



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: L-3 Communications Westwood Corporation

File: B-295126

Date: January 19, 2005

Michael A. Hordell, Esq., Charles H. Carpenter, Esq., and Laura L. Hoffman, Esq., Pepper Hamilton, for the protester.

Linda L. Shapiro, Esq., A. Ben Foster, Esq., and Mary Catherine Hodes, Esq., Thompson Coburn, for Engineered Electric Company d/b/a/ Fermont; and David T. Ralston, Esq., Philip A. Nacke, Esq., and Aaron C. Chatterjee, Esq., Foley & Lardner, for Onan Corporation d/b/a/ Cummins Power Generation, intervenors.

Jeffrey I. Kessler, Esq., William Kampo, Esq., and Frank DiNicola, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's evaluation of protester's proposal is denied where record shows allegations are without merit, or that alleged evaluation errors did not result in competitive prejudice to protester.

DECISION

L-3 Communications Westwood Corporation protests the award of contracts to Engineered Electric Company d/b/a/ Fermont and Onan Corporation d/b/a/ Cummins Power Generation under request for proposals (RFP) No. W15P7T-04-R-A001, issued by the Department of the Army to acquire electrical generator sets. L-3 argues that the agency misevaluated proposals, failed to engage in meaningful discussions, and made an unreasonable award decision.

We deny the protest.

BACKGROUND

The RFP contemplated award of up to three indefinite-delivery, indefinite-quantity contracts to design, build, and furnish to the Army a new set of generators (variously sized and configured, and ranging from 5 to 60 kilowatts (kW)). The RFP contemplated performance in three phases. During phase I (to last approximately

13 months), the contractors will develop prototype generators, complete a maintenance demonstration, conduct limited testing, and provide limited logistics data; at the conclusion of phase I, the Army will select one of the contractors to continue performance of the remainder of the contract. During phase II (approximately 30 months), the contractor will engage in further developmental and operational testing, perform a logistics demonstration, and develop additional logistics data. During phase III (approximately 38 months), the contractor will engage in production of the generators and associated documentation (such as technical manuals). Phases I and II are to be performed on a cost-plus-fixed-fee basis, while phase III is to be performed on a fixed-price basis.

The solicitation provided for the award of contracts to the firms submitting proposals deemed to offer the “best value” to the government, considering cost/price and non-cost/price factors as follows: technical, integrated logistics support (ILS) (equal in importance), performance risk (slightly less important than the technical and ILS factors individually), cost/price (slightly less important than performance risk), and small business participation plan (slightly less important than cost/price). The subfactors for the technical factor (in descending order of importance) were: key operational performance parameters; specific design characteristics; design concept; capabilities, plans, personnel and facilities; and configuration management. The subfactors for the ILS factor (all equal in weight) were: supportability analysis; logistics support; maintenance planning; and technical publications. For the non-cost/price considerations, the proposals were assigned adjectival ratings of outstanding, good, acceptable, susceptible of being found acceptable, or unacceptable, and, for the performance risk factor, low, moderate or high risk. (The cost/price evaluation is not at issue in the protest.)

The Army received numerous proposals and, after establishing a competitive range comprised of four proposals, engaged in discussions and solicited and received final proposal revisions (FPR). The agency evaluated the FPRs and assigned the following ratings to the proposals:

Factor	Subfactor	Onan	Fermont	L-3	Offeror A
Technical		Good	Outstanding	Acceptable	Acceptable
	Key Operational Performance Parameters	Good	Good	Acceptable	Acceptable
	Specific Design Characteristics	Outstanding	Outstanding	Good	Good
	Design Concept	Outstanding	Outstanding	Good	Good
	Capabilities, Plans, Personnel and Facilities	Good	Outstanding	Good	Good
	Configuration Management and Product Drawings	Acceptable	Acceptable	Acceptable	Acceptable
ILS		Good	Outstanding	Good	Outstanding
	Supportability Analysis	Outstanding	Outstanding	Good	Good
	Logistics Support	Good	Outstanding	Good	Outstanding
	Maintenance Planning	Good	Outstanding	Good	Outstanding
	Technical Publications	Outstanding	Good	Outstanding	Outstanding
Performance Risk		Low Risk	Low Risk	Moderate Risk	Low Risk
Cost/Price		\$89,347,161	\$110,253,455	\$103,727,169	\$118,122,189
Small Business		Good	Outstanding	Outstanding	Acceptable

Agency Report (AR), exh. 25, at 2. On the basis of these evaluation results, the agency made awards to Onan and Fermont, finding that those two firms' proposals offered the best value to the government.

