

**DECISION**



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

**FILE:** B-207285

**DATE:** June 6, 1983

**MATTER OF:** Tracor Marine, Inc.

**DIGEST:**

1. For negotiations to be meaningful, Government negotiators must be as specific as practical considerations permit in advising offerors of the deficiencies in their proposals. Where the Navy advised an offeror of one of the bases for the agency conclusion that the offeror's proposal was unrealistic, but failed to disclose the other bases, thus denying the offeror the opportunity to fully correct the deficiencies when preparing its best and final proposal, the agency has failed to conduct meaningful negotiations with the offeror.
2. Given the agency's finding that the protester's proposal was unrealistic, with a high potential for large cost overruns, a protester alleging that the agency departed from the evaluation criteria set forth in the request for proposals, which assigned equal weight to cost and technical criteria, does not carry its burden of clearly proving such a departure merely by showing that the agency awarded the contract to an offeror who proposed a total cost exceeding that proposed by the protester.
3. New grounds of protest must independently satisfy the timeliness requirements of our Bid Protest Procedures. Where the protester supplements its original protest against the award of a contract with new grounds of protest more than 10 working days after the basis for them should have been known, the new grounds are untimely and we will not consider them on their merits.

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4. Where awardee has exhausted the contract funds in an unsuccessful attempt to fulfill his obligations under the contract and the agency lacks the funds to resolicit, we will not recommend resolicitation even though we are sustaining an unsuccessful offeror's protest against the award. GAO will not question an agency's determination as to the unavailability of funds.
5. Award of proposal preparation costs is only justified if protester shows both that the Government's conduct towards the protester was arbitrary and capricious and that, if the Government had acted properly, the protester would have had a substantial chance of receiving the award. Where the protester fails to show it had a substantial chance for award, GAO will deny proposal preparation costs.

Tracor Marine, Inc., protests the award of a contract to Tetra Tech, Inc., for a hydrographic survey of the Nicaraguan Rise in the Caribbean Sea under request for proposals (RFP) No. N62306-81-R-0064, issued by the Naval Oceanographic Office, and requests proposal preparation costs. We sustain the protest in part, but deny the claim for proposal preparation costs.

On June 26, 1981, the Navy sent the RFP to 58 firms, including Tracor Marine. After completing the initial review of proposals, the Navy requested clarifications and additional information from the offerors. The Navy began oral negotiations with the offerors on November 30, 1981, including Tracor Marine. At the conclusion of the negotiations, the offerors were requested to submit best and final offers by December 18, 1981. After evaluating the final offers, the Navy awarded the contract to Tetra Tech on April 12, 1982, which was followed by Tracor Marine's protest to our Office. However, while the protest was pending, Tetra Tech exhausted the contract funds after completing

only 58 percent of the work. The Navy terminated the contract and has informed us that it lacks the necessary funds to resolicit.

Tracor Marine alleges that the Navy, in violation of 10 U.S.C. § 2304(g) (1976), as amended by Pub. L. No. 97-86, § 907 (December 1, 1981), and Defense Acquisition Regulation (DAR) § 3-805.3 (Defense Procurement Circular No. 76-7, April 29, 1977), failed to conduct meaningful discussions because the Navy failed to identify alleged deficiencies which the Navy perceived in Tracor Marine's proposal and the Navy misled Tracor Marine into believing that its proposal was not deficient in those areas.

The Navy admits in its report submitted in response to this protest that the negotiations with Tracor Marine were flawed because the Navy evaluators overlooked deficiencies in Tracor Marine's initial proposal and, therefore, did not provide Tracor Marine with a reasonable opportunity to identify and correct the deficiencies. However, the Navy denies affirmatively misleading Tracor Marine and contends that its actions were neither arbitrary nor capricious.

The Navy perceived serious deficiencies in Tracor Marine's proposals regarding both schedule and cost realism. Tracor Marine initially proposed a total cost of \$942,681, more than \$500,000 less than that proposed by Tetra Tech, the second lowest offeror. The Navy found Tracor Marine's initial proposal to be unacceptable in regards to schedule realism and cost and characterized it as having the "Highest potential for cost overrun."

