DECISION

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

7795

FILE: B-189884 DATE: September 25, 1978

MATTER OF: Serv-Air, Inc.

DIGEST:

1. Protest concerning RFP's price evaluation formula and application thereof is untimely since formula was clearly set forth in detail in RFP, alleged problems with application were reasonably discernible from formula, and protest was not filed before closing date for initial proposals as required by 4 C.F.R. § 20.2(b)(1) (1977).

2. Untimely issue of whether price evaluation formula eliminated price as evaluation factor will be considered only to extent that it impacts on timely issue relating to adequacy of price competition to invoke exemption to cost or pricing data requirements.

3. Protest that oral negotiations should have been held due to size, complexity, and potential 5-year duration of procurement is untimely since it was not filed, at latest, within 10 days of closing date for best and final offers.

4. Argument that discussions were not meaningful is timely since it was not known until protester received certain documents pursuant to Freedom of Information Act request, and argument was raised within 10 days of that time.

5. Argument that Government should have held oral negotiations on price when it discovered that both offerors proposed prices lower than Government estimate is timely, since protester could not have known of basis until debriefing, and issue was raised within 10 days of debriefing.

6. Contention that evaluation criteria concerning experience restricted competition and favored incumbent contractor is untimely because criteria were listed in RFP, and protest should have been, but was not, filed before closing date for initial proposals.

7. None of issues found to be untimely are significant issues which could be considered notwithstanding their untimeliness.

8. Price evaluation which scored proposals nearly equally did not eliminate price as evaluation factor, since price proposals were close and only varied by approximately 5 percent.

9. Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor.

10. Failure to hold oral price discussions was not improper where prices were within 9 percent of Government estimate, price evaluation was in accordance with criteria set forth in RFP, and there was adequate price competition.

11. Allegation that agency had "unannounced preferences" for specific manner of performing work, which incumbent knew and protester did not, is not supported by record. Meaningful written discussions concerning technical proposals were held, even though written discussions could have more specifically pointed out deficiencies in some areas. Agency presented protester with large number of questions and comments which led

protester to deficient areas of proposal, and protester was given opportunity to and did substantially revise proposal, resulting in significant increase in scores. Oral discussions were not required, since written negotiations were meaningful.

12. Agency delay in filing response to protest is procedural matter, not affecting merits of protest. Response to protest cannot be disregarded on this basis.

13. GAO will consider all documents filed by agency in deciding protest, even though agency withheld certain documents from protester pursuant to Freedom of Information Act.

14. Documents destroyed by agency appear to have been workpapers of technical panel which were incorporated into formal comments of technical panel that were provided to protester. Therefore, protester was not prejudiced by this action.

Serv-Air, Inc. (Serv-Air), has protested the award of a contract for the operation and maintenance of Vance Air Force Base, Oklahoma (Vance), to Northrop Worldwide Aircraft Services, Inc. (Northrop), under request for proposals (RFP) F41689-77-0016, issued by the Air Training Command (ATC), Randolph Air Force Base, Texas.

I. Background

The RFP was issued on March 29, 1977. The RFP sought proposals for a fixed-price-incentive contract with a firm target price to provide management, equipment, personnel, and services for the operation of Government-owned facilities and the maintenance of Government-owned training aircraft in support of the Undergraduate Pilot Training Mission at Vance. The RFP contemplated an initial 1-year contract (October 1, 1977, to September 30, 1978), with the possibility that the incumbent contractor could be retained for up to 4 additional 1-year periods, under an Extended Contractual Coverage Policy.

Fifty-three prospective contractors were solicited, and two proposals were received--Serv-Air's and Northrop's. Northrop is the incumbent under a contract awarded for the 1-year period, 1972-1973, and continued for 4 successive 1-year periods. Serv-Air was the contractor at Vance from 1960-1972.

In evaluating proposals, the technical evaluation was weighted 70 percent and price 30 percent, with 700 total points possible for the technical evaluation and 300 for price. Price points were broken down into two categories: 150 points for cost realism and 150 for assumption of risk. The weighting and point system was not disclosed in the RFP, although it stated that technical capability would be weighted more heavily. The initial proposals received the following point scores from the evaluation panels:

	Serv-Air	Northrop
Price		
Risk	150	119.9
Realism	78	150.0
Technical	450	657.3
Total	678	927.2

Both proposals were included in the competitive range. After initial evaluations, the contracting officer (C.O.) furnished each offeror a list of comments and questions, requesting replies by June 20, 1977. The revised proposals were received and were given the following scores:

	Serv-Air	Northrop
Price		
Risk	150.0	119.9
Realism	90.0	150.0
Technical	561.4	687.2
Total	801.4	957.1

Requests for best and final offers were made on June 30, 1977, with July 15, 1977, as the deadline for submitting them. Both offerors submitted best and final offers, which received the following scores:

	Serv-Air	Northrop
Price		
Risk	150.0	126.6
Realism	120.0	150.0
Technical	570.1	687.2
Total	840.1	963.8

By letter dated August 1, 1977, and received August 4, 1977, the C.O. notified Serv-Air that the contract had been awarded to Northrop. By letter received in our Office on August 12, 1977, Serv-Air protested the award. In a debriefing conducted August 16, 1977, Serv-Air was told that its low price had resulted in a reduced point score for cost realism. Serv-Air then, by letter dated and received at our Office on August 25, 1977, amplified its protest.

