



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Corion Corporation

File: B-265602; B-265602.2

Date: December 15, 1995

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Harry C. J. Blair, Esq., for Fraser-Volpe Corporation, an interested party.

Captain David Harney and William G. Bradley, Esq., Department of the Army, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency waived mandatory technical specification for awardee is denied where awardee's proposal documents reasonably convey intent to comply with specification.
2. Protest that awardee's prices were materially unbalanced is denied where base price reasonably reflects price of engineering modification to commercial specifications required for production of first 20 prototypes; awardee's price becomes low in the first option period of the contract (which included four option periods); and the agency reasonably expected to exercise all options.
3. Protest that agency improperly relied on unstated evaluation criteria is denied where the record shows that the agency's judgments were reasonable and consistent with the explicit terms of the solicitation.
4. Protest that agency improperly ignored negative pre-award survey in evaluating awardee's management experience and responsibility is denied where in the course of making its responsibility determination, the agency thoroughly considered the pre-award survey and reasonably concluded that awardee's successful production and delivery experience under eight recent contracts for identical items sufficiently

rebutted concerns set forth in the survey regarding awardee's delinquent performance on another contract for a different type of item.

DECISION

Corion Corporation protests the award of a contract to Fraser-Volpe Corporation (FVC) under request for proposals (RFP) No. DAAE20-95-R-0019, issued by the Army for 20 XM25 Stabilized Binoculars, and four follow-on production options, with a total option quantity ceiling of 5,000 binoculars. Corion contends that the Army's technical evaluation was improper because the agency waived a mandatory technical requirement for the awardee and utilized evaluation criteria which were not specified in the RFP. Corion also contends that the agency improperly disregarded a negative pre-award survey when it evaluated the manufacturing capability and experience of the awardee.

We deny the protest.

The XM25 is a hand-held, lightweight, internally stabilized binocular with laser protection and a rubber coating; it is classified as a non-developmental item (NDI). The RFP was issued on March 3, 1995, and set forth the XM25 purchase item description in the statement of work (SOW). The RFP required offerors to submit three samples for evaluation under four go/no-go criteria which required (1) that the sample be a binocular, consisting of two parallel telescopes; (2) that the binocular have an internally stabilized image; (3) that the binocular weigh 2.5 kilograms or less; and (4) that the binocular's size be equal to or less than 12 inches long, 9 inches wide, and 4 inches high. The RFP further provided that the Army would only evaluate proposals from those offerors whose binocular samples met each of the four go/no-go criteria.

Offerors were required to submit technical proposals demonstrating full compliance with each criterion set forth in the SOW, as well as a basic quantity pricing schedule and an "Evaluated Options" pricing schedule, which set forth an evaluation quantity for each option period. The RFP provided that technical proposals would be evaluated on a "best value" basis under three evaluation factors--(1) technical; (2) price and cost; and (3) manufacturing capability, experience, and past performance--and that "[t]echnical [was] the single most important element, and significantly more important than [p]rice and [c]ost." The RFP further stated that the Army would evaluate the degree to which the offeror's binocular samples met each of the SOW requirements, and--of significance to this protest--provided that:

"Where the offeror's bid samples submitted do not meet a specified requirement, the degree of risk associated with any proposed modifications which are needed to enable it to meet the requirements in time for delivery of test and production hardware will be evaluated. Apparent inconsistencies between the claimed current capabilities and

the bid sample or other literature, if unexplained, may result in a lower evaluation."

By the April 7 closing date, offers were received from FVC and Corion.¹ After concluding that each offeror's three binocular samples met the four go/no-go criteria, the agency conducted its technical evaluation of the proposals and samples. On May 23, the Army issued discussion letters which set forth each offer's technical deficiencies and requested that the deficient technical areas be "further addressed/clarified." Of significance to this protest, the Army's letter to FVC advised the firm that while each of FVC's submitted bid samples passed the go/no-go criteria, one of the samples "slightly did not meet" the SOW's resolution requirement which provided

"The day system resolution in the caged mode with the unit powered down shall be 4.3 seconds of arc or better, when measured at the center of the field of view."

