

White



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ferranti International Defense Systems, Inc.

File: B-237760

Date: March 22, 1990

Edward F. Canfield, Esq., Casey, Scott, Canfield & Heggstad, P.C., for the protester.
Joseph J. Kelley, Esq., for Raytheon Company, an interested party.
Margaret A. Olsen, Esq., Department of the Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

Contracting agency's refusal to permit protester to compete for trainer procurement, because agency seeks to limit competition to two offerors found within competitive range by prime contractor who subsequently failed to complete procurement, does not comply with statutory requirement that offers be solicited from as many sources as practicable, where protester shows that prime contractor's evaluation of protester's proposal was flawed, and protester is able to submit its proposal within the time constraints of the agency's urgent need for the trainers.

DECISION

Ferranti International Defense Systems, Inc., protests its exclusion from the limited competition underway pursuant to request for proposals (RFP) No. N00019-89-R-0123, issued by the Department of the Navy, Naval Air Systems Command, for design, fabrication, test and installation of an Update IV operator and maintenance trainer for the P-3C aircraft. Ferranti contends that the Navy improperly failed to give Ferranti an opportunity to compete under the RFP.

We sustain the protest.

On October 23, 1989, the Navy published a notice in the Commerce Business Daily (CBD) announcing its intention to hold a limited competition between Raytheon Company and

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CAE-Link Corporation for the "design, fabrication, test, and installation of an Update IV operator and maintenance trainer for the P-3C and P-7A aircraft."^{1/} Ferranti protested its exclusion from the competition to the Navy on October 30. In its protest, Ferranti argued that it had participated in an earlier aborted procurement for the Update IV trainer conducted by the Boeing Corporation, prime contractor for the Update IV Avionics System, and that as a result, Ferranti was prepared to submit an offer under the current RFP. Ferranti also urged that evaluating its offer should not significantly jeopardize the Navy's schedule for procurement of the trainer.

On November 2, the Navy denied Ferranti's agency protest, stating that the limited competition was based on the urgent requirement that deliveries of the Update IV trainer parallel deliveries of the Update IV Avionics System. The Navy also based its decision on "competitive efforts undertaken over the last two years which have identified Raytheon and CAE-Link as the only two firms which have demonstrated the technical, managerial and financial capabilities to meet the Navy's urgent requirements." On November 13, Ferranti protested to our Office.

BACKGROUND

The "competitive efforts" cited by the Navy in its response to Ferranti refer to efforts by the Navy's prime contractor for the Update IV Avionics System, Boeing, to procure the Update IV trainer. The Navy originally intended for Boeing to purchase the Update IV trainer using a major subcontract to be approved by the Navy. Thus, after Boeing was awarded its prime contract on July 10, 1987, it issued an RFP for the trainer on September 28. By December 11, six proposals were received by Boeing, including a proposal from ISC Defense Systems, Inc., now Ferranti.

Boeing presented its evaluation of initial proposals to the Navy on March 22, 1988, and the Navy concluded that none of the six proposals was priced within the Navy's funding constraints. In an attempt to lower costs, the Navy and Boeing revised the statement of work for the trainers by reducing the quantity of trainers solicited and relaxing the specifications for the trainer. On January 18, 1989, Boeing issued the revised statement of work, together with a

^{1/} Since publication of the notice in the CBD, the Navy has deleted the portion of this procurement related to trainers for P-7A aircraft. Now only trainers for the P-3C aircraft are included in the instant procurement.

request for best and final offers (BAFOs). After receipt of BAFOs on March 6, Boeing reevaluated the offers and concluded, on April 10, that only two firms, Raytheon and CAE-Link, were within the competitive range.

On May 22, the Navy received both Boeing's formal recommendation that CAE-Link be selected for award, and Boeing's cost proposal for the subcontract. Again, the Navy concluded that the cost of the project exceeded funds available for the program. Thus, in order to avoid Boeing's labor and overhead rates and profits, hence reducing costs, the Navy decided to procure the Update IV trainer via a separate prime contract. The Navy now seeks to proceed with its own procurement limiting competition to the two offerors evaluated by Boeing as within the competitive range.

DISCUSSION

Ferranti contends that the Navy violated the requirement of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2304 et seq. (1988), that agencies solicit offers from as many sources as practicable, even when using less than full and open competition. Ferranti argues that the Navy acted improperly in limiting competition to the two offerors evaluated as within the competitive range in the Boeing procurement.

