

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

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FILE: B-210092**DATE:** September 2, 1983**MATTER OF:** Wild Heerbrugg Instruments, Inc.**DIGEST:**

1. Where an agency intends to conduct cost evaluation on the basis of life-cycle costs, this intention must be specified in the language of the solicitation.
2. Solicitation language which indicates that an agency will procure an existing design rather than a new design since this will result in the lowest life-cycle costs does not provide a basis for concluding that life-cycle costs of the offered existing designs will be evaluated.
3. A solicitation requirement is not ambiguous where only one reasonable interpretation is possible.
4. Allegation that life-cycle costs should have been evaluated where a solicitation did not provide for such evaluation relates to an alleged apparent solicitation impropriety which must be filed prior to the closing date for the receipt of initial proposals.
5. Where protest was filed after award, allegation that performance testing should have been required and conducted is untimely and will not be considered since it relates to an apparent solicitation impropriety (failure to provide for or require such testing).
6. GAO will not review affirmative determination of responsibility except under circumstances not present here.

Wild Heerbrugg Instruments, Inc. (Wild), protests the award of a contract to Optic Electronic

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Corporation (OEC) for muzzle boresight devices under request for proposals (RFP) No. DAAA09-82-R-5620 issued by the Department of the Army (Army).

Wild's primary bases of protest are that the Army improperly failed to include life-cycle costs in evaluating the price of the proposals and that the Army failed to conduct necessary testing pertaining to the performance of the devices being procured. During the development of this protest, Wild submitted a number of other objections regarding collateral matters which occurred in the conduct of the procurement. However, Wild's final comments were confined to the primary bases which Wild considered to be the germane issues for resolution under this protest.

We find the protest without merit.

As Wild points out, the relevant RFP provision regarding life-cycle costs is as follows:

"1.1 Objective

The objective of the TPR [technical proposal requirements] is to obtain performance disclosure for the subject boresight device. It is the intent of the procuring activity not to pay for new design and development of Muzzle Boresight Device (MBD). Such a device will satisfy an approved operational requirement at the lowest life cycle cost with the shortest possible acquisition schedule consistent with performance and reliability. Included in the written proposal required herein, offerors must show previous design, development, producibility, and performance data, and history of use by weapon type, for the offered MBD. The expected content and format of the Technical Proposal (TP) are specified to provide a uniform base for evaluation."

Wild argues that this language evidences a requirement that life cycle costs be evaluated in order to meet the stated objective. The Army concedes that it did not evaluate life cycle costs. However, the Army contends that

life-cycle cost evaluation is not called for or required by the quoted language. Rather, the Army contends that the provision in question indicates that life-cycle costs will not be evaluated. We agree with the Army.

In our view, the quoted language regarding life-cycle costs provides a rationale for the agency decision to procure an existing item rather than to pay for new design and development of the device being procured. The RFP specifically indicates that use of such an existing item will satisfy the Army operational requirement at the lowest life-cycle cost. We do not believe that this language can reasonably be construed to convey an intention to evaluate life-cycle costs; rather, it merely provides the rationale for procurement of an existing design on the basis that such a design has been determined to have lower life-cycle costs than would a new untested design, along with other specified advantages. The same provision goes on to indicate that the RFP will specify content and format for the technical proposal which will provide a uniform base for evaluation. However, the requirements which follow do not call for any life-cycle costing data or material.

As Wild points out, if life-cycle costing is to be applied, the RFP must so notify offerors. Eastman Kodak Company, B-194584, August 9, 1979, 79-2 CPD 105. Here, there is simply no relevant RFP language which can reasonably be construed to call for the evaluation of life-cycle costing.

Wild also asserts alternatively that, at best, the quoted RFP language is ambiguous with respect to the evaluation of life-cycle costs. However, ambiguity is not established by the mere allegation that it exists or that an offeror construed a clause in a manner other than that in which it was intended. Rather, for an ambiguity to be found to exist, two or more reasonable interpretations of the requirement must be possible. Atterton Painting, Inc., B-208088, January 18, 1983, 83-1 CPD 60. As indicated in the above discussion of the relevant provision, we find that the only reasonable interpretation is that life-cycle costs had already been taken into consideration by the Army in the decision to procure an existing rather than a new design. We do not find it reasonable to interpret such language as requiring life-cycle cost evaluation of the offered existing designs.

To the extent that Wild is arguing that life-cycle costs should here be considered despite the lack of such a requirement under the RFP, this aspect of the protest is not for consideration. It is untimely since Wild did not file its protest until after award had been made. The allegation constitutes a protest against an alleged apparent solicitation impropriety which, under our Bid Protest Procedures, must be filed prior to the closing date for the receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983); The Willard Company, B-202921, October 9, 1981, 81-2 CPD 292; Dictaphone Corporation, B-193033, October 25, 1978, 78-2 CPD 303.

With respect to the alleged failure of the Army to require or to perform relevant testing, as Wild concedes, the general rule is that the determination of what tests and procedures will be used in technical evaluation is the function of the contracting activity. Aeronautical Instrument and Radio Company, B-190920, October 13, 1978, 78-2 CPD 276. As Wild also concedes, the procuring activity has discretion to determine whether higher cost is warranted by technical superiority, or vice versa, as long as the judgment is consistent with the RFP evaluation criteria and has a rational basis. However, Wild suggests that, in this instance, the Army could not reasonably have concluded that OEC met the RFP technical requirements because of the Army's failure to conduct testing of the devices. Wild contends that such testing is essential in order for the Army to be able to evaluate whether the design offered meets the RFP technical requirements.

However, Wild does not point to any testing requirement in the solicitation and, in fact, the solicitation does not contain any such requirement. On the contrary, the RFP provides under part I, section C(4), that offerors should provide test plans for approval prior to incorporation into the contract. The testing is to be conducted after award in order to assure compliance with the RFP functional requirements. Accordingly, this aspect of the protest is untimely filed and will not be considered since it relates to an alleged apparent impropriety in the RFP which, as noted above, must be filed prior to the closing date for receipt of initial proposals. Ingersoll-Rand, B-205792, January 8, 1982, 82-1 CPD 26.

In this respect, Wild also asserts that the absence of such testing makes it impossible for the agency to evaluate the contractor's ability to satisfy the procurement requirements. More particularly, Wild asserts that this deficiency means that the activity cannot adequately conduct a preaward survey. In effect, Wild is questioning the responsibility of the awardee. However, the Army conducted a preaward survey of OEC and made a resulting determination that it was responsible and was capable of manufacturing the devices in question. Our Office will not review protests of affirmative determinations of responsibility absent allegation of fraud on the part of procuring officials or of the misapplication of definitive responsibility criteria. Domar Industries Co., Inc., B-202735, September 4, 1981, 81-2 CPD 199. Neither exception is alleged here, hence we will not consider this aspect of the protest.

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

Wild also claims proposal preparation costs. In view of our conclusion that Wild's protest is without merit, its claim for proposal preparation costs is denied. Armco, Inc., et al., B-210018; B-210018.2, May 23, 1983, 83-1 CPD 553.

for Harry R. Van Cleave
Comptroller General
of the United States