Tracor Marine proposed in its initial and best and final proposals to use the ARGO navigation system on a 24-hour-a-day basis. During negotiations, the Navy warned Tracor Marine that, as a result of Navy experience with ARGO, the Navy believed that ARGO possessed a maximum nighttime range of only 150 nautical miles. The Navy asked Tracor Marine whether its proposed survey schedule was based on 24-hour operation of ARGO at ranges greater than 150 nautical miles.

While Tracor Marine proposed to complete the survey in 62 survey days, the Navy estimated that 96 survey days would

be required and Tetra Tech proposed 125 days. The Navy found Tracor Marine's estimate to be unrealistic because it believed that: (1) Tracor Marine would be unable to operate ARGO on the 24-hour basis; (2) Tracor Marine failed to sufficiently allow for contingencies such as vessel or equipment downtime; (3) Tracor Marine failed to allow for the time required to slow down on turns and to deploy and retrieve the towed sonar array; (4) the stated cruising speed of Tracor Marine's survey vessel would have to be exceeded in order to average the proposed overall 11 knots; and (5) Tracor Marine's survey vessel would occasionally have to exceed the 6-knot maximum allowed under the specifications when towing the sonar array in order to average the 6 knots proposed by Tracor Marine for towing sonar. The Navy concluded that Tracor Marine's unrealistic estimate of the survey days required to complete the survey presented a "high cost overrun potential." However, the Navy did not point out the five reasons stated above to Tracor Marine because Navy did not consider the five reasons for questioning the realism to be "deficiencies" that had to be brought to Tracor Marine's attention. On the contrary, the Navy warned Tracor Marine that any contingency costs which it included in its best and final offer must be based on factual data or past experience, and that unless any contingency costs were fully substantiated, the cost element in the proposal would not be considered credible.

Section 2304(g), supra, provides that, in negotiated procurements, "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered." DAR § 3-805.3(a) implements the provisions of section 2304(g) by requiring that:

"(a) All offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements."

For written or oral negotiations to be meaningful, Government negotiators must be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. See 52 Comp. Gen. 466 (1973); MAR, Incorporated, B-194631, August 13, 1979, 79-2 CPD 116.

By failing to disclose to Tracor Marine the basis for its conclusion that Tracor Marine's proposal was unrealistic, the Navy failed to hold meaningful discussions with Tracor Marine. Accordingly, we sustain the protest on this basis.

However, we find Tracor Marine's other bases for protest to be without merit. Tracor Marine alleges that the Navy, by warning against unsupported contingencies, affirmatively misled or induced it into not providing for contingencies.

We consider Tracor Marine's reasoning unconvincing. A warning against unsupported, speculative contingencies was entirely proper. Such a warning in no way constituted a prohibition on providing for those contingencies. Nor does it appear that Tracor Marine understood the Navy's warning to represent such a prohibition because in its best and final proposal, Tracor Marine, in fact, provided for contingencies arising from adverse weather conditions.

Tracor Marine alleges that the Navy improperly applied the evaluation factors (management/technical and cost criteria were to be equal) set forth in the request for proposals, when the Navy awarded the contract to Tetra Tech at a total cost \$340,000 more than that proposed by Tracor Marine. The Navy denies that it failed to give equal weight to the technical and cost factors.

Tracor Marine has failed to carry its burden of clearly showing that the Navy departed from the evaluation criteria set forth in the request for proposals. See Holmes and Narver, Inc., B-206138, January 11, 1983, 83-1 CPD 27. Given the Navy's finding that Tracor Marine's proposal was unrealistic with a high potential for cost overruns, the fact that the Navy awarded the contract to Tetra Tech, which proposed a higher cost, does not clearly show that the Navy departed from the evaluation criteria set forth in the request for proposals.

