

Protest of) Date: May 29, 1991
TRW FINANCIAL SYSTEMS, INC.)
Solicitation No. 104230-90-A-0133) P.S. Protest No. 91-19

DECISION

TRW Financial Systems, Inc. ("TRW") protests the award of a contract under Solicitation No. 104230-90-A-0133 to ElectroCom Automation L.P. ("ECA") for production of the Image Processing Subsystem ("IPSS") of the Remote Bar Coding System ("RBCS"). The IPSS is an external system where the digital images of the faces of letters are retrieved and stored until the appropriate nine-digit ZIP Code information can be supplied by a human operator, who then sends the information to be stored until needed by the bar code sorter.

Background

The procurement of the IPSS comprised two stages.^{1/} The first was the award of Modification and Test Agreement ("MTA") contracts by the USPS. Bell & Howell, AEG Electrocom GmbH ("AEG") and TRW each was awarded an MTA on June 28, 1988. In order to be eligible to compete for the production contract, the second stage of this procurement, an offeror had to complete the first stage successfully. Attachment cc to the MTA solicitation described the intended method for evaluation of the proposals in the second stage. Pertinent provisions of Attachment cc are as follows:

Evaluation Cost Model for Image Processing Subsystem

The basic criteria for the evaluation of the IPSS will be the net present value (NPV) of total cost over a five (5) year period for the Image Processing Subsystem(s) at an "average" video encoding site. The initial investment will be combined with the present value of the annual operating and maintenance costs to provide the total life-cycle cost. If a decision is made to proceed with a production procurement, the system which meets the requirements described in

^{1/} Although the protester contends that three stages were involved in this procurement, the record reflects that offerors were required to participate in only two stages in order to be eligible for award.

this solicitation and which has the lowest total NPV will be selected.

GO/NO-GO FACTORS

In addition to the above cost model, the following factors will be used to determine if the contractors will be allowed to compete for the production solicitation:

- I. Error rate for the first five digits shall not exceed 2.5% and error rate for the last four of the nine-digit code shall not exceed 4%.
- II. The contractor shall code at least 80% of the total mail to its finest or highest level of potential.

After the MTA contracts were awarded, but before the solicitation for the production contract was issued, the USPS offered all three competitors the opportunity to submit proposals for Early Activation Pilot Site ("EAPS") contracts in order to learn more about how the IPSS technology would work in a live mail environment. Participation in the EAPS project was neither a precondition to, nor a factor in, the evaluation and award of the production contract. Bell & Howell and TRW submitted proposals and were each awarded EAPS contracts in June, 1988. AEG declined to propose. Subsequently, in May, 1990, AEG was awarded a noncompetitive developmental contract for "long lead materials and preliminary work on a remote bar code sorting . . . early activation pilot site." The statement of work required several upgrades or modifications to AEG's MTA system.

The contracting officer evaluated the performance of AEG, Bell & Howell and TRW in the MTA and determined that the equipment proposed by all three offerors met the requirements of the first stage and that each was eligible to compete for the production contract. The solicitation for the production contract was issued by the Office of Procurement, Headquarters, on June 29, 1990, with an offer due date, as amended, of September 24. As issued, the solicitation stated in Section M.2 in terms similar to those set out in the earlier MTA that the criterion for evaluation and award of the IPSS contract would be the life-cycle cost of the equipment.^{1/} However, Amendment A01, issued on August 13, revised the evaluation factors set forth in Section M.2 by adding three more criteria upon which proposals would be evaluated. As revised, Section M.2 provided:

^{2/} Since the solicitation provided for award to be made on the basis of only one evaluation criterion, the procurement plan and source selection plan were silent regarding weighing among various criteria.

5. Contract Award

Offers within the competitive range from a technical standpoint will be evaluated according to the following factors, in descending order of importance:

1. Life-Cycle Cost from the "Evaluation Cost Model for Image Processing Subsystem," included herein as Attachment cc;
2. Reasonableness of price. Among the components to be included as a portion of this factor are the following: (1) the dollar amount of the acquisition of the equipment as proposed by the offeror; (2) a comparison between the dollar amount of the estimate of the Postal Service and the dollar amount of the acquisition of the equipment as proposed by the offeror; and (3) whether the dollar amount of the acquisition of the solicited items, as proposed by the offeror, is within the funding limitations; and
3. Technical Evaluation (Item M.2.2) and ability to Fulfill Delivery Requirements; and
4. Other business and technical features which, in the assessment of the USPS offer value to the Postal Service.

Options will be evaluated in lights [sic] of these four factors and according to Item K.10, Evaluation of Options (Provision 2-3).^{3/} One firm-fixed-price award for the basic contract quantity, exclusive of the option items, will be awarded to that offeror [sic] which represents the best value to the Postal Service, as expressed in the four-evaluation factors, set forth in this paragraph and is within the funding limitation authorized by the Postal Service Board of Governors, April, 1990.

Amendment A01 also added the following statement to Section M.2:

OFFERORS ARE HEREBY PLACED ON NOTICE THAT AN OFFEROR WHOSE EQUIPMENT IS JUDGED TO OFFER THE BEST VALUE TO THE POSTAL SERVICE, BUT THE ACQUISITION PRICE OF WHOSE EQUIPMENT EXCEEDS THE POSTAL SERVICE FUNDING LIMITATION, MAY NOT RECEIVE AN AWARD UNDER THIS SOLICITATION.

Despite the reference to a limitation on funds available for the procurement, no figure for the funding limitation was disclosed. The actual amount available for capital funds for the basic contract was \$71.2 million.

Technical and price proposals were received from TRW, Bell & Howell and ECA^{4/} in

^{3/} Section K.10 provided that the price of all option quantities would be added to the basic quantity price to determine the evaluated price, and that any materially unbalanced offer may be rejected as technically unacceptable.

^{4/} TRW questions whether it was proper for ECA to compete for the production contract since it was

September of 1990. The technical proposals were reviewed by a technical evaluation team. All three offerors were determined to be in the competitive range from a technical standpoint. The USPS subsequently held discussions with each offeror. On February 8, 1991, the Postal Service issued Amendment 09 which changed the number of sites for the program from 35 to 24. The amendment also requested Best and Final Offers ("BAFOs") to be received on or before February 15. After reviewing the BAFOs, the contracting officer determined that ECA's proposal offered the best value to the USPS,^{1/} and awarded the contract to ECA on February 25. A debriefing was held with TRW on March 4. This protest followed.

Issues Presented

The three grounds of TRW's protest are as follows: first, the Postal Service failed to follow the evaluation criteria set forth in the solicitation; second, the Postal Service failed to conduct meaningful discussion with TRW; and third, the Postal Service provided ECA with an unfair competitive advantage.

