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DECISION

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

FILE: B-200672 DATE: December 19, 1980

MATTER OF: Ford Aerospace & Communications Corporation

DIGEST:

1. Agency consideration of aspects of proposal which exceed solicitation requirements is not improper and does not establish that such aspects themselves became unstated evaluation factors.

2. Offeror's proposal to convert goals to firm performance requirements while under a cost-type contract is not illusory where contract requires such conversion and offer is merely to do so earlier than required.

3. Protester was not prejudiced by most probable cost evaluation conducted by agency which covered portions of contract for which offerors submitted budgetary estimates, even though protester was allegedly advised that most probable cost evaluation would only cover portions of contract for which "firm" cost proposals were submitted, since most probable cost determination was an independent estimate based on a cost data submitted by offerors and not cost proposals or budgetary estimates. Moreover, cost was not primary factor in award decision and protester's most probable cost for "firm" portion of contract was not low.

4. Agency did not violate requirement for conducting meaningful discussions by not informing offeror that two aspects of its proposed approach were considered to be "high risks" since risks did not prevent proposal from being technically acceptable and therefore in conformity with applicable regulation were not considered deficiencies which had to be pointed out to offeror.

[Contract Award Protest]

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5. Agency's acceptance of alternate delivery schedule proposal by awardee during negotiations which differed materially from schedule contained in RFP is improper where differences appear to be of benefit to awardee and to represent relaxation of RFP requirements.

AGC 00748

Ford Aerospace & Communications Corporation protests the award of a contract to Martin Marietta Corporation under the Department of the Air Force's LANTIRN (Low Altitude Navigation and Target Infrared System for Night) program. The contract calls for the development and production of a low-altitude navigation, targeting and fire control system for F-16 and A-10 aircraft at a total estimated cost of up to $1 billion. Ford Aerospace has, at the same time, filed suit against the Air Force in the United States District Court for the District of Columbia seeking to enjoin the Air Force from taking further action with respect to the contract awarded to Martin Marietta. Ford Aerospace & Communications Corporation v. United States Department of the Air Force, Civil Action No. 80-2592, filed October 10, 1980. Although by an order dated October 10 the court denied Ford Aerospace's motion for a temporary restraining order, the court requested that our Office render a decision on Ford Aerospace's protest as "expeditiously as possible." This decision is in response to that request.

Briefly, Ford Aerospace contends that the award to Martin Marietta was improper because the Air Force (1) based its selection in large part on factors which were not solicitation requirements; (2) failed to point out weaknesses in Ford Aerospace's proposal in violation of the statutory mandate that meaningful negotiations be conducted; and (3) awarded the contract based on an alternate delivery schedule proposed by Martin Marietta which deviated from the delivery requirements set forth in the solicitation. We find the protest to be meritorious on the last issue.

BACKGROUND

On February 6, 1980, the Air Force issued Request for Proposals (RFP) No. F33657-79-R-0786 for the development and acquisition of the LANTIRN navigation and targeting system.

The proposed system integrates a forward looking infrared sensor, a semi-covert manual terrain following device, a laser target designator, and a target recognizer into one or two pods which can be attached externally to F-16 and A-10 aircraft. The system is designed to permit the aircraft to fly at low altitudes in order to avoid enemy detection, acquire targets, and launch air-to-ground missiles in "under-the-weather" flying conditions 24 hours per day.

The RFP provided for a two phase full-scale engineering development program. Phase I included a fire control pod design and development effort up to and through a design review and also provided for material acquisition in order to meet a Phase II production readiness requirement. In addition, Phase I included airborne demonstration of the target recognizers and other critical technologies identified by the contractor. Phase II consisted of design completion, fabrication of six prototype fire control pods, fabrication of interim support equipment, a comprehensive test program, and production. The RFP indicated that two awards would be made for the Phase I effort. The Air Force contemplated that one Phase II contractor would be competitively selected from the two Phase I contractors.

As revised, the RFP also required the submission of technical and cost proposals by April 8 and set forth four general evaluation factors in descending order of importance. These were: technical approach, management and manufacturing, logistics supportability, and cost. The RFP further noted that cost would not be a primary basis for award.

Ford Aerospace and Martin Marietta submitted proposals in response to the RFP. Ford Aerospace proposed a single pod design which utilized a CO_2 laser terrain following device and a target recognizer manufactured by Honeywell, Inc.

Martin Marietta, on the other hand, proposed a two-pod approach which utilized a modified Ku Band terrain following radar manufactured by Texas Instruments, Inc. and a target recognizer manufactured by Hughes Aircraft Company, Inc.

These initial proposals were evaluated by the Air Force and negotiations were conducted by the use of written deficiency and inquiry reports submitted to both offerors. The Air Force also held oral discussions with Ford Aerospace and Martin Marietta. During these discussions, the offerors were asked to propose alternatives which would permit the Air Force to complete Phase I of the engineering development within a $40 million budget. Following these negotiations, the Air Force determined that it did not have sufficient funds to support the award of two Phase I contracts as originally contemplated by the RFP and decided that a change in its procurement strategy was necessary. Accordingly, on July 22 the Air Force issued Modification Request-12 (MR-12) to the RFP setting forth the new framework for the LANTIRN fire control pod program.

As modified by MR-12, the RFP contemplated the award of a single contract for the development and ultimate production of the LANTIRN fire control pod.* Offerors were required by the RFP to propose two different target recognizer designs which would be developed in the initial part of the engineering development effort. The RFP provided that following the completion of the critical design review, the contractor and the Air Force would select a target recognizer design for the remainder of the engineering development effort which required the fabrication and delivery of six prototype pods and target recognizers. The RFP also provided for a production readiness option for the fabrication and delivery of three preproduction pods and target recognizers. The RFP further provided for three production options for 34 pods and target recognizers (Lot 1), 138 pods and target recognizers (Lot 2), and 128 pods and target recognizers (Lot 3).

Revised technical proposals were received from Ford Aerospace and Martin Marietta by August 5 and revised cost proposals were received by August 21.

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* The term "fire control pod" will be used to designate the complete assembly including the target recognizer component. The term "pod" will be used to designate that assembly without the target recognizer.

Ford Aerospace again proposed a single-pod approach that utilized a CO_2 laser terrain following device. As required by the RFP, Ford Aerospace proposed two different target recognizer designs: one designed by Honeywell and the other designed by Harris Corporation. Ford Aerospace's proposal conformed with the delivery schedule as set forth in the RFP.

Like Ford Aerospace, Martin Marietta retained its original design approach. Specifically, Martin Marietta proposed a two-pod fire control system consisting of a navigation pod which utilized a terrain following radar and a targeting pod. Martin Marietta also proposed two target recognizers as required by the RFP: a design by Hughes and a design of its own.

In addition, Martin Marietta proposed an "accelerated" LANTIRN program delivery schedule. Specifically, Martin Marietta proposed to begin delivery of six navigation pods and six targeting pods without target recognizers starting in the 23rd month after contract award, three months earlier than specified by the RFP planning schedule. Under this proposal the six prototype target recognizers would be delivered starting in the 26th month after contract award as set forth in the RFP planning schedule.

Martin Marietta also proposed to accelerate delivery of the three preproduction navigation pods and the three targeting pods without target recognizers by the 32nd month after contract award, five months earlier than specified by the RFP planning schedule. Again, under this proposal the target recognizers would not be accelerated and would be delivered beginning in the 37th month after contract award, the same as in the RFP planning schedule.