Finally, regarding Tracor Marine's allegations that the evaluation of its proposal was flawed by the Navy's incorrect assumptions that the proposed average speed of 11 knots would have required the survey vessel to occasionally exceed its maximum speed, that the vessel could not sustain an average of 6 knots while towing a sonar array, and that the Navy failed to note that Tracor Marine had included an allowance for contingencies in its proposal, we will not consider these allegations since they are clearly untimely. They were not filed with our Office until July 13, more than 10 working days after the April 28, 1982, conference with the Navy from which the basis for the allegations should have been discovered. See 4 C.F.R § 21.2(b)(2) (1983); Weaver Shipyard & Drydock, Inc.--Request for Reconsideration, B-210652.2, April 5, 1983, 83-1 CPD \_\_\_\_.

Tracor Marine generally requests that we grant whatever relief is appropriate in the circumstances if its protest is sustained. Although we sustain Tracor Marine's protest, we will not recommend that the Navy resolicit for the hydrographic survey. As indicated above, the Navy has informed us that it lacks the funds to resolicit. We will not question the Navy's determination as to the unavailability of funds. See Allstate Flooring Company, Inc., B-205661.2, October 15, 1982, 82-2 CPD 337.

Nor will we grant Tracor Marine's specific request for proposal preparation costs. Not every irregularity entitles a disappointed offeror to compensation for the expenses incurred in submitting a proposal. Ultra Publicaciones, S.A., B-200676, March 11, 1981, 81-1 CPD 190. Rather, the award of proposal preparation costs is only justified where the protester shows both that the Government's conduct towards the protester was arbitrary and capricious, as opposed to merely negligent, and that, if the Government had acted properly, the protester would have had a substantial chance of receiving the award. See McQuiston Associates, B-202766; B-203351, August 12, 1982, 82-2 CPD 127; Norfolk Conveyor Division of Jervis B. Webb Company; E.C. Campbell, Inc., B-190433, July 7, 1978, 78-2 CPD 16; International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320.

Tracor Marine contends that, had the Navy fully disclosed the basis for its concern as to the realism of the

schedule proposed by Tracor Marine, then Tracor Marine would have been reasonably certain of receiving the award. On the basis of the discussions that were held, Tracor Marine proposed a total cost of \$1,026,339 in its best and final proposal, \$340,125 less than the \$1,366,464 proposed by Tetra Tech. As previously indicated, Tracor Marine proposed to complete the survey in 62 survey days, 63 less than the 125 survey days proposed by Tetra Tech.

Tracor Marine argues that, given the "cushion" provided by the above differences between the two proposals, it could have increased the number of proposed survey days, and thus the cost, sufficiently to correct any deficiencies in regards to schedule realism and still have proposed a cost less than Tetra Tech. Tracor Marine submits that had it known the full extent of the Navy's criticism, it would have proposed completing the survey in 94 survey days and at a cost of \$1,320,800.

Tracor Marine's estimate of what it would have proposed had the Navy conducted meaningful discussions is a speculative estimate made only after learning what Tetra Tech offered in its best and final proposal. The record compiled before Tracor Marine filed its protest contains neither an indication of how Tracor Marine might have revised its proposal nor an indication that it would have even seriously attempted to meet the thrust of the Navy's criticism. On the contrary, from our examination of the record, we have serious doubts as to Tracor Marine's willingness to sufficiently revise its proposal. Although the Navy disclosed during the discussions its concern as to Tracor Marine's proposed 24-hour use of ARGO, one of the primary bases for the Navy's finding that Tracor Marine's proposal was unrealistic, Tracor Marine nevertheless neither abandoned its proposed 24-hour use of ARGO nor specifically allotted additional survey days for the possibility that it might be unable to use ARGO as proposed.

Since Tracor Marine has not convincingly shown that it would have corrected the deficiencies that led the Navy to find Tracor Marine's best and final proposal unrealistic and unacceptable, we conclude that Tracor Marine has therefore failed to demonstrate that, if the Government had acted properly, then Tracor Marine would have had a substantial

chance of receiving the award. Accordingly, we need not consider whether the Government's conduct towards Tracor Marine was arbitrary or capricious.

The protest is sustained, but the request for proposal preparation costs is denied.

*for Milton J. Asst*  
Comptroller General  
of the United States