A. Evaluation Criteria

The evaluation scheme was set out at Section M.2, stated above. The contracting officer's statement reveals that TRW was rated highest on the first of the four evaluation factors, life-cycle cost, while ECA was judged to be the best in the other three factors. TRW disagrees with the contracting officer's evaluation. TRW argues that it should have received award of the contract since 1) it was rated highest under the most important evaluation factor, 2) its proposal was reasonable in price, 3) the

AEG, not ECA, who had participated in the MTA stage of the procurement and expresses some surprise that ECA was a competitor in the procurement. The contracting officer, ECA, and AEG all explain that ECA is AEG's production licensee for the IPSS. The substitution of ECA for AEG in the second stage of the procurement was permissible, since the equipment that ECA is producing has been "prequalified" by AEG's successful completion of the MTA contract.

Concerning TRW's surprise, the record reflects that TRW was, or should have been, aware of the presence of ECA as an offeror on the production solicitation no later than October, 1990, when it was the recipient of an October 4, 1990, letter from the contracting officer which was jointly addressed as follows:

Bell & Howell - Bruce Rennecker
 ElectroCom Automation, Inc. - J.D. Welch, Jr.
 TRW Financial Systems, Inc. - Brian Ward

The letter addressed the layout requirements of the cost model. To the extent that TRW is now seeking to protest ECA's inclusion in the competition for the production contract, it is clearly untimely. Procurement Manual (PM) 4.5.4 d.

^{5/} The BAFO prices, net present value computations, in accordance with the cost model, and capital funds requirements were as follows:

<u>Offeror</u>	<u>Total Cost With Options</u>	<u>Net Present Value</u>	<u>Basic Contract Capital Funds</u>
TRW	\$596,713,935	\$7,091,072,478	\$122,156,242
ECA	\$281,650,321	\$7,298,731,968	\$ 69,969,533
Bell & Howell	\$364,666,588	\$7,828,441,486	\$ 58,850,656

technical evaluations of all offerors were basically equal, and 4) other criteria favored award to TRW over ECA.

1. Life-Cycle Cost

TRW claims that acceptance of its proposal would have provided the Postal Service with a life-cycle cost savings, in net present value, of \$550 million^{1/} over the five years of the cost model, increasing to over \$931 million over a ten-year period. TRW alleges that there is no question that, based on the primary evaluation factor, TRW's proposal was the superior offer.

In his statement, the contracting officer notes that TRW's life-cycle cost, in net present value, was 2.8 percent lower than ECA's life-cycle cost. He adds that although the cost model is the most significant of the four criteria, its weight is diminished by various factors. One major factor is that the cost model is largely theoretical, especially since it is based upon 1995 mail volume projections.^{1/} Another factor which affects the weight to be attributed to the cost model "score" is that, at the time the IPSS cost model was derived, it was based upon the encoding function being performed by Postal Service personnel. A preliminary determination to contract out the encoding function was made in the summer of 1990. When costs are adjusted to reflect this change, the life cycle cost differential between TRW and ECA is reduced from approximately \$170 million to slightly more than \$30 million.^{1/}

The contracting officer claims that the life-cycle cost benefits of TRW's proposal would be further eroded because TRW's price exceeded the funding limitation set out in the Board of Governors' approval for the IPSS program. In the event of award to TRW, the Board of Governors would have to approve additional funds, delaying the implementation of the contract. The contracting officer alleges that between three and seven months would be needed to get additional funding, and that the resultant delay would be costly to the Postal Service.

The contracting officer also claims that a delay in award of the IPSS contract will disrupt the Postal Service's plan to have the IPSS equipment and the remainder of the RBCS (the Input/Output Subsystem ("IOSS") equipment) delivered at the same time. According to the contracting officer, a contract has been awarded to Westinghouse Electric Co. ("Westinghouse") for the IOSS.^{2/} This contract requires either an IPSS

^{1/} This figure represents the difference in the cost of operation of the two systems over five years, after subtracting the acquisition cost of the systems. The life cycle cost formula used in the solicitation did not subtract out acquisition cost in arriving at the calculation of the net present value, so TRW's figure overstates the life-cycle cost savings attributable to its proposal.

^{2/} TRW claims, in response, that the Postal Service told TRW several times that the projected mail volumes were conservative.

^{3/} TRW contends that the use of contractor labor was not part of the MTA or production cost models. Attachment cc to the production solicitation states "[t]he IPSS processing cost will be based on a loaded labor rate of \$22.87 per hour." (Emphasis added). TRW asserts that if the Postal Service wished to change the model, it was obligated to amend the solicitation and advise all offerors of the changed evaluation criteria.

^{4/} The IOSS equipment that Westinghouse will be supplying is based on technology that has been

system or IPSS simulators to test and accept the IOSS equipment. Any delay in the delivery of the IPSS will cause significant increased costs on the IOSS contract.

The contracting officer alleges that these factors indicate that "the extent of the benefits projected by the cost model will not materialize." The contracting officer argues that, as a result, it is not in the Postal Service's best interest to spend twice as much for the acquisition of TRW's equipment in return for a less than three percent cost benefit.¹⁰

TRW replies that the contracting officer apparently did not have confidence in the life-cycle cost model set forth in the evaluation criteria, and felt free to rely on factors outside of the solicitation. TRW states that by relying on "other factors," the contracting officer effectively eviscerated life-cycle cost as the primary evaluation factor. TRW claims that this was done without apprising offerors of the change in the evaluation criteria, and without giving them a chance to revise their technical proposals and their prices. TRW characterizes the contracting officer as admitting that he disregarded the evaluation criteria, and concludes accordingly that this protest becomes simple to resolve since proposals are required to be evaluated in accordance with the solicitation's stated evaluation criteria.

The contracting officer counters that he did not "abandon" the life-cycle criterion. Instead, he explains that he used the life-cycle cost evaluation factor and "framed that factor more accurately to reflect what had occurred concerning the net present value."

2. Reasonableness of Price

As for the second evaluation factor, TRW is troubled by the fact that although reasonableness of price was not a factor under the original solicitation, it was added to the solicitation by amendment and given too much weight. TRW claims that its system was designed around the fundamental concept that "net present value of total costs" was to be the basic evaluation criteria. After the long development, testing, and approval process, TRW claims that it lacked flexibility to change its production offer to accommodate concerns over initial equipment acquisition costs.

The contracting officer maintains that to the extent that TRW is basing its protest against the use of reasonableness of price as a factor in the selection process, it must be considered a protest against the terms of the solicitation, which is now untimely.

