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**DECISION**



Jerold Cohen  
Proc. I  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-187367

DATE: January 26, 1977

MATTER OF: TM Systems, Inc.

**DIGEST:**

1. Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of GAU's Bid Protest Procedures.
2. Sole-source procurement was changed to competitive procurement by amendment to RFP which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment.
3. Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition.
4. "Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations.
5. Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement

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for interchangeability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations.

Request for proposals (RFP) No. N00039-76-R-0288(S) was issued on April 27, 1976, by the Naval Electronic Systems Command (NAVELEX) to TM Systems, Inc. (TM), on a sole-source basis to procure 18 amplifiers, associated repair parts, and options for additional repair parts. The solicitation required the amplifiers to be manufactured so that they would be interchangeable with similar equipment being used by the Navy.

The justifications for procuring the items on a noncompetitive basis were that TM was the only firm that had previously manufactured the equipment and, at the time of issuance of the RFP, the Navy did not have data available which was believed to be adequate for competition; and (2) an urgent requirement existed for the equipment. In regard to the lack of data, in two separate procurements since 1968, NAVELEX has purchased the same amplifiers as those being procured under the present RFP. The first contract was awarded to TM in 1968 after a two-step formally advertised procurement. In 1973 the Navy procured a quantity of the amplifiers from TM in a noncompetitive procurement. The terms of the 1968 contract required the contractor to deliver "Category F" engineering drawings within 60 days after approval and/or delivery of the first production article. NAVELEX states that "Category F" drawings were considered sufficient to have permitted future procurements of the amplifiers on a competitive basis. However, although delivery and approval of the first production article under the 1968 contract were accomplished in August of 1970, the Navy has not yet received the "Category F" drawings. In August of 1976 an unofficial microfilm copy of the drawings was submitted by TM for informational purposes, but it has not yet been verified for accuracy by the Navy.

Subsequent to issuance of the present solicitation, West Electronics, Inc. (West), expressed to the contracting officer an interest in the procurement, and obtained a copy of the solicitation. On June 23, the contracting officer received a proposal from West for the equipment and options solicited in the RFP that was issued to TM. West's offer was conditioned, however, upon the availability as Government-furnished equipment of amplifiers that had previously been produced for the Navy by TM.

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Notwithstanding that an urgent requirement existed for the equipment, the contracting officer determined that it would be in the best interest of the Government to obtain competition for the items between the two companies. Accordingly, on August 10 the contracting officer issued to both companies Amendment 0001 to the solicitation which increased the number of amplifiers to be procured, provided as Government-furnished equipment amplifiers already in use, and established evaluation criteria for award as follows:

"The criteria to be used in evaluation of the contractor's proposal are set forth below in descending order of relative importance, with the most important factor listed first. It is of prime importance that the offeror address each criteria regardless of its relative ranking.

- "1. How the offeror proposes to insure interchangeability.
- "2. How the offeror proposes to meet the delivery schedule.
- "3. In house procedures to be used to assure the quality and reliability of both company fabricated, and vendor purchased components.
- "4. Price (if the offeror is going to use GFP, the evaluation factor, per month of use, shall be 1% of the purchased cost of the property).

"Offers shall be reviewed to determine technical acceptability and compliance with technical requirements, and award shall be made to that acceptable offeror, offering the most advantageous proposal to the Government, price and other factors considered."

The amendment also provided in section F:

"The components and parts of the equipment shall be physically, mechanically and

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electrically interchangeable with the corresponding components and parts of the Government furnished property."

Finally, the amendment established a closing date for receipt of proposals of August 25.

TM states that upon issuance of the amendment it "suspected that perhaps the Navy now was seeking another source." TM states that its "suspicion" was the reason that in its August 20 response to Amendment 0001, it indicated its belief that TM was the only firm that could meet all the evaluation criteria set forth in the amendment, and that any other offeror would have to comply with the Preproduction Test and other requirements which, because of TM's experience on similar Navy contracts, had been deleted from the RFP issued to TM. TM alleged that compliance with those test requirements would delay delivery, required in 6 months, by at least 9 months.

West responded to Amendment 0001 by August 25. TM states that on or about August 30, it learned that the Navy had received an unsolicited proposal, and that the procurement was no longer being conducted on a noncompetitive basis. That information was verified on September 2 in a telephone conversation with the NAVELEX Executive Director of the Contracts Directorate. TM thereupon filed a protest with our Office, which we received on September 8.

TM presents a number of bases for its protest. First, TM protests the Navy's decision to conduct a competitive procurement rather than proceed on a sole-source basis with TM. TM contends that it is the only firm that can meet the requirements of the first evaluation factor set out in Amendment 0001 and of Section F of the amendment. TM states:

"\* \* \* TM is the designer and sole manufacturer, and, is in sole possession of the drawings, in-house procedures and manufacturing techniques absolutely required to duplicate all the components and parts so as to make the contract end item interchangeable with the Government property.

