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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Construcciones Aeronauticas, S.A.

File: B-244717; B-244717.2

Date: November 14, 1991

Edward J. Tolchin, Esq., Fettmann & Tolchin, for the protester.
Gilbert J. Ginsburg, Esq., Epstein, Becker & Green, for Israel Aircraft Industries, Ltd., an interested party.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Byrd Amendment, 31 U.S.C. § 1352 (Supp. I 1989), which requires disclosure of lobbying expenditures paid for with other than appropriated funds, is not violated when an agency awards a contract to a corporation that did not report any such expenditures where there is no evidence that expenditures required to be disclosed were made.

2. Agency reasonably did not initially reject an offeror's significantly lower-priced proposal that was based on performance outside the permissible geographical area, since the agency was cognizant of pending legislation that would make the offeror's proposed place of performance acceptable.

3. Agency properly did not reject proposal that included a request for progress payments since solicitation permitted offerors to request such payments.

4. While cost realism ordinarily is not considered in evaluating fixed-priced proposals, an agency may use a cost realism analysis as a gauge of the offerors' understanding of the solicitation requirements.

5. Source selection official reasonably selected lowest-cost proposal for award where no other proposal was significantly better technically and selection involved savings of approximately $40 million.

DECISION

Construcciones Aeronauticas, S.A. (CASA) protests the award of a contract to Israel Aircraft Industries, Ltd. (IAI) by the Department of the Air Force for F-15 aircraft programmed depot maintenance (PDM) services under request for proposals (RFP) No. F09603-90-R-81157. CASA asserts that IAI's proposal should not have been considered for award because IAI allegedly violated the Byrd Amendment, 31 U.S.C. § 1352 (Supp. I 1989), by lobbying for award of the contract. CASA also argues that IAI's proposal should have been rejected because it offered performance in Israel in violation of the terms of the RFP. CASA further contends that IAI's proposal was otherwise unacceptable and lacked cost realism, and that the source selection failed to account for CASA's technical superiority.

We deny the protest.

The RFP did not restrict the procurement save for a geographic restriction on the place of performance. As issued, the RFP required the contractor to perform the work at a facility located in the:

> "EUROPEAN THEATRE, WHICH CONSISTS OF BELGIUM, DENMARK, FRANCE, GREECE, GERMANY, ITALY, NETHERLANDS, NORWAY, PORTUGAL, SPAIN, TURKEY, AND THE UNITED KINGDOM."

The RFP is for a firm, fixed-price contract for a base year and 2 option years, with not-to-exceed ceiling prices for the remaining 2 option years. The RFP provided for an award to the offeror providing the best value to the government, based on an integrated assessment that considered stated general considerations, technical proposals[1] and price proposals. The RFP evaluation criteria in descending order of importance were:

AREA I:	Technical Quality Facilities Production Planning Management

[1]Technical proposals were rated in two ways: (1) by color code--Blue (the highest), Green, Yellow, Red (the lowest)--and (2) by proposal risk--basically the risk of the offeror not being able to perform as required by the RFP.

Logistics
Safety
Engineering

AREA II: Cost to the Government

The Air Force received seven proposals by the October 3, 1990, closing date.

IAI's[2] proposal, in disregard of the stated geographic restriction, offered performance of the PDM work in Israel at a price significantly lower than that received from the other offers. Faced with IAI's very favorably-priced offer, the contracting officer contacted higher Air Force echelons to determine if operational needs still mandated the imposition of the geographic restriction. The contracting officer was told that the restriction might be lifted by legislation then pending in Congress, and that the basis for the geographic restriction that excluded Israel was questionable. Considering the alternatives of rejecting IAI's low offer or viewing IAI's offer as containing a deficiency to be addressed during negotiations, the contracting officer elected to proceed to the point of including IAI in the technical evaluations and a precompetitive-range-determination audit conducted on all seven offerors.

