Van Schaik 149710

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

Decision

Matter of: Bendix Oceanics, Inc.

File: B-247225.6

Date: June 29, 1993

Michael D. Newman, Esq., and Paul Shnitzer, Esq., Crowell & Moring, for the protester.
Barbara A. Pollack, Esq., for Hughes Aircraft Company, an interested party.
Andrew E. Squire, Esq., Department of the Navy, for the agency.
John Van Schaik, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that, in reevaluating proposal pursuant to recommendation in previous decision, agency should have accepted protester's offer of equipment to perform battery tests or should have accepted protester's alternate offer to perform the tests under agency supervision, is denied. Contracting agency assembled team of battery experts and arranged to conduct the tests at an agency facility with extensive experience in battery evaluations. The contracting agency was not required to allow the protester to perform the tests or to use protester supplied test equipment.

2. Although protester argues that during reevaluation, pursuant to the recommendation in earlier sustained decision, the contracting agency unreasonably based its test of the protester's proposed batteries on an assumption that the battery-powered sonar system proposed by the protester would use a constant current discharge instead of constant impedance, agency's constant-current assumption was reasonable since the protester had itself consistently used that same assumption, without qualification, in its previous protest and had used that assumption in its submissions in the current protest.

3. Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the new allegations must independently satisfy the timeliness requirements in the General Accounting Office Bid Protest Regulations.

DECISION

Bendix Oceanics, Inc. protests that the Department of the Navy failed to comply with the recommendation in Bendix Oceanics, Inc., B-247225.3, July 27, 1992, 92-2 CPD ¶ 54. In that decision, we recommended that the Navy reevaluate the technical proposals submitted by Bendix under request for proposals (RFP) No. N00019-89-R-0061 issued by the Navy for development of an airborne low frequency sonar (ALFS) system, which is a "dipping" sonar system used on Navy helicopters to detect submarines.

We dismiss the protest in part and deny it in part.

BACKGROUND

As we explained in our original decision, the purpose of the ALFS system is to provide an increased detection capability over that provided by the dipping sonar currently used by the Navy. The RFP contemplated the award of a contract to the offeror submitting the proposal that provided the best value to the government, considering the following evaluation criteria, listed in descending order of importance: technical, cost, management, and integrated logistics support. The proposals were to be rated as outstanding, highly satisfactory, satisfactory, marginal, or unsatisfactory under each of the noncost evaluation criteria with risk ratings of low, medium, and high.

Five firms, including Bendix and Hughes Aircraft Company, submitted proposals. Bendix submitted two separate proposals, one for its "F" system and a second for its "X" system.[1] The proposed Bendix system is powered by batteries that are recharged by a low-level power source supplied through a cable connected to the helicopter. In the systems proposed by all of the other offerors, power is supplied directly to the sonar by means of a high voltage cable running from the helicopter to the sonar transducer; no batteries are used.

In deciding to award the contract to Hughes, the source selection authority stated that Hughes was the only offeror whose technical proposal was rated highly satisfactory with low risk, and that other offerors had either a lower rating or higher risk in the technical area, which was the most

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[1]As we explained in our earlier decision, the Navy eliminated the Bendix "F" system from consideration for award as a result of concerns about that system which were not challenged in the earlier protest. Accordingly, our discussion here refers solely to the "X" system.

important criterion under the RFP. The source selection authority awarded the contract based on the determination that the Hughes proposal represented the best value and lowest risk to the government.

With respect to Bendix's proposal, the Navy's technical evaluators listed a single weakness under one technical subcriterion. The evaluators were concerned that the system proposed by Bendix could not permit the generation of 35 consecutive 4-second sonar pulses as required under conditions set out in the RFP specifications. In its original protest, Bendix argued that the Navy erred in concluding that the Bendix system batteries would fail to generate the required 35 consecutive pulses. According to Bendix, since the 35-pulse concern was unfounded and was the only weakness listed in the final evaluation report under the relevant technical subcriterion, its "marginal" rating under that subcriterion was improper and should have been "satisfactory" or "highly satisfactory."