TRW further argues that the price it offered was reasonable for the sophisticated equipment it proposed. TRW contends that although its initial acquisition cost is higher than ECA's, this is not enough to outweigh its superior life-cycle cost savings. According to TRW, even when the acquisition prices are considered, TRW's proposal would still save the Postal Service \$205 million,¹¹ in net present value, over the next five years, and \$586 million over the next ten years.

developed by and licensed by AEG.

¹⁰ TRW claims that statements such as this obscure the real dollar savings that are at stake, since it erroneously compares current nondiscounted dollars used to acquire the equipment with monetary savings over the life of the equipment which have been discounted to net present value.

¹¹ This figure represents the savings in operating cost of the TRW system less the savings in investment cost of the ECA system.

The contracting officer disputes the significance of the \$205 million figure quoted by TRW. He asserts that it is based on the base year portion of the contract that was awarded plus the two one-year option periods.^{12/} The contracting officer notes that if the life-cycle cost is considered for the twenty-five sites awarded under the protested contract, without taking into account the two option periods, ECA's life-cycle cost is superior to TRW's by approximately \$40 million.^{13/} The contracting officer states that this result occurs because the significantly lower initial investment by the Postal Service for the ECA equipment offsets TRW's minimal projected life-cycle cost advantages.

The contracting officer also disagrees with TRW's assertion that its price was reasonable for the equipment it offered. According to the contracting officer, a comparison to the other offers received, the Postal Service estimate,^{14/} the audit findings,^{15/} and the funding limitation revealed that ECA's proposal was the most favorable on each of these categories.^{16/} The contracting officer asserts that TRW was informed during price discussions that its Direct Labor, Fringe Rates, Overhead Rates and License Fees should be reduced to be more reasonable. TRW did not reduce its Direct Labor, Fringe Rates and Overhead, and retained its profit rate of 16.50 percent.^{17/}

3. Technical Evaluation

TRW's concerns with the third evaluation factor involve an offeror's technical evaluation and its ability to fulfill delivery requirements. TRW claims that given the narrow margin between the offerors' technical scores and the fact that this was the third most important evaluation factor, it should not have been a major factor in the award decision, and that with respect to technical matters, it should have been regarded as technically equal or superior to ECA.

TRW claims that to the extent that it was not rated as high as ECA in its technical

^{12/} The contracting officer also points out that although TRW refers to life-cycle cost savings over a ten-year period, the life-cycle cost model is based on a five-year period.

^{13/} TRW disagrees, contending that even if the Postal Service considers only the cost of the initial 25 sites, its proposal offers a savings of more than \$66 million in net present value.

^{14/} The Postal Service estimate for IPSS was developed for the Postal Service by the Mitre Corporation under a separate contract.

^{15/} The contracting officer notes that in its audit, the Inspection Service questioned more than \$150 million of TRW's costs.

^{16/} TRW argues that the initial price comparison made by the Postal Service, in which it compared TRW's highly automated and efficient system to ECA's inefficient system is arbitrary. TRW notes that even the Mitre price estimate cited by the Postal Service states that "[b]ecause of the abbreviated time allowed and lack of relevant data . . . a high degree of uncertainty surrounds these [estimated] costs."

^{17/} TRW disagrees, stating that it lowered its price in its BAFO, and that its overhead costs are reasonable, comparable to those used elsewhere in the company, and have been audited and approved in other Federal procurements.

evaluation, its lower rating was attributable to the fact that the Postal Service gave undue regard to its extensive prior dealings with ECA and AEG.^{18/} TRW further contends that it was unreasonably penalized for the alleged complexity of its system, and that its technical superiority is evidenced by the technical transfusion to ECA which is now occurring. The contracting officer claims that TRW has failed to notify the Postal Service of any technical transfusion or to give any specific information in support of its assertion. He asserts that considerable care has been, and will continue to be taken, to ensure that there will be no improper technical transfusion.

The contracting officer further states that although the technical scores are close, there is more than a three percent differential between the scores of ECA and TRW. The contracting officer notes, however, that if TRW perceives a three percent differential as insignificant, so as to render the two proposals equivalent on this factor, then the life-cycle cost differential between ECA and TRW, which is only 2.8 percent, is also insignificant, and the offerors should be evaluated as equivalent on that factor, to TRW's disadvantage.

4. Other Business and Technical Features

TRW submits that the fourth evaluation factor, which allows for consideration of other business and technical features which offer value, should have included a factor weighting against ECA and AEG because of the overwhelming dependence the Postal Service has on AEG, a foreign company, for products of this type. TRW claims that the Postal Service needs competition for these types of procurements in the future or it will become dependent on a de facto sole-source foreign supplier.

The contracting officer replies by stating that no requirement in the solicitation precludes any foreign entity from competing, either independently or as a licensor teamed with an American company. In addition, the contracting officer notes that there are no foreign end products in the equipment that ECA will be providing.

TRW also claims that the Postal Service disregarded the value of some of the added features in TRW's proposal. TRW states that in addition to offering superior key-entry productivity, its system is flexible in design and modular in construction. TRW's modular construction was demonstrated at the pilot site when TRW was able to accommodate a significant configuration change. The flexible design makes it possible to modify keyer roles or to add new ones. TRW asserts that AEG's design was not able to accommodate the same requirement in the scheduled timeframe.

The contracting officer maintains that, where appropriate, TRW was given credit in its technical score for the technical attributes of its system. However, TRW failed to offer any features beyond those required in the solicitation, and was therefore not given credit under the fourth criterion for other business and technical features. The contracting officer claims that ECA, unlike TRW, offered an initial delivery one month

^{18/} The record establishes that ECA and AEG often team on Postal Service automation procurements, but that they are separate entities whose interests and concerns are not always the same. The record further reflects that AEG has licensed and is licensing its technology to a number of manufacturers other than ECA for use in Postal Service procurements.

earlier, and that this was a technical business feature which was of value to the Postal Service.¹⁷

TRW replies that while the Postal Service held discussions with both TRW and Bell & Howell, neither offeror was left with the understanding that a one-month acceleration in delivery would have any impact in the evaluation. Moreover, TRW claims that the delivery schedule was already being evaluated in the technical factors section so that any participant who offered to deliver the equipment in twelve months should not have been given extra credit under the "other business or technical features" criterion. The contracting officer responds that all offerors were advised that an accelerated delivery schedule was desired, but that adherence to the delivery schedule set for in the solicitation would be acceptable.