Arc-second resolution is typically measured by arc-seconds of "line pair"--or "LP." This measurement standard reflects the amount of distance between the human eye and the object at which an optic's focus--or resolution--between two lines (thus, the term "line pair") can be distinguished. In this case, the specification set forth above required a resolution of "4.3 seconds of arc or better"--but did not include the term "line pair." Based on its 20 years of experience in manufacturing the XM25, the degree of magnification required by the RFP, and the resolution specification's omission of the term "LP," FVC concluded that the 4.3 number listed above referred to the width of one line in the resolution line pair measurement; consequently, FVC determined that all binoculars produced for this contract had to meet an 8.6 arc-second LP requirement (two lines with the width of 4.3 arc-seconds each) and prepared its binocular samples in accordance with this interpretation. After receiving the Army's discussion letter, FVC learned that the 4.3 number in the resolution specification was intended to refer to a 4.3 arc-second LP--and that the "line pair" reference had been inadvertently omitted.

By letter dated May 31, FVC provided the Army with a 25-page technical briefing paper which responded to and discussed each of the technical deficiencies outlined in the Army's discussion letter. With regard to the resolution specification, FVC explained the basis for its initial interpretation of the specification, and further requested that the agency "modify the specification resolution allowance from 4.3 arc[-]seconds to 5.0 arc[-]seconds." FVC's reason for requesting the modification was clear: the firm asserted that a 5.0 arc-second LP specification would meet the

¹A third offer was also received but later eliminated from the competitive range as technically unacceptable on May 30.

Army's minimum needs since this measurement represented state-of-the art resolution. Nevertheless, FVC further advised the agency that "[s]hould the [Army] determine that the 4.3 arc[-] second [LP] is essential FVC can meet this requirement for a slight increase in price." FVC explained that the price increase would reflect the cost of realigning its optic production equipment to the 4.3 arc-second LP standard.

The Army carefully reviewed FVC's request for a 5.0 arc-second LP measurement but ultimately determined that its minimum needs required the more stringent 4.3 arc-second LP resolution standard. On June 6, the contracting officer separately informed both FVC and Corion by telephone that the 4.3 arc-second LP resolution specification was a firm requirement and would not be modified. On June 21, the Army ended technical discussions and requested best and final offers (BAFO) from FVC and Corion; both offerors submitted BAFOs by June 28. On July 26, the Army awarded the contract to FVC based on its technically superior, lower-priced offer. On August 7, Corion filed this protest at our Office; the protest was timely supplemented on September 21, after Corion attended an agency debriefing.

PROTESTER'S CONTENTIONS

Corion contends that FVC's proposal does not commit it to provide binoculars equipped with the 4.3 arc-second LP resolution and that, consequently, the Army must have waived this requirement for the awardee. Corion also argues that the awardee does not understand this requirement because its pricing is materially unbalanced. Corion further contends that the Army improperly downgraded its proposal based on application of unstated evaluation criteria. Finally, Corion contends that the agency ignored a negative pre-award survey of FVC, resulting in an improper evaluation of the firm's manufacturing capability and experience.

ANALYSIS

Compliance with the 4.3 Arc-Second LP Resolution Requirement

Corion argues that because FVC did not explicitly use the term "4.3 arc-seconds" in its BAFO, the awardee is not obligated to meet the 4.3 arc-second LP resolution requirement, and, consequently, the Army must have improperly waived this mandatory specification for the awardee. In this regard, the record shows that as its BAFO, FVC, like Corion, submitted only a cover letter and new pricing schedules.

In a negotiated procurement, an offeror must demonstrate within the four corners of its proposal that it will perform the required work in accordance with the terms and conditions set forth in the solicitation. See A&W Maintenance Servs., Inc., B-258293; B-258293.2, Jan. 6, 1995, 95-1 CPD ¶ 8. In this case, we think that the

Army reasonably concluded that FVC was committed to comply with the 4.3 arc-second LP resolution specification.

In its May 31 technical response to the Army's discussion letter, FVC clearly explained why it regarded the resolution specification as ambiguous, and set forth a reasoned basis for its interpretation. Next, although FVC asked that the Army modify the resolution standard, it also stated

"Should the U. S. Government determine that the 4.3 arc[-]second [LP] is essential FVC can meet this requirement for a slight increase in cost."

Additionally, in the cover letter attached to the technical response, FVC reiterated that if the day resolution "specification remains unchanged" this option would impact FVC's costs. Thus, FVC clearly communicated that if the Army insisted on the 4.3 arc-second LP resolution requirement, it would comply with this requirement--though at a higher price.

