



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Avtron Manufacturing, Inc.

**File:** B-280758

**Date:** November 16, 1998

Norman J. Phillion, Esq., Edward V. Hickey, Esq., and Christopher D. Perry, Esq., Thompson Hine & Flory, for the protester.

Gregory H. Petkoff, Esq., and Mark Frazier, Esq., Department of the Air Force, for the agency.

Adam Vodraska, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## **DIGEST**

Protest that awardee's aircraft generator test stand is not a nondevelopmental item (NDI), and thus did not meet the solicitation's NDI requirement, is denied where the solicitation was issued under commercial item procedures seeking a "commercial NDI," and the awardee's proposed test stand in fact exists as a commercial item needing only minor modifications to be acceptable.

## **DECISION**

Avtron Manufacturing, Inc. protests the award of a contract to AAI/ACL Technologies, Inc. (ACL) by the Department of the Air Force, San Antonio Air Logistics Center, under request for proposals (RFP) No. F41608-97-R-0168 for aircraft generator test stands. Avtron primarily contends that ACL's offered test stand is not a nondevelopmental item (NDI), as required by the RFP, and was improperly evaluated as technically acceptable.

We deny the protest.

## **BACKGROUND**

The Air Force issued the RFP in draft form on September 30, 1997, for a replacement to the agency's existing MC-2 aircraft generator test stand, which had been designed to a military specification and supplied by ACL during the 1970's. The solicited test stand is to be used to field test multi-aircraft integrated drive generators (IDG), constant speed drives (CSD), and their associated generators (GEN). On December 30, the Air Force issued amendment 1, which converted the

draft RFP into a final RFP, and established January 23, 1998 as the deadline for receipt of proposals, which later was extended to January 30 by amendment 2.

Section 3 of the RFP's Performance Purchase Description (PPD) established minimum essential criteria for the proposed test stand to be considered acceptable. The PPD required the contractor to furnish a current and complete test stand of modular design and listed major modules or assemblies that offerors should include on the test stands they proposed. PPD at 2, 5. The PPD also provided:

3.3. NDI Commercial Item. The test stand shall be an already developed, state-of-the-art, market proven, commercial test stand with a proven reliability track record. Minor modifications are allowed to the existing test stand. . . .

3.3.1. Major Modules or Assemblies: If the proposed [test stand] is assembled using commercial NDI major modules or assemblies, which have not been previously merged and sold commercially as a test stand, the major modules or assembly that is proposed[/]used shall have a proven reliability track record of reliable and satisfactory service in similar test stands. Offeror shall provide evidence that these are proven and reliable commercially available assemblies.

3.4. Description. The proposed test stand shall be a commercial NDI test stand. . . .

PPD at 4.

The solicitation stated that proposals would be evaluated for compliance with PPD § 3 and that offerors should provide evidence that their proposed units are reliable and commercially "'market proven' per 3.3 and 3.3.1." RFP at 22, 24; PPD at 9-10.

The RFP required each offeror to submit a technical proposal, with performance specifications for the offeror's proposed test stand and commercial manuals, as well as present and past performance information, including a list of all contracts and subcontracts performed during the last 5 years for the same or similar work. RFP at 19-22. The RFP specified that award would be made to the acceptable offeror submitting the lowest evaluated offer based on the factors established in the RFP's performance-price tradeoff evaluation scheme, under which technical requirements were significantly more important than performance or price, with performance risk rating and price ranked second and co-equal. RFP at M-505, 22-24.

The Air Force received five proposals in response to the RFP by the January 30 closing date, including proposals from Avtron and ACL. The agency evaluated the proposals, issued written requests for technical clarifications to all offerors on March 13 and, based on the satisfactory written responses from the offerors, determined by April 3 that all five proposals were technically acceptable. According to the Air Force, the technical clarification request to ACL involved "very minor" aspects of its proposal, and the offeror's response satisfied the agency and did not result in any revision to ACL's proposal. Agency Report, Tab 1 at 3. The agency then issued four more amendments to the solicitation, finally requiring, through amendment 6 issued on July 7, that revised proposals be submitted by July 13.

