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**Comptroller General  
of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Transact International, Inc.

**File:** B-241589

**Date:** February 21, 1991

Herbert Bass, Esq., Pompan, Ruffner, & Bass, for the protester.  
Douglas L. Campbell, Esq., Department of the Air Force, for the agency.  
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest that awardee's proposal of material handling system with an electric lift failed to comply with specification calling for hydraulic lift is denied where solicitation provided for consideration of proposed enhancements included in offered systems, the agency specifically determined that awardee's proposed electric lift would exceed the performance of a hydraulic lift, and protester was not prejudiced in any case since it argues only that the awardee's system should be rejected, not that it desires an opportunity to furnish an electric lift system.

2. Protest that agency improperly considered protester's performance under prior contracts without first discussing contracts with protester is denied; agency reasonably considered problems in past performance to be weaknesses that could not be remedied through discussions and, moreover, protester does not present information that would have led agency to change its evaluation.

## DECISION

Transact International, Inc. protests the award of a contract to Mannesmann Demag Corp. under request for proposals (RFP) No. F33600-89-R-0328, issued by the Department of the Air Force for a mechanized material handling system for the air freight terminal at Charleston Air Force Base, South Carolina. The protester asserts that the agency's evaluation of proposals was defective in a number of respects and that Demag should not have been found eligible for the award.

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We deny the protest.

The solicitation called for the design, site preparation, installation, and testing of a three-level, single pallet material handling system, as well as instruction of Air Force personnel in its operation and maintenance. The RFP advised that offers would be evaluated in accordance with streamlined source selection procedures and on the basis of an integrated assessment of the offeror's ability to satisfy the requirements of the solicitation and the needs of the agency:

"This integrated assessment will include evaluation of general considerations [which may] . . . include past performance, proposed contractual terms . . . , and results of a preaward survey. . . . Present and past performance will not be evaluated as an assessment criterion . . . [but] will be evaluated as a general consideration called Performance Risk. Performance risk assesses an offeror's present and past work record to determine its ability to perform what has been proposed in the proposal."

With regard to performance risk, the RFP further stated that the agency reserved the right to review contracts it considered representative of relevant and recent past performance, even though such contracts had not been volunteered by the offeror, but that each such contract "will be made known to and discussed with the offeror." The solicitation provided that the major evaluation criteria, in descending order of importance, were engineering capabilities, management, and cost, and that the government reserved the right to make the award to other than the low priced offeror. The RFP also advised offerors to "identify any significant exceptions to the RFP" and to "highlight any significant enhancements to the requirements of the RFP." Lastly, with respect to a technical element of the system that is at issue here, the solicitation stated: "Each ETV [elevating transfer vehicle] shall be equipped with a hydraulically-operated lift device."

The Air Force found both Demag's and Transact's proposals technically acceptable, held discussions with both firms, and invited both to submit best and final offers (BAFO). The agency ultimately awarded the contract to Demag on the basis that its proposal, although higher in price, demonstrated superior technical capabilities with less performance risk, and was consequently more advantageous to the government overall. Transact's protest followed.

## ELECTRIC LIFT ENHANCEMENT

Transact asserts that Demag proposed an electric lift for the ETV and therefore failed to satisfy the requirement for a hydraulic lift. According to Transact, an electric lift does not enhance performance and capability, so the Air Force should have found Demag's proposal technically unacceptable. The Air Force responds that Demag's offer of an electric lift is in fact an enhancement, rather than a deviation from the specifications, because it is a "characteristic [which] exceeds specified performance or capability in a beneficial way," the definition the agency provided to Transact prior to receipt of proposals.<sup>1/</sup> Consequently, according to the agency, since it found an electric lift to be more beneficial than a hydraulic lift, that feature of Demag's proposal properly was accepted as an enhancement to the specifications for the ETV.

We think the agency reasonably construed the electric lift feature as an enhancement. In its proposal, Demag explicitly identified and characterized the electric lift as an enhancement to the minimum acceptable (i.e., hydraulic lift) requirement, as provided for in the RFP, and the record shows that the agency specifically determined that the electric lift feature was superior to a hydraulic lift in several respects. The Air Force found, for example, that electric units are less fatiguing to the lift operator because, in contrast to hydraulic units that start and stop with a jerky motion, they have ramped inputs which allow for smooth, even acceleration and deceleration; and that, unlike hydraulic units, they are not by nature subject to frequent fluid leaks which create slippery conditions and housekeeping, environmental, and fire safety problems. In addition, the Air Force determined that electric units are more reliable and easier to maintain. For example, while hydraulic lifts require both plumbing and electrical technicians for maintenance, electric lifts require only electrical technicians; and while no spare parts in hydraulic units are interchangeable between the vertical and horizontal travel systems, in electric units many of those parts are interchangeable.