II. Serv-Air's Allegations

Serv-Air, in the letter of August 12, 1977, made two general allegations:

1. That it should be awarded the contract because its proposal was found technically acceptable and also offers the lowest cost, fee, and ceiling price.

2. That the incumbent, Northrop, had access to more detailed information concerning a new element of work than was made available to Serv-Air, thus unfairly allowing Northrop to receive a higher score on that part of its proposal.

Serv-Air's August 25, 1977, letter raised several new grounds of protest, as follows:

1. The technical evaluation criteria were designed to give special weight to recent experience rather than the quality of services offered.

2. The system of price evaluation is inherently defective because it penalizes

offerors for cost-saving techniques, regardless of the soundness of the techniques, by subtracting points from proposals whose target cost falls outside a predetermined range from the Government estimate.

3. Oral discussions concerning both technical and price proposals should have been held.

After release of certain information by the Department of the Air Force (Air Force) pursuant to a request filed in accordance with the Freedom of Information Act (FOIA), Serv-Air, by letter dated February 24, 1978, amplified the August 25 grounds of protest and raised additional objections to the procurement, as follows:

1. Serv-Air modified the allegation concerning the price evaluation by objecting to the manner in which the formula was applied and to the effect of the application in these circumstances. Specifically, Serv-Air alleged that the application of the price evaluation formula had the effect of eliminating price as an evaluation factor.

2. Serv-Air alleged that the Air Force failed to satisfy mandatory statutory and regulatory requirements to obtain and analyze certified cost or pricing data.

3. Serv-Air alleged that the Air Force failed to disclose in the RFP or during negotiations preferences for specific methods employed by the incumbent to accomplish certain tasks, thus making equal technical competition impossible.

4. Serv-Air expanded its allegations relating to negotiations by arguing that even if oral negotiations were not required, the written negotiations were so inadequate as to not constitute "meaningful discussions."

III. Timeliness

The Air Force has argued that several of Serv-Air's allegations are untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1977). First, the Air Force argues that all of the allegations contained in Serv-Air's August 25, 1977, letter are untimely because they should have been known on August 4, 1977, when Serv-Air was notified of the award to Northrop, and that letter was not filed within 10 working days, as required by 4 C.F.R. § 20.2(b)(2) (1977). Additionally, the Air Force argues that even if some of the arguments are considered timely, the allegations concerning the evaluation procedure are untimely pursuant to 4 C.F.R. § 20.2(b)(1), which requires that protests based on patent solicitation improprieties be filed prior to the closing date for receipt of initial proposals. The Air Force also argues that Serv-Air's argument concerning the lack of oral negotiations is untimely, presumably because it was not raised until approximately 1 month after the Air Force's request for best and final offers.

Serv-Air responded to these arguments in a submission of February 24, 1978. Serv-Air stated it first learned that its low price had resulted in a reduced price realism score at the August 16, 1977, debriefing, and that the price evaluation criteria had been irrationally implemented. Also, Serv-Air argues that "* * * the debriefing provided the first evidence that the negotiation process had failed in its essential purposes." Regarding the Air Force's arguments that Serv-Air should have protested any problems with evaluation criteria before the due date for initial proposals, Serv-Air states:

> "* * * this protest could not have been made on the basis of the RFP itself. The RFP did not disclose that the analysis of 'price realism' would ignore the differences between proposals, that no audit or cost analysis would be conducted, that the scoring formulae would eliminate cost as a factor, that negotiations would be curtailed regardless of obvious misunderstandings or that penalties would be imposed for deviation from unannounced preferences. The debriefing, in turn, only

> hinted at these defects and suggested where to look. Serv-Air's development of the facts now permits a greater particularization of improprieties that could only be inferences drawn from anomalous results before."

Certain grounds of Serv-Air's protest have been untimely raised. It is our opinion that the arguments concerning the price evaluation are untimely (August 25 letter No. 2; February 24 letter No. 1). The price evaluation method is set out in detail in the RFP. For example, the method to be used to evaluate cost realism is stated, as follows:

> "(2) Realism will be evaluated by comparison of the proposed target cost to a government estimate of target cost. Any price falling within a predetermined range from the government estimate will receive the maximum number of points. A target cost that falls above or below this range will receive fewer points the farther away it is from the range."

Serv-Air's August 25 allegation that this formula penalizes rather than rewards cost-saving innovation directly takes issue with the above provision of the RFP and should have been raised prior to the closing date for initial proposals. We note that Serv-Air does not argue that the Air Force conducted the price evaluation in a manner inconsistent with that set out in the RFP. As for Serv-Air's February 24 argument that it could not have known the effect that this formula would have until it learned of the point scoring system, the Government estimate, and the range, we think that the formula was sufficiently detailed to put Serv-Air on notice that the price evaluation could have been conducted in the manner that it in fact was. Therefore, this argument, raised after the closing date, is untimely. See, e.g., Design Concepts, Inc., B-186125, October 27, 1976, 76-2 CPD 365.

According to Serv-Air the fact that the price evaluation had the effect of eliminating price even though the RFP stated that it would be weighted 30 percent resulted in the absence of price competition. In the absence of price competition the C.O. must meet certain statutory and

regulatory requirements to ensure that the awardee's price is reasonable (February 24 letter No. 2). Since the Air Force did not meet those requirements in this case, Serv-Air argues that the contract is void.

