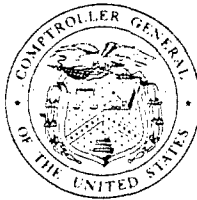


Proc I

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-193240

DATE: May 29, 1979

101,302

MATTER OF: Servo Corporation of America

DIGEST:

CNG 02466

1. [Protest that solicitation contained biased specifications] because of agency's improper cancellation of prior contract with protester and consequent revision of agency's minimum needs is untimely. GAO believes any deficiencies in specifications concerning design or performance characteristics of protester's equipment should have been readily apparent from face of solicitation. Thus, protest should have been filed before closing date for receipt of proposals as required by 4 C.F.R. § 20.2(b)(1) (1978).
2. In absence of abuse of discretion or unreasonableness or a violation of procurement statutes or regulations, GAO will not disturb technical judgment of agency. Record reveals that awardee's proposal is technically superior in certain major technical areas. Consequently, GAO concludes that agency's technical evaluation of proposals submitted was reasonable.
3. Critical test for determining whether there was bias in evaluation of protester's proposal is whether all offerors in context of competition have been treated fairly and equally. Protester has presented no specific evidence of fraud, abuse of discretion, or arbitrary action in procurement itself which would show that it was treated unfairly or unequally. Therefore, since it is the responsibility of protester to present evidence sufficient to affirmatively establish its allegations of bias in evaluation of its proposal.

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4. Record shows that agency's review of its technical evaluation after protest was made to it was not intended to be a full-scale, second-source selection evaluation. Moreover, results of review were consistent in those technical areas reviewed with those of original evaluation. GAO consequently is of view that agency took more than adequate steps to insure that original technical evaluation of proposal was in fact reasonable.
5. GAO finds no merit in protester's contention that review by it of agency's evaluation is necessary. It is not the practice of GAO to conduct investigations pursuant to its bid protest function for purpose of establishing validity of protester's speculative statements.
6. GAO does not review affirmative determinations of responsibility except where fraud is alleged on part of procurement officials or where solicitation contains definitive responsibility criteria which allegedly have not been applied. Neither exception is present here. Moreover, while determinations as to responsibility of offerors should be based on most current information available, GAO concludes that protester has not offered any new information which would affect agency affirmative determination of awardee's responsibility.
7. Failure of protester's subcontractor to deliver critical technology to it is matter which directly relates to the technical merits of protester's proposal. Since GAO does not disturb agency's technical evaluation in absence of clear showing of arbitrariness or unreasonableness, protester has no basis for questioning agency's technical determinations. Moreover, record shows that agency evaluated protester's proposal on assumption that critical technology would be transferred to protester prior to any possible award.
8. Protester's contention that agency did not conduct meaningful negotiations concerning protester's computer software approach is without factual basis. Agency evaluation report which protester refers to shows that any change in this area would have involved a complete redevelopment on the part of the

protester. Further, report indicates that agency did hold lengthy discussions with protester on the matter.

Servo Corporation of America (Servo) protests the award of a contract for a system to detect, analyze and transmit atmospheric meteorological data for use by the Army Field Artillery to anyone other than itself under request for quotations (RFQ) DAAB07-78-Q-2704 issued by the Army Electronics Research and Development Command, Fort Monmouth, New Jersey.

#### BACKGROUND

The meteorological system that the Army had relied upon for the detection of data that would affect artillery firings is the GMD-1, Rawinsonde System. The GMD-1 was developed in the late 1940's to provide the Army with an automatic system to replace older manually operated equipment for obtaining meteorological data. First production sets of this system were placed in use in 1949. With the passage of time, however, the GMD-1 became increasingly incapable of meeting the Army's needs. The system's vacuum tube technology was markedly inferior to the solid state electronics technology that had arisen. Repair parts became increasingly more difficult and expensive to find. Also, because the strip recorder printout of the GMD-1 must be reduced by hand, an inordinate amount of time was needed in battlefield situations to make use of the GMD-1 data.

A contract was awarded to Fairchild-Hiller Corporation (then Republic Aviation Corporation) in June 1963 to develop the Automatic Atmospheric Sounding Set, the TMQ-19, and the Atmospheric Meteorological Probes, AMQ-22 and AMQ-23, which were all parts of the Meteorological Data Sounding System, the UMQ-7. Phase I of this contract resulted in a final report in September 1965. It traced the growth of the system from the initial requirement phase into hardware specifications and finally into actual hardware designs by the contractor.

Phase II of the above-described program was initiated in April 1964 and continued until 1967. During Phase II, the systems proposed in the first phase were built and tested in accordance with the electrical and environmental

requirements specified in the specifications prepared by the Army. Most importantly, a model of the TMQ-19, which was the data acquisition and processing nucleus of the UMQ-7, was delivered in December 1966 and accepted by the Army in March 1967.

A special In Process Review (IPR) was made by the Army in April 1969. At that time a determination was made to proceed with the engineering development of two TMQ-19 sets on an expedited basis. As a consequence, a solicitation was issued in September 1969 and in June 1970 Servo was awarded a fixed-price, incentive contract for the two test models of the TMQ-19. Servo performed work in developing the TMQ-19 until its last contract was terminated for convenience in March 1976.

Although sizeable expenditures had been made for the TMQ-19, the Army during this time had been actively pursuing several alternatives in view of the doctrinal and need changes of its field artillery. In general, the Army desired an automated lightweight mobile meteorological data system for timely acquisition and dissemination of meteorological data to front line field artillery battalions. The general requirements for a new system were established in November 1976. This system was termed the Field Artillery Meteorological Acquisition System (FAMAS).