Under CICA, an agency may use other than fully competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). However, when restricting competition based upon 10 U.S.C. § 2304(c)(2), the contracting agency also must request offers "from as many potential sources as practicable under the circumstances." 10 U.S.C. § 2304(e).

Ferranti argues that the Navy's use of the Boeing evaluation to limit competition is improper because Boeing's evaluation was flawed and inadequate, and because the Boeing competition occurred too long ago to provide a meaningful measure of Ferranti's current ability to perform. Ferranti also claims it can meet the necessary delivery schedule and asserts that evaluation of an additional proposal will not significantly delay the Navy's procurement.

Ferranti contends that Boeing's evaluation was inadequate because the Navy never informed Boeing of Ferranti's successful experience on the Navy's PC-3 2F142 program, a

program Ferranti argues is similar to the instant procurement.^{2/} Ferranti argues that its approach, successful on other PC-3 aircraft trainers, was unreasonably downgraded by Boeing as high-risk because Boeing was unfamiliar with the approach. In addition, Ferranti argues that Boeing's evaluation of the risk in Ferranti's proposal was unreasonable because Boeing did not have the benefit of the Naval Air Systems Command's knowledge that the proposed approach had been accepted by the Naval Training Systems Center in Orlando, Florida. Further, Ferranti argues that under Boeing's method of conducting the procurement, Ferranti was unable to submit proprietary information demonstrating its performance for the Navy on the PC-3 2F142 program.

Ferranti also argues that since the beginning of the aborted trainer procurement by Boeing, Ferranti has gained significant successful experience with Navy programs similar to the instant procurement. In this regard, Ferranti again points to the company's ongoing performance on the PC-3 2F142 program. Ferranti argues that this intervening experience makes the Boeing evaluation more dated and less relevant to any accurate measure of Ferranti's current capability. Thus, according to Ferranti, it is now even more likely that a Ferranti proposal will be technically acceptable to the Navy.

The Navy responds on two related grounds. First it states that it has an urgent requirement to proceed with this procurement. Update IV trainers are needed to train the P-3C aircrews to operate the Update IV Avionics System. Without the necessary training, the Navy argues that it will be unable to fully utilize the capabilities of the Update IV Avionics System. Thus, the Navy contends that it reasonably limited competition to the two sources that Boeing evaluated as having the best technical approach in order to shorten the procurement process. According to the Navy, using the evaluations performed by Boeing permits the Navy to maximize competition within the constraints of the cited urgency.

Second, the agency argues it should be permitted to limit the competition to the two offerors selected by Boeing because Boeing conducted a valid, legally sufficient

^{2/} The 2F142 program is for the design, fabrication, and delivery of 2 weapons system trainers for aircrews using the P-3A/B TACNAVMOD avionics suite. According to Ferranti, this system incorporates many of the same specification requirements and government-furnished data bases as does the Update IV trainer program.

competition, and the Navy should not be required to repeat that effort. Specifically, the Navy claims that Ferranti was evaluated by Boeing as submitting the lowest-ranked and highest-priced proposal, and that Ferranti's design for the Update IV trainer did not meet the modularity requirements set forth in the specification. Further, the Navy asserts that it conducted a concurrent and independent evaluation and reached the same conclusion as Boeing.

In response to the Navy's first argument, we see no basis to question the Navy's determination that urgent circumstances justified a decision to limit competition. However, we find that the Navy's refusal to permit Ferranti to compete on this procurement was improper given the statutory mandate to maximize competition to the extent practicable in an urgent procurement. To the extent that the Navy contends that evaluating Ferranti's proposal will unduly delay the procurement, Ferranti first asked to participate in this procurement in October 1989. The final version of the RFP was not then ready, and was not released to Raytheon and CAE-Link until March 2, 1990, although a draft RFP was available in late 1989. To date, the Navy has yet to explain why evaluating a third proposal from Ferranti would significantly delay the ongoing procurement. Accordingly, we see no basis to conclude that permitting Ferranti to compete would unduly delay the procurement.^{3/}

With respect to the Navy's view that it could adopt Boeing's evaluation, Ferranti's challenge to the validity and adequacy of that evaluation has remained largely unaddressed by the Navy. The Navy has provided our Office with copies of the briefing materials used by Boeing in Boeing's May 22, 1989, briefing for the Navy on the results of Boeing's evaluation of the trainer proposals. The Navy has not provided any backup materials or other information beyond Boeing's evaluation conclusions that would permit a review of the reasonableness of Boeing's evaluation.