On November 5, 1990, the 1991 Department of Defense Appropriation Act (Act), Pub. L. No. 101-511, 104 Stat. 1874 (1990), was enacted. Sections 8003(b) and (d) of the Act in effect eliminating the geographic restriction with respect to Israel by providing that Israel was to be considered in the European theater.[3]

On January 18, 1991, after completion of the audits and technical evaluations, the Air Force established the competitive range, issued amendment No. 0004 advising all

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[2]IAI is wholly owned by the government of Israel.

[3]Section 8003 in part provided that:

> "(b) A contract awarded during fiscal year 1991, or thereafter, . . . may be performed in the theater in which the equipment is normally located or in the country in which the firm is located."
>
> "(d) For purposes only of this section, Israel shall be considered in the European Theater in every respect, with its firms fully eligible for non-restrictive, non-discriminary contract competition under the Overseas Workload Program."

offerors of Israel's inclusion as an acceptable site for a PDM facility,[4] and opened negotiations with the seven offerors, all of whose proposals were included in the competitive range.

On January 31, CASA filed an agency-level protest asserting that the Air Force's issuance of amendment No. 0004 constituted improper technical leveling.[5] The Air Force denied the protest on February 26, received revised proposals on March 22, and best and final offers (BAFO) on May 15. All seven offerors were rated "green" (acceptable) in the technical area, although CASA's proposal was considered to have more strengths and less deficiencies than the other proposals. IAI's BAFO price was the lowest at $60 million (American dollars), while CASA submitted the fourth lowest-priced offer of $108.7 million. On June 11, the Source Selection Evaluation Team recommended award to IAI. The Source Selection Authority (SSA) found all offers essentially equal technically and selected IAI based on its significantly lower price. Award was made to IAI on July 1. This protest followed.

CASA first contends that IAI violated the Byrd Amendment in that it did not disclose in its offer that it was lobbying Congress and the Department of Defense (DOD) for relaxation of the RFP's geographic restrictions on acceptable facility sites to permit contract performance in Israel. In this regard, CASA alleges that IAI and its owner, the government of Israel, expended funds to lobby for this contract and that IAI failed to disclose such expenditures in its proposal. In CASA's view, IAI's failure to disclose its lobbying expenditures renders its proposal ineligible for consideration. We find no evidence that IAI violated the Byrd Amendment.

The Byrd Amendment prohibits the expenditure of appropriated funds by the recipient of a federal contract to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in connection with the awarding of the contract. 31 U.S.C. §§ 1352(a)(1), (2). The amendment also requires, as a prerequisite to award, disclosure by offerors requesting or receiving a contract for more than $100,000 of

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[4]The agency amended the RFP by adding Israel to the geographic restriction's list of European theater countries.

[5]CASA argued that amendment No. 0004 improperly advised Israel of CASA's "on location labor force strategy" when it added Israel to the list of acceptable places of performance.

any such lobbying expenditures paid for with other than appropriated funds that would be prohibited if done with appropriated funds. 31 U.S.C. § 1352(b). The Federal Acquisition Regulation (FAR) implements the Byrd Amendment through the clause found at FAR § 52.203-11 (FAC 90-4), which requires offerors to disclose such expenditures with their offers. The RFP here, contained that clause.

Essentially, CASA argues that IAI failed to comply with the Byrd Amendment because its proposal did not include a disclosure that IAI had made expenditures for lobbying. CASA's argument is premised on the assumption that IAI and the government of Israel are the same for the purposes of the Byrd Amendment.

Although the record confirms that IAI did not disclose any expenditures for lobbying in its proposal, we find no evidence of a violation of the Byrd Amendment. As admitted by IAI, representatives of the government of Israel contacted representatives of the government of the United States to solicit support for the passage of section 8003 of Public Law 101-511. It appears from the legislative history of Public Law 101-511 that this specific solicitation for the maintenance of F-15 aircraft may well be one that Congress had in mind in passing the provision that permitted IAI to be eligible for award.[6] Thus, the government of Israel may have influenced the passage of this legislation that made IAI eligible for award under the RFP.