B. Meaningful Discussions

The second ground for TRW's protest is that the USPS failed to conduct meaningful discussions with TRW. Specifically, TRW maintains that the Postal Service never informed TRW that its initial acquisition prices exceeded the funding ceiling.¹⁸ TRW alleges that the Postal Service should have provided TRW with a price goal, a government estimate, or information on the dollar amount of its funding limitations.¹⁹ It maintains that discussions with the Postal Service focused on particular cost items and did not concern the overall budget. TRW claims that since the discussions failed to alert TRW to any problem regarding the funding ceiling, they were not meaningful.

TRW further argues that the deficiency of its high initial equipment cost could have been cured through discussions. TRW claims that if it had been informed of the funding limitations problem earlier, it could have amortized front-end costs to obtain a lower initial cost.²⁰ TRW contends that this case is no different than Price Waterhouse, Comp. Gen. Dec. B-220049, 86-1 CPD & 54 (1986), in which the agency failed to advise the protester during discussions that its estimated level of effort and proposed price were considered unreasonably high.

^{18/} The contracting officer has not quantified the estimated cost savings arising from such an acceleration.

^{20/} TRW claims that it was aware of a \$379.3 million capital budget shared between the IPSS and three other projects. TRW contends that it was also aware of the \$25.4 million award that had been made to Westinghouse Corporation for the IOSS project. TRW maintains, however, that it did not know before submitting its proposal, nor does it know presently, how the budget was to be divided or what the funding ceiling was for the IPSS. TRW asserts that based on information it has obtained, its offer should be below budget.

^{21/} TRW cites M.W. Kellogg Co./Siciliana Appalti Costruzioni, S.p.A., Joint Venture v. United States 10 Cl. Ct. 17, 24 (Cl. Ct. 1986); Washington School of Psychiatry, Comp. Gen. Dec. B-192756, 79-1 CPD & 178 at 11, 13 (1979); Ikard Mfg. Co., 63 Comp. Gen. 239 (1984) and Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., Comp. Gen. Dec. B-215303.3; B-215303.4, 85-1 CPD & 394 at 11 (1985) in support of this contention.

^{22/} TRW also claims that as a result of AEG's dominant market position in Postal Service procurements, it is likely that ECA had superior knowledge as to the Postal Service's funding limitations. TRW asserts that ECA constructively knew what awards were made or contemplated and what the budget was for the IPSS. The contracting officer denies these assertions.

The contracting officer disagrees that TRW was not advised that its price presented a budgetary problem for the Postal Service or that its price was unreasonable. The contracting officer states that although no offeror was informed of the specific IPSS funding estimate or advised that its interim offer exceeded the funding ceiling, TRW was advised during both the November and January discussions that there was concern over the funding for the IPSS program.

The contracting officer notes that on November 6, 1990, TRW offered suggestions to the Postal Service on how the Postal Service could reduce its costs in response to a request by the Postal Service. The contracting officer claims this is to be evidence of TRW's understanding that funding problems might exist. He also points to the following statement in TRW's Best and Final Offer:

We also recognize that reasonableness of price, as well as budget, are important issues in the selection. We were clearly reminded of this in the price discussions.

TRW also maintains that the funding ceiling constituted a problem for all offerors. TRW believes that all the offerors were over the Postal Service's hidden budget. TRW suggests that the solicitation amendment which reduced the number of sites for the equipment from thirty-five to twenty-four may have brought ECA and perhaps Bell & Howell within the undisclosed funding budget. TRW argues that the Postal Service should not use its budgetary process to favor some offerors over others, especially when the life-cycle cost savings offered by TRW's proposal are so much greater than those in ECA's proposal.

C. ECA's Unfair Competitive Advantage

TRW's third ground for protest is that the Postal Service provided ECA with an unfair competitive advantage. According to TRW, this solicitation completed a trilogy of procurements. TRW, AEG and Bell & Howell each won a contract to build field test systems. The field test contracts led to early activation contracts for both TRW and Bell & Howell. AEG did not obtain an early activation contract because it did not qualify. TRW claims that this should have eliminated AEG or its licensee from consideration for the production contract.

TRW maintains that it did not become aware that AEG was given its May, 1990 developmental contract until after February 25, 1991.^{23/} TRW claims that its lack of knowledge was due to the fact that this contract was performed in Konstanz, Germany, and no notice of it was published in the Commerce Business Daily. It alleges that the Postal Service "rescued AEG from its failure to qualify for a pilot contract." According to TRW, AEG's developmental contract was a special deal which bestowed a competitive advantage on AEG, without which, AEG may not have been in a position to compete with TRW and Bell & Howell for the production contract.

^{23/} TRW claims that it is not protesting the award of the developmental contract to AEG since that is now moot. Rather, TRW states that it is concerned with the impact of the sole-source award to AEG on this procurement.

The contracting officer states that the only requirement for participation in the IPSS production solicitation was successful completion of the MTA. The contracting officer asserts that the contractors participating in the early activation site were informed, both during the early activation site proposal stage and subsequent to the award of the contracts, that participation in an early activation site would have no impact on the award of the production contract. The contractors were further informed that the only performance that would be considered in the production solicitation was that demonstrated during the MTA.

The contracting officer further contends that the developmental contract which was awarded to AEG was not as advantageous as the contracts that were awarded to AEG's competitors for the following reasons: (1) AEG was not able to manufacture a full-size system; (2) AEG was not able to gain operational system experience in a live mail environment; and (3) AEG's contract did not include the encoding keyers to gain actual experience in the use of the system.

The contracting officer asserts that if any offeror suffered prejudice as a result of the award of the EAPS contracts, it was AEG, not TRW or Bell & Howell. The contracting officer explains that the reason for providing AEG with a developmental contract, while its two competitors had been awarded much larger, non-competitive contracts to expand their systems to production configuration, was simply "to allow AEG, to the extent practical, to remain on 'equal footing' with its competitors."

In reply, TRW alleges that the developmental contract that was awarded to AEG was more advantageous than the one that TRW received because it gave AEG the opportunity to perform production engineering and long-lead procurement on a configuration directly associated with the production system requirements. TRW claims that AEG was not required to produce, demonstrate, test, maintain, or deploy an operational system. TRW claims that while AEG received funding to do production engineering, TRW and Bell & Howell received funding to meet the Postal Service's needs in a live mail environment. TRW states that "[t]his preferential leg up allowed ECA to offer a one month accelerated schedule, to improve its technical proposal, to work on cost savings, and to address pre-existing ECA deficiencies."