The protested RFQ was issued on December 22, 1977, with February 13, 1978, specified as the closing date for receipt of proposals. At Servo's request, the closing date was extended to March 13, 1978. A preproposal conference was held on January 10, 1978, at which time prospective offerors were briefed on the FAMAS requirements and the RFQ. On the closing date, two proposals were received by the Army, one from Servo and one from the Bendix Corporation (Bendix). These proposals were then technically evaluated and on July 11, 1978, each offeror was informed of its proposal deficiencies. Negotiations were held with Bendix on July 26-27, 1978, and on July 27, 1978, with Servo. Best and final responses were received on August 15, 1978, and the Army's final technical evaluation was completed on August 17, 1978. An Overview Group met on August 18, 1978, to review the technical evaluations that had been made to that date.

By letter dated September 15, 1978, Servo submitted a protest to the Army alleging certain improper actions and procedures in the procurement. Because of Servo's allegation of bias in the evaluation of its proposal and to be certain that the evaluation and source selection process had not been improperly influenced by any one individual, the Army conducted a technical review of the original technical evaluations of the proposals of Servo and Bendix. A written report of the technical review was completed on October 13, 1978.

The Army denied the protest on October 18, 1978. By letter received in our Office on the same date, Servo protested that the Army did not accord it the relief to which it was entitled under applicable procurement laws and regulations and that the review procedures utilized by the Army to correct deficiencies in the technical evaluation in the procurement were themselves deficient.

By letter dated November 30, 1978, Servo lodged a second protest under the FAMAS procurement with our Office. Servo alleged that its competitors may have improperly influenced or interfered with the procurement and delivery of certain technology to Servo by its subcontractor. Therefore, Servo questioned the eligibility of Bendix for award and the propriety of the Army's evaluation of Servo's technical proposal.

The Army procuring activity which issued the FAMAS procurement initiated on January 11, 1979, a Request for Authorization to award a contract to Bendix prior to resolution by us of Servo's protest. The GMD-1 system, which FAMAS is to replace, operates in a radio frequency band which interferes with the effective operation of the German Meteorological Satellite. Also, the factors of age, obsolete technology and cost of maintenance have caused a degradation in the state of readiness of the Army's present meteorological data acquisition equipment. Therefore, the Army has scheduled the FAMAS program to assure deployment of 10 FAMAS systems in Europe by December 1983. This schedule was predicted on award of a contract in June 1978. Because of the time consumed in the evaluation and negotiation of the proposals submitted, the Army's proposed date of award slipped to September 1978. Because of the protests of Servo the proposed award had been indefinitely delayed so that the

Army's commitment to delivery by December 1983 was in serious jeopardy.

Consequently, on March 13, 1979, the authority to award to Bendix pending resolution of Servo's protests was granted by the Assistant Secretary of the Army for Research, Development and Acquisition. This authority to award was pursuant to Defense Acquisition Regulation (DAR) § 2-407.8(b)(3)(i) (1976 ed.), which permits award prior to resolution of a protest on grounds of urgency.

#### SERVO'S ALLEGATIONS

By letter dated November 6, 1978, Servo, in providing additional details in support of its first protest, made several allegations:

1. That only it was entitled to award of the FAMAS contract in accordance with the solicitation's established evaluation criteria since it had solid technical experience relevant to the performance of the contract from its performance during the past 7 years of Army contracts for the development of meteorological equipment directly related to FAMAS.
2. That in view of its technical experience any higher technical rating given to Bendix can only be the result of favoritism toward Bendix and/or prejudice against Servo by one or more members of the Army's technical evaluation team.
3. That the bias and prejudice against it was the result of the Army's improper cancellation of the TMQ-19 and the Army's revision of its requirements which provide the basis for the FAMAS specifications so as to exclude Servo and the TMQ-19 from consideration.
4. That certain review procedures utilized by the Army to correct deficiencies in the technical evaluation of the proposals submitted were themselves deficient and incapable of insuring a complete and impartial evaluation.

By letter dated December 21, 1978, Servo, in supplementing its November 30, 1978, letter, provided the following grounds for its second protest:

1. That the Army knew of Servo's failure to receive critical technology to which it had exclusive right and that this knowledge affected the Army's evaluation of Servo's proposal.
2. That the circumstances surrounding its failure to receive the technology raise serious questions about the extent and propriety of the role which Bendix had in the matter.

#### TIMELINESS

With respect to Servo's first protest, the Army argues that the issues raised by Servo concerning the cancellation of the TMQ-19 and the redefinition of the field artillery's meteorological needs are untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1978). The Army points out that the events surrounding the termination of the UMQ-7 of which the TMQ-19 was a part and parcel of the preparation of the requirements for FAMAS occurred in late 1975 and early 1976. To raise issues involving these events in September 1978 is, in the Army's opinion, far beyond the intent of the time limits established by our Office for filing timely protests and is clearly beyond the 10-day limit for filing a protest after the basis for the protest is known or should have been known.

In support of the above position, the Army further contends that the proper time for Servo to have raised the issue of bias resulting from the termination of the UMQ-7 was at the time it occurred which was prior to the issuance of the FAMAS solicitation. According to the Army, Servo knew or should have known the basis for its protest on this issue on or after February 24, 1976, because Servo raised the matter in a letter to the Office of the General Counsel, Department of the Army, dated January 8, 1976. The Army states that it replied to that letter on February 24, 1976. Since Servo received formal notification of adverse agency action on this date, the Army believes a protest should have been filed within 10 days thereafter. See 4 C.F.R. § 20.2(a).