This does not mean, however, that disclosure under the Byrd Amendment was required. The Byrd Amendment does not require the disclosure of the expenditure of other than appropriated funds to pay reasonable compensation to regularly employed officers or employees. See 31 U.S.C. § 1352(e)(2)(A). Accordingly, no disclosure is required when such employees engage in lobbying activities. What the Byrd Amendment does require to be disclosed, therefore, is the payment of funds to other than such employees. There is absolutely no evidence that either IAI or the government of Israel paid any third person for influencing or attempting to influence Congress or DOD officials in connection with this award. CASA has produced no evidence whatsoever that such payments were made and IAI has unequivocally denied that any such payments were made either by it or the government of Israel. In this regard, IAI asserts that Israel's only registered lobbyist performed no lobbying on IAI's behalf associated with the passage of section 8003 of Public Law 101-511. The Air Force also denies any knowledge of lobbying activities

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[6]S. Rep. No. 101-521 (Senate Report of the 1991 DOD Appropriation Bill) expressly references Israel's specific depot maintenance expertise on F-15 aircraft.

that should be disclosed under the Byrd Amendment. Thus, we are faced with little more than an allegation rooted in suspicion and speculation; the protester has simply failed to provide any specific support suggesting that a third person was employed by IAI or Israel to lobby in connection with this award. See generally FEMCOR, B-244402; B-244402.2, Oct. 15, 1991, 91-2 CPD ¶ ___.

CASA argues that the Byrd Amendment has a broader scope and covers expenditures for such things as airline tickets and telephone calls associated with employee lobbying activities, expenses that unquestionably were incurred. We disagree. Such payments are not made to the airlines or telephone companies to cause those companies to influence agency or congressional officials, which is what is encompassed by the Byrd Amendment; the payments represent only the value of the transportation and communications services rendered. There is no indication in the Byrd Amendment or its legislative history that such payments are to be disclosed.

CASA next protests that the Air Force should have immediately rejected IAI's proposal as materially defective because it offered performance of the work in Israel.[7] A fundamental purpose of negotiated procurement is the determination of deficient proposal's susceptibility to being made acceptable through discussions. When there is doubt as to whether a proposal should be included in the competitive range, the proposal should be included. Federal Acquisition Regulation (FAR) § 15.609(a). While CASA suggests that IAI's proposal was nonresponsive, the concept of responsiveness, i.e., an offeror's unconditional offer to comply with the terms of a solicitation, does not generally apply to the give-and-take of negotiated procurements, although certain obligations and terms may be so material that a proposal that fails to comply with them could be rejected as technically unacceptable. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182; Computer Mach. Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358. Whether to include a proposal that does not meet all material requirements in the competitive range is a matter of administrative discretion, which we will only question if

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[7]Initially, CASA argued that IAI's offer to perform the work in Israel constituted an unacceptable late proposal. CASA's protest indicates that it was under the misapprehension that IAI originally proposed an acceptable facilities site in Belgium, and had later amended its proposal to change the place of performance to Israel. CASA abandoned this argument after learning that IAI had proposed an Israeli site from the outset.

the record shows it to be unreasonable. Scan-Optics, Inc., B-211048, Apr. 24, 1984, 84-1 CPD ¶ 464.

Here, the contracting officer had made no competitive range determination when she authorized the technical evaluation and pre-competitive-range-determination audits of IAI and the other offerors. Given the pendency of the legislation authorizing performance in Israel and IAI's low price, we think the contracting officer acted reasonably in not immediately rejecting IAI's proposal. When the competitive range determination was made in January 1991 after technical evaluations and audits and the issuance of amendment No. 0004 authorizing performance in Israel, it was appropriate for IAI's low-priced, technically acceptable proposal to be included in the competitive range.

CASA next argues that IAI was not evaluated for quality as required by the solicitation because some of IAI's quality procedures were submitted in Hebrew and could not be read by the evaluators. The record does not support CASA's contention. Instead, it shows that the evaluators initially downgraded IAI's proposal for this deficiency but, after a technical review at IAI's facility by persons able to read Hebrew, IAI's procedures were found to conform to Air Force procedures and the IAI proposal was upgraded in the quality area.