ABANDONED AND UNTIMELY ISSUES

In its initial letter of protest, L-3 made a large number of assertions relating to the agency's evaluation of its proposal. In particular, L-3 alleged that the agency unreasonably failed to assign an additional 35 strengths to its proposal under the technical factor¹ and an additional 8 strengths under the ILS evaluation factor.² The agency provided a detailed report in response to the protest that specifically

¹ Specifically, L-3 alleged that the agency unreasonably failed to assign 9 strengths under the key operational performance parameters subfactor, 5 strengths under the specific design characteristics subfactor, 18 strengths under the design concept subfactor, 6 strengths under the capabilities, plans, personnel and facilities subfactor, and 3 strengths under the configuration management and product drawings subfactor.

² Specifically, L-3 alleged that the agency unreasonably failed to assign three strengths under the supportability analysis subfactor, three strengths under the logistics subfactor, and two strengths under the technical publications subfactor.

addressed each of L-3's numerous arguments. In its comments responding to the report, L-3 makes no mention of either the overwhelming majority of its initial assertions under the technical factor, or of any of its assertions relating to the ILS factor. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. Thus, except as specifically discussed below, we find that L-3 has abandoned its assertions relating to the agency's evaluation of its proposal under the technical and ILS factors.

In a similar vein, L-3 initially argued that the agency evaluated the performance risk under its and Fermont's proposals in a disparate manner. Specifically, L-3 asserted that the agency unreasonably assigned its proposal a moderate risk rating because of performance problems occurring under its prior generator contracts, while rating Fermont's proposal low risk, notwithstanding that Fermont had experienced performance problems under one of its prior contracts for generators. (In support of its allegation, L-3 asserted that the agency listed on a website some 24 problems associated with Fermont's 3 kW generators.) The agency responded to L-3's assertion, specifically noting that the problems under Fermont's contract had been resolved without excessive government involvement, and noting as well that the cognizant contracting official who completed the past performance questionnaire assigned Fermont scores of at least acceptable in every area. (In contrast, the agency took the position in its report that there had been a need for excessive government involvement in resolving the performance problems under L-3's contracts, and that the cognizant contracting officials had not given L-3 acceptable ratings on its past performance questionnaires.)

In its comments responding to the agency's report, L-3 did no more than restate its initial protest argument—that the agency unreasonably failed to assign the Fermont proposal a moderate risk rating because of the alleged 24 problems with Fermont's 3 kW generators. L-3 neither mentions nor rebuts the agency's position that the different ratings were warranted because the problems with the Fermont contract were resolved without excessive government involvement, and Fermont received at least acceptable ratings for that contract's past performance questionnaire. Given that L-3 merely restated its initial protest argument without substantively responding to the agency's position, we deem this aspect of L-3's protest abandoned as well. Citrus College; KEI Pearson, Inc., supra.

In its comments responding to the agency report, L-3 asserted for the first time that the agency had evaluated its and Onan's proposals in a disparate manner, and also afforded Onan more detailed discussions than those provided to L-3. L-3 maintains that it could have improved its proposal had it been given similarly detailed

discussions, and that this disparate treatment evidences bias on the part of the agency.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2004), require that protests be filed within 10 days of when the protester knew or should have known the basis for protest. The agency filed its report responding to the protest—which contained the information on which L-3’s additional arguments are based—on November 19, 2004. L-3’s comments responding to the report (which included the new assertions) were not submitted until December 3, that is, 14 days after the report was submitted.³ Since L-3 did not raise its new assertions within 10 days of its receipt of the report, this aspect of the protest is untimely and will not be considered.⁴

EVALUATION OF THE L-3 TECHNICAL PROPOSAL

L-3 asserts the agency miscalculated its proposal in several respects. In reviewing protests relating to the propriety of an agency’s evaluation, our Office does not reevaluate proposals; our review is limited to considering whether the agency’s evaluation is reasonable and consistent with the solicitation’s evaluation scheme, as well as applicable statutes and regulations. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 4. As discussed below, we find that the evaluation here was unobjectionable.

Digital Control System

³ During the development of the protest record, our Office granted an extension for the submission of comments responding to the report due to misdelivery of a portion of Onan’s copy of the report to counsel for L-3. In granting this extension, we specifically advised protester’s counsel that the extension of time for submitting comments did not extend the deadline for filing any supplemental bases for protest.

