particular element is intrinsic to the stated factors or subfactors, Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16, the solicitation must inform offerors of all minimum requirements that apply to evaluation factors and subfactors. FAR § 15.605(e); see W.B. Jolley, 68 Comp. Gen. 444 (1989), 89-1 CPD ¶ 512. It is also fundamental that the contracting agency must treat all offerors equally, which includes providing a common basis for the preparation and the submission of proposals and not disparately evaluating offerors with respect to the same requirements. AT&T Comm., 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 429.

Here, the Air Force compiled a detailed list of "standards" for use in evaluating proposals under the factors and subfactors stated in the RFP to determine whether proposals could satisfy the government's requirements. The standards on this list were "met" when a proposal described the detailed technical requirements on the list. These standards were not provided or otherwise disclosed to the offerors, but were provided only to the evaluators.

The agency repeatedly downgraded Sarasota's proposal for failure to meet some of these unstated standards, which caused Sarasota to be rated lower than the awardees. In addition, there is no indication in the evaluation record that these standards were applied to the awardees' proposals. Two examples of this are discussed below.

The RFP environmental requirements, as stated in the purchase description, were:

"All ATGs shall be capable of withstanding the pressure, temperature, and other environmental conditions likely to be encountered in the service. Relative humidity requirements shall range from 0 [percent] to 100 [percent]. The ATG shall be dust-tight, water-tight, and sleet-resistant."

During discussions, Sarasota informed the Air Force that the minimum operating temperature of its system was minus 30 degrees Fahrenheit. The Air Force concluded that Sarasota's proposal did not meet the "required" operating temperature range of minus 40 degrees Fahrenheit to plus 120 degrees Fahrenheit. This specific temperature range was only specified in the standards given to evaluators; this required temperature range was neither stated in the RFP nor

otherwise announced to offerors,<sup>7</sup> This was one of the significant deficiencies identified by the evaluators to Sarasota as justification for downgrading its technical rating.<sup>8</sup>

A second example involves the following purchase description requirement:

"The installation of ATG equipment shall not prevent [g]overnment access for taking product quality control samples from the tank; i.e., all level samples. Should existing tank appurtenances used for quality control be used in ATG installation, the [c]ontractor shall be required to provide a [g]overnment[-]approved capability at [c]ontractor's expense."

Sarasota's proposal stated that it would use existing tank openings for installing its system and included a paragraph labeled "Access - Fuel Sampling/Manual Gauging" which described the space requirement of its product at the point of tank entry and stated that the size of its product "will

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<sup>7</sup>We note that the Air Force's unpublished standards identified two temperature ranges; one for "Temperature" which stated that "[t]his standard is met when the proposal describes that , , , [t]he gauge is capable of providing product temperature readings from -40 degrees Fahrenheit (-40 degrees Celsius) to +120 degrees Fahrenheit (+50 degrees Celsius)" and another for "Operating Environment" which stated that "[t]his standard is met when the proposal describes that the gauge is capable of operating accurately in extreme arctic and tropic environmental conditions (-40 degrees Fahrenheit to +150 degrees Fahrenheit)." Not only were no temperature ranges stated in the RFP, the record shows that the agency incorrectly applied the temperature range for gauge readings in place of the temperature range for the operating environment sub-subfactor.

<sup>8</sup>We also note that the unstated minimum requirement for temperature range was the only rating standard applicable to determine whether the stated evaluation sub-subfactor "Operating Environment" was satisfied. Since the purchase description, as quoted above, mentioned a number of other environmental considerations, which were apparently minimum requirements, offerors could not reasonably discern from the RFP that the operating temperature range was basically definitional of this evaluation sub-subfactor instead of all of the environmental considerations stated in the purchase description.

permit access for sampling and will not interfere with procedures previously established."

The Air Force found that Sarasota's proposal did not adequately address the requirement that the offered system not prevent manual gauging/sampling by the agency when measured against the standard requiring proposals to show that "safe access to the gauge well should require no more than 1/2 hour for the purpose of manual sampling and gauging." The evaluators' conclusion that Sarasota "failed to specify the length of time to gain access for manual sampling and gauging purposes" was one of the reasons that Sarasota was downgraded under the "Installation" factor.