Martin Marietta further proposed to begin delivery of the Lot 1 production navigation pods and targeting pods without target recognizers in the 43rd month after contract award, eight months earlier than specified in the RFP planning schedule. Martin Marietta also proposed to deliver target recognizers between the start of the 51st month and the end of the 61st month after contract award. This represented a one month extension beyond that set forth in the RFP planning schedule.

In addition to the "accelerated" delivery schedule, Martin Marietta proposed to make various target recognizer performance standards firm requirements rather than "goals" as part of its initial development effort. Under the RFP, target recognizer performance standards were set as goals, and were not to become requirements until after critical design review. Martin Marietta further proposed to exceed the specified Mean Time Between Failure (MTBF) test requirements for the fire control pods. Under the RFP, fire control pods were to have an Upper Test MTBF of 100 hours when operated in any mode and a Lower Test MTBF of 50 hours in accordance with MIL-STD-781C. Martin Marietta, however, proposed an Upper Test MTBF of 140 hours and a Lower Test MTBF of 70 hours.

Discussions were held with both offerors and the final technical evaluation by the Source Selection Evaluation Committee (SSEC) was completed on August 30. Both proposals were found to be acceptable by the SSEC. Ford Aerospace received green ratings in the technical approach, management and manufacturing approach, and logistics supportability areas for an overall green rating. Under the source selection procedures a green rating signified that the proposal was average, satisfied most requirements, had a good probability of success, and any deficiencies could be corrected. Martin Marietta, on the other hand, received a blue rating in the management and manufacturing approach area and green ratings in the technical approach and logistics supportability areas, for an overall green rating. A blue rating signified that a proposal exceeded specified performance or capability and that such excess was useful, had a high probability of success, and that there were no significant weaknesses.

Offerors were then requested to submit their best and final offers in the form of executed model contracts no later than September 4. Ford proposed a cost of $234,085,383 through the Lot 1 production phase if the Honeywell target recognizer were selected after critical design review and $235,718,642 if the Harris target recognizer were selected. Martin Marietta proposed a cost of $242,504,555 through the

Lot 1 production phase if the Hughes target recognizer were selected and $242,413,991 if its own target recognizer were selected.

In addition, Martin Marietta's best and final offer proposed a delivery schedule for major contract items which differed from the "accelerated" schedule initially proposed with respect to the sequence of the delivery of target recognizers. By letter dated September 3 submitted in connection with its best and final offer, Martin Marietta also set forth the terms of its "accelerated" delivery schedule, under which final delivery of production Lot 1 target recognizers would occur by the end of the 60th month after award, the same as contemplated by the RFP planning schedule. Martin Marietta further indicated that if the Air Force preferred delivery in accordance with the delivery schedule contained in the RFP that it was prepared to meet the RFP schedule also at the prices quoted in its best and final offer.

Thereafter, on September 10, the SSEC presented its findings to the Source Selection Authority (SSA) by means of a formal briefing. The briefing consisted of an oral and viewgraph presentation outlining the approaches proposed by the offerors, their strengths and weaknesses, advantages and disadvantages, risks, proposed costs and most probable cost.

Following the briefing, the SSA, by a memorandum dated September 11, selected Martin Marietta for the LANTIRN contract award. In making this selection, the SSA noted that Martin Marietta's design approach met or exceeded the technical performance requirements of the RFP. Specifically, the SSA noted that Martin Marietta proposed to meet various target recognizer performance standards as firm requirements rather than goals and to exceed the MTBF test requirements for the fire control pod. The SSA further noted that the target recognizers proposed by Martin Marietta were assessed as offering the lowest technical risk, and the best probability of success for meeting the schedule for the technical demonstration requirements, flight testing, and production. Accordingly, the SSA requested the contracting officer to make an award to Martin Marietta and to include its proposed "accelerated" schedule as part of the contract.

Subsequently, on September 18, the Air Force awarded the LANTIRN contract to Martin Marietta. The awarded contract reflected the delivery schedule contained in Martin Marietta's best and final offer. The contract, however, did not reflect the earlier milestones set forth in Martin Marietta's letter of September 3 and upon which Marietta's best and final offer was conditioned.

I. Evaluation and Selection

We will first consider the protester's contentions that in several respects the evaluation and selection was improper. According to Ford Aerospace, certain technical aspects of the Martin Marietta proposed system--all weather performance and blind letdown capability--inproperly became evaluation factors even though they were not RFP requirements. In addition, Ford Aerospace contends that two other aspects of Martin Marietta's proposal--the conversion of target recognizer performance goals to firm requirements and the increase in MTBF test requirements--were improperly considered and relied upon by the Air Force because 1) the protester was not advised that the Air Force was interested in these "requirements" and 2) the apparent benefit to the Government of the Martin Marietta promises were illusory or otherwise meaningless. Ford Aerospace also disputes the evaluation of most probable cost.

As indicated, the award selection was made by the SSA based in part on a September 10 briefing by the SSEC. The briefing was divided into five parts: introduction, proposal analysis, contractual considerations, cost to the Government, and findings. As part of the proposal analysis portion, the SSA was advised as to the RFP's technical requirements and evaluation factors. The SSA was then given a technical description of the Ford Aerospace and Martin Marietta proposals.

Next, the SSA was briefed on five special interest areas in the technical approaches proposed by Ford Aerospace and Martin Marietta. These were: target recognizer approaches proposed by the offerors, the F-16 and A-10 weapon delivery capability of the systems, aircraft systems performance analysis, the terrain following approaches, and the terrain following weather capabilities of the Ford Aerospace and Martin Marietta approaches.

First, the SSA was advised that one of the target recognizers proposed by Ford Aerospace and both of those proposed by Martin Marietta were considered to be high risk items. The Harris recognizer proposed by Ford Aerospace was characterized as a very high risk item because it was

centered around a large scale integrated circuit which was larger than any Harris had previously produced. Additionally, the SSEC noted Harris was experiencing problems as a sub-contractor on another Air Force contract.

With respect to the weapons delivery capabilities of the proposed system, the SSA was advised that the overall capability of the Martin Marietta system was better than that of Ford Aerospace especially in poor weather. *

The SSA was then presented with the following comparison of the terrain following sensor approaches of Ford Aerospace and Martin Marietta:

FORD CO_2 LASER

ADVANTAGES	DISADVANTAGES
SMALL SIZE (SINGLE POD)	HIGH RISK NEW TECHNOLOGY LAB TESTS ONLY
LOW PROBABILITY OF DETECTION	WEATHER PERFORMANCE REDUCED RAIN & CLOUD PERFORMANCE
JAM RESISTANT	MINIMUM BLIND LETDOWN CAPABILITY
LIGHTWEIGHT	
LOW A/C POWER DEMAND	
WIRE DETECTION	

* Our discussion of this aspect of the briefing is limited due to its classified nature.

MARTIN 16 HGz RF

ADVANTAGES	DISADVANTAGES
ADVERSE WEATHER PERFORMANCE	LARGER SIZE (TWO PODS)
BLIND LETDOWN CAPABILITY	EMISSIONS DETECTABLE
LOW RISK	HIGH AIRCRAFT POWER REQUIREMENT
GREATER RANGE	

In connection with this comparison, the briefing official stated:

> "The terrain following radar and CO_2 laser sensor advantages and disadvantages are as indicated on the chart. The only item I would like to draw your attention to is the minimum blind letdown capability for the CO_2 laser. There will be very few situations where the CO_2 laser will provide a blind let down capability through weather."