In any case, the protester does not assert, and there is nothing in the record to indicate, that Transact would or could have altered its own technical approach even had the agency specifically advised offerors that an electric lift would be evaluated as an enhancement; rather, Transact argues only that Demag's system should have been rejected. Thus,

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<sup>1/</sup> The quoted language is from the Air Force's record memorandum of the conference, whose accuracy is not disputed by the protester.

Transact was not prejudiced by the agency's failure to indicate in the RFP that it considered an electric lift to be an enhancement of the hydraulic lift requirement. See Applied Mathematics, Inc., 67 Comp. Gen. 32 (1987), 87-2 CPD ¶ 395; Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. Consequently, there is no basis for sustaining this aspect of the protest. Id.

#### TRANSACT'S PROPOSED ENHANCEMENT

Transact argues that the Air Force failed to give it evaluation credit for an enhancement that Transact proposed, an auxiliary power pack on the ETV. Transact rests its allegation on a letter that the Air Force sent to the firm in connection with the protest, stating that "upon review of the drawings, there is an auxiliary power unit shown . . . [but] it was not evaluated and no added value was given." This quote, according to the protester, indicates that the agency improperly disregarded the proposed enhancement. Transact's allegation, however, is based on a mischaracterization of what the entire letter stated. The full relevant text states:

"Your technical proposal has been reviewed and there is not any information in Volumes I through V of your proposal that indicates an "Auxiliary Power Pack" for backup ETV lift was proposed. Specifically, . . . paragraph 3 . . . addresses the lift unit of the ETV and no mention is made of the power pack there. Moreover, upon review of the drawings, there is an auxiliary power unit shown. You did not state the purpose of the auxiliary power unit and the added features that it provides. Furthermore, in Section II - "Proposed Exceptions/Additions," there is no mention of any added capabilities provided through the auxiliary power unit. It was, therefore, not evaluated and no added value was given." (Emphasis added.)

Transact does not dispute the accuracy of any of these statements, and our review of Transact's proposal confirms they are correct. Thus, it was the protester's failure to comply with the RFP instructions regarding enhancements that led the agency not to evaluate the auxiliary power unit as an enhancement, and there is no basis for objecting to the evaluation in this regard. See Ingersoll-Rand Co.; Trilectron Indus., Inc., B-232739 et al., Feb. 7, 1989, 89-1 CPD ¶ 124, (agency's failure to give extra credit for exceeding specifications was proper where, contrary to RFP requirement, protester failed to identify exceeded specifications.)

## RELATIVE EVALUATION

The protester asserts that the agency generally rated its proposal too low relative to Demag's; as evidence of its own technical capabilities, Transact notes that it was recently awarded a contract for virtually the same kind of material handling system at Travis Air Force Base. The Air Force, on the other hand, asserts that, while it found Transact technically acceptable, it determined that Demag offered a superior system that utilized state-of-the-art technology and involved lower risk.

We find no basis for questioning the evaluations. For example, the Air Force gave Demag extra credit for offering larger motors and solid bracing on the pallet lift scissor mechanism, which the agency determined was stronger than the tubular bracing offered by Transact, and for pallet rotator technology that it also considered superior. In addition, because Charleston Air Force Base is considered to have difficult soil conditions that require particularly sound construction, the Air Force rated Demag's proposal more favorably for offering thicker walls than the specified minimum, with additional steel reinforcement, and for identifying a construction subcontractor that, in the agency's assessment, had already demonstrated under prior contracts at the base that it could build structures without settling problems. Conversely, the agency downgraded Transact in the construction area because its proposal failed to identify a construction subcontractor for the Charleston project and because the agency found that the firm had experienced construction settling difficulties on prior projects.