TRW requests that we direct award of the contract to TRW. Alternatively, if award to TRW cannot be directed, then TRW requests that we order (1) the termination of the award to ECA; (2) the re-evaluation of all offers in accordance with the announced evaluation criteria;^{1/} and (3) the award to TRW of its bid preparation costs and fees expended in pursuing this protest as compensation for breach of the implied contract to consider all bids fairly.^{1/}

Supplemental Statements

^{24/} TRW notes that due to the disclosure of its profit rate and other cost information, resolicitation would result in an illegal auction.

^{25/} We are without authority to award offer preparation costs or attorneys fees in a protest proceeding. See DHL Airways, Inc., P.S. Protest No. 89-36, July 7, 1989.

The foregoing discussion of TRW's protest sets out the views expressed in its initial protest, the contracting officer's statement and rebuttal, and TRW's comments in response to those submissions and following its protest conference. The other interested parties have participated in the protest.

Bell & Howell has intervened in this protest on the specific ground that the USPS provided AEG/ECA with an unfair competitive advantage. Bell & Howell claims that the sole source award of the IOSS to AEG/ECA provided it with an unfair competitive advantage to the extent that AEG/ECA had the ability to influence the specification of the interfaces between IOSS and IPSS.^{1/}

The contracting officer states that the participation by AEG in the MTA contract for the IOSS did not provide AEG with an unfair competitive advantage nor did it give AEG the ability to influence the specification of the interfaces between the IOSS and the IPSS. The contracting officer states that the same technical information concerning the IOSS and IPSS interface specifications was provided to all offerors during the IPSS solicitation process.

Bell & Howell also claims that improper favoritism was shown towards ECA when it was given credit under the fourth evaluation criteria for delivering its equipment in twelve months instead of thirteen. Bell & Howell asserts that USPS never informed Bell & Howell that a one-month improvement in delivery would be a decisional factor. Bell & Howell states that it would have made a firm commitment to meet the earlier schedule at no added cost if its importance in the evaluation of the award had been understood.^{1/}

Bell & Howell further contends that AEG/ECA may have received an unfair advantage to the extent that it utilized advanced character recognition technology to create a savings in its life-cycle cost. Bell & Howell declares that it did not include this technology in its system because USPS made it clear that it would be added at a later time. Bell & Howell asserts that addition of this technology would increase throughput and, thus, reduce the life-cycle cost. If the technology was added early in the IPSS production process, that would reduce any advantage gained by any offeror who included it in its proposal for the production contract. Therefore, the throughput advantage obtained by offerors who used such technology should not have been considered in the evaluation of the proposals.

Bell & Howell also alleges that the USPS amended the solicitations in order to accommodate AEG/ECA. According to Bell & Howell, the solicitation as originally issued provided that, while the first fifteen minutes of downtime were to be charged against throughput, the remainder would be charged against maintenance costs. Bell & Howell asserts that on December 11, 1990, USPS amended the life-cycle cost formula

^{26/} Bell & Howell misstates the facts regarding the procurement of the IOSS equipment. Neither AEG or ECA was awarded the IOSS production contract. AEG's role in the IOSS procurement arises out of its participation in the MTA phase and its license of technology to Westinghouse.

^{27/} Bell & Howell urges that if it had not had to deal with the demands of its pilot site contract but had been able to use its resources to optimize its system for the production contract, it would have been able to meet the an earlier delivery schedule as well.

to remove the component related to maintenance costs. Bell & Howell believes that AEG/ECA had very substantial downtime during the MTA, and that this amendment enabled AEG/ECA to remain in the competition.^{1/}

In reply, the contracting officer states that it is simply not true that the equipment designed by AEG encountered substantial downtime during the MTA. Rather, the data collected during the equipment test periods showed that there were no equipment failures. He further states that all offerors met the "go/no-go" factors necessary to compete for the production solicitation.^{1/}

Finally, Bell & Howell argues that the equipment it offered had more flexibility and greater redundancy than that offered by AEG/ECA and TRW. Bell & Howell claims that it was able to easily reconfigure the equipment tested at the MTA to meet the requirements for remote operation at the early activation pilot site. It also delivered its pilot system several months before TRW and at a lower development cost. Bell & Howell states that the fact that AEG/ECA did not qualify for a pilot site indicates that its system had to be less flexible than that of other offerors.

While AEG was not an offeror for the IPSS production contract, it argues that it is an interested party in this protest since it has an economic interest which may be affected by this pro-test.^{1/} AEG also states that since it is the party that is best qualified to respond to some of TRW's allegations, it should be allowed to do so.

AEG responds in detail to TRW's and Bell & Howell's assertion that AEG was given a competitive advantage in the IPSS procurement process by virtue of its receipt of the developmental contract. AEG begins by explaining why it did not propose for an EAPS contract when the Postal Service requested proposals.^{1/} AEG then compares the developmental contract it received with the one received by TRW and alleges that TRW's contract was, in fact, more beneficial. AEG further claims that it was TRW who got an unfair advantage in the IPSS procurement when the Postal Service waived

^{28/} Bell & Howell and TRW also allege that AEG's system may have failed one or both of the "go/no-go factors" found in Attachment cc to the MTA solicitation, thereby rendering AEG ineligible to compete for the production contract.

^{29/} Bell & Howell's objections to the amendment issued on December 11, 1990, are untimely. "Protests of alleged deficiencies in the solicitation after the receipt of initial proposals must be received not later than the next closing date and time for the receipt of proposals." PM 4.5.4 c. This timeliness requirement is jurisdictional and cannot be waived. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990. Since Bell & Howell did not raise this issue until March 18, 1991, we are foreclosed from further review of it.

^{30/} AEG cites Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1315 n.14 (D.C. Cir. 1971); NEFF Instrument Corp., Comp. Gen. Dec. B-216236, 84-2 CPD & 649, December 11, 1984 and Carol L. Bender, M.D., Comp. Gen. Decs. B-196912, B-196287, 80-1 CPD & 243, April 1, 1980 in support of this contention.

^{31/} AEG explains that since the EAPS project had not been mentioned in the original solicitation, AEG had committed its resources to producing an IPSS system for Canada Post in the interim between the MTA and the production award. AEG claims that since it was not able to reassign its resources to meet the Postal Service's scheduling needs, it later proposed an alternative, which the Postal Service accepted.

TRW's failure to submit its offer for the MTA contract in a timely manner.^{32/} Finally, AEG disputes TRW's assertion that there is a risk to competition from the Postal Service becoming dependent on AEG's technology.^{33/}

ECA's comments consist of a detailed point-by-point refutation of TRW's allegations, which, in the main, repeat at length that put forth by the contracting officer. ECA states that the Postal Service correctly applied the evaluation criteria. ECA argues that although the four evaluation factors were listed in descending order of importance, nothing in the solicitation suggested that life-cycle cost was to be given predominant or paramount importance in the evaluation. ECA maintains that in order for TRW to have been awarded the contract, the Postal Service would have had to determine that life-cycle cost was the determinative evaluation factor in the solicitation. With respect to TRW's allegations of favoritism towards AEG, ECA argues that these allegations are untimely, and, as well, that TRW has failed to meet its burden of proof since it has not shown that there was any nexus between the award of a pilot contract to AEG and the award of a production contract to ECA.