The SSA was further presented with a chart comparing the terrain following weather capability of two proposed approaches and informed:

> "The only RFP terrain following weather requirement is for an under-the-weather capability. However, as the source selection proceeded the terrain following system weather performance became an issue. This viewgraph addresses the issue by comparing the weather limited operational utility of both CO_2 laser and 16 GHz sensors in West Germany. Note that this comparison is for informational purposes and is not a comparison against a source selection standard."

"Both contractors meet the "under-the-weather RFP requirement. * * *"

Next, the SSA was given a technical analysis of the Ford Aerospace and Martin Marietta proposals. A viewgraph used in the briefing indicated the strengths of the Ford Aerospace and Martin Marietta proposals as follows:

FORD	MARTIN
EXPERIENCE	BLIND LETDOWN CAPABILITY
HONEYWELL TARGET RECOGNIZER	FINS & TAS PERFORMANCE
SINGLE POD APPROACH	RISK REDUCTION EFFORTS
POSITIVE STRUCTURAL MARGIN	GRACEFUL SYSTEM DEGRADATION
IMPROVED CLUSTER WEAPON DELIVERY	DUAL BORESIGHT CORRELATOR

The SSA was then presented with the weaknesses of the competing approaches. The following viewgraph chart was used in the briefing:

FORD	MARTIN
CREW STATION IMPACTS	CREW STATION IMPACTS
ADDED SOFTWARE FOR F-16	TWO POD APPROACH
A-10 INTERFACE	WINDOW EXPOSED TO BLAST
FINS PERFORMANCE	POD MOUNTING
CO_2 LASER PERFORMANCE	UNPROVEN TAS & FINS DESIGN
HARRIS/ERIM TARGET RECOGNIZER	ECU INLET DESIGN VOLATILE OFP MEMORY

The SSA was then briefed on the major risks associated with the Ford Aerospace and Martin Marietta proposals. A viewgraph used in the briefing outlined the risks as follows:

FORD	MARTIN
TARGET RECOGNIZERS (HIGH RISK)	TARGET RECOGNIZERS (HIGH RISK)
CO_2 LASER (HIGH RISK)	
ADDED AIRCRAFT MODIFICATIONS	ADDED AIRCRAFT MODIFICATIONS
ELECTRICAL POWER	ELECTRICAL POWER
INFRARED SENSOR PERFORMANCE	PRODUCIBILITY OF IR DETECTORS
GaAs INFRARED WINDOW	SVV STRUCTURAL CASTINGS

After explaining in detail these major risks of the Ford Aerospace and Martin Marietta proposals, the briefing official concluded that "the weaknesses for both the Ford and Martin proposals are correctable and that the risks are manageable if proper emphasis is provided by the contractor and the Air force in these areas."

Following the proposal analysis, the SSA was briefed on the management and manufacturing aspects of the two proposals, contractual considerations, and the cost to the Government. The SSA was advised that Ford Aerospace's most probable cost through Lot 1 production was $317 million while Martin Marietta's was $305 million. The SSA was also advised that Ford Aerospace's most probable cost for the total production called for under the LANTIRN program (preproduction phase and Lots 1,2, and 3) was $894 million while Martin Marietta's was $770 million.*

The SSA was then presented with the final findings of the SSEC. The SSA was advised that Ford Aerospace

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* The total production figures do not include the most probable cost figures for the full scale engineering development effort included in the most probable cost figures through Lot 1 production. Ford Aerospace's most probable cost for this effort was $143 million while Martin Marietta's was $144 million. Thus, Ford Aerospace's most probable cost for the total LANTIRN program was $1.037 billion and Martin Marietta's was $914 million.

received green ratings in the technical, management and logistics areas for an overall green rating, while Martin Marietta received a blue rating in the management area and green ratings in the technical and logistics areas for an overall green rating.

Blind Letdown and All Weather Performance Capability

The protester's position is simply that it complied with the RFP requirement for a semi-covert terrain following capability and preference for a single pod design, but that this compliance was overshadowed by the Air Force's concern with the unspecified requirements of all weather performance and blind letdown capability.

The Air Force denies that it improperly considered these features, stating that the SSA was advised that both blind letdown capability and all-weather performance were not RFP requirements. The Air Force also states that the comparison of the all-weather performance of the Ford Aerospace and Martin Marietta terrain following devices was made to give the SSA and the SSA's advisors a "thorough understanding of a complicated subject." The Air Force argues that "[o]nce it is determined that a proposal meets RFP requirements, it is appropriate to mention a proposal which exceeds the basic RFP requirements" and that Martin Marietta was properly credited with strengths for its blind letdown capability and all-weather performance. The Air Force further argues that in any event blind letdown capability was not, as alleged by Ford Aerospace, a "key consideration" in the selection of Martin Marietta as it was not even mentioned by the SSA in his source selection justification.

It is undisputed that the RFP contained no specific requirements for "all-weather" or "blind letdown" capabilities. It is also clear from the SSEC briefing documents that although the SSEC warned the SSA that these characteristics were not RFP requirements, it informed the SSA that it considered these characteristics strengths in the Martin Marietta proposal and the lack of these capabilities to be weaknesses in Ford Aerospace's approach.

We agree with the Air Force that in a procurement such as this where the emphasis is on technical innovation it was appropriate for the SSEC to have credited Martin Marietta for those characteristics of its proposed terrain

following sensor approach which exceeded the required RFP performance characteristics in a manner considered beneficial. See Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124. On the other hand, we do not think the SSEC should have cited as "weaknesses" or "disadvantages" the lack of these performance characteristics in Ford Aerospace's approach which met the RFP performance requirements, see Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 386, although the SSA was certainly entitled to know that one offeror proposed these features and that from a technical standpoint they were desirable. We do not perceive this SSEB action to have been prejudicial to Ford Aerospace since the SSEC concluded that both firms proposed technically acceptable approaches.

Nevertheless, the record contains no evidence which shows that the SSA based his decision on these factors. No reference concerning blind letdown or all-weather performance capabilities is contained in the SSA's source selection justification of September 11 nor is there any other indication in that document that the Air Force's minimum needs changed to require those capabilities. All that appears here is that Martin Marietta, while meeting the RFP requirements, also proposed certain characteristics which while not inconsistent with the RFP requirements, went beyond them in a way deemed advantageous to the agency. There is nothing improper with an agency's consideration of such matters in a technical evaluation. See, e.g., Automated Systems Corporation, supra.

In this respect, we do not agree with Ford Aerospace that the Air Force abandoned its preference for a single pod approach or that it waived its requirement for a semi-covert terrain following capability. As indicated above, a review of the briefing documents clearly shows that Ford Aerospace's proposal was credited with "strengths" for its single pod approach and for the nondetectability of its CO_2 laser approach. The fact that the SSEC stated that emissions from Martin Marietta's sensor were "detectable" does not establish that it did not meet the semi-covert requirement. In this regard, the Air Force indicates that the semi-covert requirement was satisfied if there

was a low probability that emissions from the terrain following device would be detected. The evaluation records clearly show that the Air Force believed there was an overall low probability that Martin Marietta's emissions would be detected in a combat situation even though they were more detectable than Ford Aerospace's.

We do not believe as Ford Aerospace argues, that it necessarily would have been significantly upgraded by the SSEC if it had known that blind letdown and all-weather capabilities were desired by the agency and had proposed an approach similar to Martin Marietta's design involving two pods and a terrain following radar sensor. The SSEC documents show that Martin Marietta was downgraded because of the two pod approach and the detectability of its radar emissions while Ford Aerospace's single-pod approach and lack of detectable emissions from its CO_2 laser were listed as strengths.