Based on these and similar considerations, the record indicates that the Air Force had a reasonable basis for concluding that Demag's proposal was technically superior to Transact's. See Ingersoll-Rand Co.; Trilectron Indus., Inc., B-232739 et al., supra. Transact's contract at Travis Air Force Base is irrelevant to the consideration of whether the agency's conclusion here was justified; each procurement is a separate transaction, and proposals must be evaluated on the basis of the factors and requirements specified in the solicitation in response to which they were submitted. Id.

## PAST PERFORMANCE

Transact maintains that the agency improperly considered the firm's performance on prior contracts in evaluating its proposal; according to the protester, these are matters of responsibility that cannot properly be considered in the technical evaluation of proposals. This argument is untimely. Under our Bid Protest Regulations, alleged solicitation improprieties must be protested prior to the closing date for

receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990). As noted above, the RFP specifically provided that the award would be based in part on an "evaluation of general considerations [which may] . . . include past performance," and that "past performance . . . will be evaluated as a general consideration called Performance Risk." Therefore, if Transact believed this aspect of the evaluation was improper, it was required to challenge it in a protest filed prior to the initial closing date; as Racal did not protest until after award to Demag, this allegation is untimely and will not be considered.

The protester raises the related objection that the Air Force improperly failed to discuss with it the performance problems noted above, and Transact's failure to identify a construction subcontractor in its proposal. Transact relies in part on the statement in the solicitation that each contract reviewed by the agency in assessing past performance would be made known to and discussed with the offeror. This provision was violated, according to the protester, when the agency failed to advise Transact which contracts were being reviewed and failed to notify Transact of the deficiencies that the agency found--namely, problems with late delivery, classroom instruction, and construction settling. Transact maintains that, since it was never advised during discussions that these contracts were viewed as indicating deficiencies in these areas, as the RFP stated would be done, it was improperly deprived of the opportunity to explain these matters. The Air Force responds that it determined that the performance problems were not deficiencies in the proposal that were subject to correction, but rather were weaknesses in prior performance that could not be remedied through discussions.

The RFP language providing for discussion of the contracts notwithstanding, the agency's assessment is consistent with our findings in similar cases; that is, an agency generally need not discuss matters with offerors which, by their nature, generally are not subject to correction through the discussion process. See Training and Mgmt. Resources, Inc., B-234710, supra. We note, moreover, that although Transact argues that it should have been given an opportunity to explain its prior performance, it has presented no evidence or argument in connection with its protest refuting the agency's specific findings as to its problems under prior contracts; the protester merely asserts that there were "valid explanations" for them, without providing those explanations. We thus find nothing objectionable in the agency's failure to discuss Transact's prior contract performance with the firm.


Similarly, we reject Transact's contention that the agency improperly failed to advise it that its failure to identify a construction subcontractor was considered a deficiency in its

proposal. The record shows that the Air Force sent a clarification request to Transact which stated, "Clarify if an installation contractor has been established. If so please give qualifications." Transact's reply to the letter was that a contractor had not been selected but that negotiations were underway with two firms. Transact argues that the agency should have followed the request for clarification with a deficiency report, but agencies are not obligated to search out omitted information in this manner or to credit offerors with information that they may have omitted. Campbell Eng'g, Inc., B-231126, Aug. 11, 1988, 88-2 CPD ¶ 136. The Air Force thus properly viewed this as a deficiency of which Transact was advised but failed to remedy.

#### AWARD ON BASIS OF PRICE

Finally, according to Transact, even if its proposal properly was found to be only technically equal to Demag's, Transact should have received the award on the basis of its proposed price, \$4,022,134, which was \$356,323 lower than Demag's. In a negotiated procurement, the agency is not required to make an award to the firm offering the lowest priced acceptable proposal, regardless of relative technical merit, unless the solicitation states that price will be the determinative factor. Ingersoll-Rand Co.; Trilectron Indus., Inc., B-232739 et al., supra. Here, the RFP ranked technical factors higher in importance than cost and specifically stated that award could be made to other than the lowest priced offeror. Consequently, there was no requirement that the award be made to Transact as the lowest priced offeror. Id. 2/

The protest is denied.

  
for James F. Hinchman  
General Counsel

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2/ In its initial protest, Transact also argued that the agency had a hidden agenda in making the award to Demag and that it actually was attempting to develop an alternative source. There is no evidence supporting this allegation. In any case, we already have found that the award was based on a proper evaluation.