Discussion

There is an initial question whether TRW has standing to challenge the award of the IPSS contract. The Procurement Manual vests this office with jurisdiction to decide protests where the protester is an "interested party." PM 4.5.2 a. The test to determine whether a protester is an interested party is "whether the protester would be eligible for award of the contract if the protest were upheld." Compu-Copy, P.S. Protest No. 90-21, July 5, 1990, quoting Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. Here, TRW is an interested party because it is challenging, among other things, the evaluation of its proposal. If TRW's proposal was evaluated improperly according to the evaluation criteria set out in the solicitation, TRW may be in line for award under a proper evaluation. Under these circumstances, TRW has the requisite direct interest to maintain this protest. Sheldon Transfer & Storage Co., P.S. Protest No. 91-08, March 13, 1991, reconsideration denied, April 13, 1991.

There are also concerns about whether AEG and Bell & Howell are interested parties in this protest. We have, in a prior case, stated as follows:

The requirement that a party be "interested" serves to ensure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided.

Waterloo Building Trades Council, P.S. Protest No. 77-13, May 17, 1977. AEG and Bell & Howell are interested parties under the Waterloo Building Trades Council standard, and, therefore, we will consider their timely comments.

^{32/} According to AEG, TRW's offer was submitted approximately five to six weeks late.

^{33/} AEG states that the Postal Service has been, and continues to be, the beneficiary of vigorous competition. Even when the Postal Service has wanted to procure equipment based on already-licensed AEG technology, it has required AEG to license that technology to at least three manufacturers who then compete for the business.

A. Evaluation Criteria

In a case such as the present one, where there is an abundance of factually complex claims, it is important to set forth the standards by which we review the challenged actions of the contracting officer.

The determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. American Airlines, Inc., P.S. Protest No. 84-72, December 14, 1984. When such a determination rests upon the judgment of technical personnel, we will not substitute our views for their considered judgment in the absence of fraud, prejudice, or arbitrary and capricious action. See Hi-Line Machine, Inc., et al., P.S. Protest No. 85-6, March 7, 1985. The protester bears the burden of affirmatively proving its case. Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position, Michaletz Trucking, Inc., P.S. Protest No. 85-28, June 14, 1985.

POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985 (footnote omitted).

Bearing these standards in mind, we examine TRW's contention that award to ECA is contrary to the evaluation factors set forth in the solicitation.

TRW contends that it should have received award of the IPSS contract since it was rated highest under the most important evaluation factor, life-cycle cost. Award was to be made to the proposal which offered the best value to the Postal Service, considering four evaluation factors listed in descending order of importance without specifying the weight that was to be assigned to each one.

TRW argues without support that the only reasonable interpretation of the phrase "in descending order of importance" is "that the weight assigned to the first factor must be reasonably more substantial than the second factor, and so on down the line." We disagree.

Where, as here, evaluation factors are listed by relative importance but without having specific weights assigned, the difference in weight accorded one factor and that accorded the factor either immediately preceding or immediately following it, must be small. If one factor is to have predominant (i.e. 90% - 10%) consideration over the other factors, it should be disclosed to the offerors.

Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988 (citations omitted).

In Sperry Rand Corp., Univac Division, Comp. Gen. Dec. B-179875, 74-2 CPD & 158, September 12, 1974, the GAO held that where the first of three factors listed in descending order of importance is assigned the undisclosed weight of 60 percent, while the second and third factors are assigned the weights of 22 percent and 18 percent respectively, the first criterion was a predominant criterion, and its relative value in

relation to the other two factors should have been disclosed to the offerors. See also BDM Services Company, Comp. Gen. Dec. B-180245, 74-1 CPD & 237, May 9, 1974 (the predominant value should have been disclosed to the offerors where the first of the five evaluation factors listed in order of importance constituted 72 percent of the total technical evaluation score and was 6 times the weight of the second factor).

In the instant case, since the solicitation did not state that any one factor was to be given predominant or paramount importance in the evaluation, the contracting officer could not have accorded any factor substantially more weight over others. Thus, the fact that TRW was rated highest in the first evaluation factor does not necessarily mandate award of the contract to TRW, as TRW contends.^{1/}

TRW argues that the contracting officer changed the evaluation criteria when he relied on "other factors" not listed in the solicitation in evaluating the life-cycle cost factor. The contracting officer states that he "used the life-cycle cost evaluation in its entirety and framed that factor more accurately to reflect what had occurred concerning the net present value."^{1/}

It is well settled that the evaluation of a proposal must be based on factors outlined in the solicitation. Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990; Columbia Airline, Inc., *supra*. The contracting officer has "broad discretion in the selection and weighting of evaluation criteria to determine which offers will best meet the Postal Service's actual needs." Frederick Manufacturing Company, P.S. Protest No. 87-13, April 8, 1987. However, "[o]nce offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme." POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985, quoting PAE GmbH, Comp. Gen. Dec. B-212403.3 *et al.*, 84-2 CPD & 94, July 24, 1984.

In this case, the contracting officer correctly applied the life-cycle cost formula set forth in the solicitation and properly determined that TRW's life-cycle cost was 2.8 percent lower than ECA's. However, the contracting officer improperly looked at other factors not listed in the solicitation to diminish the significance of the difference between TRW's and ECA's life-cycle cost. Although the contracting officer's actions were improper, they did not result in any prejudice to TRW, because even if TRW was given

^{34/} TRW claims that only when criteria are listed without an identification of the relative order of importance can they be applied as if they were of approximately equal importance. To Reaves, Pogue, Neal & Rose, 52 Comp. Gen. 686 (1973); Dikewood Services Co., 56 Comp. Gen. 188, 76-2 CPD & 520. These cases are inapplicable. In both, the solicitation did not indicate whether one factor would be paramount or subordinate to another. As a result, the GAO found the two factors should have been weighed equally. Here, the factors were listed in descending order of importance, thereby alerting offerors to the fact that the evaluation factors would not be weighed equally.