Target Recognizer Performance Goals and MTBF Test Requirements

The SSA justification indicates that the award decision was based in large measure on Martin Marietta's willingness to have target recognizer performance standards set as requirements rather than goals, its willingness to increase the MTBF requirements for the fire control pod, and the overall assessment that Martin Marietta's two target recognizers offered the best probability for success. In this regard, the SSA's decision in pertinent part provides:

> "5. I have determined that the LANTIRN FCP contract will be awarded to Martin Marietta Corporation. The following is the rationale for this Source Selection Decision:
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> a. The Martin Marietta FCP design approach, including the RFP requirement for selection of two distinct Target Recognizer (TR) designs, meets or exceeds the technical performance * * * requirements of the solicitation. For example, the TR performance requirements were established as goals in the RFP. * * *

b. Martin Marietta also proposed to exceed the Mean Time Between Failure (MTBF) Reliability Test requirements for the overall FCP. * * *

c. In the area of Life Cycle Cost Analysis (LCCA), the evaluation results reflect that the MMC [Martin Marietta] two-pod design will be less expensive for cost ownership to the Government.

d. Finally, reference paragraph 5.a, above, the MMC selection of Target Recognizer designs (Martin Target Recognizer and Hughes Target Recognizer), assessed as the lowest technical risk, offer the best probability of success for meeting the schedule for the Technical Demonstration requirements, flight testing, and production.

e. Other factors considered in the source selection decision and as a part of the total integrated assessment of the MMC proposal included the selection of the subcontractors based upon each one's technical capability as well as relevant past performance. In addition, MMC also conveyed in the Management and Manufacturing Proposal, a very detailed in-depth analysis of the Manufacturing-Technology (MAN-TECH) requirements of the RFP as well as an extensive commitment to incorporate various MAN-TECH applications that could potentially result in even greater acquisition cost savings.

"6. Based upon all the factors as documented above, I have determined that the MMC has the better probability for successful completion of the LANTIRN FCP program. Therefore, the LANTIRN FCP award is to be made to MMC."

Ford Aerospace asserts that the Air Force's reliance on Martin Marietta's proposal to establish various recognizer performance standards as firm requirements rather than "goals" before critical design review as set forth in the RFP and to increase the MTBF test requirements was improper because the protester was never informed that the Air Force was interested in these increased "requirements." Ford Aerospace also argues that Martin Marietta's proposal to set various target recognizer performance standards as firm requirements rather than goals is illusory because the initial target recognizer effort is to be on a cost reimbursement basis and the risk of nonperformance is on the Government. The protester further argues that the Air Force's reliance on Martin Marietta's proposal to increase MTBF test requirements was arbitrary because the cost-reimbursement target recognizers are included in the fire control pod system which is the subject of the MTBF test requirement and therefore "the risk of not meeting the inflated MTBF numbers is on the Government, not Martin Marietta." Ford Aerospace further asserts that Martin Marietta agreed to MTBF figures for pods with target recognizers, and pods without target recognizers of 30 and 35, respectively, for award fee determinations, the same as Ford Aerospace did. In this regard, Ford Aerospace argues "it is incredible that the Air Force would rely on the inflated MTBF numbers, when Martin Marietta's promise is, by contract unenforceable and when Martin Marietta would, by contract, obtain an award fee by achieving MTBFs which are the same as those proposed by Ford Aerospace."

We find no merit to these contentions. First, we agree with the Air Force that its acceptance of Martin Marietta's approach does not represent a change in requirements but merely reflects acceptance of a proposal which exceeded the minimum requirements. As indicated in the preceding section, there is nothing improper with an agency's consideration and acceptance of such a proposal.

With respect to the assertion that Martin Marietta's offer to convert the target recognizer performance goals into firm requirements before critical design review is illusory, the Air Force explains that under the RFP provisions the contractor must convert target recognizer performance goals into performance requirements after critical design review and notes that the entire target recognizer development program is a cost-type effort from critical design review through full scale engineering development. In the agency's view, Martin Marietta merely offered to make the change from goals to requirements earlier than was required under the RFP and in either event would operate under cost-type conditions.

The Air Force further disagrees that the increase in the MTBF test requirements is illusory because the "cost reimbursement target recognizers" are part of the fire control pod. The Air Force contends that the target recognizers are "only one of many components" that go into making the fire control pod which as a system was a fixed price item under the RFP and notes that the cost of the target recognizer was only about five percent of the total unit production cost of the system.

The Air Force also notes that the target recognizer performance requirements are software related and are basically unrelated to meeting the MTBF test requirements for the fire control pod as a whole which is largely hardware dependent. In other words, the Air Force states, "the performance parameters of the target recognizers are independent of how long a component may operate without a failure." Thus, regardless of how well or how poorly the target recognizer performs, under Martin Marietta's proposal that firm would be contractually bound to 70 and 140 hours MTBF on the fire control pod system. The Air Force further asserts that the MTBF verification test requirements of 30 and 35 hours associated with the award fee are independent requirements from the MTBF test requirements of 70 to 140 hours which were the laboratory type tests. The MTBF requirements of 30 and 35 hours are related to field tests which are measured after systems are delivered. The laboratory MTBF tests, the Air Force states, are "the only reliability type test that can be performed prior to delivery [and acceptance] of the system." The Air Force argues that while the award fee was tied only to the MTBF verification field tests, that fact "does not reduce the importance of the MTBF laboratory tests."

We do not believe that the Air Force was unreasonable in concluding that Martin Marietta's offer was beneficial in these areas. It may be true, as Ford Aerospace argues, that under certain circumstances in a cost-type environment the Government will bear a part of the risk that a requirement cannot be met. However, as the Air Force points out, the entire target recognizer portion of the project is on a cost-reimbursement basis. Ford Aerospace does not suggest that the RFP provision which changes target recognizer goals into requirements after critical design review is illusory. Thus, although it may be that the difference between a goal and a requirement is largely academic in the overrun situation we cannot conclude that a requirement would not be more beneficial to the agency under other circumstances. As far as the MTBF limits are concerned, the fact that the cost reimbursement target recognizers constitute only five percent of the fixed-price fire control pods which are the subject of the tests would seem to eliminate Ford Aerospace's arguments that increases in test MTBF limits are illusory because of the cost reimbursement nature of the target recognizers. Further, as the agency points out, the MTBF requirements of 30 and 35 hours are for different tests than the disputed MTBF requirements of 70 to 140 hours.

Most Probable Cost Evaluation

Ford Aerospace contends that the Air Force violated the selection ground rules by not restricting its most probable cost evaluation to the "firm phases" of the LANTIRN program. The protester asserts that it was advised that the Air Force's evaluation would be restricted to the "firm phases" of the contract, i.e., those that would be under contract or the subject of priced options (through Lot 1 production), but that the SSEC briefing documents reveal that the Air Force's evaluation extended beyond the firm phases to unreliable budgetary estimates submitted for Lot 2 and Lot 3 production quantities.

The Air Force asserts that its most probable cost calculations were based on cost data submitted by the offerors and that an independent estimate was generated from this data and other data through use of an RCA price model in accordance with the RFP. The Air Force further states that the briefing of the SSA "clearly segregated the most probable cost calculations as between the portion of the program that was firmly priced and that portion which was not." In this regard, the Air Force further argues that in any event Martin Marietta's most probable cost for the firm phases was lower than Ford Aerospace's and that cost was not a primary factor in the award decision.