The Air Force completed its performance-price tradeoff evaluation during July by conducting a performance risk analysis based on past and present performance information from the offerors and from returned questionnaires sent to the offerors' listed customers. The agency states that, because ACL's first commercial sale of its proposed test stand had just been completed and the customer had not yet had an opportunity to assess its performance, the Air Force sent an inspection team consisting of an engineer, the program manager, and several other agency personnel to visit the customer's facility in order to verify that the test stand ACL had sold commercially was the same as, or similar to, ACL's proposed test stand. Agency Report, Tab 1 at 4-5. The Air Force maintains that its inspection team did not enter into discussions of any kind with ACL personnel during this visit, which took place after the agency had already determined ACL's proposal to be technically acceptable. Id. Based on this review of ACL's proposed test stand and the confirmed commercial sale of the unit, the Air Force rated ACL as a low performance risk. Agency Report, Tab 1 at 5. Avtron also received a low performance risk rating based on questionnaire responses from two of its customers. Id.

On July 24 the Air Force awarded the contract to ACL because, while both ACL's and Avtron's proposals were technically acceptable and represented low performance risk, ACL's price of \$5,734,677 was significantly lower than Avtron's price of \$7,411,130. Id.; Agency Report, Tab 10 at 3-4.

## ANALYSIS

Avtron's primary contention is that ACL's proposed test stand was not an NDI and thus did not meet the requirements of the PPD.<sup>1</sup> Avtron asserts that at the time of

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<sup>1</sup>Under Federal Acquisition Regulation (FAR) § 52.202-1(e), which was incorporated in the RFP by reference (through the solicitation's incorporation of FAR § 52.212-4, Contract Terms and Conditions--Commercial Items, RFP at 1), an NDI is:

(continued...)

the evaluation, ACL had not yet developed its proposed test stand (and that ACL's existing MC-2 test stand improperly would require major modifications to become acceptable), and ACL's test stand was not market proven with a proven reliability track record, as required. In this respect, Avtron points out that, even though ACL's proposed test stand may have been sold to a commercial customer, the stand was not installed and operating at the time of the agency's technical evaluation.

We first point out that an offer of either a commercial item or an NDI would have been acceptable under PPD § 3.3's requirement for an "NDI Commercial Item" and PPD § 3.4's requirement for a "commercial NDI test stand."<sup>2</sup> In addition to the

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<sup>1</sup>(...continued)

(1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government . . .

(2) Any item described in paragraph (e)(1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(3) Any item of supply being produced that does not meet the requirements of paragraph (e)(1) or (e)(2) solely because the item is not yet in use.

<sup>2</sup>FAR § 52.202-1(c) defines a commercial item as:

(1) Any item . . . that is of a type customarily used for nongovernmental purposes and that--

- (i) Has been sold, leased, or licensed to the general public; or
- (ii) Has been offered for sale, lease or license to the general public;

(2) Any item that evolved from an item described in paragraph (c)(1) of this clause through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (c)(1) or (c)(2) of this clause, but for--

- (i) Modifications of a type customarily available in the commercial marketplace; or
- (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. . . .

(continued...)

language of those requirements, the RFP was issued under the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, which are used for the acquisition of supplies or services that meet the definition of commercial items at FAR § 2.101.<sup>3</sup> Further, the RFP included numerous commercial item solicitation provisions and clauses, and set out requirements for the test stand such as market acceptability and inclusion of commercial manuals.<sup>4</sup> We think it is clear that the RFP contemplated offers of either an NDI or a commercial item.<sup>5</sup>

In our view, the Air Force properly determined that ACL's offered test stand met the RFP requirements at issue. The firm's proposal states that [DELETED].

To support its claims that its proposed test stand was market proven with a reliability track record, ACL, as requested by the RFP, provided performance specifications, a commercial specification sheet, a commercial manual, and lists of commercial customers for its CSD/IDG/GEN test stands, including the [DELETED] offered here. *Id.* at v.1, § 2, app. 2-B, § 3, and v.2.

ACL's proposal thus established that it was not merely offering the MC-2 with major modifications, but was offering an existing commercial test stand that, albeit developed from the MC-2, was already "repackaged" and updated with "state-of-the-

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<sup>2</sup>(...continued)

(4) Any combination of [the above] of a type customarily combined and sold in combination to the general public . . . .

<sup>3</sup>The definitions in FAR § 2.101 are essentially the same as those in FAR § 52.202-1(c), (e).