Finally, although FVC's BAFO does not refer to any specific arc-second LP resolution measurement, the cover letter to the BAFO states

"Our review consisted of evaluating the impact on cost and schedule of [FVC's laser hardening] Technical Approach, the clarified resolution specification and other clarifications discussed in our letter of May 31, 1995."

The remainder of FVC's BAFO consisted of a revised pricing schedule which reflected a \$3.9 million increase over its initial proposal price.

Based on FVC's offer to meet the standard if so required; the agency's June 6 conversation with offerors making clear that the 4.3 arc-second requirement was firm; FVC's statement after discussions on this issue that its BAFO price increase reflected the "clarified resolution specification"; and the BAFO price increase itself, we think the agency reasonably concluded that FVC's final offer was based on the required 4.3 arc-second LP resolution feature.² See E. W. Bliss Co., B-255648.3, Apr. 26, 1994, 94-1 CPD ¶ 280.

²We note that the actual contract award document executed by the parties reflects this compliance by stating that "[a]s a clarification, the resolution shall be as stated in the purchase description and shall be for a line pair not an individual line."

FVC's Pricing

The RFP's basic pricing schedule solicited fixed prices for the base contract quantity of 20 binoculars, and the "Evaluated Options" pricing schedule solicited fixed prices for the four follow-on production option quantities. The record shows that although FVC's total contract price for the base and option quantities was \$2.3 million lower than Corion's, FVC's price for the base 20-unit production quantity was significantly higher than Corion's base price.³ As a result, Corion argues that FVC's pricing proposal is materially unbalanced.

We find this contention without merit. First, both the Army and FVC explain that the higher base quantity price reflects the cost of engineering changes to commercial specifications. The RFP required that 5 of the initial 20 base quantity binoculars be equipped with a special "3rd generation" night vision capability--a technology which the Army estimate indicates would cost at least \$100,000.⁴ Additionally, as permitted by the RFP, FVC proposed a technical modification to the existing commercial specifications which gives the Army an internal electronic means for stabilizing the binoculars during non-use; the cost of implementing this feature, as well as the cost of realigning FVC's optic production equipment to obtain

³A comparison of the unit prices is as follows:

	<u>FVC</u>	<u>Corion</u>
Base Quantity	\$34,805 ea	\$20,916 ea
Option 1	4,425	5,868
Option 2	4,265	4,829
Option 3	4,425	4,829
Option 4	4,650	4,829

The total evaluated price for FVC was \$22,855,130; the total evaluated price for Corion was \$25,214,189.

⁴The record shows that a similar commercial binocular equipped with similar night capability (but which would not meet the Army's more stringent minimum needs here) is available on the General Services Administration's Federal Supply Schedule for \$20,000 more than the price of a binocular without that feature. Since five night-vision equipped binoculars are required here, the Army estimates that this technology would add approximately \$100,000 to the base price.

the 4.3 arc-second LP resolution for the entire production line, is reflected in the base quantity unit price of \$34,805 per binocular.⁵

Next, a comparison between the FVC and Corion pricing reveals that the Army will realize a price savings as soon as the first option is exercised:

<u>Price</u>	<u>No. of Units</u>	<u>FVC</u>	<u>Corion</u>
Base Quantity	20	\$ 696,100	\$ 419,220
Option 1	425	1,880,625	2,493,900
Option 2	1,725	7,357,125	8,330,025
Option 3	1,800	7,965,000	8,692,200
Option 4	1,050	4,882,500	5,070,450

The Army states that it intends to exercise all options.

Under these circumstances, since the higher base price has been reasonably explained and related to FVC's technical superiority, and since the Army will immediately obtain price savings upon exercising the first contract option, we find FVC's pricing to be unobjectionable. See A&W Maintenance Servs., Inc., B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214; Integrated Protection Sys., Inc., B-254457.2; B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24.

Unstated Evaluation Criteria

The record shows that Corion's technical proposal was downgraded in part because its binocular samples failed to meet the required 4.3 arc-second LP resolution requirement, and because the agency determined that Corion's manufacturing method for complying with the resolution requirement was high risk. Corion contends that these portions of the agency's technical evaluation were improper because the Army deviated from the solicitation's evaluation criteria.

Although the protester contends that the agency applied unstated evaluation factors, the record simply does not support this contention. First, the RFP specifically provided that "Bid Sample Resolution" would be examined as part of the technical

⁵The Army acknowledges that it will pay a higher price in the prototype phase of this contract to realize the benefits of FVC's technically superior product.

evaluation. Thus, offerors were clearly on notice that their samples would be evaluated to ascertain whether they met the 4.3 arc-second LP resolution specification.