As indicated by the Air Force, the most probable cost evaluation was an independent estimate and was not based directly on an offeror's proposed cost or its budgetary estimates but rather on cost data submitted by the offerors. Additionally, cost was not a primary factor in the SSA's award decision and Martin Marietta's most probable cost for the LANTIRN program through Lot 1 production was lower than Ford Aerospace's. Thus, we fail to see how Ford Aerospace was prejudiced by the Air Force's most probable cost evaluation of the total LANTIRN program.

II. Negotiation

Ford Aerospace argues that the Air Force's failure to point out perceived weaknesses in its proposal deprived it of its statutory right to meaningful discussions and that this in turn deprived it of the opportunity to submit, and the Government to receive, the best possible offer. Specifically, Ford Aerospace complains the Air Force did not indicate during negotiations that the SSEC considered the Harris Corporation design for the target recognizer (Harris was Ford Aerospace's subcontractor for one of the two target recognizer designs required by the RFP) as imposing a "very high risk" and Ford Aerospace's terrain following CO_2 laser system as involving a "high risk."

The Air Force maintains that it considered the Ford Aerospace proposal to be technically acceptable in both of these areas but that it was the SSEC's assessment that there was a high risk that Ford Aerospace "could not actually accomplish its proposed development of the CO_2 laser for use in an operational tactical system and a very high risk that Ford could not accomplish the development and manufacture of the Harris Target Recognizer on schedule." The agency states that these problems did not constitute deficiencies as they involved areas of Ford Aerospace's proposal which met the Government's requirements, but were comparative weaknesses which it was not required to discuss. Further, the agency argues that it would have been unfair to Martin Marietta to have discussed these matters with Ford Aerospace as such discussions could well have resulted in the "transfusion" of Martin Marietta's successful design approach for these functions to the protester or in "leveling", a process through which a proposal is brought, through discussions, to the level of a superior proposal.

10 U.S.C. § 2304(g) (1976) requires that oral or written discussions be held with all offerors in a competitive range, and we have recognized that this mandate can be satisfied only by discussions that are meaningful. Union Carbide Corporation, 55 Comp. Gen. 803 (1976), 76-1 CPD 134. In order to be meaningful, discussions in general must point out weaknesses, excesses or deficiencies in proposals so that the Government may obtain the most advantageous contract. Dynalectron Corporation, B-184203, March 10, 1976, 76-1 CPD 167.

At the same time, we have also recognized that inferior aspects of technical proposals need not always be related to offerors during discussions. Systems Engineering Associates Corporation, B-187601, February 24, 1977, 77-1 CPD 137. As we indicated in 51 Comp. Gen. 621, 622 (1972): *

> " * * * [10 U.S.C. 2304 (g)] should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. * * * Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such 'transfusion' should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposals up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in his proposal."

In this regard, whether a given weakness or inadequacy must be discussed is to be determined by the nature of the weakness or inadequacy and the impact that its disclosure would have on the competitive process. Dynalectron Corporation, supra. Furthermore, the content and extent

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* Ford Aerospace argues that this case is not controlling. We believe the cited proposition is clearly applicable. The proposition is not limited to a particular method of procurement or agency but is clearly significant in any procurement such as the instant one where technically complex innovative approaches are required of offerors. See, for example, Gould Inc., B-192930 May 7, 1979, 79-1 CPD 311; Dynalectron Corporation, supra.

of discussions is a matter of judgment primarily for the agency and not subject to question by our Office unless clearly arbitrary or without a reasonable basis. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176.

Here, the SSEC considered the technical approaches for these areas in Ford Aerospace's proposal to meet the specification requirements but believed that it would be difficult for the firm to transform its proposed designs into an operational system. The SSEC believed that in order for Ford Aerospace's proposed CO_2 laser system to perform properly all its components and processor would have to operate near their theoretical limits. It was also the SSEC's assessment that Harris would have difficulty meeting Ford Aerospace's delivery requirements because of potential problems in producing the large scale integrated circuits required by the design. In the SSEC's judgment, this could have jeopardized an important feature of the overall procurement--meaningful competition between the contractor's two target recognizer sources.

We do not believe that the agency acted unreasonably by not discussing these matters with Ford Aerospace. These weaknesses were not the result of Ford Aerospace's failure to include substantiation for its proposed approaches or that firm's misunderstanding of RFP requirements. They simply were areas where in the SSEC's technical judgment Ford Aerospace's and Harris' acceptable design approaches were not as advantageous as those proposed by Martin Marietta. These weaknesses appear to have been inherent in Ford Aerospace's and Harris' proposed design approaches and would have required extensive proposal revisions to resolve. In this regard, we have held that the "negotiation process should not be used to re-write an offeror's proposal * * *." Westinghouse Electric Corp., B-189730, March 8, 1978, 78-1 CPD 181.

Moreover, the Air Force's actions were consistent with Defense Acquisition Regulation § 3-805.3, which requires that during discussions offerors be advised of deficiencies in their proposals but defines deficiency as "that part of an offeror's proposal which would not satisfy the Government's requirements." Since the Ford Aerospace proposal was viewed overall as technically acceptable, these relative judgments about the efficacy of the firm's technical approaches clearly were not viewed as deficiencies requiring discussion.

Consequently, we cannot conclude that the Air Force erred in not explicitly informing Ford Aerospace of its concerns regarding risk.

III. Delivery Schedule

Ford Aerospace maintains that the Air Force denied it the opportunity to compete on an equal basis with Martin Marietta by accepting Martin Marietta's alternate delivery schedule without permitting it to propose the same schedule. Ford Aerospace contends that while the contract awarded to Martin Marietta may result in the earlier delivery of pods, in some cases it results in significant delays in the delivery of preproduction and Lot I production target recognizers. Thus, the protester concludes, this schedule constitutes a relaxation of the RFP terms which should have been communicated to all offerors through an amendment to the RFP.

While the Air Force does not deny that the alternate delivery schedule differs from that contained in the RFP, it argues that Ford Aerospace could not have been prejudiced by the acceptance of the alternate schedule because that schedule was not considered in the evaluation and until Martin Marietta was selected as the contractor on the basis of a proposal which conformed to the RFP. The Air Force also denies that the alternate delivery schedule results in delays in the delivery of preproduction and Lot 1 production target recognizers and contends any confusion on this point was due to the failure of the awarded contract to accurately reflect the understanding of the parties.*

It is difficult to conclude, on the basis of the record before us, that the proposed alternate delivery schedule played a significant role in the evaluation and award selection. On the one hand, the SSEC briefing documents (which represent the SSEC's recommendation to the SSA) and evaluation record indicate that the Martin Marietta alternate schedule was evaluated and considered a strength by that body, and contributed to the SSEC's conclusion that Martin Marietta merited an outstanding rating for its management approach. On the other hand, it appears that the evaluation of the technical, logistics and cost areas was based on the RFP delivery schedule and not the proposed alternate. Moreover, the SSA, who

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* On November 25 we received a copy of a modification to the contract which is said to reflect the understanding reached by the Air Force and Martin Marietta during the discussions prior to the submission of best and final offers. Although the modification was received after the date specified for the close of the record and differs from an earlier proposed modification which was submitted to our Office as part of the Air Force's report, we have considered it in reaching our decision.

had the sole authority to make the final award selection and whose decision was based at least in part on the briefing by the SSEC, did not in his source selection justification of September 11 mention the alternate delivery schedule as one of the factors in the selection of Martin Marietta. While it seems likely that the Air Force's view of Martin Marietta's management was influenced, at least in part by the fact that the company had proposed an accelerated delivery schedule, we believe that overall the record does not establish that the evaluation of Martin Marietta's proposal was based on anything other than the RFP schedule.