^{35/} The contracting officer relies on Pitney Bowes Inc., P.S. Protest No. 89-22, July 7, 1989 and B.B. Saxon Co., Inc., Comp. Gen. Dec. B-190505, 78-1 CPD & 410, June 1, 1978 to support his contention that he acted properly in taking into account other factors which affect the costs which the Postal Service will have to bear. The cases cited deal with complaints that the evaluation schemes provided unfair advantages to incumbent contractors. They do not address the issue of whether the contracting officer may use factors outside of the evaluation scheme in deciding what weight to give one of the evaluation criteria. Consequently, we find these cases of little assistance.

more credit under the first evaluation factor for its lower life-cycle cost, its relative standing with respect to the awardee would remain unchanged as long as its proposal was properly rated lower than ECA's in the second and third evaluation criteria.^{36/} See, e.g., Huff & Huff Service Corporation, Comp. Gen. Dec. B-235419, 89-2 CPD & 55, July 17, 1989 (no prejudice to protester where the agency failed to discuss the protester's deficiencies in one area since even if the protester had received the additional points available in this area, its competitive position with respect to the awardee would not have changed); Kunkel-Wiese, Inc., Comp. Gen. Dec. B-233133, 89-1 CPD & 98, January 31, 1989 (no prejudice to protester where the agency improperly evaluated its score in one factor because even if the protester received a perfect score under this one criterion, it would not have changed the selection decision in view of the awardee's demonstrated superiority in other important technical areas); Custom Janitorial Service, Comp. Gen. Dec. B-205023, 82-2 CPD & 163, August 23, 1982 (no reversible error where agency used an improper scoring method because even if proper scoring were used, the protester would not receive award); Book Fare, Inc., P.S. Protest No. 80-29, July 3, 1980 (harmless error where the contracting officer mis-evaluated the awardee's proposal by giving it more points than it was entitled to under one factor, since the awardee remained the higher ranked offeror even when properly evaluated); Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986 (no prejudice to protester where scoring of its technical proposal may have been improper because, even if scoring was done according to method proposed by protester, relative standing of the offerors would not change).

With respect to the second evaluation factor, TRW contends that the price it offered was reasonable for the sophisticated equipment it proposed.^{37/} The solicitation specified three components that would be used in evaluating the reasonableness of price of each proposal: (1) the acquisition price proposed by an offeror, (2) a comparison between the Postal Service's estimated price and the acquisition price proposed by an offeror and (3) whether the acquisition price, as proposed by an offeror, was within the funding limitations.

The record reflects that ECA's acquisition price was \$315 million, or 53 percent, lower than that offered by TRW. A review of the estimate which was prepared for the Postal Service also reveals that ECA's acquisition price for the total contract was two percent lower than the estimate, while TRW's price was 108 percent greater. Furthermore, ECA's offer was within the \$71.2 million funding limitation, while TRW's offer significantly exceeded the capital funding available. Because ECA's offer proposed the lowest acquisition price, compared favorably with the independent estimate, and was within the capital funding limitation, the contracting officer was not arbitrary in con-

^{36/} As discussed below, we find no basis to dispute the contracting officer's evaluation of the second and third factors.

^{37/} To the extent that TRW objects to the use of reasonableness of price as a factor in the selection process, its protest is untimely. "Protests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4 b. Since TRW did not raise any allegations of deficiencies in the solicitation until after award, this issue cannot be considered on its merits and is dismissed. Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989.

cluding that ECA's offer contained a more reasonable price, and, accordingly, should have received a substantially higher score than TRW's offer as to this criterion.

We next address TRW's contention that given the narrow margin between the offerors' technical scores and the fact that this was the third most important evaluation factor, it should not have been a major factor in the award decision. Despite TRW's attempt to suggest that the technical differences between its proposal and ECA's were insignificant, the record reflects that the technical evaluators rated ECA's technical proposal higher than TRW's proposal.^{1/} There is nothing in the record to suggest that this evaluation was unreasonable.

TRW's allegations that its lower technical rating was attributable to the fact that the Postal Service gave undue regard to its extensive prior dealings with ECA and AEG are unavailing. It is well-settled that a competitive advantage accruing to an offeror by virtue of prior experience "need not be discounted or equalized in favor of the other offerors so long as it does not result from preferential or unfair treatment by the government." Pitney Bowes Inc., P.S. Protest No. 89-22, July 7, 1989. See also Lingtec, Incorporated, Comp. Gen. Dec. B-208777, 83-2 CPD & 279, August 30, 1983.

As set forth below, neither AEG or ECA has received preferential or unfair treatment in this procurement, and neither TRW or Bell Howell has substantiated any allegations that prior, unrelated procurements have led to unfair preferential treatment by the Postal Service. The solicitation specifically stated that the offeror's experience was one of the areas on which the technical score would be based. In the absence of unfair preferential treatment favoring AEG or ECA, there is nothing improper in the Postal Service's consideration of ECA's and TRW's prior experience in evaluating their technical proposals.^{1/}

TRW also claims that improper favoritism was shown to ECA in the Postal Service's application of the fourth evaluation criterion. We agree that the use of the fourth evaluation criterion as an evaluation factor was flawed. "The Postal Service may make award on the basis of any factors it chooses, consistent with applicable regulations, so long as the evaluation and award factors in the solicitation fairly advise prospective offerors of the basis on which their offer[s] will be considered for award." Hill's Capitol Security, Inc., P.S. Protest No. 90-25, July 20, 1990, quoting Sea-Land Service, Inc., P.S. Protest No. 77-28, August 18, 1977. The fourth evaluation factor was too vague to advise offerors fairly of the basis on which their proposals would be considered. However, even when the fourth evaluation factor is eliminated from consideration, no prejudice results to TRW or Bell & Howell, since, as stated more fully below, the contracting officer's determination to award to ECA may be upheld without reliance on

^{38/} The contracting officer asserts that the difference between the two technical proposals is greater than 3 percent. Our independent review of the technical scores suggests that the difference between ECA's and TRW's technical score was slightly more than 4.5 percent. If anything, the contracting officer was conservative in the preference he gave to ECA as to this criterion.