The protester argues, citing E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565, that IAI's request for progress payments rendered its proposal unacceptable. In E.C. Campbell, we found that an agency's acceptance of an offer that included delivery and payment terms that were noncompliant with the solicitation's requirements amounted to a relaxation of the agency's requirements and a prejudicial deviation from the basis on which the competition was conducted. Here, unlike the situation in E.C. Campbell, there is no such change in the agency's requirements or in the basis on which the competition was conducted. The RFP did not prohibit requests for progress payments and indeed asked offerors whether they required such payments. Under these circumstances, IAI's request for progress payments did not render its proposal unacceptable. See Advance Gear & Mach. Corp.--Recon., B-228002.2, Feb. 3, 1988, 88-1 CPD ¶ 102.

CASA also argues that the Air Force improperly assessed the cost realism of IAI's low price, since it did not adequately consider expected foreign exchange rate and inflation fluctuations from the base year through the option years.

Where fixed-price contracts are sought, "cost realism" ordinarily is not considered in proposal evaluation since a firm, fixed-price contract provides for a definite price,

and this contract type places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. Fairchild Space and Def. Corp., B-243716; B-243716.2, Aug. 23, 1991, 91-2 CPD ¶ 190; Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 CPD ¶ 552. Nevertheless, agencies may properly use a cost realism analysis as a gauge of the offerors' understanding of the solicitation's requirements. Id. Here, the RFP provided for a cost realism assessment for just such a purpose.[8]

The record shows that the audit of IAI's fixed-price proposal expressly considered exchange rate and inflation data and found that IAI had taken into account these factors in its price. In making this assessment, the audit utilized figures provided by an Israeli consulting firm. Our review shows that the auditors properly used the information from the Israeli firm to evaluate the impact of likely future economic changes in domestic wages and exchange rates (as a percentage) on labor costs expressed in United States Dollars. This allowed the auditors to make a reasonable assessment of the impact of these changes on the cost of the project in United States Dollars and to confirm that IAI's offer substantially acknowledged the scope of the anticipated cost increases based on inflation and exchange rates.

While the protester has provided historical figures to demonstrate that IAI's price did not reasonably consider inflation and exchange rate factors, our comparison of the figures for these factors, which the auditors relied on, with the historical data presented by the protester tends to confirm the reasonableness of the agency's analysis. The overall pattern of both the agency's and protester's data shows that wages are rising more than the exchange rate depreciates. Although the magnitudes of the consulting firm's and the protester's figures differ, both reflect the same trends. In our view, the difference in magnitudes is not significant because there is no assurance that the historic figures cited by the protester will exactly repeat themselves in the future and the consulting firm's figures

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[8]The RFP, which specifically designated cost realism as an evaluation factor, warned that:

> "Proposals . . . unrealistically low in cost or price, will be deemed reflective of an inherent lack of technical competence or indicative of a failure to comprehend the complexity and risks of the contract requirements and may be penalized during evaluation to the extent of rejection."

are best estimate projections of future trends.[9] Thus, we think the agency reasonably determined IAI's pricing to be realistic and not indicative of a failure to understand the RFP requirements.

Finally, CASA contends that the Air Force failed to account properly for CASA's technical superiority in making the award selection. We disagree. The evaluation narratives presented to the source selection official show that CASA was the highest rated technically; CASA was stated to be exceptional in the areas of quality and safety, excellent in the area of facilities and to have a clear edge in the area of logistics with an overall low risk. CASA, however, was not given an overall rating of exceptional; it was given an overall green (acceptable) rating, as were all the offerors. This green rating reflected the fact that while CASA was strong in some areas, it was no better than its competitors in many other areas, and not as strong in some. Thus, even though CASA's proposal was viewed as the strongest of those in the competitive range, it was not seen as significantly better than the others; overall, the evaluators saw the proposals as essentially equal technically, a position with which the SSA concurred. In short, CASA's technical superiority was not seen as significant, and in any event as not worth the more than $40 million premium associated with its proposal. On this record, we find no basis to disagree with the SSA's decision.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

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[9]The auditors use of a local consulting service adds weight to the agency analysis, since a local firm should be attuned to the local and regional economic trends that differ from the historical pattern.