

**DECISION**



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

60245 97652

FILE: B-184176

DATE: November 28, 1975

MATTER OF: Hydrosystems, Inc.

**DIGEST:**

1. Where initial proposal was basically acceptable from technical standpoint, except that computer offeror proposed to incorporate in equipment was not available on Government-furnished equipment basis proposed, it cannot be concluded that offer of computer rendered proposal outside competitive range where simple substitution of another computer was equally acceptable.
2. RFP clause providing for addition of evaluation factor to cost proposal for rent-free use of unscheduled "Government production and research property" does not pertain to material or equipment being furnished for incorporation into contract end product.
3. Contention that offeror was allowed to modify proposal after "best and final" offer is denied, since although telegram extending date for submission of revised proposal referenced late proposals provision, it did not contain additional statements required by ASPR that discussions have been concluded and that offerors are being given opportunity to submit "best and final" offer. In any event, where exception in proposal is not discovered until after submission of "best and final" offer, procurement activity has no alternative but to institute another round of negotiations.
4. Reduction in price during negotiations does not imply that offeror had access to prices submitted.
5. Cost modification was appropriately rejected as late, since it was received after deadline for "best and final" offers and, on basis of offers received by that time, it was not amendment of "otherwise successful" proposal, exception to rule against consideration of late proposal.
6. Where contracting agency has indicated that certain information in agency report on protest is "For Official Use Only," withholding of information by GAO is proper.

Hydrosystems, Inc. (Hydrosystems), has protested against award of a contract to Sperry Systems Management (Sperry) under request for proposals (RFP) No. N61339-75-R-0026 issued by the Naval Training Equipment Center (NTEC), Orlando, Florida.

The RFP was sent to seven prospective offerors. Procurement by negotiation had been approved under the "public exigency" authority of 10 U.S.C. § 2304(a)(2) (1970), as implemented by Armed Services Procurement Regulation (ASPR) § 3-202.2(vi) (1974 ed.). Five companies sent representatives to the preproposal conference of which only three responded to the RFP: Hydrosystems, Sperry and General Dynamics. Technical ratings were assigned to each proposal with the determination that each offeror had a technically acceptable proposal. Discussions were held with the respective offerors after which each was requested to furnish written answers to the technical questions presented and any other proposal modification by April 28, 1975. All three offerors responded within the timeframe. Further negotiations were held with all offerors during May 28 through 30, 1975. As a result of Hydrosystems' protest to NTEC of May 23, 1975, Sperry was advised that the UYK-20 computer it proposed to use for the simulation programs in the Trident ship control trainer offered would not be Government-furnished equipment (GFE) contrary to its proposal. "Best and final" offers were requested by June 6, 1975. Sperry's "best and final" offer of June 5, 1975, replaced the UYK-20 computer with a UYK-15 computer. A "best and final" offer also was received from Hydrosystems. Thereafter, revision of that offer was received on June 12, 1975. The revision was rejected as a late proposal. Hydrosystems protested to our Office against an award to any offeror other than itself. However, the contract was awarded to Sperry on June 18, 1975, pursuant to ASPR § 2-407.8(b)(3) (1974 ed.) because of the priority of the procurement.

Hydrosystems contends that because Sperry initially included the UYK-20 computer, which was not available as GFE, its proposal was not within the competitive range nor "responsive" to the solicitation. In this regard, ASPR § 3-805.1(a) (1974 ed.) requires discussions with all responsible offerors who submit proposals within a competitive range. The competitive range is determined on the basis of price or cost and technical and other salient factors and includes all proposals which have a reasonable chance of being selected for award. ASPR § 3-805.2(a) (1974 ed.). A proposal is in the competitive range unless it is so technically inferior or out of line with regard to price that meaningful negotiations are precluded. See 48 Comp. Gen. 314, 317-318 (1968).

The determination of whether a proposal is technically acceptable and within the competitive range is a matter of administrative discretion and will not be disturbed absent a clear showing that the determination was unreasonable. 52 Comp. Gen. 382, 385 (1972). From the record before our Office, it appears that Sperry's initial proposal was basically acceptable from a technical standpoint, except that the UYK-20 computer it proposed to incorporate in the ship control trainer is not available on a GFE basis. Although the initial determination that Sperry was in the competitive range overlooked the proposed use by Sperry of the UYK-20 computer on a GFE basis, we are unable to conclude that the offer of the computer rendered the proposal so technically inferior as to preclude meaningful negotiations where, as here, the simple substitution of a UYK-15 computer was equally acceptable. As to Hydrosystems' contention that use of UYK-20 rendered Sperry's proposal "nonresponsive," the concept of competitive range--whether the proposal is or can readily be made acceptable--is incompatible with responsiveness. Therefore, the test of "responsiveness" as used in formal advertising is not applicable in procurement by negotiation. Linolex Systems, Inc., et al., 53 Comp. Gen. 895, 896-897 (1974), 74-1 CPD 296.

In the alternative, Hydrosystems contends that NTEC erred in making a competitive range determination without adding to Sperry's cost proposal an evaluation factor for use of unscheduled GFE. In that regard, Hydrosystems cites the RFP clause that provides for the addition of a rental factor for the rent free use of "Government production and research property" other than that set forth in the RFP. However, "Government production and research property" does not pertain to material or equipment being furnished for incorporation into the contract end product. See ASPR § 13-101.9 (1974 ed.). Moreover, the addition of \$800,000 to \$1,000,000 that Hydrosystems contends should have been added because of the clause would have made the Sperry proposal about \$2,000 to \$200,000 more than the highest proposal received which was also considered to be in the competitive range. Thus, it is not apparent that Sperry should not have been placed in the competitive range, especially where the amount would not be significant in any event if the computer could be substituted as it was.

Hydrosystems contends that Sperry was allowed to modify its proposal after "best and final" offers as to technical aspects had been submitted. Discussions were held with all offerors on April 14, 15 and 16, 1975. Each offeror was told at the conclusion of discussions that any revision to its proposal (technical or cost) must be received not later than 3 p.m., April 24, 1975. The response date was extended by telegrams which stated:

"Response to questions raised during technical clarification meeting \* \* \* must be received by 3:00 pm 28 April 1975. No other revision to your proposal will be considered at this time. Solicitation provision entitled late proposals, modification of proposals and withdrawals of proposals shall apply."

The call for "best and final" offers by June 6, 1975, after the further round of negotiations held during May 28, 29, and 30, 1975, is interpreted by Hydrosystems as pertaining to price only. Accordingly, Hydrosystems concludes that award could not be made to Sperry since its proposal on April 28, 1975, still contained the UYK-20 computer. Simply stated Hydrosystems has construed the April 28 date as the time for "best and final" offers for technical aspects and the June 6, 1975, date as the time for "best and final" offers as to price.

We agree with NTEC that "best and final" offers were not required before June 6, 1975. Although the telegrams extending the date for the submission of revised proposals to April 28, 1975, referenced the late proposals provision, they did not contain the additional statements required by ASPR § 3-805.3(d) (1974 ed.) that discussions have been concluded and that offerors are being given an opportunity to submit a "best and final" offer. In any event, our Office has held that where an exception stated in a proposal is not discovered until after the submission of the "best and final" offer, the procurement activity has no alternative but to institute another round of negotiations. Swedlow, Inc., 53 Comp. Gen. 564 (1974), 74-1 CPD 55. Thus, we are unable to conclude that the opportunity provided Sperry to replace the UYK-20 computer was improper.

Hydrosystems contends that NTEC applied auction techniques to the procurement. Whenever negotiations are conducted with more than one offeror, auction techniques are prohibited, although it is

permissible to tell an offeror that the Government considers its price to be too high. ASPR § 3-805.3(c) (1974 ed.). Our review of the record in this case does not establish that any auction techniques took place nor that Sperry received information about Hydrosystems proposal during negotiations. It is not uncommon for an offeror to withhold its lowest-priced offer for the best and final offer. The mere fact that an offeror reduces its price during negotiations does not imply that the offeror had access to the prices submitted. Davidson Optronics, Inc., B-179925, February 22, 1974, 74-1 CPD 93.

The cost modification of Hydrosystems submitted June 12, 1975, was appropriately rejected as late since it was not received by June 6, 1975, and on the basis of offers received by June 6, 1975, it was not the amendment of an "otherwise successful" proposal, an exception to the rule against consideration of late proposals.

Hydrosystems contends that certain documents contained in the agency report on the protest which were marked "For Official Use Only" should not have been withheld from it under the Freedom of Information Act, 5 U.S.C. § 552 (1970). However, our Office has no authority to determine what information must be disclosed by other agencies under the Act. DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. Further, where the contracting agency has indicated that the information is not appropriate for release under the Act, the withholding of information by our Office is proper. Unicare Health Service, Inc., B-180262, B-180305, April 5, 1974, 74-1 CPD 175.

In a letter of October 9, 1975, Hydrosystems stated that it has reason to believe that Sperry recently has informed the Navy that it may not be able to meet the contract delivery date. Further, the letter states that Sperry's cost proposal under the RFP was considered to be unrealistic by the Navy. Hydrosystems states that if either of these contentions is correct, our Office should require the contract to be terminated. However, the first contention relates to a matter of contract administration for the Navy and, with respect to the second, documents in the agency report on the protest indicate that the Sperry proposal was considered to be reasonable.

Accordingly, the protest of Hydrosystems is denied.

*Paul B. Leubling*  
FOR THE Comptroller General  
of the United States