With respect to Servo's second protest, the Army contends that Servo has admitted that the facts which support the assertion that the delivery of the technology was improperly influenced were brought to Servo's attention during a deposition taken on November 15, 1978, in a bankruptcy proceeding. Consequently, the protest that Servo filed with our Office on November 30, 1978, was filed more than 10 days after the basis for such protest was known to Servo. Although it appears that Servo exceeded the filing deadline by only a few days, the Army refers to our decisions which hold that the time limits for filing protests are not to be regarded as mere technicalities which can be waived. See, for example, R. A. Miller Industries, Inc. (Reconsideration), B-187183, January 14, 1977, 77-1 CPD 32.

In response to the Army's assertions as to the timeliness of its first protest Servo asserts that the Army has misconstrued the bases of this protest and failed to distinguish between the various issues Servo has raised. The issues raised by Servo are distinct from those presented in its letter of January 8, 1976. Servo contends that the first issue raised by it in the first protest is the bias resulting from the manipulation of the Army's requirements after the cancellation of the TMQ-19 which bias affected the FAMAS procurement. Servo argues that this issue could not have been raised in its letter of January 8, 1976, because the FAMAS solicitation was not issued until December 22, 1977. Servo states that it could hardly be expected to protest bias and prejudice relating to a solicitation which had not been issued. Had it done so, Servo agrees that the Army would have had a legitimate timeliness argument.

Furthermore, Servo claims that it was unaware that the bias and prejudice which resulted in the cancellation of the TMQ-19 had infected the FAMAS procurement until its discovery of a back channel, "eyes only," internal Army message from an individual named "John." The individual's last name does not appear on the message, but Servo avers that he is the Chief, Special Censors Division, United States Army Combat Surveillance and Target Acquisition Laboratory, Fort Monmouth, New Jersey. In any event, Servo states that this document was not uncovered until October 23, 1978, pursuant to a search Servo conducted of Army files under a Freedom of Information Act (FOIA) request.



The above-mentioned message describes in some detail a dispute among various commands within the Army as to what the Army's requirements for a meteorological data acquisition system should be. Apparently, certain commands went along with the decision to cancel the TMQ-19 rather than modify it because of a refusal on the part of other commands to discuss any modifications in "good faith." Also, the message indicates that the Army's new meteorological data acquisition requirements had been at that point very hastily drawn up and, thus, had not been adequately thought through.

In addition, Servo contends that the above-described message, which was written on December 19, 1975, reveals that the Army violated Federal procurement regulations and disregarded fair procurement practices in an ill-advised and ultimately futile effort to eliminate the TMQ-19 in favor of the Japanese-made Automatic Tracking Rawinsonde Receiver Station, known as the RD-65A. The RD-65A, a commercial, lightweight, radio direction-finding system, had been under Army review since July 1974. Servo claims that the message indicates that the Army was focused solely on the RD-65A and was closed to any other technological system. Moreover, Servo contends that the message shows that the Army's new meteorological requirements which were being formulated at that time were merely a smokescreen to provide a rationale for eliminating the TMQ-19 and insuring a contract for the RD-65A.

It is our opinion that the arguments raised by Servo relating to the designing of the FAMAS specifications to improperly eliminate it are untimely. While we agree with Servo that bias and prejudice relating to the FAMAS solicitation specifications could not have been protested prior to the issuance of that solicitation, protests based on patent solicitation improprieties are required to be filed with us prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 20.2(b)(1). Here, the deadline, as amended, for receipt of proposals was March 13, 1978. Servo did not question the FAMAS specifications until more than 6 months after this date when it filed a protest on September 15, 1978, with the Army.

We recognize Servo's claim that it did not discover that the FAMAS specifications had been manipulated to exclude the TMQ-19 until October 23, 1978, when Servo discovered the back channel message during a search of Army files pursuant to FOIA. Nevertheless, regardless of what this message may have revealed about the motivations for the FAMAS specifications, we think that the deficiencies in the specifications themselves concerning the TMQ-19 should have been readily apparent from the face of the RFQ. Moreover, if Servo really desired that the FAMAS specifications provide for some or all of the design and performance characteristics of the TMQ-19, it should have made such desire known to the Army prior to the closing date for receipt of proposals.

Servo also contends that while the Government enjoys wide discretion to determine its minimum needs, this discretion is not unlimited. The exercise of that discretion may not involve, as Servo alleges here, fraud, abuse of authority, arbitrariness, unreasonableness, or a violation of procurement statutes or regulations. However, we have also indicated that in a preprocurement situation, the Government is not required to comply with the rules and regulations generally governing procurements in conducting procedures to determine its minimum needs. See Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. Furthermore, our examination of the Government's determination of its minimum needs is limited to considering whether the procuring agency's evaluations and conclusions are arbitrary. See American Chain & Cable Company, Inc., B-188749, May 23, 1978, 78-1 CPD 390.

The technical specifications and the technical evaluation method were set out in detail in the RFQ. Servo has not provided any details as to how the technical specifications in the RFQ were biased as a result of the cancellation of its TMQ-19. Moreover, Servo itself indicates that the RD-65A which the Army was favoring in 1976 was eventually disqualified. In view of the foregoing, we think that Servo had sufficient information to put it on notice that the technical specifications for the FAMAS procurement were substantially different than those for the TMQ-19. Therefore, Servo's argument regarding biased specifications, raised after the closing date, is untimely. See Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 CPD 223.

