

**DECISION**

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

FILE: B-184375

DATE: January 28, 1976

MATTER OF: Raytheon Company

## DIGEST:

1. Agency's award of negotiated contract without conducting discussions with offerors on basis that agency's urgent needs precluded holding such discussions is not subject to objection since Federal Procurement Regulations 1-3.805-1(a) permits agencies to dispense with discussions and award on basis of initial proposals received where time of delivery does not permit discussions to be held and record does not establish that contracting officer's decision was abuse of discretion.
2. Protest against inclusion of certain provisions in solicitation which is filed after award of contract is untimely under section 20.2(b)(1) of GAO Bid Protest Procedures which requires that protests against solicitation improprieties which are apparent prior to closing date for receipt of proposals be filed prior to such date.
3. Although procurement was negotiated, agency did not execute determination and findings (D&F) justifying use of negotiation and record does not disclose why it would not have been feasible for agency to have used formal advertising to satisfy its procurement needs. Although contract will not be disturbed on this basis, GAO understands that agency does not intend to exercise any options available under contract.

The Veterans Administration (VA) awarded a negotiated contract on June 25, 1975, without conducting discussions, for the lease with purchase option of three interactive terminal systems to GTE Information Systems, Inc., under request for proposal (RFP) No. 8-75. The RFP was issued June 10, 1975, and proposals were due June 24, 1975. By letter of June 30, 1975, the contracting officer formally notified Raytheon Data Systems Company (Raytheon) that its proposal was "considered non-responsive because ten (10) exceptions were taken to Section C, Special Provisions of RFP-8-75." Raytheon protested the award by telegram of July 1, 1975, and requested that this Office cancel the award to GTE and order that negotiations proceed with Raytheon, the low offeror.

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Raytheon contends that negotiations should have been conducted. Raytheon states that VA's intention not to negotiate with the offerors was not called out with particularity or emphasis since the RFP "contained no warning that [this procurement] would be handled differently from any other negotiated procurement." In this connection, Raytheon cites Clause C-16 of the RFP, Clause 1 of VA Form 10-1130, which was included in the RFP, and "Clause 10(g) (stressing only price and technical features.) of SF-33A." It is Raytheon's view, citing our decision DPF Incorporated, B-180292, June 5, 1974, 74-1 CPD 303, that even if the Raytheon exceptions made its proposal "nonresponsive" these matters nevertheless were proper subjects for negotiation. Moreover, Raytheon states that the specification objections it raised "might well have been reconciled in twenty-four to forty-eight hours or less, and perhaps even over the telephone." It insists that, at the very least, VA should have advised Raytheon that "unless all (or identified portions) of the exceptions taken were withdrawn, Raytheon's proposal would have to be considered nonresponsive." In addition, Raytheon claims that certain provisions of the RFP are improper and restrictive of competition.

In explaining its actions, the VA states that an urgent need existed for these systems and that, therefore, the discussions ordinarily held in connection with negotiated procurements could not be held in this instance. Since Raytheon "took ten (10) exceptions" to the RFP the contracting officer felt obliged "to award the contract to GTE Information Systems whose proposal is next lowest and who took no exceptions to the RFP-8-75 requirements." VA believes the offerors were informed of the urgency, since a notice was attached to the front of the RFP alerting offerors to specific certification requirements and stating that, "Due to the urgency of the Veterans Administration requirements, proposals offering installation dates later than those specified in RFP-8-75 for each regional office must be considered as non-responsive." The VA also states that the Raytheon exceptions, which included changes to the RFP liquidated damages provision as well as changes to the RFP provision concerning VA's option to transfer the equipment from one government site to another, were material and would have lowered "the RFP's level of requirements."