In order to address the technical issue concerning the batteries in Bendix's proposed system and to address an issue concerning the evaluation of the Hughes proposal, we conducted a hearing to obtain testimony from Navy technical personnel and a consultant retained by Bendix. Based on that hearing and our review of the entire record, we agreed with Bendix that the Navy's evaluation of battery capacity and the ability of the Bendix proposed system to meet the requirement for 35 consecutive pulses was flawed, and we sustained the protest on that basis.[2]

Specifically, we concluded that there were two flaws in the Navy's analysis of the capability of the Bendix proposed system to meet the 35-pulse requirement. First, we found that, in its calculation of battery capacity for Bendix's system, the Navy incorrectly shortened the battery "recharge time," which is the time between sonar pulses during which the batteries recharge. Second, we found that the Navy's analysis did not credit the Bendix system with the full effect of the constant recharging which occurs between the sonar pulses. As a result of these concerns, we concluded that the Navy's calculations of the capability of the Bendix system did not provide reasonable support for the agency's conclusion that the batteries proposed by Bendix did not

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[2]We denied the protest grounds concerning the agency's evaluation of the Hughes proposal and the agency's cost/price evaluations. Bendix requested reconsideration of the issue concerning the evaluation of the Hughes proposal. We denied that request. Bendix Oceanics, Inc.--Recon., B-247225.4, Nov 24, 1992, 92-2 CPD ¶ 368.

have sufficient capacity for the system to meet the RFP performance requirements.

We noted that Bendix's proposal received ratings of "marginal" with medium risk under one technical evaluation subcriterion due to concerns about the 35-pulse requirement. We concluded that a proper evaluation could well result in higher ratings under that subcriterion and possibly a higher overall technical rating. Since these higher ratings could have had an impact on the selection, we recommended that the Navy reevaluate the Bendix technical proposal in light of our decision and conduct a new cost/technical tradeoff to determine whether Bendix or Hughes should receive the award.

Shortly after our decision sustaining the protest, the Navy advised Bendix that its effort to comply with our recommendation would include laboratory testing of the batteries proposed by Bendix to evaluate their performance under the simulated operational conditions specified in the ALFS performance specification. In an August 12 letter, Bendix informed the Navy that battery tests conducted using a battery pack that was not properly conditioned would provide erroneous results. Bendix explained in that letter that in a previous test of the ALFS, the company had used a battery pack conditioned by 90 days of "trickle" charging and that the tested unit met all requirements set forth in the ALFS specification.

Also, in the August 12 letter, Bendix stated that a proper test of the battery pack required a pulse generator, a dummy load and an ALFS battery charger. The company offered either to provide the Navy with a battery pack and test equipment for the test or to conduct the test at a Bendix facility under Navy supervision. Alternatively, Bendix offered to allow the Navy to use two previously conditioned battery packs for the test. Finally, the August 12 letter stated that if the Navy preferred to conduct the test using newly purchased batteries, then the battery pack should be conditioned for several months prior to the test.

In an undated letter that was postmarked September 14, the Navy declined the Bendix offer of assistance in testing the batteries. That letter stated that "the government's efforts in this matter are now considered source selection sensitive, so we are restricted in our use of contractor provided data to that which was provided in the Bendix Best and Final proposal dated 17 November 1991."

In a letter dated November 30, the Navy informed this Office and Bendix that it had complied with our recommendation to reevaluate the ability of the Bendix proposed systems to meet the requirement for 35 consecutive pulses. That letter stated that a new and independent technical team, composed

of battery technology experts from several government agencies, had conducted an analysis of the proposed battery power system. The letter stated that, in addition to the mathematical analysis recommended in our original decision, the technical team had conducted a series of laboratory tests of the Bendix proposed batteries to evaluate their performance under the simulated operational conditions specified in the ALFS performance specification. The November 30 letter stated that, based on the analysis and the tests, the technical team concluded that the "predicted performance of the batteries used in both the Bendix systems would fail to meet the ALFS technical specification. Consequently, the Navy's original contract award to the Hughes Aircraft Company was appropriate and will not be reversed."

On December 10, the Navy debriefed Bendix and provided greater detail concerning the reevaluation. Along with information on the laboratory tests, Bendix was given information on how the Navy conducted the mathematical analysis as well as the results of that analysis. Specifically, the Navy informed Bendix at the debriefing that the new evaluation team determined that the Bendix system battery was capable of supplying only 30 consecutive pulses under the operating conditions set forth in the RFP.

Bendix protested on December 23 and filed a second protest on February 23 after it received the Navy's report or the December 23 protest.

PROTEST ALLEGATIONS

According to Bendix, the debriefing disclosed that the reevaluation was arbitrary, capricious and devoid of a rational basis since, in testing the batteries, the Navy ignored essential and readily available information in Bendix's August 12 letter and in the Bendix proposal.