Servo argues that if some of the issues raised in its first protest are untimely, these issues should, nevertheless, be considered. Servo believes that any untimely issues should be considered pursuant to the "good cause" or "significant issue" exceptions set forth in our Bid Protest Procedures. See 4 C.F.R. § 20.2(c). Citing our decisions in Fiber Materials Inc., 54 Comp. Gen. 735 (1975), 75-1 CPD 142, and LTV Aerospace Corporation, B-183851, October 1, 1975, 75-2 CPD 203, Servo also argues that its allegations concerning bias specifications are substantially intertwined with its allegations concerning the bias of the evaluators and the Overview Group in evaluating the two proposals submitted in this procurement. Because of the substantial intertwinement, then, Servo urges that it is proper for us to review all these issues together.

The good cause exception generally refers to some compelling reason, beyond the protester's control, which prevented it from filing a timely protest. 52 Comp. Gen. 20, 23 (1972); Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. Servo asserts that the Army had hindered prior attempts by it to obtain information concerning the cancellation of the TMQ-19 and the subsequent issuance of a new meteorological doctrine. Because Servo's allegations of biased specifications pertain to improprieties which would have been apparent from the face of the solicitation, we fail to understand how the alleged hindrances by the Army prevented Servo from protesting these improprieties prior to the closing date for receipt of proposals under the RFQ. Consequently, we do not believe that the good cause exception can be invoked here.

The significant issue exception is limited to issues which are of widespread interest to the procurement community and is "exercised sparingly" so that the timeliness standards do not become meaningless. R. A. Miller Industries, Inc., *supra*. Servo cites our decision in Willamette-Western Corporation; Pacific Towboat & Salvage Co., B-179582, B-179328, November 14, 1974, 74-2 CPD 259, as an example of where the issue of bias, although untimely, was reviewed by us under the significant issue exception. That case involved the release of a draft solicitation for marine salvage to an incumbent contractor approximately 5 months before the other competitors received an official solicitation which release resulted in the incumbent's sole knowledge

of approximate weights of evaluation criteria. Also, there was consideration of criteria not stated in the solicitation which were unequally applied to favor the incumbent. We believe that the cited case involved more than the mere fact that there was bias in favor of the incumbent contractor-offeror. Therefore, we cannot conclude that the situation that existed in Willamette-Western Corporation, which led to consideration by us under the significant issue exception, was the same as exists here.

We have also indicated that a significant issue is one which affects more than the individual procurement itself. See Catalytic, Incorporated, B-187444, November 23, 1976, 76-2 CPD 445. Here, we believe that the allegations of bias in the FAMAS specifications concern only the protested procurement. Therefore, consideration of these allegations under the significant issue exception is also unwarranted.

Nor do we feel compelled to consider the merits of Servo's claims regarding biased specifications on the basis that they are intertwined with the timely claims regarding bias by the Army in evaluating the proposals submitted under the RFQ. Servo cites our decisions in Fiber Material, Inc., supra, and LTV Aerospace Corporation, supra, as authority for the propriety of considering late issues because of their relationship to timely ones. In Fiber Material, we considered the merits of the protest because it raised an issue significant to procurement practice or procedure. In LTV Aerospace Corporation, we felt that it was appropriate to consider untimely issues concerning the propriety of solicitation specifications because these issues also involved questions of Federal appropriation and "congressional intent" which affected the timely issue regarding the fairness and equality of the solicitation evaluation. Here, however, Servo's general allegations of biased specifications resulting from alleged improprieties in canceling its TMQ-19 show no specific relationship with Servo's allegations of bias in the proposal evaluations.

With regard to the second protest, Servo argues that it was filed within 10 working days after the facts upon which it is based were brought to its attention. We agree. There are 10 working days from November 15, 1978, the date upon which Servo discovered the facts

upon which it has based its second protest, to November 30, 1978, once weekends and Thanksgiving Day, a Federal holiday, are excluded.

#### BIAS IN EVALUATION AND TECHNICAL REVIEW

Servo contends that, at a minimum, its technical proposal must be deemed essentially equal to Bendix's. The RFQ evaluation criteria were technical, cost, and management, with technical and cost substantially more important than management. Servo asserts that it has had solid technical experience relevant to the performance of the FAMAS contract from its performance from 1970 to 1976 on contracts for the development of meteorological equipment related to FAMAS. Also, Servo states that it has purchased technology from and now employs former key personnel of Beukers Laboratories, Inc. (Beukers), Bohemia, New York. According to Servo, Beuker's unique and proprietary technology and hardware were directly utilized by the Army in its development of the prototype FAMAS equipment. In view of the foregoing, Servo believes that if Bendix's technical rating was higher, it can only have been the result of favoritism toward Bendix and/or prejudice against Servo by one or more members of the Army's technical evaluation team.

In addition, Servo refers to a letter dated October 18, 1978, from the Army which related the results of the technical review it conducted pursuant to Servo's protest to it. Servo emphasizes that the Army stated in this letter that "the propriety of the methods employed in the evaluation would not necessarily preclude the possibility that individual prejudice might influence the selection of the successful offeror." As a consequence, Servo asserts that it is clear that reasonable cause exists to believe that the original evaluation of its technical proposal was subject to possible bias and prejudice. Also, Servo urges that based on the above statement, there is evidence in the Army's possession and control that bears upon this matter. While noting that the Army did state in the October 18, 1978, letter that "the selection did not appear to have been influenced by prejudice," Servo takes the position that this conclusion by the Army is not binding on our Office. In Servo's opinion, we must reach an independent determination as to whether any bias did affect the evaluation process.