⁴ In an unsolicited letter submitted after the parties tendered their comments responding to a supplemental report filed by the agency, L-3 suggests that these supplemental assertions are timely because they are simply additional examples of its original assertion that the agency engaged in disparate treatment of the offerors. We disagree. L-3’s initial protest made no mention of the agency’s evaluation of the Onan proposal, or of the allegedly disparate conduct of discussions; these assertions appear for the first time in L-3’s comments which, as noted, were filed 14 days after the agency provided L-3 its report. (L-3 did allege disparate evaluation of its proposal as compared to the evaluation of Fermont’s proposal for performance risk; as noted above, however, L-3 abandoned that assertion.) A general allegation in an initial protest does not render timely subsequently identified specific examples of the general allegation. Dismas Charities, Inc., B-289575.2, B-289575.3, Feb. 20, 2004, 2004 CPD ¶ 66 at 3.

L-3 asserts that the agency unreasonably failed to assign its proposal strengths under the key operational performance parameters and specific design characteristics subfactors based on its proposed digital control system (also referred to in the record as its computer interface module-control system (CIM-CS)). According to the protester, it offered the only field-proven generator control system among the competitors and, further, its CIM-CS offers superior performance in terms of survivability against adverse environmental factors such as high humidity, salt, fog, spray, and electromagnetic interference.

The agency responds that, contrary to the protester's assertion, its proposed CIM-CS is not field proven because the offered CIM-CS is a substantially redesigned version of L-3's earlier computer interface module (CIM); the agency maintains that, because of this significant redesign, there was no basis to give evaluation weight to reliability information relating to the earlier model. The agency further notes that, in fact, the L-3 proposal was assigned a minor strength under the specific design characteristics subfactor for the quality of its response to the solicitation's survivability requirements (that is, the generators' ability to function in adverse environmental conditions).

We have no basis to object to the evaluation in this area. As noted by the Army, the record shows that L-3's CIM-CS is, in fact, a significantly redesigned version of its earlier CIM. The new version differs from the older version in that: [deleted]. AR, exh. 10, vol. II, Design Concept, at 79-81. L-3 maintains that these changes do not result in a significantly different configuration for the CIM-CS. However, the agency has sufficiently established that the changes are extensive enough that it reasonably could discount reliability data associated with the earlier CIM model and conclude that the currently-proposed CIM-CS is not field tested.

The record also shows that the agency gave L-3's proposal two (minor) strengths for meeting the RFP's survivability requirements. In particular, the agency's final evaluation materials provide:

The proposal provides a thorough discussion about the material properties required to allow the set to operate in environments with extreme Humidity. This information enhances the merit of the proposal and increases the probability of successful performance of the contract.

....

The proposal addressed all of the survivability requirements in great detail. The proposal described the design approach the offeror is using to meet the requirements. The discussion was very detailed and this information enhances the merit of the proposal and increases the probability of successful performance of the contract

AR, exh. 23, Appendix A, at 95-96. While the protester essentially disagrees with the weight that this favorable finding was given in the technical evaluation--that is, it believes its proposal should have received major, rather than minor, strengths for its CIM-CS component--such disagreement, without more, does not provide a basis for our Office to object to the agency's evaluation. Kathryn Huddleston & Assocs., Ltd., B-294035, July 30, 2004, 2004 CPD ¶142 at 2. We conclude that the evaluation in this area was reasonable.

Generator Weight

L-3 asserts that the agency unreasonably failed to credit its proposal with a strength for proposing generators that were lighter than the RFP-specified required weights, and also unreasonably penalized its proposal for not meeting objective weights (lower than the required weights, but objectives of the agency). In this latter regard, L-3 asserts that, since the objective weights were not specified in the RFP, penalizing it for failing to meet those weights was tantamount to applying an unstated requirement.

This aspect of L-3's protest is without merit. As for the required weights, the record shows that the evaluators did not credit L-3's proposal with a strength because the firm's proposed generators were [deleted]; the agency nonetheless did specifically note that the proposed generators were [deleted] the required weights. AR, exh. 23, Appendix A, at 89. The source selection plan defines a major strength as an aspect of a proposal that appreciably enhances the merit of the proposal, AR, exh. 4, revision 3, at 26; the agency could reasonably conclude that this relatively minor advantage did not warrant being rated a strength. As for the objective weights, there is no indication in the record that L-3's proposal was penalized for failing to meet those weights; there is no mention in the evaluation materials of L-3's failing to meet the objective weights.⁵ Accordingly, we find that this aspect of the evaluation was unobjectionable.