No question has been raised concerning the timeliness of this issue. In order to decide whether the Air Force should have met the applicable cost or pricing data requirements, we must determine whether there was adequate price competition. Therefore, we will examine the price evaluation in this case, but only to ascertain whether the formula did produce adequate price competition for purposes of cost or pricing requirements.

Serv-Air's allegations (August 25 letter No. 3; February 24 letter No. 4) concerning the lack of oral negotiations and the inadequacy of written negotiations are partially untimely. Serv-Air knew that oral negotiations were necessary due to the size and complexity of the procurement, and the possible long duration of any resulting contract award by the request date for best and final offers, at the latest. Since these arguments were raised more than 10 working days later, they are untimely and will not be considered.

After receiving certain evaluation documents pursuant to its FOIA request, Serv-Air alleged that, during written negotiations, the Air Force had not understood aspects of Serv-Air's technical proposal and should have realized that Serv-Air might be confused concerning several requirements. Serv-Air argues that, at that point, the Air Force should have instituted oral negotiations to clear up these problems. Serv-Air also alleges that, whether or not oral negotiations were warranted, the results of the technical evaluation showed that the written negotiations were superficial and inadequate. Since these grounds could not be known by Serv-Air until it received the evaluation documents, they were timely raised.

Serv-Air also argues that price negotiations should have been held, instead of a continued mechanical application of the price evaluation formula, when the Air Force discovered that both prices were substantially lower than the Government estimate. This argument is also timely, as it could not have been raised until after the debriefing when Serv-Air first learned of the relative prices and the Government estimate, and it was raised within 10 days of the debriefing in Serv-Air's letter of August 25, 1977.

Finally, Serv-Air's contention (August 25, 1977, letter No. 1) that the technical evaluation criteria unduly restricted competition and favored the incumbent contractor is clearly untimely. The evaluation criteria were listed in the RFP and should have been but were not protested prior to the closing date for initial proposals.

Serv-Air has argued that even if some of its allegations are untimely, "* * * the critical nature of the issues raised necessitates review." 4 C.F.R. § 20.2(c) permits consideration of untimely protests that raise issues significant to procurement practices or procedures. This exception to the general timeliness requirements is limited to issues which are of widespread interest to the procurement community and is "exercised sparingly" so that the timeliness standards do not become meaningless. R.A. Miller Industries, Inc. (Reconsideration), B-187183, January 14, 1977, 77-1 CPD 32. We see nothing in the untimely issues here that warrants invoking this exception.

IV. Adequate Price Competition

Price was evaluated using a predetermined Government estimate of target cost, fee, and ceiling price as a baseline and giving equal weight up to 150 points to "cost realism" and "assumption of risk". The Air Force estimate and the Serv-Air and Northrop proposals with the following differences were:

	Serv-Air	Northrop	Difference	Air Force Estimate
Total Target Cost	$16,395,424	$17,100,785	$705,361	$18,040,944
Total Target Fee	819,386	891,963	72,577	902,048
Total Target Price	17,214,810	17,992,748	777,938	18,942,992
Ceiling Price	17,707,058	18,810,864	1,103,806	19,845,039
Over Target Sharing	60/40%	60/40%		
Under Target Sharing	80/20%	70/30%		

Cost realism, which is at the heart of the dispute, was evaluated in the following manner. A Government estimate of target cost (shown above) was developed by a certified public accountant on the Headquarters ATC Pricing Staff. The estimate was based on Department of Labor Service Contract Act Wage Rates, manning estimates, and data from prior contracts for the same and similar services. The predetermined range, within which proposed target costs would receive the maximum cost realism score, was set at 7.5 percent. According to the Air Force, this represented the Government's range of confidence in the accuracy of the estimate. Target costs falling outside this range, either above or below, received fewer points the farther they were from the range. The zero point mark was at 15 percent above or below the estimate.

Assumption of risk was evaluated by comparing each proposal's target price, ceiling price, 5-percent cost overrun, and 5-percent cost underrun to the Government estimate. A 70/30-percent sharing formula was used to calculate the Government's cost overrun and underrun figures. Basically, 75 points were to be awarded to any proposal matching the Government estimate, and prices below the estimate received more points up to 150 at 7.5 percent below the estimate.

Serv-Air's best and final price proposal received 150 points for assumption of risk and 120 points for cost realism, for a total of 270. Northrop's higher-priced proposal received 126.6 points for assumption of risk and 150 points for cost realism, for a total of 276.6, or a 6.6-point advantage.

Serv-Air argues that there was not "adequate price competition" in this procurement, as defined by Armed Services Procurement Regulation (ASPR) § 3-807.1(b)(1) (1976 ed.). Serv-Air bases this argument on its contention that the price evaluation eliminated price as an evaluation factor and on the fact that the RFP states that "* * * lowest price will not necessarily receive the award." Serv-Air argues that because there was not adequate price competition, the Truth in Negotiations Act, 10 U.S.C. § 2306(f) (1976), required the Air Force to obtain certified cost or pricing data prior to the award of the contract, ASPR § 3-807.2(a) (1976 ed.)

required a cost analysis, and ASPR § 3-801.5(b) (1976 ed.) required an audit. Since the Air Force admittedly failed to meet these requirements, Serv-Air argues that the contract is invalid and that any follow-on contracts would also be invalid.