With regard to the technical review, Servo indicates that the Army acted in good faith to attempt to correct the deficiencies in the technical evaluation of the RFQ proposals. Nevertheless, Servo contends that the review procedures of the Army were themselves deficient and incapable of insuring a complete and impartial evaluation of the technical proposals. Servo alleges that no member of the review team had technical competence in the meteorological area. Servo also points out that the entire review was conducted in the space of 3 to 4 weeks as contrasted with the months of negotiation and evaluation normally accorded a procurement of the size and complexity of FAMAS. Finally, Servo claims that the only questions and answers available to the reviewers were those which resulted from the negotiations conducted by the original evaluators. Thus, the reviewers, despite their best intentions, were misled by the bias and prejudice of the original evaluation.

The Army states that regarding the technical evaluation, the evaluation factors and subfactors, as well as the directions given in the solicitation for response to them, were specifically designed for this particular procurement. Section "D" of the solicitation contained a clear statement that evaluation would be made upon proposal submission. The Army further states that the evaluation was conducted in accordance with section "D" and the solicitation's evaluation plan. Each offeror was given a fair, impartial and honest opportunity to compete and the technical ratings given to each proposal were based on the reasonable judgments of the evaluators. Thus, the Army contends that there is no evidence of any arbitrary action or abuse of discretion with respect to the technical evaluation under the FAMAS procurement. In the Army's opinion, the only evidence of any bias or prejudice here is Servo's written allegations.

As to the review of the technical evaluations, the Army states that the review team was given no information concerning the final conclusions of the evaluators. Moreover, the Army emphasizes that the purpose of the review was not to reevaluate the entire proposal of each offeror, but rather to check the original evaluation for the possibility of bias. The review team consisted of technical personnel who had no prior involvement with the technical evaluation or the RFQ. According to the Army, the scope of the review was

limited to the technical design of the hardware offered. Support areas such as technical manuals, training aids, logistic support analysis, design to cost, contract cost and management, and the like were not evaluated.

The Army states that the reviewers were not informed that the purpose of their review was to check the technical evaluation for possible bias. Instead, they were told to make their own independent judgments on the technical merits of each offeror's proposal. After the review team had made its findings, a comparison was made with the original findings of the evaluators. The Army states that both the findings of the reviewers and the findings of the evaluators demonstrated that Bendix's technical proposal was superior to Servo's. Furthermore, the Army contends that Bendix's higher technical rating was earned solely by its submission of a better proposal and not by any allegedly improper means.

Bendix asserts that Servo has not submitted sufficient evidence under our established standard of review to warrant disturbing the Army's selection of it for award under the FAMAS solicitation. Bendix argues that our decisions make it clear that allegations of improper conduct based on unfair or prejudicial motives are mere speculation where the written record fails to clearly demonstrate the alleged unfair treatment. See Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. Moreover, Bendix points out that an agency evaluation will not be disturbed by us "absent a clear showing that the determination was arbitrary or unreasonable." See Advanced Design Corporation, B-191762, August 10, 1978, 78-2 CPD 111. In Bendix's opinion, Servo's allegations of bias and prejudice should be dismissed as mere speculation because no bias or prejudice has been shown.

With regard to the possibility of bias mentioned in the Army's October 18, 1978, letter to Servo, Bendix contends that the true situation is that the Army, out of extreme caution, despite no indication of prejudice, but recognizing the theoretical possibility of such, empaneled a whole new evaluation team. This team, which was wholly isolated from the original evaluation team in its considerations and deliberations, arrived at the same conclusion; that is, that Bendix had the higher rated technical proposal. Consequently, Bendix believes that Servo's conclusion that the empaneling of

a second evaluation team constitutes a recognition of impropriety by the Army is without foundation, as is equally Servo's conclusion that the second evaluation was biased.

We agree with the Army and Bendix. It is not the function of our Office to make determinations as to the acceptability or relative merits of technical proposals. As stated by Bendix, our examination of the record in this matter is to determine whether the judgment of the contracting agency was clearly without a reasonable basis. Joseph Legat Architects, supra. Unless such a finding is made by us, or there is an abuse of discretion, or a violation of procurement statutes or regulations, the contracting agency's judgment will not be disturbed. Struthers Electronics Corporation, B-186002, September 10, 1976, 76-2 CPD 231. Otherwise, the contracting agency must bear the burden of any difficulties resulting from a defective evaluation. Macmillan Oil Company, B-189725, January 17, 1978, 78-1 CPD 37.

The record reveals that under the original technical evaluation the proposals of both Servo and Bendix were determined to be acceptable but the proposal of Bendix was given an overall rating of superior. This technical superiority was in the major technical areas of meteorological data processing, low weight trailer assemblage design and antenna feeding system. Also, the Army concluded that Bendix's proposal demonstrated an excellent overall basic knowledge of the maintenance and logistic requirements necessary to support military systems in the field. Based upon our review of the record, we conclude that the Army's technical evaluation of the proposals was reasonable.

Turning to Servo's contentions concerning the bias of the evaluators themselves, unfair or prejudicial motives cannot be attributed to individuals on the basis of inference or supposition. See A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541. The record contains no evidence of any improprieties on the part of the technical evaluators. Also, Servo has cited no specific instances of bias or prejudice. Therefore, we believe that Servo's allegations basically amount to speculation about possible bias or unfairness on the part of the Army's evaluators, without any factual substantiation.