The more significant question is whether the Air Force, having evaluated Martin Marietta's proposal on the basis of the RFP delivery schedule, properly can award a contract to the firm on the basis of a different schedule. The Air Force, asserting that the alternate delivery schedule was more favorable to the Government, likens its acceptance of the alternate schedule to acceptance of a price reduction offered by a contractor after its selection for award, which long has been held to be permissible. See, e.g., Leitman v. U.S., 104 Ct. Cl. 324 (1945).

If this were indeed comparable to a price reduction, where there is no relaxation of specifications and the total benefit of the change accrues to the Government, we would have no problem with the propriety of the Air Force's acceptance of the alternate delivery schedule, since generally the Government may accept more favorable terms offered by the winning bidder or offeror. 40 Comp. Gen. 466 (1961). If, however, the specifications (including delivery terms) have been significantly relaxed so that it can be said that the awarded contract is not the one for which the competition was held, then considerations of both statutory

requirements and fundamental fairness would compel the conclusion that the award is improper. Our review and analysis* indicates that under the alternate schedule significant delays in the delivery of preproduction and Lot 1 production target recognizers (although not prototype target recognizers) could result and that this appears to represent a relaxation of requirements. Our analysis, necessarily in some detail, follows.**

The RFP contained a detailed schedule for the completion of the engineering development phase of the contract and for items to be provided under the production readiness and Lot 1 production phases. The RFP schedule for some of the major contract items is set forth below:

Item 0001AA - Demonstration of target recognition function

Complete 14 months after contract award.

Item 0002 - 6 Pods (Prototypes)

1st Pod to be completed 26 months after date of award. The 2nd, 3rd, 4th, 5th, and 6th pods are to be completed respectively 27, 28, 29, 30, and 31 months after award.

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* The various delivery schedules consist of narrative provisions and charts which are set out in the amended RFP, Martin Marietta's initial response to that amended RFP, its various letters to the agency, its best and final offer, the contract and two modifications (one draft and one executed) to that contract. In fact, the schedule is so complex and confusing that the Air Force and Martin Marietta could not agree on its terms until well after the contract was awarded. Since there was no single set schedule but a seemingly infinite number of combinations depending on when options are exercised or tests conducted, our analysis is based on various assumptions. In each instance where the schedule is discussed below we have indicated the assumptions which we have made. It should be recognized that the variations discussed are not the only possible incarnations of the schedule and that due to imperfect meshing of the various documents and charts (which do not in every instance appear to be consistent) may contain some inaccuracies.

** The item numbers and option numbers contained in Martin Marietta's best and final offer and the awarded contract differ from those contained in the RFP. For the purpose of clarity we will use the item numbers and option numbers contained in the RFP.

Item 0004 - 6 Target Recognizers (Prototypes)

1st Target Recognizer to be completed 26 months after date of award. The 2nd, 3rd, 4th, 5th, and 6th target recognizers are to be completed respectively 27, 28, 29, 30, and 31 months after award.

Item 0022 (Option V) - 3 Preproduction Pods.

1st Pod to be completed 19 months after exercise of Option V. The 2nd and 3rd pods are to be completed respectively 20 and 21 months after the exercise of Option V.

Item 0024 (Option V) - 3 Preproduction Target Recognizers

1st Target Recognizer to be completed 19 months after exercise of Option V. The 2nd and 3rd target recognizers are to be completed respectively 20 and 21 months after exercise of Option V.

Item 0031 (Option VII) - Long lead production items

To be completed 31 months after exercise of Option VII.

Item 0032 (Option VIII) - 34 Pods

1 Pod to be completed 12 months after exercise of Option VIII.
1 Pod to be completed 13 months after exercise of Option VIII.
2 Pods to be completed 14 months after exercise of Option VIII.
2 Pods to be completed 15 months after exercise of Option VIII.
3 Pods to be completed 16 months after exercise of Option VIII.
3 Pods to be completed 17 months after exercise of Option VIII.
4 Pods to be completed 18 months after exercise of Option VIII.
5 Pods to be completed 19 months after exercise of Option VIII.
6 Pods to be completed 20 months after exercise of Option VIII.
7 Pods to be completed 21 months after exercise of Option VIII.

Item 0034 (Option VIII) - 34 Target Recognizers

1 Target Recognizer to be completed 12 months after exercise of Option VIII.
1 Target Recognizer to be completed 13 months after exercise of Option VIII
2 Target Recognizers to be completed 14 months after exercise of Option VIII.
2 Target Recognizers to be completed 15 months after exercise of Option VIII.

3 Target Recognizers to be completed 16 months after exercise of Option VIII.
3 Target Recognizers to be completed 17 months after exercise of Option VIII.
4 Target Recognizers to be completed 18 months after exercise of Option VIII.
5 Target Recognizers to be completed 19 months after exercise of Option VIII.
6 Target Recognizers to be completed 20 months after exercise of Option VIII.
7 Target Recognizers to be completed 21 months after exercise of Option VIII.

In connection with this schedule, the RFP gave the Air Force the right to exercise Option V (three preproduction pods and target recognizers) within 120 days of completion of critical design review. The RFP also gave the Air Force the right to exercise Option VII (long lead production items) within 30 days after completion of the F-16/fire control pod (F-16/FCP) integration tests and the right to exercise Option VIII (Lot 1 production) within 460 days after the completion of the F-16/FCP integration tests.

In addition to the schedule set forth in the RFP, the Executive Summary accompanying MR-12 set forth a planning schedule for the LANTIRN program which established milestones for completing critical design review, conducting F-16/FCP integration tests and the exercising of various options including Options V, VII, and VIII. Specifically, the planning schedule contemplated completing critical design review 14 months after the award of the contract and conducting the F-16/FCP integration tests between the beginning of the 28th month and the end of the 29th month after the award of the contract. The planning schedule also indicated that the agency contemplated that Option V (preproduction pods and target recognizers) would be exercised at the beginning of the 19th month after award of the contract, that Option VII (long lead production items) would be exercised at the the 30th month after contract award, and that Option VIII (Lot 1 production) would be exercised at the beginning of the 40th month after contract award.

Thus, under the RFP and the planning schedule accompanying MR-12, the delivery of the six prototype fire control

pods would begin in the 26th month after contract award; delivery of the three preproduction fire control pods would start in the 37th month following contract award; delivery of the long lead production items would commence at the beginning of the 30th month after award and be completed by the end of the 60th month; and the 34 Lot 1 production fire control pods would be delivered during the 51st through 60th months after contract award. The delivery schedule in the RFP and the planning schedule contemplated simultaneous delivery of pods and target recognizers in the prototype, preproduction and production phases.