The Truth in Negotiations Act requires that contractors submit certified cost or pricing data prior to the award of any negotiated contract where the price is expected to exceed $100,000. The act provides that this requirement need not be met "* * * where the price negotiated is based on adequate price competition." ASPR § 3-807.3(a) also requires such data, and has the same adequate price competition exemption. The requirements of ASPR §§ 3-807.2(a) and 3-801.5(b), as stated above, must be met whenever the contract price is based on certified cost or pricing data.

"Adequate price competition" is defined, in ASPR § 3-807.1(b)(1), in the following manner:

> "(1) Adequate Price Competition.
>
> a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting price offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation."

Serv-Air contends, for the above-enumerated reasons, that subsection (iii) was not met, since the contract was not required to be, and was not, in fact, awarded to the offeror with the lowest evaluated price.

While we have not specifically addressed the issue of what constitutes adequate competition for the purposes of invoking the exemption in the Truth in Negotiations Act, we have interpreted ASPR § 3-807.1(b)(1) in the context of 10 U.S.C. § 2304(g) (1976). That statute and the implementing regulation, ASPR § 3-805.1, require that written or oral discussions be held in all negotiated procurements over $10,000, unless it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. In Shapell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839, 848 (1976), 76-1 CPD 161, in finding an award to a higher-priced, higher technically rated offeror to be the result of adequate price competition, we stated that "* * * we believe the language 'lowest evaluated price' [italic supplied] should be defined to include all of the factors in the award evaluation." Generally, then, adequate price competition exists and certified cost or pricing data need not be submitted where more than one offeror is considered to be within the competitive range and price is a substantial, though not necessarily determinative, factor in the prescribed evaluation criteria.

As for the impact of the elimination of price as a factor in this issue, Serv-Air argues that the two price proposals here were "widely divergent", and were leveled by the price evaluation, and that both proposals were scored so near the maximum that "differences between them were lost." Serv-Air cites Group Operations, Inc., 55 Comp. Gen. 1315 (1976), 76-2 CPD 79; W.S. Gookin & Associates, B-188474, August 25, 1977, 77-2 CPD 146; and Design Concepts, Inc., B-184658, January 23, 1976, 76-1 CPD 39, as cases in which our Office condemned price or cost evaluation schemes which leveled divergent proposals. There are, however, significant differences between these cases and the instant case.

In Group Operations, Inc., supra, a low proposal of $10,810 and a high proposal of $23,216 received nearly identical scores. The high proposal was over 100 percent above the low proposal. We determined that even though the cost evaluation was improper, there was not sufficient prejudice to disturb the award, since the technical evaluation was substantially more important and the awardee had a significant edge in the technical evaluation.

In W.S. Gookin & Associates, supra, the high proposal was over 100 percent higher than the low proposal, but scored the same. Again, even though we found the evaluation improper, we found no basis to disturb the award because of the importance of technical excellence and the significant technical superiority of the higher-priced proposal.

In Design Concepts, Inc. (B-184658), supra, the evaluation formula penalized offers to the degree that they deviated from the arithmetic mean of all offers. This resulted in low offers receiving no advantage whatsoever from being low. This evaluation scheme was not revealed in the RFP, and, in fact, the RFP clearly indicated that low offers would be scored higher. The result was that award was made to an offeror whose technical proposal was only about 5 percent higher than the protester's, but whose price was approximately 4 1/2 times that of the protester's.

The above cases involve extreme circumstances, especially as compared to the present case. While Serv-Air characterizes the proposals as "widely divergent," the largest difference in price or cost is the approximately 5.5-percent difference in ceiling price. In addition, there was no surprise in the instant case, as there was in Design Concepts, Inc. (B-184658), because the evaluation followed the criteria explicitly detailed in the RFP, including the admonition that the lowest price would not necessarily receive the highest score. In short, while we realize that the approximately 5-percent lower Serv-Air proposal did not receive a 5-percent price evaluation advantage, we cannot say that price was eliminated as an evaluation factor. We see nothing improper in two closely priced proposals being scored closely in a price evaluation.

In the present case, both offerors were within the competitive range, and award was made to the offeror whose price was approximately 5 percent higher, but whose technical rating was substantially higher. Since we have determined that the price evaluation did not eliminate price as an evaluation factor and price was a substantial factor in the evaluation scheme (30 percent) we feel that there was adequate price competition. Therefore, the Air Force properly did not require the submission of cost or pricing data.

Serv-Air argues that oral price negotiations should have been held once the Air Force discovered that both offerors' proposed prices were below the Government estimate, to ensure that the Government received the best price. The Air Force points out that both offerors were within 9 percent of the Government estimate. In light of our finding that the price evaluation was proper and in accordance with the RFP and that there was adequate price competition, we do not feel that the fact that both offerors were slightly lower than the Government's estimate requires the Government to hold price discussions in order to ensure that it received the best price. See Vinnell Corporation, B-180557, October 8, 1974, 74-2 CPD 190.

V. Technical Evaluation and Negotiations

The RFP listed the following factors to be considered in the technical evaluation:

> "a. Overall experience in simulator and jet aircraft maintenance functions on aircraft of equal or greater complexity than those assigned to Vance AFB.
>
> "b. Overall experience in other base support functions for a pilot training facility and/or operation of the same or similar facilities contemplated by this Request for Proposal.
>
> "c. Understanding of the requirement and proposed method of operation.
>
> "d. Operation and management policies and procedures.
>
> "e. Manpower resources and utilization of key personnel.
>
> "f. Mobilization (phase-in) plan."