Essentially, Servo is contending that because of its prior experience in developing the TMQ-19, it is the only company that is technically capable of meeting the specifications of the FAMAS procurement. This contention, however, is, in our opinion, inconsistent with Servo's untimely allegations concerning the Army's manipulation of FAMAS so as to exclude Servo and its TMQ-19. Further, we think that this contention is unfounded since the record indicates that Bendix and its subcontractor also have prior experience with meteorological systems. Most importantly, the contracting agency, not the protester, has the responsibility for determining which offeror has submitted the best proposal. See Advanced Design Corp., supra. In this regard, the fact that an offeror has outstanding qualifications does not give it legal entitlement to any specific award. Rather, the offeror must demonstrate its superior qualifications in the proposal submitted to the contracting agency in response to a given solicitation. See University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22.

Despite the foregoing, Servo takes the position that the evaluation of its proposal was biased ipso facto because the evaluation was based on improper specifications. According to Servo, an evaluation based on biased specifications must necessarily result in a biased evaluation regardless of how unbiased the evaluation team is. Since the Army states that its evaluation was in accordance with the solicitation specifications, Servo concludes that it is quite clear that its proposal was not fairly evaluated.

We do not believe that any bias that may have flowed from the cancellation of the TMQ-19 automatically implies that the evaluation of Servo's proposal was biased. Servo had the opportunity to protest any and all patent defects in the solicitation specifications at the time the solicitation was issued. Furthermore, the critical test for bias in evaluation is whether all offerors in a certain competition are treated fairly and equally. Metropolitan Contract Services, Inc., B-191162, June 14, 1978, 78-1 CPD 435. Servo has presented no specific evidence of fraud, abuse of discretion, arbitrary action or other agency conduct in this procurement which would show that it was treated unfairly or unequally.

With respect to the Army's technical review conducted subsequent to Servo's protest to that agency, Servo, in a letter dated February 22, 1979, submitted detailed arguments in support of its allegation that the Army's review procedures were deficient. Servo asserts that the reviewers did not perform an independent review because the biases of the original evaluators were transmitted to the reviewers. According to Servo, the reviewers received for review only a list of specific "issues" or problem areas which had been formulated by the evaluators themselves. In addition, Servo contends that the reviewers ignored significant portions of the RFQ's technical evaluation criteria. Moreover, the written review submitted by the viewers reveals, in Servo's opinion, a complete lack of understanding by the reviewers of the requirements for the FAMAS software and antenna/trailer assembly systems. Finally, Servo claims as matter of general principle that the review was biased because it was based upon the same biased specifications as the original evaluation.

From the record, we believe that it is clear that the Army's review was not intended to be a second full-blown source selection evaluation. Moreover, the Army emphatically denies that there were any deficiencies in the original evaluation or that the evaluation was tainted by bias. The intent of the review, then, was to give the Army a basis of comparison with respect to the ratings achieved by the offerors in certain specified areas. The record indicates that the results of the review were consistent with those areas of the original technical evaluation, although the reviewers did find that Servo's technical proposal was unacceptable in many of the categories that the evaluators considered it to be acceptable, but only marginally so. Therefore, we feel that the Army took more than adequate steps to insure that the original technical evaluation of the proposals was in fact reasonable.

#### BURDEN OF PROOF

Servo contends that the Army has failed to produce any evidence of its own and, instead, has submitted unsigned, unsworn and undated statements prepared solely for the purpose of answering Servo's protests. Moreover, according to Servo, the Army has failed to address, much less contravert, the December 19, 1975, back channel

message which detailed the events surrounding the cancellation of the TMQ-19. Rather than produce documents and statements from individuals under its control, Servo argues that the Army has chosen to rely upon mere denials. Under these circumstances, Servo avers that the Army must be deemed to have admitted the facts as alleged. In this regard, Servo asserts that where a party refuses to produce evidence that is within its control, the presumption arises that the evidence, if produced, would support the allegations of the other party. Servo asserts that this evidentiary principle, which is firmly established in the law and embodies important equitable considerations, must be applied by our Office here.

Furthermore, Servo argues that if the Army desires to avoid application of the above-mentioned evidentiary principle, it should be required to produce all the evidence within its possession and control relating to bias. More specifically, Servo requests that we obtain and review the technical ratings of certain members of the Army's proposal evaluation team. Servo believes that such a review will provide additional evidence of bias and prejudice because certain evaluators were members of commands within the Army that were primarily responsible for the cancellation of the TMQ-19.

The Army contends that Servo has submitted no evidence that it or its proposal was given unequal consideration with that of Bendix. The Army further takes the position that Servo has failed to set forth any evidence that either the determination to cancel the TMQ-19 or the evaluation of the relative merits of the FAMAS technical proposals lacked a reasonable basis or that there was fraud or abuse of discretion involved. As to the back channel message, the Army asserts that the statements in it that are attributable to persons other than the preparer of the message are nothing more than hearsay. Since hearsay evidence is ordinarily inadmissible under formal rules of evidence, such evidence should be given little or no weight here by us.

Bendix argues that the back channel message cannot be evidence of prejudice in the evaluation of the proposals submitted under this procurement since the message was written almost 27 months before proposals were even submitted. As to any review by us of the technical ratings given by the evaluators, Bendix takes the position that

the circumstances do not call for our review. Bendix asserts that the evidence presented by Servo does not rise to the level required by Advanced Design Corp., and Joseph Legat, supra, to establish allegations of bias and prejudice.

It is the responsibility of the protester to present evidence sufficient to affirmatively establish the allegations made in its protest. Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. Except for the back channel message, Servo has not provided any documentary evidence to support its allegations that the evaluation of its proposal was biased. As to the message itself, we agree with Bendix that in view of the length of time that it was prepared prior to the issuance of the FAMAS solicitation, this document has no probative value on the issue of whether there was bias or prejudice in the technical evaluation. Accordingly, Servo has not met its burden of proof on this element of its first protest. See Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415.