Specifically, Bendix first argues that, before the battery tests, the Navy failed to comply with a provision in the Bendix proposals entitled "Quality Conformance Inspection," the purpose of which is to weed out substandard batteries before they could be used. According to Bendix, the procedures used by the Navy to select batteries for the tests may have resulted in the use of substandard batteries, thus degrading the test performance.

Bendix also argues that the Navy damaged the batteries prior to the test by disregarding information supplied in the August 12 letter and in the Bendix proposal concerning battery conditioning. Bendix states that the batteries must be conditioned prior to use, including discharging and then recharging them, and argues that it is essential that proper

guidelines be followed in both the discharge and recharge phases. According to Bendix, the Navy ignored information in the Bendix proposal and the August 12 letter on both discharge and recharge, thereby damaging the batteries. Bendix argues that the Navy's improper conditioning of the batteries could have impaired the batteries' initial performance by 20 to 40 percent.

In addition to its contentions concerning the selection and conditioning of the batteries, Bendix argues that the Navy incorrectly used a constant current load in its laboratory tests of the Bendix batteries. According to Bendix, its proposed system uses a varying current load, which the Navy should have known. Bendix explains that its system uses a constant level of electrical impedance, which corresponds to a diminishing level of electrical current being drawn from the batteries over time. Bendix maintains that this method reduces the stress on the batteries and ensures their ability to generate the required 35 consecutive pulses. According to Bendix, its use of constant impedance, and hence varying (diminishing) current, was evident from the technical information in the Bendix proposal and, in any event, automatically would have been taken into account if the Navy had accepted Bendix's August 12 offer to supply the equipment for the test process.

Finally, in response to the Navy's report on the December 23 protest, Bendix argues that, in its mathematical analysis of the Bendix batteries, the new evaluation team repeated the error pointed out in our original decision regarding the effect of recharging between pulses.

ANALYSIS

Battery Selection and Conditioning

Bendix argues that the Navy failed to follow the proper procedure when it inspected and selected the batteries for the tests and also that the procedures used by the Navy to condition the batteries, including discharging and recharging, damaged the batteries. In response, the Navy argues that it conducted a stringent inspection of the batteries and that it used appropriate procedures to condition the batteries and, although those procedures were not identical to those which Bendix argues were required, they were consistent with the guidelines established by the battery manufacturer.

Most importantly, however, the Navy states that, in fact, none of the battery cells used in the tests was substandard and none was damaged by the conditioning procedures used by the Navy. In this respect, the Navy reports that after Bendix protested, the Navy officials who conducted the

battery tests checked the internal resistance of each battery cell used in the laboratory tests and found that the cells were not substandard or damaged.

In response, Bendix concedes that the measurements of the internal resistance of the battery cells provided by the Navy, if accurate, indicate that "the batteries appear to have been in excellent condition at the time of the laboratory tests." As a result, Bendix also concedes that the test failures in all likelihood were not due to the flaws alleged by Bendix in battery selection and conditioning. Bendix states that "[i]f GAO finds [the Navy's] internal resistance measurements to be credible, then the facts alleged in the battery condition protests would appear not to have prejudiced Bendix."

We have no reason to doubt the credibility of the internal resistance measurements provided by the Navy. Under the circumstances, since Bendix concedes that those measurements show that the battery cells used in the tests were in excellent condition, we conclude that Bendix was not prejudiced by any alleged flaws in the battery selection and conditioning procedures used by the Navy.

The Bendix August 12 Letter

As explained above, in its August 12 letter, Bendix explained how it believed the battery pack should be conditioned before the battery tests and offered either to provide the Navy with a battery pack and test equipment or to conduct the battery tests under Navy supervision. Bendix argues that the Navy should not have ignored the August 12 letter.

With respect to the appropriate battery conditioning procedures, as explained above, since the Navy's internal resistance measurements showed that the battery cells used in the tests were in excellent condition, Bendix concedes that it was not prejudiced by any alleged flaws in the battery conditioning procedures used by the Navy. Any difference between the procedures used by the Navy and the procedures set forth in Bendix's August 12 letter are therefore immaterial.