Ferranti charges that the Navy failed to inform Boeing of Ferranti's similar experience in other Navy training simulator procurements, thus calling into question Boeing's

^{3/} In this regard, by deciding to use a fixed-price incentive type contract, the Navy itself has introduced delay into the procurement, since section 9048 of the Fiscal Year 1990 Department of Defense Appropriations Act, Pub. L. No. 101-165, requires a 30-day delay for notification of the Committees on Appropriations of the Senate and House of Representatives when a defense agency uses a fixed-price type contract to procure a development effort.

low evaluation of Ferranti's capability, and in particular, Boeing's negative assessment of Ferranti's approach to the modularity requirements of the solicitation. This issue was raised and discussed at length during the conference on this protest. During the course of the conference the Navy appeared to accede to Ferranti's claim, and in its comments on the conference, Ferranti reiterated its original arguments supplemented by the conference discussion. The Navy, on the other hand, failed to challenge this point, or even to argue that any failure to inform Boeing of a possible weakness in its evaluation caused no prejudice to Ferranti. Accordingly, in view of the evidence and arguments submitted by Ferranti on this issue and the Navy's failure to respond, we conclude that, had the additional information on Ferranti's experience with similar procurements been available to Boeing, it reasonably could have had a significant impact on the evaluation of Ferranti's proposal.^{4/}

Moreover, Ferranti states that it has continued its successful performance on these programs since the Boeing procurement. During the conference, Ferranti referenced a successful Critical Design Review by the Naval Training Systems Center, on September 11-19, 1989, of its training equipment for the 2F142 program, also for a P-3 class of aircraft. These events, together with a January 19, 1990, letter from the Navy's P-3 Project Manager referencing the review, make a strong showing that Ferranti is in a better position to respond to the RFP now than it was at the time of the Boeing competition. For this reason, Boeing's evaluation of BAFOs submitted more than a year ago, in a procurement that began 18 months before that, is simply too dated to justify the Navy's current exclusion of Ferranti.

The Navy also states that it conducted its own evaluation of the offers submitted in response to the Boeing procurement. According to the contracting officer's statement, Boeing presented its evaluation of initial proposals to the government on March 22, 1988. At that time, Boeing had concluded that Ferranti had submitted the lowest-ranked technical proposal, and the highest price. The contracting officer states that this conclusion was consistent with the

^{4/} Ferranti claims that under Boeing's method of conducting the procurement, Ferranti itself was unable to submit proprietary information demonstrating its performance for the Navy on the PC-3 2F142 program. We take this to mean that Ferranti did not believe it could obtain the necessary proprietary protection for its technical information related to procurements other than the Update IV trainer.

Navy's evaluation. However, after Boeing presented its evaluation of initial offers, the Navy concluded that all six proposals exceeded the Navy's budget for the program. Thus, the Navy and Boeing rewrote the RFP reducing the quantities of trainers purchased and relaxing the specifications for the trainers. The Navy makes no claim that it conducted an independent evaluation of the second round of proposals submitted to Boeing in response to the revised solicitation. Further, the Navy has produced no documents evidencing any Navy evaluation--either of the first or the second round of proposals submitted to Boeing--that we might review for reasonableness; nor does the Navy base its decision to limit competition on the Navy's own evaluation.^{5/} With respect to the Navy's contention that Ferranti submitted the highest-priced offer, we have no basis to conclude that Ferranti would remain the highest-priced offeror if permitted to compete.

For the reasons set forth above, we find the Navy's exclusion of Ferranti from the competition to be unreasonable, and in violation of the statutory requirement to maximize competition to the extent practicable in an urgent procurement. Fairchild Weston Sys., Inc., B-225649, May 6, 1987, 87-1 CPD ¶ 479. We therefore recommend that the Navy permit Ferranti to submit a proposal in the ongoing procurement on the same basis as Raytheon and CAE-Link. In addition, we find that Ferranti is entitled to recover the costs of filing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1989). The protester should submit its claim for such costs directly to the Navy. 4 C.F.R. § 21.6(e).

The protest is sustained.


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^{5/} The required Justification and Approval (J&A) document in the record contains one sentence stating that the government monitored Boeing's evaluation of proposals and also conducted its own evaluation. Nonetheless, a fair reading of the J&A is that the Boeing evaluation forms the basis for the decision to limit competition here.