[deleted]

L-3 asserts that the agency improperly failed to assign a strength to its proposal for offering [deleted] generator models. According to the protester, only the [deleted] will meet all of the other requirements (in terms of weight, size, noise levels, reliability and paralleling) of the RFP for [deleted] generators. L-3 also asserts that the agency unreasonably failed to assign a strength to its proposal for offering an [deleted], a component that allows power to be delivered by the generators during times when short circuits occur. L-3 maintains that the [deleted] exceeds the requirements of the RFP because it can deliver short circuit current for [deleted]

⁵ We note that L-3 is incorrect in its assertion that the RFP did not specify the objective weights. See RFP at 227; amend. No. 1, at 154; amend. No. 3, at 4.

and, in the [deleted] models, provides redundancy and increased reliability because the [deleted] can deliver power when there is a failure of the [deleted].

The agency responds that, with respect to L-3's proposed [deleted], there was no basis to assign a strength to the proposal merely because the proposed generators meet the requirements of the solicitation, and L-3's use of the [deleted] is simply one method of meeting the RFP's requirements for short circuit current availability. As for the ability of the [deleted] to [deleted] the agency states that this was not a requirement of the RFP, and does not provide a benefit to the agency in any case because it does not use [deleted], and therefore does not need to have a [deleted]. Finally, the agency states that it did not assess the reliability of individual system components (such as the [deleted]) in the evaluation but, rather, evaluated the overall reliability of the generators; it properly did not assign an individual strength to the L-3 proposal based on the allegedly enhanced reliability of the generators solely because they incorporate the [deleted].

The evaluation in this area was unobjectionable. As the protester concedes, the proposed [deleted] simply meet all of the requirements of the RFP for generators of that size; there thus is no basis to find that the agency was unreasonable in not assigning a strength to the L-3 proposal based on the [deleted]. Similarly, there is no basis to find unreasonable the agency's failure to assign a strength to the L-3 proposal for offering the [deleted] on its generators; all generators were required to include a method for providing current during short circuits, and the [deleted] is simply one method for meeting that requirement. Moreover, the capability of the L-3 generators' [deleted] to provide short circuit current for purposes of [deleted] was not required by the RFP, and since the agency does otherwise require this feature, there was no basis to assign the proposal a strength. Finally, there was nothing in the solicitation to indicate that the agency would evaluate the reliability of individual system components, and the protester has neither alleged nor shown that the agency otherwise failed to reasonably evaluate its proposed generator systems' reliability.

Performance Risk

L-3 asserts that the agency improperly assigned the firm's proposal a moderate performance risk rating and unreasonably failed to elicit information during discussions that could have resulted in its proposal receiving a low risk rating. According to the protester, the agency relied on incorrect information relating to the firm's performance of prior generator contracts to find that its proposal represented a moderate performance risk. L-3 also maintains that, in assigning L-3 a moderate risk rating, the agency improperly penalized it for failing to provide information relating to the identity of one of its subcontractors; according to L-3, this information was neither required by the RFP, nor elicited during discussions.

We need not resolve these arguments, since the record establishes that there was no prejudice to L-3 arising from the alleged errors. In this connection, prejudice is an

essential element of every viable protest, and where none is shown or is otherwise evident, we will not sustain a protest, even where the agency's actions may arguably have been improper. Joint Mgmt. and Tech. Servs., supra, at 7.

Even if we assume that L-3's proposal should have been assigned a low performance risk rating, there is no basis to conclude that the firm would have been in line for award ahead of either of the two awardees. Onan's proposal was rated superior to L-3's under the technical factor (good versus acceptable) and equal under the ILS factor. Although L-3's proposal was rated superior to Onan's under the small business participation factor (outstanding versus good), since that was the least important factor and Onan's cost/price was significantly lower, there is no reason to believe that there is a reasonable possibility that the agency would have selected L-3's proposal for award, even with a low performance risk rating. As for Fermont, although its proposed cost/price was slightly higher than L-3's, its proposal was rated superior to L-3's under the two most important factors--technical (outstanding versus acceptable) and ILS (outstanding versus good)--and was rated equal under the small business participation factor. We conclude that there is no reasonable possibility that the agency would have made award to L-3 instead of Fermont, even if it had received a low performance risk rating.

The protest is denied.

Anthony H. Gamboa
General Counsel