<sup>4</sup>Consistent with the commercial item solicitation requirements of FAR §§ 12.204(a), 12.301, and 12.303, the RFP was issued on a Standard Form 1449, Solicitation/Contract/Order for Commercial Items, and either incorporated by reference or included the full text of FAR § 52.212-1, Instructions to Offerors--Commercial Items; FAR § 52.212-3, Offeror Representations and Certifications--Commercial Items; FAR § 52.212-4, Contract Terms and Conditions--Commercial Items; and FAR § 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders--Commercial Items. RFP at 1, 9-11, and 14-22. The RFP also included Defense Federal Acquisition Regulation Supplement provisions and clauses for solicitation of commercial items. RFP at 12, 18-19.

<sup>5</sup>In fact, the statutory definition of an NDI specifically encompasses a commercial item. 10 U.S.C. § 2376(1) (1994); 41 U.S.C. § 403(13) (1994).

art" components and needed only minor modifications<sup>6</sup> to meet the RFP's requirements.<sup>7</sup> We therefore have no basis to disagree with the agency's conclusion that ACL's proposed test stand met the requirements of the PPD.

Avtron also maintains that ACL should not have received a low risk rating for past performance.

The record shows that offerors were assigned performance risk ratings based on present and past performance information and input from the questionnaires sent to their customers for the same or similar kind of work described in the RFP. Agency Report, Tab 10 at 2. As noted, ACL submitted extensive present and past performance information in its proposal encompassing numerous contracts for CSD/IDG/GEN test stands, including the same model proposed for this RFP that had recently been sold to a commercial customer. ACL Proposal at v.1, app. 1-A and v.2. Although the Air Force recognized that this test stand had not yet been delivered to the commercial customer at the time the customer responded to the agency's inquiries, the agency determined, as a result of its inspection after the stand was delivered, that the customer's test stand was similar to the item solicited and provided satisfactory overall operation.<sup>8</sup> Agency Report, Tab 10 at 2. Further, the record indicates that the agency's evaluation included data maintained by the government from ACL's past performance which provided no unfavorable information. Agency Report, Tab 8. We have no basis to find objectionable the Air Force's rating of ACL's performance risk as low.

Finally, Avtron suggests that the Air Force repeatedly extended the RFP's closing date to provide ACL an opportunity to improve its proposal or to accommodate ACL's attempt to get its "prototype up and running" before award. Protest at 14; Comments at 6-7, 11-13.

As stated above, the agency amended the RFP four times after initial proposals were submitted. Amendment 3, issued on April 13, specified that any first article changes needed to meet the PPD requirements would be at no charge to the government, and requested that offerors verify their price proposals by April 24. Amendment 4, issued April 21, extended the time for revised proposals to April 29.

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<sup>6</sup>A "minor modification" under FAR § 52.202-1(c) is one that does not "significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process."

<sup>7</sup>[DELETED].

<sup>8</sup>The questionnaire returned by this customer reported favorable experience with ACL, including a prior contract for a similar test stand and subsequent upgrade. Agency Report, Tab 8.

On June 18, the agency issued amendment 5, which added an omitted clause for a subcontracting plan, revised the PPD to correct minor errors and to make minor specification changes, requested offerors to fill in their prices on replacement schedule forms, and extended the due date for revised proposals to July 2. Amendment 6 was issued on July 7 to extend the date a final time, to July 13. In this regard, Avtron's protest, at 14, notes that amendment 6 stated that it was issued to request a final proposal revision as a result of "discussions following Amendment 05." Avtron questions whether there was any legitimate need for any of the amendments, particularly amendment 6, given that the contracting officer has reported that the reference to "discussions" only meant conversations dealing with the anticipated award date "and other logistical questions."<sup>9</sup>

The record simply does not support the protester's view that the Air Force kept extending the due date for revised proposals merely to provide ACL with more time to install its commercial test stand for government inspection. There is nothing in the protest filings, other than Avtron's speculation, to indicate that the agency's reasons were other than to provide all offerors the opportunity to make any revisions to their proposals necessitated by the amendments as described above, which included changes to the PPD and elsewhere in the RFP. In sum, we have no basis to find that ACL received preferential treatment of the sort the protester suggests.

Since the Air Force reasonably determined that ACL's proposed item test stand was technically acceptable and presented low performance risk, we find unobjectionable the Air Force's selection of ACL's low-priced proposal under the RFP's award criteria.

The protest is denied.

Comptroller General  
of the United States

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<sup>9</sup>[DELETED].