^{39/} TRW also claims that its technical superiority is evidenced by the technical transfusion which is now taking place. In the absence of substantive evidence presented by TRW to substantiate its own position or to contradict the contracting officer's, we must accept the contracting officer's assertion that no technical transfusion is taking place. Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.

this criterion.⁴⁰

Since the solicitation did not give predominant weight to any one of the criteria, and the difference in weight accorded between any two factors had to be small, the contracting officer had to consider all the evaluation criteria in determining the comparative merits of the proposals. If the only evaluation criterion had been life-cycle cost, as it was in the solicitation as originally issued, TRW would have been entitled to award. However, the solicitation was amended to include other evaluation criteria. While TRW's proposal offered a relatively small advantage in life-cycle cost, ECA's proposal offered a relatively large advantage in price, and it was rated technically superior to TRW's proposal. It was within the bounds of the contracting officer's discretion to determine that the advantages which ECA's proposal presented in the second and third evaluation criteria were sufficient to outweigh the advantage TRW's proposal presented in the first criteria. See Litton Systems, Inc., Comp. Gen. Dec. B-239123, 90-2 CPD & 114, August 7, 1990; McShade Government Contracting Services Comp. Gen. Dec. B-232977, 89-1 CPD & 118, February 6, 1989; Novadyne Computer Systems, Inc., P.S. Protest No. 90-49, November 9, 1990. Therefore, we find that the contracting officer's determination to award the contract to ECA was reasonable.

B. Meaningful Discussions

TRW contends that discussions conducted with it were not meaningful because it was never informed that its initial acquisition prices exceeded the funding limitations. Our regulations provide that discussions must be conducted so as to "[a]dvise the offeror of deficiencies in its proposal, in terms of Postal Service requirements, but not deficiencies relative to other proposals, nor deficiencies resulting from the offeror's lack of diligence or competence. . . ." PM 4.1.5 g.3. The Procurement Manual further states that "[t]he content, form, and extent of the discussions is a matter of the contracting officer's judgment." PM 4.1.5 g.3. The contracting officer is only required to proceed in a manner that alerts offerors to perceived weaknesses in their proposals. See Cohlmya Airline, Inc., *supra*; Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83 February 14, 1986.

The contracting officer states that TRW was informed by the Postal Service negotiator on more than one occasion that its price was unattractive and unreasonable. TRW maintains that the Postal Service's discussion focused on particular cost items, not on the overall budget. When there is a conflict between a statement of a protester and the contracting officer, we accept the contracting officer's statement in the absence of evidence sufficient to overcome the presumption of correctness which attaches to the contracting officer's action. See Neil Gardis & Associates, Inc., P.S. Protest No. 89-44, September 15, 1989; Arthur D. Berry, P.S. Protest No. 90-56, November 27, 1990. Therefore, we adopt the contracting officer's position that TRW was informed that its price was unreasonable.

Even if TRW was not informed of specifics of the IPSS funding limitations or advised that its offer exceeded this ceiling, the fact that it was told that its price was

^{40/} Since we have found that the fourth evaluation factor was vague on its face, we need not consider whether it was properly applied.

unreasonable should have alerted TRW to the possibility that its price exceeded the funding limitations.^{41/} Further, although TRW did not know the dollar amount of the funding limitation, it was on notice from Section M.2 of the solicitation that if its price exceeded the funding limitation, it would not receive award. In addition, from the record, it is apparent that TRW was reminded of the importance of price in its discussions since it said so in its BAFO.

Contracting agencies are not required to conduct all-encompassing discussions. Rather, they are required only to lead offerors reasonably into those areas of their proposals which are considered deficient in the context of the procurement. Business Information Management Corporation, Comp. Gen. Dec. B-238875, 90-2 CPD & 45, July 17, 1990; Centex Construction Company, Inc., Comp. Gen. Dec. B-238777, 90-1 CPD & 566, June 14, 1990. The contracting officer reasonably apprised TRW of the perceived weaknesses in its proposal in the area of price.

Finally, it is less than clear that TRW would have been able to bring its price within the funding ceiling if the Postal Service had specifically advised it that its offer exceeded the ceiling. On the one hand, TRW claims that if it had been informed of the funding limitations problem earlier it could have amortized front-end costs to obtain a lower initial cost. On the other hand, TRW claims that after the long development, testing, and approval process in the MTA, it lacked flexibility to change its production offer to accommodate concerns over initial equipment acquisition costs. "Speculative injury does not suffice as a basis on which to sustain a protest." DHL Airways, Inc., P.S. Protest No. 89-45, July 31, 1989.

C. ECA's Unfair Competitive Advantage

TRW's final claim is that the Postal Service provided ECA an unfair competitive advantage since it awarded AEG a developmental contract that was more advantageous than the one it awarded to TRW.^{41/} Whether AEG's developmental contract was more advantageous than TRW's is important only to the extent that it gave ECA an unfair advantage in the production phase of the procurement. TRW has not shown how ECA's production proposal was enhanced by the developmental contract awarded to AEG, except to the extent that it alleges that ECA was able to offer a one-month acceleration on the delivery of its equipment as a result of AEG's participation in the pilot contract.

We are unable to see how TRW was prejudiced by AEG's participation in the

^{41/} TRW cites Price Waterhouse, Comp. Gen. Dec. B-220049, 86-1 CPD & 54, January 16, 1986 to support its position that its protest should be sustained since meaningful discussions were not held. In Price Waterhouse, the two technically acceptable offerors proposed levels of effort substantially in excess of the agency's estimates. The GAO concluded from the record that the agency either did not discuss estimated levels of effort with the offerors or that it discussed the issue only with the awardee. In the case before us, however, TRW was apprised that its price was unreasonable.

^{42/} Since TRW states that it is not protesting the award of the developmental contract to AEG, but its impact on the production phase, there is no issue as to whether our regulations were properly followed in awarding this contract.

developmental contract.⁴¹ Even if TRW could show that award to AEG of the developmental contract made it possible for ECA to furnish the equipment in twelve months, the outcome of the award would remain unchanged. The only benefit that ECA derived from its offer was that it received extra points under the fourth evaluation criterion. However, we have determined that the use of this criterion in the solicitation was flawed. As a result, TRW's claim that ECA received an unfair advantage in its production proposal by virtue of AEG's participation in its sole-source contract is unsubstantiated. Indeed, it is just as likely on the facts presented that TRW and Bell & Howell received greater advantages under their EAPS contracts than AEG did under its contract. Given the indeterminate state of facts here, we must uphold the contracting officer's position that AEG and ECA did not receive an unfair advantage.

As for Bell & Howell's claim that ECA/AEG received an unfair competitive advantage since it had the ability to influence the specification of the interfaces between the IOSS and the IPSS, we find that this claim is unsupported by the record. Furthermore, since Bell & Howell has provided no factual basis for this assertion, we afford it no weight. Pacific Bell, P.S. Protest No. 90-51, December 21, 1990.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts & Property Law

[Compared to original 5/16/95 WJJ]

^{43/} Although TRW alleges that ECA was able to offer a one-month acceleration as a result of AEG's participation in the developmental contract, this allegation is not supported by any evidence outside the protester's bare assertions, and must therefore fail for lack of proof. Service America Corporation, P.S. Protest No. 86-96, January 14, 1987.