The RFP further stated that:

> "* * * Most weight will be given to factor a. A lesser weight will be given to factor b. Factors c, d, e and f will be given equal weights but less than either factor a or b."

Serv-Air has made two basic allegations concerning the technical evaluation and related negotiations:

(1) That the Air Force had preferences for specific methods of performing certain tasks based on the incumbent's performance, and these preferences were known by the incumbent, but were never communicated to Serv-Air.

(2) That the Air Force's written negotiations were insufficient to resolve uncertainties relating to work requirements, and misunderstandings concerning the Serv-Air proposal, thus violating the requirement for meaningful negotiations and resulting in an improper technical evaluation.

Serv-Air has presented 27 examples, grouped into five categories, which it argues are illustrative of the Air Force's failure to conduct meaningful negotiations which resulted in unfair penalties assessed against the firm in the technical evaluation. Among the 27 examples of deficiencies in the technical evaluation and negotiations, five allegedly illustrate the Air Force's preconceived and unannounced preferences; the others allegedly illustrate other categories of improprieties. While we have carefully reviewed all of the examples, we do not feel that it is necessary to address each one in this decision, as they are only meant to be illustrative examples of the lack of meaningful negotiations. Rather, we will discuss one example in each category of deficiency noted by Serv-Air.

Generally, it is not the function of this Office to reevaluate technical proposals, or resolve disputes over the scoring of technical proposals. Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175; Techplan Corporation, B-180795, September 16, 1974; 74-2 CPD 169; 52 Comp. Gen. 382 (1972). The determination of the needs of the Government and the method of accommodating such needs is primarily the responsibility of the procuring agency, 46 Comp. Gen. 606 (1967), which, therefore, is responsible for the overall determination of the relative desirability of proposals. In making such determinations,

contracting officers enjoy "a reasonable range of discretion" in determining which offer should be accepted for award, and their determinations will not be questioned by our Office unless there is "a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations." METIS Corp., 54 Comp. Gen. 612 (1975), 75-1 CPD 44. While Serv-Air states that it is not asking us to reallocate the points awarded in the technical evaluation, but only to determine the sufficiency of the negotiations, many of the examples presented by Serv-Air go to the question of whether points should have been deducted in the technical evaluation. Consequently, we feel that the above standard of review is appropriate in this case.

Concerning the issue of when and to what extent negotiations are required, 10 U.S.C. § 2304(g) (1976) requires that oral or written discussions be held with all offerors in the competitive range. The statutory mandate can be satisfied only by discussions that are meaningful. Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; 51 Comp. Gen. 431 (1972). Generally, to be meaningful, discussions must include the pointing out of deficiencies or weaknesses in an offeror's proposal. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61; 50 Comp. Gen. 117 (1970). We have stated, however, that:

> "* * * It is * * * unfair, we think to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal." 51 Comp. Gen. 621, 622 (1972).

Additionally, we have held that the "* * * extent and content of meaningful discussions * * * are not subject to any fixed, inflexible rule," Decision Sciences Corporation, supra, and that what will constitute such discussion "* * * is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for competitive negotiations * * *." 53 Comp. Gen. 240, 247 (1973).

Further, it is a fundamental principle of competitive negotiation that offerors must be treated equally, and that they must be provided with identical statements of the agency's requirements to provide a common basis for the submission of proposals. Computek Incorporated, et al., 54 Comp. Gen. 1090 (1975), 75-1 CPD 384. Also, if an agency changes stated needs during the course of a procurement, all offerors must be informed of the changes and permitted to revise their proposals. Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134; Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201, (1975), 75-2 CPD 144.

1. Alleged Air Force Preferences

Basically, Serv-Air argues that the Air Force preferred specific methods of performing tasks based on Northrop's performance as the incumbent, and that Serv-Air's proposal was penalized to the extent that it deviated from these unannounced preferences. The Air Force insists that these preferences were not preconceived or developed during the procurement, but rather were opinions of the Air Force technical experts concerning which proposal offered the best method of performing the required work. That is, the RFP told the contractor what to do, but not how to do it, and the so-called "preferences" were nothing more than the technical panel's judgment as to which proposal provided the best means of accomplishing the work.

The following example allegedly illustrates the Air Force's failure to reveal preferred techniques:

"Example No. 2

"Original Question No. 1 (May 31, 1977):

"'In view of emphasis upon energy and fuel conservation, why do you propose the "hot line" procedure for de-icing aircraft during extreme ice and snow conditions?'

"Serv-Air's Response (June 20, 1977):

"'The reference to the "hot line" procedure Paragraph 3.1.5.3 [of Serv-Air's proposal], for removal of ice from aircraft surfaces, was intended to reflect a capability that could be utilized if considered necessary. The necessity to utilize this expensive method will be a joint Air Force/Serv-Air decision based on student program status and other mission factors. * * *'

"Evaluation Panel Final Comment No. 12 (July 21, 1977):

"Reference Question 1: Although the 'Hot Line' procedure used to de-ice aircraft was acceptable during Serv-Air's previous tenure at Vance AFB, it has since been discontinued [in favor of chemical deicing] because of factors affecting aircrew and aircraft safety and, more recently, fuel conservation efforts."