With regard to Servo's allegation that the Army has documents and other evidence within its control that are relevant to Servo's allegations of bias, it is not the practice of our Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the validity of a protester's speculative statements. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105. In the absence of evidence demonstrating bias, we must assume that Servo's allegations are speculative. See Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1. In addition, where the only evidence before us with regard to an issue consists of contradictory statements by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving the matter. See Telectro-Mek, Inc., B-185892, July 26, 1976, 76-2 CPD 81.

Nor do we think that a review for bias of any of the evaluators' technical evaluations is warranted. While we recognized in Joseph Legat Architects, supra, that it is very difficult or impossible for a protester to establish on the written record--which forms the basis for our Office's decisions in protests--the existence of unfair treatment which is allegedly based

upon the subjective motivations of an agency's procurement personnel, we also pointed out that sweeping allegations of improper conduct, such as made here, are no substitute for concrete proof. Protester has thus shown no factual basis for its contention that the evaluators from the Army commands that recommended the TMQ-19 be canceled were biased against it.

#### THE SECOND PROTEST

Servo states that shortly after the FAMAS solicitation was issued, Beukers approached it with the proposition of a merger between the two companies. Servo indicates that it was interested in such a merger because Beukers' proprietary technology for ground equipment, computer software and certain other components was extremely important for FAMAS. Moreover, Beukers had performed the contract with the Army for production of a FAMAS prototype. Therefore, Servo believed that its possession of Beukers' technology would give it a substantial competitive advantage in the FAMAS procurement. Accordingly, Servo began negotiations with Beukers concerning the purchase of this technology and the merger of the two companies.

Although the merger was never consummated, Servo claims that an agreement was entered into whereby Servo became "the sole and exclusive owner" of the above-mentioned technology and Beukers promised to promptly commence its transference to Servo. However, despite having the right to the technology, Servo states that Beukers has to date failed to deliver it to Servo. According to Servo, no logical or plausible reasons for this failure to deliver have been forthcoming from Beukers.

Servo believes that during the course of the instant procurement Bendix may have improperly influenced or interfered with the required delivery of Beukers' technology and adversely affected the Army's evaluation of its proposal. Servo declares that its proposal included Beukers as a major subcontractor and that it noted in the proposal that it had "already purchased all of the technology in existence" at Beukers. Further, Servo informed the Army in its proposal that it was completing negotiations for the acquisition of Beukers. While Servo admits that Beukers notified the Army on May 12, that its acquisition

by Servo would not be consummated and that it did not have the financial ability to perform as subcontractor for Servo, Servo asserts that subsequent to revising its proposal on May 26, 1978, to indicate that it had Beukers' technology and that company's key employees, some party or parties were advising the Army of the status of the delivery of the technology. In this regard, Servo cites several incidents which occurred between July 11, 1978, and September 1978 to show that the Army was being apprised regularly of Beukers' continuing failure to deliver the technology which Servo acquired.

Servo further declares that during the course of litigation it instituted on November 2, 1978, to compel delivery of the technology, the president of Beukers was deposed on November 15, 1978. Servo believes that during the taking of this deposition, certain facts were brought out which support Servo's assertion that Bendix may have influenced or interfered with the delivery of Beukers' technology. More specifically, Servo states that deposition revealed that during the course of the FAMAS negotiations, Bendix met with the president of Beukers to discuss the possible acquisition of Beukers by Bendix and during the meeting the issue of Beukers' delivery of its technology to Servo was raised. Also, during the course of negotiations, the president of Beukers had frequent conversations with Army technical personnel where the subjects of Servo and the status of the FAMAS procurement were addressed. Finally, the deposition revealed that during the course of negotiations, a representative of Bendix's subcontractor visited the president of Beukers and offered him a job.

In light of the foregoing, Servo contends that the meetings Bendix and its subcontractor had with the president of Beukers could easily and reasonably have served to encourage Beukers not to deliver its technology to Servo. Furthermore, any meeting between Beukers and Bendix during the critical period when the FAMAS proposals were under evaluation would be of serious concern and highly suspect. When one meeting includes a discussion of potential employment, Servo urges that such suspicions require investigations. Consequently, Servo has submitted a list of questions to be answered by the Army

and by Bendix. In Servo's opinion answers to these questions are required in order to determine both the eligibility of Bendix for award of the FAMAS contract and the propriety of the Army's evaluation of Servo's technical proposal.

Bendix categorically denies that, alone or in conjunction with any other person or organization, it has made any effort or done anything to improperly influence or interfere with the delivery of critical technology by Beukers to Servo. Further, Bendix contends that the deposition transcript has been used out of context by Servo and does not support Servo's allegations. As to the Army's technical evaluation, Bendix declares that it has no knowledge of whether Servo's problems with Beukers had any effect on the evaluation of Servo's proposal. However, if Servo did indeed rely on Beukers to supply "critical technology" with respect to its proposed performance, the apparent inability of Servo to obtain such technology could have legitimately affected the evaluation of its proposal. Moreover, since it is the availability of the technology that is important to contract performance, it should not be unreasonable for the Army to be concerned with such availability rather than who had legal title.

Bendix argues that Servo is asserting that award to Bendix would be in violation of responsibility criteria established in the controlling procurement regulations. Bendix questions the use of a protest to our Office to remind the contracting officer of responsibilities that he is fully aware of unless the failure of the contracting officer to carry out these responsibilities will result in a decision by us that is adverse to him. However, Bendix notes our decisions which hold that we do not review affirmative determinations of responsibility except where fraud is alleged on the part of the contracting officer or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated Solicitation No. M2-40-74, 54 Comp. Gen. 66 (1974), 74-2 CPD 64, and the cases cited therein. Bendix indicates that no specific solicitation responsibility criteria are at issue in the instant procurement.

