

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

60101

FILE: B-183749

DATE: October 29, 1975

MATTER OF: Ocean Technology, Inc.

97594

DIGEST:

1. In absence of probative evidence beyond mere allegation by protester, GAO cannot conclude that agency disclosed protester's technical approach and pricing data. Moreover, record indicates that even if disclosure had occurred it did not operate to protester's prejudice.
2. Protester's allegation that technical proposals were evaluated according to criteria other than those established in RFP is without merit. RFP did not contain criteria for evaluation of technical proposals but provided that technical and financial capability of offerors would be determined based on preaward survey and record shows that all technical proposals were considered acceptable and that award was made to lowest responsible offeror.
3. Protester's allegation that agency was considering award to offeror who had been denied SBA Certificate of Competency is moot since agency made award to another offeror.
4. Protest that reopening of negotiations in order to modify first article clause of solicitation was not justified is denied where record shows that protester in best and final offer took exception to first article clause and agency initiated modification in response to protester's objection.

By letter of April 26, 1975, Ocean Technology, Inc. (OTI) lodged a protest against any award resulting from RFP No. N00017-74-R-5001(REV). OTI advances three bases for its protest: (1) the conduct of discussions between Navy representatives and other offerors inadvertently permitted access by competitors to OTI's unique technical approach and detailed pricing data; (2) the evaluation of Technical Proposals was conducted according to criteria other than those established in the RFP; and (3) any award to GAP Instruments Corp., whose total issue of preferred stock is owned by the Navy, would create a gross conflict of interest. In addition, protester asserts that award should have been made to OTI following the best and final offers which were submitted December 16, 1974, since at that time OTI was the lowest responsible offeror.

The Department of Navy, Naval Sea Systems Command (NAVSEA) has responded that it fully complied with the requirements of Armed Services Procurement Regulation (ASPR) § 3.507.2 (1974) and has safeguarded data supplied by OTI to the maximum extent possible. Second, NAVSEA reports that the RFP contains criteria for evaluation of the price proposals but none relative to technical proposals, since award would be made to the lowest acceptable offeror; a preaward survey would determine whether a potential contractor is both technically and financially capable of producing in accordance with the RFP requirements. Third, the Navy contracting officer has determined that GAP Instruments is not responsible either technically or financially. By letter of May 29, 1975, the Small Business Administration has refused to grant GAP a Certificate of Competency. Finally, NAVSEA indicates that even though the protester was the low offeror at the time proposals were received on December 16, 1974, award could not be made to the protester without discussions with all other offerors in the competitive range because of an exception taken by the protester.

With regard to the protester's allegation that competitors had access to OTI's technical approach and detailed pricing data, little evidence is proffered in support of the allegation. NAVSEA, for its part, has asserted that it complied with ASPR § 3-507.2 in that no information contained in any proposal or quotation was made available to the public or to anyone within the Government not having a legitimate interest therein. In the absence of probative evidence of improper agency activity we can not conclude that the Navy disclosed OTI's technical approach and detailed pricing data.

There are indications in the record which indicate that even if there were some disclosure of OTI's information, such disclosure could not have operated to OTI's prejudice. It appears that essentially the same technical approach which OTI thought unique had been proposed from the outset by other offerors. With respect to the alleged disclosure of detailed price data, a comparison of the December 1974 best and final prices with those of the March 1975 best and final offers shows that the awardee did not change its price in the second best and final, but that OTI had increased its price, thus losing its position as low offeror which it held in the December 1974 best and finals.

We find the protester's allegation that the evaluation of Technical Proposals was being conducted according to criteria other than those established in the RFP to be without merit since the RFP

contains no criteria relative to the evaluation of Technical Proposals. All offerors who submitted technical proposals were found to meet the required performance specification. In addition, while paragraph 45 of Section C of the RFP sets forth the Government's right to conduct a Preaward Survey to determine if the prospective contractor is both technically and financially able to perform, the RFP itself contains only criteria for the evaluation of price proposals.

Concerning protester's allegation that NAVSEA might have been considering an award to GAP Instruments, the record indicates that the issue is moot since NAVSEA by letter of June 12 notified this Office of its award to G&S Systems, Inc., citing the urgent need to meet schedule requirements on the Litton DD 963 contracts as justification for award during the pendency of this protest.

Finally OTI maintains that the Navy should have made award to OTI on the basis of its position as low offeror based on the December 1974 best and final offers. NAVSEA admits that OTI was the low offeror at the time, but insists that an award could not be made at that time because of the exception taken by OTI when it submitted its best and final offer. OTI included the following language in its December 11, 1974 letter accompanying its best and final offer:

"Prices for all items of the RFP are predicated on the presumption that the Contracting Officer will, within 30 days after the date of contract provide OTI with written authorization to:

1. Acquire long lead time materials for all contracted items.
2. Acquire all materials required for production of Items 0004, 0007 and 0010 and spares associated therewith (Items 0005, 0008 and 0011) if concurrent delivery of spares is required.
3. Proceed with production of Items 0004 and 0007 and Items 0005 and 0008 if concurrent delivery of spares is required.

It is further understood all costs associated with such authorization are allocable to the progress payments clause of the contract."

The same language was contained in the letter of June 26, 1974, accompanying the submission of OTI's proposal, but went unnoticed due to a change in NAVSEA personnel conducting the negotiations in this procurement.

OTI, in its comments on the agency report, characterizes this language as:

"* * * an advance request for Contracting Officer's authorization to acquire specific materials or components to commence production to the extent essential to meet production quantity delivery requirements prior to First Article approval."

NAVSEA, however, treated the OTI language as an "exception" to the RFP. NAVSEA reports that even though the protester was the low offeror at the time best and final offers were received on December 16, 1974, because of the exception taken by OTI, discussions had to be conducted with OTI and therefore award could not be made without discussion with all other offerors in the competitive range. The Contracting Officer felt that the exception taken by OTI would work an injustice on the other competing companies since the other companies evidently were willing to enter into the contract on the basis of the provisions of the First Article provision which vested in the Contracting Officer the discretion to authorize acquisition of specific materials or components, while OTI did not appear willing to take such a risk.

Negotiations were reopened by NAVSEA by means of a letter of January 10, 1975, which stated that a review of the best and final offers "has revealed several potential conflicts between the proposed technical approach and the cost proposal which cannot be substantiated. Also several offerors have taken exception to the terms and conditions of the solicitation." These discussions led to the following modification to the solicitation.

"With regard to Paragraph (g) of the 1st Article Clause, the Government subsequent to award will authorize the contractor to incur costs for the procurements of material and labor, if requested, provided, in no event shall the Government be obligated to reimburse the contractor, in event of a termination, in any amount in excess of \$50,000.00."

OTI argues that the reopening of the negotiations and subsequent modification of the solicitation were improper and requests that this Office find that award should have been made to OTI on the basis of the December 1974 best and final offers.

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We have recognized that once negotiations have been held and best and final offers received, negotiations should not be reopened unless it is clearly in the best interest of the Government to do so, since the reopening of negotiations in the absence of a valid reason tends to undermine the integrity of the competitive negotiation process. B-176283(1) and (3), February 5, 1973. Since the Navy reopened negotiations in order to modify the first article clause of the solicitation in response to an exception taken to the clause in the protester's best and final offer, we believe the agency's action was justified.

In light of the foregoing, the protest of OTI must be denied.


Deputy Comptroller General
of the United States