While we agree that an agency, in appropriate circumstances, can establish evaluation standards to provide evaluators with guidelines as to the quality of proposals in certain evaluation areas, see, e.g., P.E. Sys., Inc., B-249033.2, Dec. 14, 1992, 92-2 CPD ¶ 409 (undisclosed manning estimate can be used to evaluate proposed staffing levels), the rating standards established here went beyond what is permissible--they imposed additional specific evaluation subfactors that were not disclosed to the offerors and that were not evident from the RFP.<sup>3</sup> Their use was therefore improper.

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<sup>3</sup>The agency's Streamlined Source Selection Procedures, Air Force Regulation (AFR) 70-30/AFFARS Appendix BB (27 April 1988), at paragraph 22, states the following:

"b. Standards, which indicate the minimum performance or compliance acceptable to enable a contractor to meet the requirements of the solicitation and against which proposals are evaluated, will be prepared . . .

"c. Standards . . . will not be released to any potential offeror . . . ."

To the extent that the Air Force has interpreted this provision to mean that minimum requirements or significant evaluation subfactors which are prepared as "standards" under this regulation shall not be stated in the solicitation, such interpretation violates CICA, 10 U.S.C. § 2305(a)(2)(A), FAR §§ 10.002(a)(3) and 15.605(e), and the fundamental principle of the competitive procurement process that all offerors be given sufficient detail in a solicitation to be able to compete intelligently and on an equal basis, which includes stating specifications or purchase descriptions so that they are unambiguous and accurately describe the agency's minimum needs. University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210.

Furthermore, the record reflects unequal application of the standards. That is, while the standards were repeatedly referenced to downgrade Sarasota's proposal, the same standards were not referenced in evaluating the awardees' proposals where they were applicable.

For example, while Sarasota's proposal was downgraded for failing to meet the undisclosed minimum operating temperature, ITT Barton's proposal, which also did not specify the minimum and maximum temperatures at which its system would operate, was not downgraded--the Air Force made no finding that ITT Barton's proposal did not meet the unstated temperature standard.

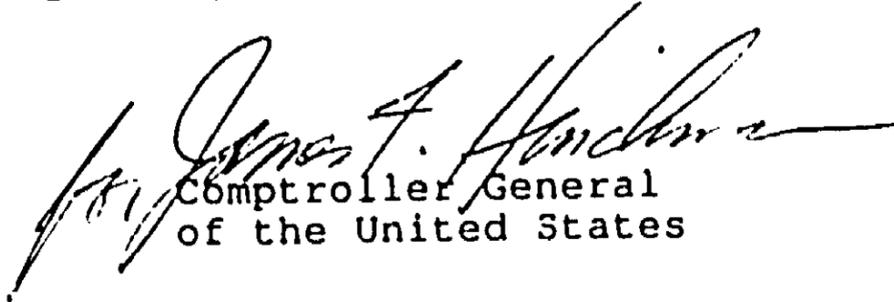
While Sarasota's proposal was downgraded for failing to meet the manual sampling/gauging standard, neither ITT Barton's nor Engineering Design's proposal was so downgraded even though each of them also did not specify the time required to gain access to the tanks for sampling and gauging purposes. The awardees' proposals and Sarasota's proposal contained very similar details with regard to this requirement; they all proposed using pre-existing tank openings for installing their systems and stated that the government's manual sampling/gauging procedures would not be affected by the presence of the system. From our review, the only difference of any significance among the proposals was that Sarasota's proposed system would occupy less space in the pre-existing opening, which suggests that this would allow for more unimpeded and quicker manual sampling and gauging. Thus, we find that the Air Force treated the offerors unequally in applying these unstated requirements to Sarasota but not to the awardees.

Accordingly, on this record we find that there was improper unequal treatment of the offerors. See Secure Servs. Tech. Inc., supra.

Sarasota's protest therefore is sustained. Sci-Tec's protest is denied.

We recommend that the Air Force amend the solicitation to reflect all pertinent requirements and evaluation criteria, reopen discussions with all competitive range offerors, request BAFOs, and proceed with the source selection process. If, after BAFOs are evaluated, any offer other than that of an awardee is determined to be most advantageous to the government under the RFP for a tank type, the contract for that tank type should be terminated and award made to the successful offeror. Sarasota is also entitled to recover

the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). Sarasota should submit its certified claim for protest costs directly to the agency within 60 days of this decision. 4 C.F.R. § 21.6(f)(1).

  
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