Apparently, this example is intended to show that while the Air Force preferred chemical deicing, it did not convey this preference to Serv-Air. Serv-Air states that there is no suggestion that it could not or would not use the preferred method, and that the penalty stems from the statement that Serv-Air was capable of using hot-line deicing if the Air Force desired, in addition to chemical deicing.

The Air Force responded that the RFP clearly indicated that the Air Force Technical Order System (T.O.) must be strictly complied with. Hot-line deicing is not permitted by T.O. 42C-1-2 and T.O. IT-38A-2-2, which specify required deicing procedures. Therefore, the Air Force argues, the only "preference" it had was for the required procedure, which was available to Serv-Air, and which Serv-Air should have researched. The Air Force states that it asked the question to be sure that Serv-Air understood the requirement.

Serv-Air's response does not dispute the fact that hot-line deicing is not permitted, but rather states that it was merely offering the capability if desired. Serv-Air also notes that the Air Force failed to indicate that this was a deficiency.

It is our opinion that the Air Force action in penalizing Serv-Air for proposing hot-line deicing was not unreasonable or arbitrary. This "unannounced preference" was, in fact, clearly indicated in the RFP. Since the T.O. did not permit hot-line deicing, then offering it, even as an auxiliary capability, indicates a lack of understanding of the current permitted procedure and a lack of diligence in proposal preparation. The Air Force question, while it did not label the area as a deficiency, should have been sufficient to put Serv-Air on notice that there was a problem with proposing the procedure. See, e.g., Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153.

2. Other Alleged Failures to Conduct Meaningful Negotiations

Examples of other alleged improprieties have been grouped into the following groups by Serv-Air:

a. Failure to Reveal Needed Factual Information.

b. Failure to Reveal Alleged Inadequate or Excessive Service Levels.

c. Failure to Understand the Serv-Air Proposal.

d. Failure to Aid Serv-Air's Understanding of Government Requirement.

a. Failure to Reveal Needed Factual Information.

"Example No. 1

"Original Question No. 50 (May 31, 1977):

"'Do you have any training requirements for Fire Protection personnel which will require quotas in USAF schools prior to 1 October 77? See Amendment/Modification No. F41689-77-R-0016-0002 for qualification requirements.'

"Serv-Air Response (June 20, 1977):

"'We do not anticipate any training requirements (quotas in USAF schools) prior to 1 October 77 for Fire Protection personnel. Our Fire Chief will be scheduled to attend the advanced Fire Department Technology Course at Chanute AFB within 6 months of 1 October 77. It is assumed that all existing fire department personnel will meet physical, experience and training requirements as of 1 October 77. Newly assigned personnel will be scheduled for training as necessary after 1 October 77.'

"Evaluation Panel Final Comment No. 37 (July 21, 1977):

"'Reference Question 50: Serv-Air assumed that all of the present fire protection personnel working at Vance are trained to meet the RFP. All personnel are not trained as evidenced by Northrop scheduling 8 Rescue personnel for training prior to 1 Oct 77. This significant requirement was not adequately researched by Serv-Air.'"

Serv-Air argues that in this instance the Air Force should have told Serv-Air that the existing fire protection staff did not meet the training requirements for the upcoming contract and, therefore, needed to be scheduled for training. Serv-Air also contends that this is an instance in which the Air Force should have, but did not, point out the specific deficiency in Serv-Air's proposal.

The Air Force response is that the requirement for training of Fire Protection personnel was clearly stated in amendment/modification No. F41689-77-R-0016-002. Additionally, the Air Force argues that Serv-Air should have been aware, with reasonably diligent research, that the present personnel did not meet this training requirement because it did not exist under the previous contract. Therefore, the Air Force maintains, Serv-Air's assumption that all existing personnel would meet the new requirements indicated a lack of research of RFP requirements.

Serv-Air, in rebutting the Air Force comments, points out that the technical panel penalized it for failure to provide trained personnel or failure to schedule them for training, although the panel admits that it had no knowledge of the qualifications of the personnel proposed by Serv-Air.

It appears to us that Serv-Air was penalized for proposing untrained fire protection personnel and the failure to fully understand the RFP requirements. We agree with the Air Force analysis. Serv-Air should have been aware of the change in training requirements from the previous contract, since the new requirement was stated clearly in the cited amendment to the RFP.

b. Failure to Reveal Allegedly Inadequate or Excessive Service Levels.

"Example No. 7

"Original Question No. 8 (May 31, 1977):

"'The ACE Program method of operation section [in the RFP] reflects both the Mission Support Kit (MSK) concept and forward supply concept. Which method will be used? Please explain the supply procedures to be used to support the ACE Operating Locations (OL). Also expand on the need for two material control clerks at the OLS.

"Serv-Air Response (June 20, 1977):

"'The ACE Program will be supported by a Mission Support Kit (MSK) * * *

"'The utilization of the two Material Control Clerks at SAW and PSM will be in support of the increased load in the area support portion of the MSKs assigned to each of the respective bases * * *.'

"Evaluation Panel Final Comment No. 19 (July 21, 1977):

"'Reference Question 8: Method of ACE Program supply support is clarified to some extent in contractors reply. However, method of operation prescribed in response to question does not properly justify need for two material control clerks at specified locations."