We do not agree with Raytheon's contentions. Although discussions usually are conducted in negotiated procurements, the applicable regulations allow for dispensing with discussions in certain enumerated situations and for the making of an award on the basis of initial proposals. See Federal Procurement Regulations (FPR) 1-3.805-1(a) (1964 ed.). One of these situations is where time of delivery does not permit such discussions

to be held. FPR 1-3.805-1(a)(3). While Raytheon contends that discussions could have been conducted expeditiously and without impacting the delivery schedule, the record is not persuasive on this point. If discussions had been initiated with Raytheon, the contracting officer also would have been required to conduct discussions with all the other offerors within the competitive range and to establish a date for receipt of best and final offers. FPR 1-3.805.1(a) and (b). However, the initial delivery and installation date established by the RFP was July 14, 1975, only three weeks after the date of receipt of proposals. As we have previously pointed out, the "decision to take exception to the requirement for discussions with all offerors in the competitive range and to make an award on the basis of initial proposals is discretionary in nature." 53 Comp. Gen. 5, 9 (1975). Under the circumstances, we find no basis to dispute the contracting officer's judgment that time of delivery did not permit discussions in this instance.

Furthermore, we do not agree with Raytheon's contention that the RFP contained no warning that discussions might not be held. Paragraph 10(g) of SF-33A, which was included in the RFP and has been cited by the protester, provided that the "Government may award a contract, based on initial offers received, without discussions of such offers." (Underscoring supplied.) In addition, as VA points out, the RFP included a notification to offerors that the VA's requirement was urgent and that proposals offering late installation would not be considered responsive. We think it was amply clear from these provisions that discussions might not be conducted.

The protester suggests that notice of the possibility that discussions might not be conducted should have appeared in RFP Clause C-16 and Clause 1 of VA Form 10-1130. Clause C-16 provided that the award would be based on the lowest aggregate rental and maintenance charges, while the other clause provided that delivery schedules expressed in terms of calendar dates would be extended to the extent award was made later than 15 days after offers were submitted. However, it has been consistently recognized that an RFP containing the language used in paragraph 10(g), quoted above, constitutes sufficient notification to offerors that award might be made without discussions. 52 Comp. Gen. 346 (1972); B-177986(2), October 3, 1973. In any event, notification in an RFP of the possibility of award on the basis of initial proposals is not a prerequisite to such award where, as here, discussions are dispensed with for reasons of urgency. B-174300, February 29, 1972.

Raytheon's reliance on DPF Incorporated, supra, is misplaced. There, a proposal submitted by the protester was regarded as nonresponsive, leading the agency to conduct discussions solely with another offeror. We held that discussions should also have been held with the protester because in negotiated procurements "'nonresponsiveness' is ordinarily considered to be a subject of negotiation." Here, however, the agency determined, pursuant to FPR 1-3.805-1(a)(3), not to hold any discussions at all. Furthermore, even though Raytheon offered the lowest price, the VA regarded Raytheon's proposal to be nonresponsive because of the materiality of a number of the exceptions Raytheon took to the RFP provisions. Accordingly, the VA had no choice but to reject Raytheon's proposal. B-177986(2), supra. We do point out, however, that the Raytheon proposal properly should have been referred to as unacceptable rather than as nonresponsive since the concept of responsiveness is for application in formally advertised rather than negotiated procurements. Riggins & Williamson Machine Company, Inc., et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366; ABC Management Services, Inc., B-179101, February 13, 1974, 74-1 CPD 67.

With regard to Raytheon's objections to certain RFP provisions, section 20.2(b)(1) of our Bid Protest Procedures, see 40 Fed. Reg. 17979 (1975), provides that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date to be considered timely. Raytheon's protest, however, was not filed until after award. Accordingly, this aspect of the protest is untimely and will not be considered.

We note that the VA has not executed a determination and findings (D&F) justifying the use of negotiation, as required by FPR § 1-3.101, subparts 1-3.2 and 1-3.3. Furthermore, although the time constraints of the procurement permitted the VA to dispense with discussions once proposals were received, the record does not disclose why it would not have been feasible to use formal advertising in this case, since it appears that the specifications were sufficiently definite and that there was adequate time for solicitation of bids pursuant to FPR 1-2.202-1(c). Although we are not disposed at this point to disturb the contract on this basis, we understand that the VA does not intend to exercise any options available under the contract.

  
Deputy Comptroller General  
of the United States