As indicated, the RFP required the delivery of three preproduction pods and target recognizers concurrently at the rate of one a month beginning 19 months after the exercise of Option V. Although the RFP planning schedule indicated that the Air Force planned to exercise this option at the beginning of the 19th month after award of the contract, the RFP (Paragraph 23, Section J, MR-12) gave the Air Force the right to exercise Option V within 120 days of completion of critical design review. The RFP planning schedule indicates that critical design review is to be completed 14 months after contract award. Thus, if the Air Force exercised Option V at the earliest date permitted under the RFP (at finish of critical design review, 14 months after award), delivery of the three preproduction pods and target recognizers would be required to start at the rate of one a month beginning in the 33rd month following contract award (14 months after award plus 19 months). However, under Martin Marietta's alternate delivery schedule, target recognizer deliveries would not begin at the earliest until 37 months after contract award, four months beyond the earliest delivery the Air Force could obtain under the RFP, while pods would be delivered earlier than under the RFP at the rate of one a month beginning in the 31st month after contract award. (Martin Marietta's alternate delivery schedule called for delivery of pods at the rate of one a month between 18 1/2 and 20 1/2 months after the exercise of Option V and delivery of target recognizers at the rate of one a month between 24 1/2 and 26 1/2 months after the exercise of Option V; as specified by Martin Marietta's September 3 letter, exercise of Option V was to occur 12 1/2 months after contract award.)

Additionally, the RFP required deliveries of 34 Lot 1 production pods and target recognizers to occur concurrently between the 12th and 21st months after the exercise of Option VIII. Although the planning schedule indicated that Option VIII would be exercised 39 months after contract award, the RFP gave the Air Force the right to exercise Option VIII within 460 days after completion of the F-16/FCP integration tests. The planning schedule indicated F-16/FCP integration tests were to occur in the 29th month after award. Consequently, if the Air Force exercised Option VIII at the earliest date permitted (29 months after contract award at completion of the F-16/FCP integation tests per RFP planning schedule) delivery of the 34 pods and target recognizers would occur between the 41st and 50th months after contract award (29 months plus the 12th through 21st months allowed for delivery). This compares with the earliest delivery of pods between the 43rd and 52nd month after contract award and delivery of target recognizers between the 51st and 60th months after contract award under the alternate schedule. (Under Martin Marietta's alternate delivery schedule the delivery of pods was to occur between the 12th and 21st months after exercise of Option VIII, while the delivery of target recognizers was to occur between the 20th and 29th months after exercise of Option VIII; by the September 3 letter, exercise of Option VIII was to occur 31 months after contract award.)

Thus, assuming the Air Force exercised Options V and VIII at the earliest time permitted by the RFP and that Marietta's schedule is governed by the milestones in its September 3 letter, delivery of the three preproduction target recognizers would begin four months later under Martin Marietta's schedule and the delivery of the Lot 1 production pods would begin two months later and the target recognizers ten months later. In addition, the requirement for concurrent delivery of pods and target recognizers is changed as well as the planned dates of the exercise of Option V (18 months after award to 12 1/2 months) and Option VIII (39 months after award to 31 months).

Our consideration of the contract modification dated November 14 does not affect our conclusion. The modification apparently reflects the understanding reached by Martin Marietta and the Air Force during the course of negotiations prior to the submission of best and final offers. In essence, it affirms that the milestones contained in Martin Marietta's September 3 letter are the earliest dates on which the Air Force could exercise options and provides that if the Air Force exercises Options V and VIII after the specified milestone month there will be an equivalent shortening of the delivery time for target recognizers. The shortening of the delivery schedule insures that the completion of target recognizer delivery will be no later than the 60th month after contract award. For example, if the Air Force exercises Option VIII on the 32nd month after contract award rather than the 31st month after contract award as set forth in the September 3 letter, delivery of target recognizers would be required to be made between the 19th and 28th months after the exercise of Option VIII or the 51st and 60th months after contract award. As noted above, if Option VIII had been exercised 31 months after contract award deliveries would be required to occur between the 20th and 29th months after exercise of Option VIII or also between the 51st and 60th months after contract award. In addition, under this modification the number of Lot 1 production target recognizers to be delivered any given month changes with respect to the date Option VIII is exercised.* The contract as modified does not, however, under any circumstances entitle the Air Force to have preproduction and Lot 1 production target recognizers delivered earlier than the 51st and 60th months after contract award. Thus, the November 14 modification does not eliminate the fundamental differences between the alternate schedule and the RFP schedule when options are exercised at the earliest possible dates.

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* The delivery rate for the Lot 1 production target recognizers contained in the November 14 modification if Option VIII is exercised the 31st month after contract award differs from the delivery rate contained in Martin Marietta's best and final offer as well as from the delivery rate contained in the earlier proposed modification.

A comparison of the RFP schedule, the schedule contained in Martin Marietta's best and final offer and the schedule reflected in the November 14 modification for the preproduction and Lot 1 production pods and target recognizers is as follows:

Item	RFP Delivery Schedule (Early exercise of options)	Alternate Delivery Schedule (Martin Marietta's Best and Final Offer)	November 14 Modification Delivery Schedule
0022	1 pod 33 months*	1 pod 31 months	1 pod 31 months
Preproduction Pods	1 pod 34 months 1 pod 35 months	1 pod 32 months 1 pod 33 months	1 pod 32 months 1 pod 33 months
0024			
Preproduction Target Recognizers (TR)	1 TR 33 months 1 TR 34 months 1 TR 35 months	1 TR 37 months 1 TR 38 months 1 TR 39 months	1 TR 37 months 1 TR 38 months 1 TR 39 months
0032			
Production Pods	1 pod 41 months 1 pod 42 months 2 pods 43 months 2 pods 44 months	1 pod 43 months 1 pod 44 months 2 pods 45 months 2 pods 46 months	1 pod 43 months 1 pod 44 months 2 pods 45 months 2 pods 46 months

* Months After Contract Award

	3 pods 45 months	3 pods 47 months	3 pods 47 months
	3 pods 46 months	3 pods 48 months	3 pods 48 months
	4 pods 47 months	4 pods 49 months	4 pods 49 months
	5 pods 48 months	5 pods 50 months	5 pods 50 months
	6 pods 49 months	6 pods 51 months	6 pods 51 months
	7 pods 50 months	7 pods 52 months	7 pods 52 months

0034

Pro-duction Target Recog-nizers (TR)	1 TR 41 months	7 TRs 51 months	7 TRs 51 months
	1 TR 42 months	6 TRs 52 months	9 TRs 52 months
	2 TRs 43 months	5 TRs 53 months	2 TRs 53 months
	3 TRs 44 months	2 TRs 54 months	2 TRs 54 months
	3 TRs 45 months	2 TRs 55 months	2 TRs 55 months
	3 TRs 46 months	2 TRs 56 months	2 TRs 56 months
	4 TRs 47 months	2 TRs 57 months	2 TRs 57 months
	5 TRs 48 months	2 TRs 58 months	2 TRs 58 months
	6 TRs 49 months	3 TRs 59 months	3 TRs 59 months
	7 TRs 50 months	3 TRs 60 months	3 TRs 60 months

Martin Marietta maintains that Lot 1 production target recognizers could not be obtained any earlier than between the 51st and 60th months after contract award. In this regard, Martin Marietta argues that Option VIII could not under the RFP schedule be exercised any earlier than 39 months after contract award because the RFP required that there be a 10 month period between the exercise of Option VII (long lead production items) and Option VIII. We do not agree.* We can find nothing in the RFP requiring that 10 months elapse between the exercise of Option VII and Option VIII. The RFP provided that Option VII could be exercised within 30 days after completion of the F-16/FCP integration test and Option VIII could be exercised within 460 days after completion of those tests. While the RFP planning schedule contemplated a 10 month period between the exercise of Option VII and Option VIII, in our view the Air Force had a right under the RFP to exercise both options at the same time and a right to have delivery of pods and target recognizers begin 12 months thereafter.