Serv-Air's argument concerning the alleged impropriety in the above example is basically that it was penalized for providing too much service, even though it was the low-priced offeror. According to Serv-Air, the Government should have matched the Serv-Air technical and price proposals to determine what service it was getting for the price. Serv-Air contends that its proposal could not properly be penalized for providing excessive manpower levels unless doing so raised the cost to the Government. Serv-Air also argues that the Air Force didn't notify it that providing two clerks was a deficiency.

The Air Force response points out that the RFP clearly states that the Price Evaluation Panel will not have access to technical proposals and the Technical Evaluation Panel will not have access to price proposals. Therefore, in evaluating manpower levels, the Technical Panel properly had no knowledge of the offeror's price. Additionally, the Technical Evaluation Panel was concerned with efficiency in the evaluation of proposed manpower levels.

We feel that the Air Force level of negotiation and the determination to downgrade Serv-Air for failure to justify the need for two clerks were not unreasonable or arbitrary. The question certainly implies that the proposal as originally written did not sufficiently justify the use of two clerks. The deficiency was pointed out and Serv-Air was given an opportunity to correct the deficiency.

c. Failure to Understand the Serv-Air Proposal

"Example No. 13

"Original Comment No. 9 (May 31, 1977):

"'Para 5.1.7.1, page 5-15, Volume 1, Management Procedures Branch [of the Serv-Air proposal], indicates the training section will provide initial training on the U-1050-II computer. Statement of work specifies successful completion of formal training at AF Tech School before personnel are allowed to operate U-1050-II Computer.'

"Serv-Air Response (June 20, 1977):

"'Specific references to formal training of equipment operations stated in the basic RFP were not addressed, nor was AFR 50-55 referenced. This paragraph has been revised to explain the training to be provided on the U-1050-II Computer.'

"Evaluation Panel Final Comment No. 9 (July 21, 1977):

"'Reference Comment 9: Reply to specifically stated comment failed completely to address or recognize the statement of work requirement for successful completion of formal computer training at AF Tech School prior to personnel being allowed to operate the UNIVAC 1050-II Computer.'"

According to Serv-Air, it did not mean that the proposed Training Section would conduct the required training, but that it would assure that the required Air Force Technical School training was completed. The Air Force response is basically that the training requirement can only be met by training at the Air Force Technical School, and that Serv-Air's response did not make this clear, even though the question clearly noted this deficiency.

It is our opinion that Serv-Air's June 20 response did not make it clear that formal training requirements would be met in the mandatory manner by attendance at the Air Force Technical School, since the revision of the applicable section of its proposal still stated that the Training Section "* * * will provide initial

and refresher training * * * to include formal basic training on the U-1050-II * * *." We think that the Air Force did not act unreasonably here. The deficiency was initially pointed out in specific terms, and Serv-Air's response reasonably indicated that it was not aware that training at the Air Force Technical School was mandatory and that contractor training could not substitute.

d. Failure to Aid Serv-Air's Understanding of Government's Requirements.

"Example No. 26

"Original Question No. 12 (May 31, 1977):

"'The UPT-IFS has no component or series of components identified as either an Automated Flight Control System (AFCS) or a Central Air Data Computer. Please define these areas more clearly and skills required to maintain. (Ref Vol 1, pg 3.1-70, Paragraph 3.1.11.1)'

"Serv-Air Response (June 20, 1977):

"'The skill requirements defined in Paragraph 3.1.11.1 [of the Serv-Air proposal] define homogeneous skills directly related to maintaining the UPT-IFS. These skill requirements are further defined in Paragraph 3.1.11.1 of our revised proposal.'

"Evaluation Panel Final Comment No. 22 (July 21, 1977):

"'Reference Question 12: Response to this question is totally inadequate. The contractor still does not understand the technical requirements for the UPT-IFS. The skills he believes are required to maintain the simulator are totally unacceptable.'"

Serv-Air states that there was no indication that it was deficient until the final comment, and that if "* * * a broadly experienced, fully competent contractor in this area did not understand the Air Force requirement negotiations should have been conducted to make the requirement known."

The Air Force response to this example follows:

"Example #26. The comment of the panel for this question was not directed toward Serv-Air's competency in Flight Simulator maintenance. It was directed toward their failure to adequately express what skills would be utilized to maintain the UPT-IFS. Serv-Air identified two USAF AFSC skills homogeneous to the skills they identify as needed to adequately maintain the UPT-IFS. These skills (325X0 - 32591 and 326XX) although related are not specifically homogeneous. The homogeneous skills required are AFSC 341X4, Digital Flight Simulator Technician and 341X5 Analog Tactics Landmass Technician. The basic skills required to maintain the UPT-IFS are a knowledge of general purpose core memory computer systems maintenance and standard peripheral units, digital linkage and interface circuits, hydraulics, closed circuit T.V. systems (camera/monitor), analog servosystems and optics. Serv-Air did not understand the requirement in that core memory repair is not authorized at base level, computer programmer skills are not required and no camera projection equipment is included in the UPT-IFS. Here, once again, the protester has apparently expected the Technical Evaluation Panel to tell the offeror how to perform a given task. That responsibility was clearly levied on the offerors throughout the preproposal conference, solicitation phase and ensuing evaluations."

Serv-Air's rebuttal argues that since the above-quoted Air Force response admits that Serv-Air is qualified to maintain simulators, the statement of analogous skills should not be penalized. If it is considered a deficiency, Serv-Air contends that the Air Force should have specifically pointed it out.