Next, although Corion maintains that the Army could not properly consider whether a manufacturing method involved "risk," in fact the RFP specifically provided that:

"Where the offeror's bid samples submitted do not meet a specified requirement, the degree of risk associated with any proposed modifications which are needed to enable it to meet the requirements in time for delivery . . . will be evaluated." (Emphasis added.)

Clearly, both the binocular samples' non-compliance with the required resolution specification, as well as the risk inherent in an offeror's technique for correcting such technical non-compliance, were encompassed by the above-referenced solicitation provision. Consequently, we deny this ground of protest.⁶ See San Diego State Univ. Found., B-250838.3, Apr. 21, 1993, 93-1 CPD ¶ 337.

Impact of the Negative Pre-Award Survey

The record shows that during the technical evaluation, the Army asked the Defense Logistics Agency (DLA) to conduct pre-award surveys of both Corion and FVC. On May 23, DLA completed its pre-award survey of FVC and recommended no award on the ground that FVC had encountered production problems in the past due to its "difficulty receiving vendor materials in a timely manner." As a result, the DLA evaluator noted that although FVC had "show[n] its ability to deliver on schedule, the question of vendor control to receive material in a timely manner must be addressed in detail." Despite the negative pre-award survey, the record shows that FVC received a favorable technical rating--slightly higher than the protester's--under the manufacturing capability, experience and past performance evaluation factor.

⁶Corion was notified in the Army's May 23 discussion letter that its submitted binocular samples did not meet the resolution requirement. Corion was also advised in the letter that its proposed manufacturing method indicated that it would not produce a high yield of binoculars meeting the resolution requirement, and that the method "could potentially cause production problems" and "does not present a strong understanding of the requirement." Consequently, to the extent Corion suggests that it was not adequately apprised of these deficiencies, this contention is without merit, especially since the record contains a written response from Corion to the Army's discussion letter stating that "[y]our letter correctly states the fact that mass production techniques will yield only a percentage of precision prism needed for this requirement."

Corion challenges this aspect of the technical evaluation on the ground that the Army improperly disregarded the negative pre-award survey.

The record shows that the pre-award survey was used in the agency's assessment of FVC's responsibility, but was not considered in the technical evaluation of FVC. Even assuming that the agency was required to consider the pre-award survey in the course of the technical evaluation, however, there is no basis in the record to conclude that FVC's rating under the manufacturing capability, experience, and past performance evaluation factor would have changed. On the contrary, the record shows that in the course of making his responsibility determination, the contracting officer conducted a detailed review of the findings in the pre-award survey and reasonably concluded that it revealed no major concerns related to this procurement.

Although the DLA surveyor recommended "no award," he nonetheless stated that "[FVC] could deliver the items on-time IF the vendor control was actively in-place. " After receiving the survey, the contracting officer further investigated the findings in the survey, and questioned FVC about its current vendor control status. On July 18, as a result of his investigation, the contracting officer executed a "Decision to Override Negative Pre-Award Survey."

The contracting officer concluded that FVC only encountered vendor control problems on those contracts where the procured items were non-NDI items--which typically involved a higher degree of difficulty due to the use of unusual and limited numbers of supplies from limited numbers of sources in remote locations. In contrast, this contract does not present the same obstacles since the binoculars are NDI items with numerous commercial sources of component supplies. Moreover, FVC has successfully completed eight contracts for these items with other agencies, and has had no delinquencies or problems in the last 24 months.

Next, the contracting officer determined that a contributing element to FVC's delinquencies on non-NDI contracts in the past had been the contractor's limited financial resources. However, as evidenced by DLA's May 23 findings, FVC now has received a positive financial recommendation.

Finally, because of DLA's negative pre-award survey, the contracting officer asked FVC to provide evidence of its ability to control vendors and obtain supplies for this contract; FVC responded with firm quotes and commitments from its suppliers.

The record shows that the Army thoroughly and carefully considered DLA's pre-award survey findings and nonetheless concluded that the principle deficiencies were not significant with respect to the current contract. Under these circumstances, we see no basis to object to the selection decision based on the agency's failure to consider the pre-award survey during the technical evaluation.

The protest is denied.

Comptroller General
of the United States