In addition, we conclude that the Navy reasonably declined Bendix's August 12 offer of a battery pack and equipment and its alternate offer to conduct the laboratory tests under the Navy's supervision. The Navy assembled a team of battery experts, including personnel from outside the Navy, and arranged to conduct the tests at the Electrochemical Power Sources Department, Naval Surface Weapons Center, Crane, a Navy facility with extensive experience in battery evaluation. We are aware of no reason why the Navy should

have been required to allow Bendix to conduct the tests or to supply the battery pack and test equipment.[1]

Constant Current vs. Constant Impedance

Bendix also maintains that the Navy's use of constant current in its laboratory tests was unreasonable since the system which Bendix proposed was to use a constant impedance discharge. Bendix argues that this alleged error materially affected the outcome of the reevaluation. Bendix maintains that it should have been apparent to the Navy's reevaluation team that the Bendix system is to use constant impedance, and not constant current. According to Bendix, viewgraphs which it submitted to the Navy during technical discussions show that current in the Bendix system varies with temperature, which indicates that the system will not use constant current. In addition, Bendix states that a "rudimentary calculation based on Ohm's Law" using information on those viewgraphs would have demonstrated to the Navy that the system impedance, or resistance, in the Bendix proposed ALFS system is constant for all temperatures, thus indicating that that system uses constant impedance.

Although Bendix argues that the use of constant current "ensures the [batteries'] ability to generate 35 pulses," this contention is inconsistent with Bendix's explanation to the Navy during discussions of how its system functions and inconsistent with Bendix's position in the original protest to our Office. In this respect, during discussions prior to the award of the contract, a Bendix representative apparently used a constant current load in his pulse discharge calculations based on a computer model. In addition, in the original protest, in a written submission to this Office, Bendix's expert used constant current loads in his calculations of the capability of the Bendix system to generate 35 consecutive pulses.

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[1]In addition, we note that the Navy was not required to conduct the laboratory tests at all. Those tests were not called for in the RFP or in our recommendation in the earlier protest, which concerned the need for improvements in the mathematical analysis of the Bendix system. The Navy reports that it followed our recommendation regarding the mathematical analysis and, as explained below, there has been no timely challenge of that analysis. Accordingly, the reasonableness of the Navy's conclusion as to the unacceptability of the Bendix system is not dependent on the laboratory tests, although, as explained in the text, we conclude that those tests were conducted reasonably.

Bendix does not dispute that it previously used a constant current load during discussions and in its submissions to our Office in the previous protest. In fact, the Navy argues, and Bendix does not dispute, that in a submission in the current protest, Bendix's consultant used a constant current load in his calculation of the capability of the Bendix system to produce 35 consecutive pulses.

Bendix nonetheless argues that its previous use of constant current is not inconsistent with its present contention that its ALFS system uses a constant impedance discharge. First, although the calculations performed by Bendix's representative during discussions were based on a constant current assumption, Bendix argues that those calculations were not intended to exactly replicate the Bendix system. Rather, Bendix argues that the purpose of those calculations was to show that, even under conservative, worst-case assumptions, the system would perform as required. In this respect, Bendix maintains that a system which is capable of generating 35 consecutive pulses using a constant current load would also be able to meet the 35-pulse requirement using what Bendix describes as the "less stressful" constant impedance load. Further, Bendix argues that its use of a constant current assumption in the earlier protest was justified by the fact that the calculations were less complex based on that assumption.

In our view, it was not unreasonable for the Navy to assume a constant current system for the laboratory tests of the Bendix system. Bendix consistently used that assumption itself, both in discussions and in its earlier protest and, until the current protest, never qualified the use of that assumption. While it may be, as Bendix argues, that a system which is capable of generating 35 consecutive pulses using a constant current load can also meet the requirement using what Bendix describes as a "less stressful" constant impedance load, in the tests conducted by the Navy, which used a constant current load, the Bendix system was not able to generate 35 consecutive pulse at all temperatures. Without running those tests again, we cannot assume that the use of a constant impedance load would provide the additional margin necessary for the Bendix system to pass the tests. Moreover, we see no reason for the Navy to rerun

the tests since, in our view, the constant current assumption was reasonable because Bendix has repeatedly used that assumption itself, without qualification.[1]

The Mathematical Analysis

In its comments on the Navy's report--which were filed here on March 4--in addition to challenging the laboratory tests, Bendix also argued for the first time that there were flaws in the Navy's mathematical analysis of the capability of the Bendix system to supply 35 consecutive pulses. In this respect, Bendix argues that the reevaluation of the batteries repeated the error pointed out in our original decision concerning the effect of recharging between pulses.

The Navy argues that this allegation is untimely. According to the Navy, at the December 10 debriefing, agency officials gave Bendix sufficient information to form its protest ground concerning the mathematical analysis, and in spite of that fact, the protests which Bendix filed on December 23 and February 23 concerned only the laboratory tests conducted by the Navy, and did not challenge the mathematical analysis. Thus, the Navy maintains that the allegation concerning the mathematical analysis--which was first raised on March 4--was untimely.