Apparently, the Air Force Technical Panel feels that Serv-Air does not understand the requirement for Flight Simulator maintenance. It is not our function to perform a second technical evaluation, but only to determine whether negotiations in this area were meaningful. The original question asked by the Technical panel clearly indicated a deficiency in Serv-Air's proposal in this this area. Serv-Air's response was apparently clearly deficient again. We do not think that the Air Force's determination here was unreasonable or arbitrary.

3. Summary

It appears that Serv-Air's complaints about the conduct of negotiations and the resulting technical evaluation involved situations in which several portions of Serv-Air's proposal were initially considered to be deficient, the Air Force pointed out the deficiencies with varying degrees of specificity, Serv-Air's responses did not cure the deficiencies, and the Air Force did not conduct further negotiations. The Air Force believes that either Serv-Air would not have been deficient if it had adequately researched clearly specified requirements, or that Serv-Air was given an adequate opportunity to correct the deficiency as pointed out by the negotiations conducted. The Air Force determined that to continue to point out specific deficiencies for successive rounds of negotiations until Serv-Air finally responded correctly would be unfair to Northrop, as it would be tantamount to writing Serv-Air's proposal by providing Air Force technical expertise. Our review of the record has disclosed some areas where the written discussions could have more specifically pointed out the deficiencies found and other areas where the deficiencies were elucidated.

Based on our review including all examples of improprieties cited by Serv-Air, it is our opinion that the discussions held were meaningful in the context of our standard of review. After the receipt of initial proposals, 53 questions were asked Serv-Air by the technical panel, and 14 additional comments were made. Serv-Air was then given the opportunity to and did substantially revise its proposal in response to the questions and comments. See Operations Research, Incorporated, 53 Comp. Gen. 593 (1974), 74-1 CPD 70. As a result of this revision, Serv-Air's technical score

increased from 450 points to 570 points, and Serv-Air's price points increased from 228 points to 270. While the Air Force may not have labeled all of Serv-Air's deficiencies as deficiencies, the questions asked led Serv-Air to the deficient areas of its proposal and we have held that questions which lead offerors into areas of their proposals that are unclear are sufficient to put them on notice that their proposals may be deficient in those areas. See, e.g., Systems Consultants, Inc., supra; ASC Systems Corporation, B-186865, January 26, 1977, 77-1 CPD 60; DOT System, Inc., B-186192, July 1, 1976, 76-2 CPD 3; Rantec Division, Emerson Electric Co., B-185764, June 4, 1976, 76-1 CPD 360. Also, while successive rounds of discussions might have allowed Serv-Air to increase its scores, we cannot say that the Air Force's decision to not conduct further discussions, even though some deficiencies remained, was arbitrary or unreasonable. Since the written discussions were meaningful, there was no requirement to hold oral discussions. See, e.g., Genesee Computer Center, Inc., B-188797, September 28, 1977, 77-2 CPD 234; Austin Electronics, 54 Comp. Gen. 60, supra; 51 Comp. Gen. 621, supra.

VI. Alleged Procedural Deficiencies

Serv-Air has recently complained that the Air Force has delayed in filing responses to this protest, and that this delay has impaired Serv-Air's chances for an effective remedy in the event the protest is sustained. Serv-Air also alleges that the Air Force destroyed documents relevant to this protest and has submitted other documents to us that have not been released to Serv-Air. Serv-Air contends that these alleged improprieties have compromised the integrity of our Bid Protest Procedures.

The Air Force admits to the delays, stating that they have not been intentional, but are the result of the complexity of the protest and the loss of personnel involved in the review of the protest. Regarding the allegation of destruction of documents, the Air Force states that while the evaluator's individual workpapers were destroyed, the substance of their contents was incorporated into the score sheets and formal comments of the panel, which were provided to Serv-Air. Concerning the documents provided only to GAO, the Air Force states that

only cost and technical elements of the Northrop proposal and an internal ATC legal opinion were not provided to Serv-Air. The Air Force argues that the elements of the Northrop proposal were properly withheld, as they contained sensitive data that could harm Northrop's competitive position, and the internal legal opinion was properly withheld under FOIA. The Air Force also states that it considers all possible remedial action options still available to GAO, including a recommendation of termination of the contract for the convenience of the Government.

Regarding Serv-Air's complaint that we should not consider documents not released to Serv-Air, we have held that documents which are not furnished to protesters because they contain information considered by the agency to be properly withheld under the FOIA will be considered and accorded full weight by our Office in deciding bid protests. See, e.g., S.J. Groves & Sons Company, B-189544, October 25, 1977, 77-2 CPD 324. Therefore, we have considered all documents in the record in this protest, whether or not they have been released to Serv-Air. Concerning the allegation of destruction of documents, we see no prejudice to Serv-Air since the Air Force has sufficiently justified the destruction of the technical panel worksheets, which apparently were incorporated into the summary technical panel comments, which were provided to Serv-Air. Finally, regarding Serv-Air's complaint that the Air Force was untimely in submitting its reports, we have held that this is a purely procedural matter and does not provide a basis to disregard the report. Systems Consultants, Inc., supra; VBM Corporation, B-182225, March 5, 1975, 75-1 CPD 130.

We do feel, however, that the delays in this case were excessive and potentially prejudicial in terms of feasible remedies.

Accordingly, the protest is denied to the extent it has been considered on the merits.

R. F. Keller

Acting Comptroller General
of the United States