After receiving assurances from Servo that it fully owned the Beukers technology, the Army completed its technical evaluation based upon this assurance. However, the Army also recognized that if Servo did not possess the technology, there could be a serious impact on Servo's capability to perform in accordance with the times specified by the solicitation schedule. Thus, the Army declares that its technical evaluators specifically assumed throughout the evaluation process that Servo owned the Beukers technology and that the transfer of it would in fact be completed.

Nevertheless, the Army points out that getting the Beukers technology did not imply that Servo had the capability to use it. The Army states that as a result of the failure of the proposed merger, certain key personnel with Beukers would not have been in the employ of Servo during the performance of the contract. The Army claims that the key personnel had a significant amount of experience in certain key technological areas where Servo had little experience. The Army states that this point was continually mentioned throughout its evaluation reports and its effect was to lower the rating achieved by Servo in the areas of personnel and schedule. The Army emphasizes that section D.3 of the RFQ specifically stated it would evaluate the availability of sufficient personnel with the required skill and experience.

In view of the fact that Servo has made no specific allegations of fraud on the part of Army procurement officials and in view of the fact that Servo has cited no definitive responsibility criteria which the contracting officer failed to apply, no basis for review by us of the contracting officer's determination of Bendix's responsibility has been provided. See also E. I. du Pont de Nemours & Company, B-191169, June 23, 1978, 78-1 CPD 458. It is true that we have held that determinations as to the responsibility of a bidder or offeror to perform a contract should be based on the most current information available. See Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187, and the cases cited therein. However, we agree with the Army and Bendix that the deposition of the president of Beukers fails to support Servo's allegation that Bendix improperly influenced the delivery of the Beukers technology to Servo. As noted by the Army, the president of Beukers



specifically stated that nobody influenced Beukers' non-delivery of the technology. Consequently, we do not think that Servo has offered any new information which would impact on the Army's affirmative determination of Bendix's responsibility.

In the absence of concrete evidence of improper conduct on the part of Bendix, we must conclude that Servo's allegations are speculative. Dependable Janitorial Service and Supply, supra. Therefore, no investigation pursuant to our bid protest function is required. Mission Economic Development Association, supra. Moreover, in view of the fact that Servo has failed to provide us with any evidence that Bendix influenced the delivery of the Beukers technology, the failure of Servo to receive this technology is solely a matter between it and Beukers and not one for resolution in a bid protest. See A & J Manufacturing Co., B-191466, November 8, 1978, 78-2 CPD 331.

As to any adverse effect on the Army's evaluation of Servo's proposal caused by Beukers' failure to deliver the technology, we believe that this is a matter which directly impacts on the technical merits of Servo's proposal. In the absence of a clear showing of arbitrariness or unreasonableness, we do not question the procuring agency's determination of technical merits of proposals. See Struthers Electronics Corporation, supra. Here, the record reveals nothing which would indicate unreasonableness on the part of the Army in its use of the knowledge that Servo's merger with Beukers was not consummated and that Beukers had not delivered critical technology to Servo. The Army evaluated Servo's proposal on the assumption that this technology would be transferred to Servo before possible award. Further, we believe that the Army properly gave Servo a lower technical rating in the area of personnel because of Servo's inability to employ key personnel within Beukers. In our opinion, the Army evaluators reasonably determined that Servo would have a long and difficult time learning the technology after obtaining it.

Finally, in a submission to us dated May 9, 1979, Servo contends that the Army failed to conduct meaningful negotiations, as required by DAR § 3-805.3(a) (1976 ed.), regarding Servo's computer software approach. In support of this contention, Servo refers to the Army's August 4, 1978, Interim Technical Evaluation Report of its proposal

which it recently obtained from the Army pursuant to a FOIA request. Specifically, Servo argues that the Army neither identified nor conducted any discussion with it concerning Servo's software approach of using two program languages.

Bendix objects to our consideration of this issue because of the fact that all parties agreed that final submissions would be made no later than the close of business March 8, 1979, and that thereafter the record would be closed. Further, Bendix argues that any consideration by us will be unfair to it since such consideration will inevitably delay our decision.

Apparently, Servo is raising an issue, the alleged factual basis of which it only recently discovered. In any event, we do not believe that further development of the matter is required. Servo cites language from the above-described report which shows that the Army made "no attempt" to have Servo change its proposal regarding the software approach during negotiation. However, Servo fails to cite the following language which sets forth the Army's rationale for not attempting to influence Servo to change its proposal:

"\* \* \* In fact, a change at this late date would not be considered favorable. To do so would require a complete development from scratch which would increase the manpower needs and increase the risk. SCA (Servo) does not show the NAVAID experience to start from the beginning."

Furthermore, the report indicates that there were lengthy discussions concerning Servo's programming technique. The report states that Servo considered its technique to be a viable approach and not a risk factor. While the Army did not attempt to influence Servo to change its position on its approach, it appears that Servo was somewhat reluctant, in any case, to change its approach. In this regard, the report concludes that, taking into consideration all factors, Servo had probably chosen the "safest approach" for the company. In view of the foregoing, then, we do not believe that the Interim Technical Evaluation Report in any way furnishes a basis for Servo's contention that the Army failed to conduct meaningful negotiations with it.

CONCLUSION

The protests of Servo are denied.

*R. F. Kuttner*

Deputy Comptroller General  
of the United States