We agree. Under our Bid Protest Regulations, a protest concerning other than a solicitation defect must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1993). Where a protester initially files a timely protest and later supplements it with new and distinct grounds of protest, the new allegations must independently satisfy our timeliness requirements. Telephonics Corp., B-246016, Jan. 30, 1992, 92-1 CPD ¶ 130. Here, at the December 10 debriefing, in addition to the information it was given on the laboratory tests, Bendix learned that the new evaluation team had determined that the

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[1]Bendix maintains that we recognized in our original decision that Bendix's calculations of its system's capabilities were based on conservative assumptions, see Bendix Oceanics, Inc., supra, at 9, and argues that the use of constant current was simply another conservative assumption of the capability of its system. While we stated in our original decision that Bendix's calculations of the capabilities of its system were based on a conservative analysis, we were referring to the fact that Bendix's analysis of battery capacity did not consider that the Bendix system would be constantly charging between the pulses. We stated no assumption as to the type of current used in the Bendix system.

Bendix system was capable of supplying only 30 consecutive pulses under the conditions required by the RFP. Thus, as of December 10, Bendix knew that the new evaluation team's mathematical analysis had shown that the Bendix system would not meet the 35-pulse requirement.

Given Bendix's position in the earlier protest, we conclude that at the December 10 debriefing Bendix should have known its basis for protest concerning the mathematical analysis. During the previous protest, both in numerous written submissions and at the hearing, Bendix argued that a properly performed mathematical analysis would demonstrate that the battery-powered Bendix ALFS system was capable of supplying 35 consecutive pulses under the conditions set forth in the RFP. Thus, when Bendix was told at the December 10 debriefing that the Navy's mathematical reevaluation had demonstrated that the Bendix system was not capable of 35 consecutive pulses, consistent with its position in the previous protest, Bendix should have been able to conclude that, in its view, the Navy's mathematical analysis again was flawed. Under these circumstances, Bendix was aware of its basis for protest concerning the mathematical analysis and it was required to protest that issue within 10 working days of the debriefing. 4 C.F.R. § 21.2(a)(2). Since Bendix did not raise this issue until March 4, 1993, its contentions concerning the paper analysis are untimely and will not be considered.[5]

Bendix argues that under our regulations, it was not required to file a separate protest concerning the mathematical analysis. According to Bendix, its two

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[5]Alternatively, even if the timeliness of Bendix's allegation concerning the mathematical analysis is calculated from Bendix's receipt of the details of that analysis, that allegation still is untimely. In this respect, since Bendix received the detailed information on the mathematical analysis on February 8, to be timely, any allegations concerning that analysis were required to be filed within 10 working days of February 8. 4 C.F.R. § 21.2(a)(2). The tenth working day after February 8 was February 23. Bendix did not file a protest concerning that information. Rather, as explained above, Bendix challenged that analysis for the first time in its comments on the agency report, which were submitted to this Office on March 4. Accordingly, an allegation based on the details of the mathematical analysis is untimely. We note that while Bendix was granted a time extension for purposes of filing its comments on the agency report, this extension did not waive the timeliness rules with regard to new bases for protest. Telephonics Corp., supra.

protests challenged the laboratory tests and, since the Navy's report responded to those protests in part by describing the mathematical analysis, Bendix's disagreement with the mathematical analysis was timely submitted in its March 4 comments on the agency report.

We do not agree. Bendix's two protests very specifically objected only to the laboratory tests, despite the fact that it knew when it protested that the new evaluation team also had determined that its batteries were unacceptable based on the mathematical analysis. While it is true that Bendix's protests challenged certain aspects of the reevaluation, this does not mean that the protester raised all possible bases for challenging the reevaluation. It was the protester's duty to set forth a detailed statement of all legal and factual grounds of protest. 4 C.F.R. § 21.1(b)(4); Hampton Roads Leasing, Inc.--Recon., B-244887.2, Apr. 1, 1992, 92-1 CPD ¶ 330. The allegation concerning the mathematical analysis is separate and distinct from Bendix's contentions concerning the laboratory tests. Bendix itself recognized that its December 23 protest challenging the laboratory tests did not raise all possible issues concerning the reevaluation, since Bendix later filed an additional protest concerning another aspect of the laboratory tests.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel