DECISION

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

60662

FILE: B-183115 DATE: March 22, 1976

MATTER OF: H. G. Peters & Company, Inc. 98463

DIGEST:

1. Failure of awardee to submit with initial offer letter of credit required by RFP does not require offer to be rejected as nonresponsive, since "responsiveness" is a concept applicable to advertised, not negotiated, procurements.

2. While protester may have been only acceptable offeror based on initial proposals, agency was not required to award contract to it without determining whether other proposals could be made acceptable during course of negotiations.

3. Agency's failure to notify protester of change in RFP requirement to allow for submission of line of credit was not prejudicial since protester had previously supplied evidence of line of credit.

4. Protest that successful offeror's proposal was materially unbalanced because it improperly took advantage of RFP's failure to include meaningful quantity estimates for substantial number of line items is untimely, since protest really concerns adequacy of RFP and it was not filed until after closing date for receipt of proposals. However, recommendation is made for agency to include estimates in future solicitations.

5. While protester alleges that price was given undue weight in evaluation, RFP stated that price was final factor once offeror was technically "responsive" and responsible, which awardee was.

6. Agency did not act improperly in making several requests for information to offerors prior to conducting discussions since agency's actions were consistent with its duty to seek maximum competition.

7. While protester alleges that agency representatives forced technical evaluator to withdraw and destroy technical evaluation favorable to protester and unfavorable to awardee, evidence does not establish improper conduct by agency.

8. Protester's allegation that agency improperly awarded contract before protester could submit written confirmation of its oral protest is not supported by record where agency insists that oral protest was withdrawn by protester prior to award. Moreover, protester was not prejudiced by award of contract.

9. While protester contends that agency's failure to provide proper notice of award to unsuccessful offeror was not justified on basis of urgency, agency has provided adequate basis for its determination of urgency.

10. Challenge to validity of award on basis that agency failed to obtain cost and pricing data from successful offeror is without merit where agency reasonably determined that adequate price competition had been obtained.

11. Contention that awardee is in default status (which agency denies) thus confirming awardee's alleged lack of ability will not be considered since matter of default is question for contracting agency and is not to be resolved under GAO bid protest function.

H. G. Peters & Company, Incorporated (Peters), protests the award of a negotiated contract by the Department of the Army to John Bransby Productions, Ltd. (Bransby). Peters contends that Bransby's proposal was nonresponsive to the RFP's financial and certain other requirements; that the Army unfairly helped Bransby to become responsive partly by changing the financial requirements without notifying Peters; that the Bransby proposal was unbalanced, thus indicating that the offeror did not understand the scope of the work and that the Government will incur higher costs than were reflected in the evaluation of Bransby's proposal; that the award was made contrary to the solicitation evaluation factors; and that the Army engaged in improper actions during the negotiating stage. In addition, Peters alleges that the contract was awarded without proper notice to Peters and without the Army obtaining the required cost or pricing data. Finally, Peters asserts that the contractor is in default under the contract. For the reasons stated below, the protest is denied.

Request for proposals (RFP) DAAH01-75-R-0149 was issued by the United States Army Missile Command, Redstone Arsenal, Alabama (Army) on October 15, 1974, for the production of motion pictures, TV spots, scripts, and ancillary photographic elements.

The RFP was restricted to small businesses and contemplated the award of a firm-fixed-price contract in the nature of a Basic Ordering Agreement (BOA) under which orders would be placed. The specific work set forth in section E of the RFP comprised 146 line items, including supplies and service, script writing, photography work, art work, production sound recording, and various types of printing, processing and editing. In addition to other line items, which concerned vehicle rental and supplemental production personnel, the RFP contained various unpriced items which could be required but were not to be priced for evaluation purposes. The contract term was for one year, with a total term including options, if exercised, of five years.

The proposals were to be evaluated in accordance with section D of the RFP, entitled "Criteria for Award of BOA." This provision (D-3) stated in part:

> "a. Financial Responsibility:
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> (1) Offeror must have adequate financial resources to meet all financial obligations incurred until products requested are finished and accepted by the Government.
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> (2) Progress payments will be authorized, however, it is estimated that approximately $500,000.00 will be required notwithstanding the Progress Payments. Accordingly, each offeror must submit as part of his offer a copy of his latest audited financial statement. Offerors, whose financial position is such that the $500,000.00 is not available internally must furnish satisfactory evidence that he will receive a letter of credit in this amount if award is made to him. Letters from banks, etc., concerning the offeror's line of credit should state clearly that a letter of credit for the required amount will be issued to him upon his receipt of an award. * * *"

Paragraphs b through g of D-3 covered requirements regarding, respectively, the offeror's skilled personnel, recently produced films, competence and ability, script writing capability, organizational structure and description, and phase-in plan, and paragraph h listed the various technical areas which would be considered. Paragraph i provided as follows:

"i. Award shall be made to that technically qualified, responsive, responsible offeror who submits the lowest total aggregate price for those elements listed in the schedule to be priced."

In addition, paragraph C-9(a) provided that award of a contract would not be based on the lowest evaluated price alone, but that due consideration would also be given to those standards for responsible contractors set forth in Armed Services Procurement Regulation § 1-900 et seq. And, finally, paragraph C-18(a) stipulated that award would be made to that offeror who submitted the lowest aggregate total price, was otherwise responsive to all the terms and conditions of the RFP, was responsible, and met all the technical requirements contained elsewhere in the RFP.

The closing date for receipt of initial proposals was November 25, 1974. Timely proposals were received from Bay State Film Productions, Inc., John Bransby Productions, Ltd., H. G. Peters & Company, Inc., PDR Productions, Inc., and MERD Corporation. After analysis of the initial proposals, the Army informed all offerors that it would conduct oral negotiations with them. These negotiations were conducted from December 30, 1974, through January 2, 1975, with all offerors except PDR Productions, which withdrew its proposal. Final offers were received from Bransby, Peters, and MERD. The final evaluated aggregate prices are as follows: Bransby - $392,456.13, Peters - $488,241.14, and MERD - $481,754.24. After analysis of these offers, the Army determined that both Bransby and Peters were technically qualified, "responsive", and responsible. On January 27, 1975, award of Basic Ordering Agreement DAAH01-75-A-0023 was made to Bransby since its evaluated aggregate price was lower than that submitted by Peters. Peters filed this protest on January 28, 1975.

Peters raises a series of allegations concerning whether Bransby met the RFP's financial requirements. As indicated above, paragraph D-3(a)(2) required each offeror whose latest financial statement did not indicate that $500,000 was available to him to submit "satisfactory evidence that he will receive a letter of credit" in the amount of $500,000. Although no offeror submitted a "letter of credit", Peters did submit evidence establishing a proper line of credit. As stated in the report, a "letter of credit" requires the financial institution to set-aside a sum of money equivalent to the specified amount, while a "line of credit" merely extends credit up to that amount. The Army advises that it furnished the other offerors a clarifying amendment on December 12, 1974, that "letter of credit" was to be interpreted as a "line of credit." On December 18, 1974, the Army was notified that a $500,000 line of credit was committed to Bransby. This notification was confirmed by letter of December 31, 1974.

Peters argues that Bransby's proposal should have been rejected as nonresponsive for failure to submit a letter of credit with its initial offer. However, as the Army points out, in a negotiated procurement initial proposals are evaluated to determine whether they are acceptable or are capable of being made acceptable through discussions, and, except in circumstances permitting award on the basis of initial evaluation, discussions are held with those offerors who have submitted proposals within a competitive range. Rejection occurs when a proposal is determined not to be in the competitive range, or when, after discussions with offerors in the competitive range and the receipt and evaluation of best and final offers, a proposal is not selected for award. Riggins & Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168. Thus, while Bransby's notice evidencing the required line of credit was not received until after the receipt of initial proposals, this did not require rejection of its proposal. The fact that an initial proposal may not be fully in accord with the specifications is not a reason to reject the proposal if the deficiency is reasonably subject to being made acceptable through negotiations. See, e.g., 51 Comp. Gen. 431 (1972). In our opinion, the Army's decision to include Bransby's proposal within the competitive range despite the lack of a line of credit was proper under ASPR § 3-805 (1974 ed.).