Even assuming, arguendo, that the earliest the Air Force could exercise Option VIII under the RFP was 39 months after contract award so that under the RFP Lot 1 production pods and target recognizers could not be delivered any earlier than between the 51st and 60th months after contract award (delivery of pods and target recognizers under the RFP must begin 12 months after exercise of Option VIII), the alternate delivery schedule still differs significantly from the RFP schedule. First, there still exists a four month delay of preproduction target recognizers. Second, in order to obtain delivery from Martin Marietta of Lot 1 production pods earlier than under the RFP schedule, the Air Force, under Martin Marietta's assumption that a 10-month period must exist between the exercise of Options VII and VIII, would be required to exercise Option VII prior to completing the F-16/FCP integration tests and, in fact, prior to receiving a completed prototype fire control pod. (Under the RFP the Air Force could not exercise Option VII until after completion of the F-16/FCP integration tests). Third, the Air Force must also agree to restrict its right to exercise Option VIII. In this regard, under the November 14 modification, Option VIII could be exercised between 60 and 460 days after

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* By a letter dated November 18, Martin Marietta alleged that Ford Aerospace had misrepresented the delivery schedule contained in the RFP by failing to discuss Option VII and its relationship to Option VIII. Although the letter was submitted after the close of the record on November 10, a date agreed to by the parties before the court, we have considered it because Ford Aerospace promptly commented on it.

integration tests; however, under the RFP, the Air Force had the right to exercise Option VIII any time within 460 days after completion of the F-16/FCP integration tests. Finally, the most obvious difference is the change in the requirement for concurrent delivery of pods and target recognizers.

These various differences clearly do not appear to be entirely or solely beneficial to the Government. While we are not in a position to dispute the Air Force's conclusion that overall the alternate delivery schedule was more advantageous to it than the RFP schedule, certain elements of the alternate schedule, such as the later delivery of the target recognizers and, under Martin Marietta's interpretation of the schedule, the restriction on the exercise of Option VIII, would seem to be less advantageous than what the RFP provided. Moreover, some of these differences would appear to benefit the contractor and to be a relaxation of RFP requirements. The most obvious of these is the relaxation of the target recognizer delivery requirements by from four to ten months.

We recognize that the alternate schedule contains some apparent trade-offs, e.g., while it provides for later delivery of the target recognizers, it also provides for earlier delivery of pods than called for by the RFP. However, under the early option exercise assumption upon which our analysis was based, it is only the three pre-production pods which are delivered early; the much larger quantity of production pods, and both the pre-production and production target recognizers, are delivered later than the RFP schedule would permit. Moreover, it is the target recognizer which is the more complex and difficult item to produce, so that while the contractor under the alternate schedule obligates itself to a somewhat earlier delivery of the relatively simple pod, it is permitted additional time to furnish the item with which significantly more risk is associated.

We further recognize that the actual impact of this relaxation of requirements is difficult to measure, as our analysis, based as it is on the assumption that the Air Force will exercise options early, may not reflect the Air Force's most likely course of conduct in this procurement.

Nevertheless, the Air Force has not provided any information on this point, and thus we can only assume that in light of the RFP requirements the Air Force at least wanted to have the contractual right to exercise the options at an early date and in that instance to have target recognizer deliveries at the times specified by the RFP and concurrently with the pod deliveries.

We have long held that a contract award must reflect the requirements upon which the competition was based and that a material change in Government requirements may not be negotiated only with the otherwise successful offeror. A&J Manufacturing Co., 53 Comp. Gen. 838 (1974), 74-1 CPD 240; Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD 134; Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. When there is such a change, the Government is required to amend its solicitation and seek new offers. Computek Inc. et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12; DAR 3-805.4. The reason, of course, is that the statutory and regulatory requirements for maximum practicable competition cannot be met if all offerors are not provided an equal opportunity to compete to satisfy the Government's actual needs; in addition, it is obviously inherently unfair to one or more offerors who do compete for a particular contract that is awarded on a basis other than what the Government said it wanted in its solicitation.

Generally, a delivery schedule or time of performance requirement is regarded as a material requirement, Lawrence Johnson & Associates, Inc., B-196442, March 11, 1980, 80-1 CPD 188, a change in which must be communicated to all offerors. Development Associates, Inc., B-188416, August 1, 1977, 77-2 CPD 64. Here, in light of the discussion above indicating that a relaxation of requirements was involved, we believe the Air Force's willingness to accept the Martin Marietta alternate delivery schedule represents a change in the Air Force's stated material requirements and that the acceptability of a delivery schedule that would permit relaxation of RFP requirements should have been communicated to Ford Aerospace,

the other offeror in the competition. In this regard, we point out that while Ford Aerospace's contention that it could have offered a more favorable proposal from both a cost and technical standpoint had it known it could have proposed a different delivery schedule, is speculative, the proper way to determine what an offeror would or could do is through competition under common specification requirements. Development Associates, Inc., supra.

In reaching this conclusion in this case, we are mindful of the Air Force's apparent belief that there was nothing improper here because the RFP permitted submission of alternate proposals and both offerors took advantage of that provision, with Martin Marietta proposing the alternate delivery schedule and Ford Aerospace proposing an additional 66 pods. The RFP however, did not provide for alternate proposals which deviated from the RFP. It provided only for submission of proposals with a pod configuration which differed from that contained in the basic proposal. In other words, if an offeror proposed one pod, it could also propose two pods as an alternate, or vice versa. See Section C16 of the RFP. In short, the RFP did not provide for submission and consideration of a proposal which deviated materially from RFP requirements.

CONCLUSION

We sustain the protest on the one issue involving the propriety of the Air Force's acceptance of the Martin Marietta alternate delivery schedule. We do so because that schedule appears to significantly relax the RFP delivery requirements and because we see nothing in the evaluation record or in the Air Force or Martin Marietta submissions which indicates that the obvious differences between the RFP and the accepted schedule are not materially advantageous to the contractor. We point out that our conclusion is bottomed not so much on what the record before us clearly shows, but on what it does not show. In other words, from the entire record before us it appears, for the reasons stated in this decision, that the alternate delivery schedule involves changes which relax the RFP provisions and could give the awardee an advantage others did not have. The Air Force has not addressed this point specifically and thus has not shown that what otherwise appears to be so in fact is not. Thus, we can

only conclude as we have, and must now recommend the appropriate remedial action to be taken if the Air Force or Martin Marietta does not, in the court proceedings, effectively rebut what the record before us indicates.

Given the nature of the procurement deficiency involved here, we recommend that negotiations be reopened, that the Air force amend the RFP to indicate that a modified delivery schedule may be considered, and that the two offerors be given the opportunity to submit revised proposals. If, upon evaluation, the Air Force determines that the Ford Aerospace proposal is more advantageous than the Martin Marietta proposal, then the contract awarded to Martin Marietta should be terminated for the convenience of the Government.

In making this recommendation, we are mindful that the technical and pricing features of the competing proposals have been revealed to the parties. However, given the deficiency in this procurement and the possible unfairness to the protester, the only effective remedy is to permit submission of revised proposals which reflect actual award requirements. Although normally offerors do not and should not know anything concerning their competitors' proposals prior to award, we have recognized that in large measure competition in a situation such as this is equalized when all competitors are made aware of each other's offers. See TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299.

Milton J. Socolar

For the Comptroller General
of the United States