However, Peters alleges that it was improper for the Army to advise all offerors but Peters that the letter of credit to be submitted was in fact a line of credit requirement. Peters alleges that the Army's actions constitute a violation of ASPR §§ 3-505(c) and 3-805.4(a) (1974 ed.). Furthermore, Peters contends that the Army's change in requirements from a letter to line of credit would have enabled other contractors who did not originally participate to now offer a proposal. Thus, it argues that this change of requirements necessitated cancellation and reissuance of the RFP.

ASPR § 3-805.4(a) (1974 ed.) requires that when changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify the Government's requirements, such change or modification shall be made in writing as an amendment to the solicitation. Moreover, ASPR § 3-505(c) (1974 ed.) provides that no award may be made under an RFP unless a required amendment is issued in sufficient time to permit prospective offerors to consider such information in modifying their proposals. In various circumstances where an offeror has been prejudiced by the denial of an equal opportunity

to compete due to the failure of a procuring agency to issue a material amendment as required, this Office has required that appropriate remedial action be taken. See, e.g., Computek Incorporated, et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 386.

However, Peters was not prejudiced by the failure to provide it with notice of the RFP change. As the Army points out, the December 12, 1974 RFP amendment in question merely advised offerors that, for clarification purposes, a letter of credit was equivalent to line of credit. With respect to the protester, the Army states that "The clarification was not sent to Mr. Peters because he had filed a letter which evidenced a 'line of credit' which was in fact the very clarification made in the said TWX message relative to the phrase 'letter of credit' as was used in the solicitation." Peters was not advised of the amendment because that offeror's interpretation of the provision as a line of credit was correct, and therefore a further submission by Peters was not necessary. Finally, we do not agree with Peters that the change was so substantial as to have required cancellation of the RFP. See ASPR 3-805.4(b) (1974 ed.).

Peters also questions whether Bransby timely and properly furnished the Army with the required audited financial statement, staffing plan, and phase-in plan. With respect to the staffing plan, Peters alleges that the only qualified personnel then available to perform this contract were in its employ, and that they had not been contacted by nor agreed to work for Bransby. Since Peters contends that use of outside personnel would be too costly under Bransby's proposal, it concludes that Bransby's staffing plan must be inadequate. In commenting on Bransby's phase-in plan, Peters alleges that the actual phase-in was disorganized, and that Bransby could not therefore have provided the Government with the proper phase-in.

We are unable to sustain these allegations. A review of the record establishes that Bransby did furnish financial statements with its proposal, and that they were examined and attested to by a firm of certified public accountants. Bransby's offer also contained a comprehensive staffing plan for the installation, including resumes of its personnel and functional work breakdown charts. Moreover, Bransby did in fact propose to recruit and hire a majority of the present contractor's employees. In this connection, paragraph C-22 encouraged offerors to consider utilizing Peters' employees, and indicated that many of those people were also employed by the predecessor contractors,

General Electric Company and RCA Corporation. Our review of Bransby's phase-in plan indicates that it was adequate for the purpose intended.

With respect to Bransby's prices, Peters contends that Bransby took advantage of the RFP's pricing schedule to unbalance its prices and thereby present a low aggregate total not representative of the actual cost to the Government.

The RFP, for purposes of evaluation, consisted of 146 line items, items 101 to 199 and 1A0 to 1E6. Offerors were to submit both a unit price and a total price per line item for the quantities set forth; these line item totals were then added together to arrive at the total aggregate price. Line items 101 to 178 consisted of various measures of estimated quantities, such as month, line, foot, inch, and hours. The estimated quantities of each varied according to the particular line item. For items 179 to 1E6 (68 line items), the measured quantities consisted of use of the item for a day or week or mile, with most supplies having a line item for a day and a week. For example, line item 198 (boom man) had a unit quantity of 1 day, while item 199 (boom man) had a unit quantity of 1 week.

Peters argues that Bransby took advantage of the pricing schedule to offer unrealistically low prices for some line items, while it offered unrealistically high prices on the remaining items. According to Peters, items 101 to 178 contained reasonable estimates of the Government's needs, while the remaining items contained only daily or weekly rates, and no reasonable estimate of the Government's needs; furthermore, the individual line items were not weighted to reflect estimated quantities, but rather were added together to obtain an aggregate total. Thus, the protester argues that the RFP evaluation scheme permitted and encouraged unbalanced prices by adding together, on the one hand, prices for total estimated quantities, and, on the other, mere daily or weekly prices without regard to frequency of usage. It is Peters' belief that Bransby's offer will ultimately cost the Government significantly more than its evaluated price when the Government's actual requirements are ordered under the RFP's daily or weekly rates under items 179 to 1E6.

The Army considers Peters' contentions regarding unbalancing to be untimely on the grounds that Peters was aware of the RFP's pricing schedule prior to submitting its proposal, yet chose not to protest until after award was made. Concerning the merits of Peters' arguments, the Army argues that the award was proper since it was made in accordance with the RFP. The Army also points out that the prices offered under the RFP represent the maximum prices possible under the BOA, and that

they are subject to negotiation so that the contracting officer can determine price reasonableness under each order. Even assuming that Bransby's prices are unbalanced, the Army believes that they are reasonable overall and will result in the lowest cost to the Government.

20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20.2(a) (1975) (in effect at the time of protest) provides in pertinent part as follows:

> "* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. * * *"

This Office has considered on the merits various "unbalanced bid" cases which have been filed after bid opening or the closing date for receipt of proposals, because the protests were directed at techniques of pricing which were alleged to be in violation of the solicitation requirements, and not at the adequacy of the solicitations' pricing requirements. See Edward B. Friel, Inc., B-183381, September 22, 1975, 55 Comp. Gen. , 75-2 CPD 164; Edward B. Friel, Inc., B-183871, October 14, 1975, 75-2 CPD 233. Here, it is contended that the RFP's lack of estimates for a substantial number of line items directly encouraged distorted pricing. Thus, while Peters' questions the validity of the RFP, it failed to file a protest on this ground prior to the closing date for receipt of proposals, even though the alleged deficiency was apparent on the face of the RFP. Accordingly, this aspect of its protest is untimely raised, and will not be considered on the merits. Descomp, Inc., B-183530, July 2, 1975, 75-2 CPD 54.

However, we are mindful of Peters' contention that Bransby's offer will ultimately cost more than its evaluated price when the actual requirements are ordered. The fact that the RFP prices are ceilings and that actual prices are subject to negotiation under each BOA does provide the Government with a degree of protection against unbalanced pricing. However, we are recommending to the Army that realistic estimates should be set forth in future solicitations whenever possible.

Peters next alleges that the Army made its award on the basis of evaluation factors not set out in the RFP. First, it contends that the Army improperly allocated more weight than disclosed to the low aggregate price in determining the successful offeror. Specifically, it alleges that the contract was awarded primarily or solely on the basis of the offeror with the lowest aggregate total price, but that the aggregate price standard was only one of a number of evaluation criteria to be used in selecting the successful offeror. It bases its conclusion on the allegedly superior performance of Peters under the prior contract, and states that Bransby could not compare with Peters in terms of operating performance. Peters therefore concludes that technical competence was given little or no weight as an evaluation criteria.

As indicated above, the RFP provided that award would be made to that technically qualified, responsive, responsible offeror who submitted the lowest total aggregate price. Thus, the RFP clearly provided that award would be made to the technically qualified, "responsive", responsible offeror submitting the lowest price. Proposers were required to substantiate technical, financial, and management capabilities prior to any consideration of price. Upon the establishment of these prerequisites, price became the controlling factor. Accordingly, price was evaluated in the manner set out in the RFP since Bransby was evaluated as technically competent and its proposal was considered acceptable.

In this connection, Peters contends that Bransby was not required to meet the RFP requirement that each offeror must demonstrate an understanding of the required effort. Peters believes that many of Bransby's unit prices are quoted below cost, and make no allowance for the periods between Government orders. It has cited various line items where it believes Bransby's unit price is so far below the Government estimate as to raise serious questions concerning what Bransby believed it was to provide. Peters submits that Bransby's final aggregate total was so low as to show a lack of understanding of the Government's needs, and thus Bransby should have been disqualified.

The Army has rebutted Peters' argument that Bransby's offer failed to demonstrate Bransby's understanding of the required effort. The Army recognized during negotiations that some of Bransby's prices were considerably below the Government estimate, but advises that it discussed these items with Bransby, and that Bransby demonstrated that it understood what was required.

Our review of the Army's negotiation memorandum of January 2, 1975, concerning Bransby, indicates that the Army identified the low priced items in Bransby's offer, and that a discussion of the applicable requirements followed. The Army was satisfied that Bransby's representatives had a "clear understanding of these items", since Bransby related that the requirements discussed by the Army were covered by Bransby's prices. Since it does not appear that the Army's evaluation of these proposals relating to price or technical acceptability was unreasonable, it will not be disturbed by this Office. Edmac Associates, B-184469, January 30, 1976, 76-1 CPD 68.

The protester next contends that the Army was responsible for several improper actions during the negotiation phase of this procurement. First, it states that the Army improperly aided all offerors, and in particular Bransby, in order to help them raise their proposals up to Peters' level. It states that there were successive requests to clear up and correct Bransby's deficiencies, including the letter of credit matter, and that even after the cutoff date for correction of defects the Army continued to assist other offerors, one of which attempted to withdraw its proposal.

Peters further alleges that the Army's actions in raising up other offerors to Peters' level was part of an attempt by cognizant Army representatives to award this contract to Bransby, regardless of Peters' technical superiority. In this connection, Peters points to an evaluation of the offers signed by the Chief of the Motion Picture and T.V. Production Division, which recommends that award be made to Peters, and states that award to Bransby would not be in the best interests of the Government. It is alleged that these evaluations were withdrawn due to pressure from other Army representatives, and that it was also requested that the evaluations be destroyed. Peters contends that the Army representatives responsible for the withdrawal and destruction of these evaluations were guilty of "serious bad faith" and "possibly fraudulent action." Moreover, Peters alleges that, had these evaluations been permitted to stand, the contract would have been awarded to Peters, not Bransby.

With respect to the allegation that the Army sought to raise up the other offerors to Peters' level, our examination of the record does not disclose any improper leveling techniques by the Army. The basis of Peters' contention is that the several successive requests to offerors to clear up deficiencies, the alleged special assistance to Bransby even after the date for correction of defects, and the alleged special effort made to provide Bransby with the opportunity to provide a proper letter of credit, represent

special efforts by the Army to bring offerors into the competitive range. The facts are that, after receipt of offers on November 25, 1974, each offer underwent a price analysis and a technical evaluation, and it was determined to obtain additional data from all offerors but Peters. (Peters' proposal was adequate without additional data, a fact substantiated by the Army's high technical rating of Peters.) This information was originally due December 13, 1974, but an amendment extended the date 3 days. Although Bransby was requested to submit by December 16, proof of $500,000 availability or evidence of a line of credit, a TWX indicating its line of credit was received December 18, 1974, and was confirmed by letter dated December 31, 1974. While two other offerors (PDR and Bay State) telephonically advised the Army that they did not wish to continue in the competition, the Army treated their original proposals as valid absent written withdrawals. Accordingly, the Army notified all offerors by TWX of December 23, 1974, of scheduled negotiations, and also requested clarification and/or additional information on various aspects of their proposals. PDR withdrew its offer by letter of December 26, 1974, and best and final offers were requested of the other four offerors by January 6, 1975. Peters, Bransby, and MERD submitted timely best and final offers.

The Army's action in soliciting and considering the additional information requested from the offerors was a proper exercise of its discretion to determine the competitive range and to seek the correction of deficiencies in proposals. ASPR §§ 3-805.2 and 805.3 (1974 ed.). While Bransby's line of credit information may have been submitted 2 days later than desired, the Army was not required to reject Bransby's proposal because of it. In this connection, a proposal can be considered in the competitive range for discussions even if it contains deficiencies. Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169. Also, the Army's action in not accepting PDR's oral withdrawal was not irregular. Paragraph 10(e) of the Solicitation Instructions and Conditions (SF33A March 1969) provides that an offer is available for acceptance within the specified time unless withdrawn by written notice received prior to award. Also, ASPR § 7-2002.4(f) (1975 ed.), issued April 1974 (but not part of the RFP), states that proposals may be withdrawn in writing or, inter alia, by a signed receipt for the proposal. We believe the Army's request for a written withdrawal was reasonable under the circumstances.

The main thrust of Peters' argument regarding alleged improper conduct concerns the Army's alleged action in forcing the withdrawal of a technical evaluation dated January 9, 1975, which stated that Peters' proposal was the offer most advantageous to the Government, that Bransby's offer was too low, and

that acceptance thereof would "put the Government in a compromising position in order to prevent the offeror from incurring serious financial losses." The evaluation was signed by the Chief of the Motion Picture/T.V. Production Division. The Army points out, and the evaluation document reflects, that the evaluation was "withdrawn prior to becoming a part of the official record." Moreover, the official technical evaluation documents furnished by the Army show, in summary, that Bransby was considered highly qualified, had an understanding of the required effort, and had the capability to perform the contract.

However, Peters contends that the Chief of Production was forced to withdraw this evaluation, and that Army Procurement and Production (P&P) representatives demanded that the document be destroyed. Peters alleges that the Chief of Production's evaluation was objective, and that the evaluation was prepared by the Chief of the Evaluation Section who was most knowledgeable in this area. Peters contends that the Army's attempt to destroy this evaluation evidences the Army's bad faith. The protester submits that its allegations are substantiated by the depositions of the Production Chief's secretary and the Evaluation Branch Chief. The Army, on the other hand, contends that the protester has misconstrued the depositions, that the statements made by these two individuals show only that the Production Chief withdrew his evaluation, and that the depositions fail to support the charges of coercion and bad faith. The Army has also submitted the affidavits of various P&P personnel to support its position. The Production Chief died on April 9, 1975, and therefore neither a statement from him nor a deposition on the matter is available.

From our examination of the depositions and statements, we find that the Production Chief did furnish the January 9, 1975 evaluation referred to by the protester (which considered Bransby's offer too low and Peters' offer most advantageous), that the Production Chief withdrew this statement, and that the Army's official evaluation stated that Bransby was technically qualified. The Army states that two P&P personnel spoke to the Production Chief on January 9, 1975, informed him that the evaluation was in the form of a price analysis, not a technical evaluation, and requested a proper technical evaluation. According to the Army, the Production Chief requested that the evaluation be returned to him, he stated that he would provide the proper technical evaluation, and that he would destroy all copies of the evaluation in question to preclude any confusion or misinterpretation. The Army contends that at no time did it demand that the evaluation be destroyed, that the evaluation was in fact voluntarily withdrawn, and that the Production Chief realized that his initial evaluation was concerned more with cost and not with technical qualifications as required.

Furthermore, it is evident that the deponents are without personal knowledge of the conversation in issue, and that they may be mistaken as to their impressions or the implications they perceived. Also, a review of the Evaluation Branch Chief's deposition raises questions as to whether the initial evaluation was prepared in accordance with the RFP criteria and, thus, it might be considered to support the statements of the P&P personnel that they asked for a new evaluation because the initial evaluation did not conform to the RFP criteria. On the record as a whole, we cannot conclude that the Army attempted to destroy an evaluation favorable to Peters, so as to prejudice its chances for award, or that the Army attempted to manipulate evaluations so as to benefit Bransby.

In connection with the Army's procedure in making this award, Peters raises a number of objections. It contends that the Army acted in direct contravention of ASPR § 2-407.8(b) (1974 ed.) by awarding the contract prior to the expiration of the period of time in which to submit written confirmation of its alleged oral protest. Peters contends that it filed an oral protest on January 27, 1975, that it subsequently became convinced by Army personnel that pursuing its protest would delay a possible award to Peters, that it delayed delivery of its written protest, and that award was made prior to written confirmation of its protest. The Army concedes that Peters filed an oral protest with the contract negotiator on January 27, 1975, but states that Peters retracted its protest, and advised that the Army would be informed if Peters decided to reinstate its protest. This is confirmed by the memorandum of another Army representative, who discussed the matter on the morning of January 28, 1975, and who was advised by Peters that its protest was withdrawn on January 27 so as not to delay a possible award to Peters. Also, the Army denies that it indicated an award to Peters was forthcoming. Based on the above, we cannot say that Peters' oral protest was in effect at the time of award, although it was reinstated thereafter. In any event, since Peters' protest is not sustainable and since the timing of the award had no effect on this conclusion, Peters has not been prejudiced thereby. Spectrolab, Inc., B-180008, June 12, 1974, 74-1 CPD 321.

Peters also argues that the Army violated ASPR §§ 1-703(b)(1) and 3-508.2(b) (1974 ed.) by failing to give notice of the award to unsuccessful offerors. These sections essentially provide that each unsuccessful offeror must receive prior to award written notice of the successful offeror when the procurement involves a

small business set-aside. It is alleged that this notice is given so that unsuccessful offerors may have the opportunity to challenge the small business status of the awardee. Peters contends that it has been prejudiced by the Army's failure to provide proper notice since it believes Bransby's small business status has been compromised.

The Army states that under ASPR § 3-805.2(b) (1974 ed.) this notification need not be given under an urgent procurement action which the contracting officer determines in writing must be awarded without delay to protect the public interest. Since the contracting officer made such a determination here, it believes that Peters' argument is without merit. However, it is contended by Peters that the Army's urgency determination was a sham, without justification, and was made to avoid the complications presented by a protest on this procurement.

The contracting officer made the following Determination and Findings with respect to the urgency of this procurement award:

"FINDINGS

"1. The term of the current Basic Ordering Agreement (BOA) was extended from 10 Jan 75 through 31 Jan 75. This was not a planned extension. It was required because the problems associated with award under subject solicitation prevented an award being made prior to the expiration date of the current BOA.

"2. The incumbent contractor needs to be notified as soon as possible that he is not the successful offeror, because an inventory of Government furnished equipment must be made in preparation for the transfer of the accountability to the successful offeror.

"3. The file contains back-up to indicate that John Bransby Productions, Ltd. is in fact a small business in accordance with the criteria set forth in the solicitation.

"4. Expensive overhaul of the laboratory equipment is highly probable if the equipment is not run due to corrosion and clogging caused by non-circulation of the chemical solutions. Any interruption in the operations of the facility could cause these things to happen.

"DETERMINATION

"I hereby determine, in accordance with ASPR 3-508.2(b), that award of this procurement must be made without delay to protect the public interest. Therefore the five (5) day notice required by ASPR 1-703(b)(1) is hereby waived."

In reviewing the propriety of the Army's determination of urgency, Peters urges that we recognize as unusual the Army's action on January 27, 1975, of receiving a verbal EEO clearance, of waiving the notice period under ASPR § 3-508(2)(b) (1974 ed.), and of making award to Bransby, all after notification on January 27 that Peters might file a protest against award to Bransby.

The parties have submitted various statements regarding the need for urgency, particularly as to the need to insure proper operation of the laboratory equipment. That the Army needed a contractor is not in doubt; even Peters offered to extend its contract to cover the Army's needs. It is Peters' position, however, that the waiver was not justified on the basis of possible corrosion and clogging of the laboratory equipment. It states that the equipment could have been protected by draining it of chemicals and filling it with water, that in this condition the tanks would be protected for months, and that it would have taken only four to six man hours to perform this task.

The Army concedes that filling the equipment with water is considered by some to be a valid protection method. It advises, however, that its technicians recommend that the equipment be filled with circulating chemicals, that water in a tank in certain instances is even more detrimental than a dry tank due to the growth of algae in the pump and lines and the possibility that the tank would corrode. It advises that shutting off the equipment is considered to be only a last resort, and that such action would be time consuming and costly.

To support its contentions, Peters has submitted the affidavit of a Peters' Project Manager with almost 30 years experience in the motion picture industry, who states that a five or ten-day period with noncirculating chemicals would not be harmful to the laboratory processors, that a 20-day delay with noncirculating chemicals would not cause corrosion, and that filling the tanks with water would protect them for at least 20-30 days. The Army takes issue with this analysis. First, it states that the Peters' Project Manager was neither a chemist nor a lab specialist, and in its view was not a specialist in this area.

The Army further states that the technicians who operated the laboratory for Peters now operate it for Bransby, and that they are the Army's source of its information regarding the care of the laboratory equipment. The Army reiterates that the processors would be better left empty when idle rather than filled with a liquid. Finally, it points out that it has consistently taken the position that an idle period is damaging to this equipment, that in 1972 the same justification was relied upon to justify the urgent award to Peters, and that Peters then claimed that the 12-day delay experienced then was harmful to the machines.

It appears to us that the laboratory processors are best maintained when filled with circulating chemicals, but that for a short period the processors might possibly not be run and yet remain in acceptable condition. Also, it appears that the facility's product was needed, and that a normal changeover of contractors would create some unavoidable delay. While Peters did offer to extend its BOA, the extension would have been needed for only a few days, unless the Peters' protest was lodged. In that case, Peters may have stayed on longer, a situation which the Army understandably found to be contrary to its evaluation of the new offers. In our view, the Army had a reasonable basis for applying what appears to be a consistent policy of not allowing the laboratory processors to remain idle, and that the need for the facility's product was real. While we do not overlook the opinions furnished by Peters with respect to the laboratory equipment, the Army's decision to make the award so as not to risk damage to its equipment was reasonable. Under the circumstances, the Army's determination of urgency was justified, and thus it was not required to provide the notice cited by Peters.

As a further ground for invalidating the award to Bransby, Peters contends that there was no adequate price competition and therefore cost or pricing data were required under ASPR § 3-807 (1974 ed.) before the award was made to Bransby. (That section states that price competition may be presumed to be adequate if at least two responsible offerors who can satisfy the Government's needs independently contend for a contract to be awarded to the responsive responsible offeror submitting the lowest evaluated price.) It is the Army's position that adequate price competition did exist here since two of the five responding offerors were considered acceptable and in line for award, and accordingly cost or pricing data (and cost analysis thereof) was not required. We believe that the Army's determination in the matter was reasonable.

Finally, Peters alleges that Bransby is in default under the contract. The Army has advised this Office that Peters' statement is without any basis in fact. Whether Bransby should be considered in default is a question for determination by the Army, and is not for resolution pursuant to our bid protest function. National Flooring Company, B-183844, July 31, 1975, 75-2 CPD 71.

Accordingly, we have no basis to disturb the award.

Deputy Comptroller General
of the United States