\* \* \* \* \*

"Thus, any firm other than TM that contends it can meet this most important criteria for award, must produce TM drawings, procedures, and manufacturing

techniques in order to prove that its equipments will be interchangeable with the components and parts of the government property - which property is previously delivered equipments supplied by TM. Nor, could such a firm employ reverse engineering even if a government furnished end item were made available for such use to meet the criteria of interchangeability since there would be no way it could control plus or minus tolerances of components and parts."

TM's remaining arguments concern the acceptability of West's proposal. TM contends that, since the RFP issued to TM on April 27 required TM's proposal to be submitted by May 14, West's unsolicited proposal, received by the contracting officer on June 23, was a late offer that should not have been considered, and West should not, therefore, have even been provided Amendment 0001. TM also contends that even if West's offer was timely received, it was not responsive to the solicitation and should be rejected. TM alleges the following as bases for that contention:

- (1) West failed to complete the clean air and water certification of paragraph 16 of the solicitation;
- (2) West did not submit with its offer information concerning material it proposed to purchase, as required in paragraph 19 of the RFP;
- (3) West failed to comply with the data requirements of item 0012;
- (4) West's response to Amendment 0001 "failed to accept all terms, conditions, and provisions" of the RFP issued to TM on April 27;
- (5) "West failed to state how it will meet and insure the interchangeability requirements listed in Amendment 0001";
- (6) "West's response to the requirement [in evaluation factor number 2] \* \* \* 'How the offeror proposes to meet the delivery schedule' is nonresponsive since it fails to commit itself to a firm delivery requirement of six months or any period of time."

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The Navy, in addition to responding to the merits of the protest, contends that TM's protest to our Office is "inappropriate for consideration" since it does not conform to section 20.1(c)(4) of our Bid Protest Procedures (Procedures), 4 C.F.R. part 20 (1976), which requires that bid protests "specifically request a ruling by the Comptroller General." The Navy also contends that, even if otherwise proper, the protest was not filed within the time required by section 20.2(b)(1) of our Procedures, at least to the extent that the protest involves the Navy's decision to convert a sole-source procurement into a competitive one. In this connection, section 20.2(b)(1) provides in pertinent part:

"\* \* \* In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation."

The Navy argues:

"\* \* \* The basis of TM Systems' allegation involves the amendment to the solicitation that provided for competition into a previously sole source request for proposals. The alleged impropriety did not exist in the initial solicitation but was subsequently incorporated therein; and, therefore, pursuant to 4 C.F.R. § 20.2(b)(1), the protest is untimely unless submitted prior to the next closing date for receipt of proposals following the incorporation. The amended closing date for receipt of proposals was August 25, 1976. TM Systems' letter of protest is dated September 2, 1976 and apparently was not received by your office until September 8, 1976.  
\* \* \*"

The Navy further argues that TM's admission as noted above that upon issuance of Amendment 0001 it "suspected" that another proposal was being considered is evidence that such "alleged impropriety" became apparent to TM prior to August 25.

In response to this last point, TM argues that "The Navy overreaches when it says that because TM said it became 'suspicious' of the Navy when Amendment 0001 was issued on August 10, 1976, it [the alleged impropriety] became 'apparent to them on August 10,

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1976." TM contends that it did not in fact know of the Navy's actions until approximately August 30, and that its protest, having been filed in our Office within 10 working days thereafter, is timely under section 20.2(b)(2) of our Procedures, which provides that "bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

Concerning TM's failure to comply with section 20.1(c)(4) of our Procedures, a request by a bidder or interested party for review of procurement procedures need not contain exact words of protest to be characterized as a formal bid protest, although the request should reasonably be understood as the lodging of specific exceptions to the questioned procedures. Johnson Associates, Inc., 53 Comp. Gen. 518 (1974), 74-1 CPD 43; Eocom, Inc., B-185345, March 25, 1976, 76-1 CPD 196. TM's letter of September 2 to our Office clearly indicated that it concerned a "Protest Before Award to Anyone Other than TM Systems, Inc. (TM);" set forth the "basis for the protest to \* \* \* [our] Office;" and stated that TM was "protesting both to the Navy and to [the General Accounting] Office." In view thereof, we consider TM's September 2 letter a "protest," and "appropriate" for our consideration, notwithstanding TM's failure to "specifically request a ruling by the Comptroller General."

Regarding the timeliness of TM's protest, although Amendment 0001 did not specifically state that the procurement was being conducted on a competitive basis, it did modify the original RFP in a manner clearly inconsistent with a sole-source procurement involving TM. Examples of such modification include the interchangeability requirement, and the availability as Government furnished property amplifiers previously supplied by TM, as well as the listing of factors for consideration in the evaluation of the relative merits of proposals. Moreover, we agree with the Navy's contention concerning the effect on this issue of TM's admitted "suspicion" after issuance of the amendment. Thus, we believe that in its August 20 response to Amendment 0001 TM in effect elected not to protest but rather to merely state that no other firm could meet the amendment's evaluation criteria. Accordingly, to the extent that the protest involves the Navy's decision to consider an offer other than TM's, the protest, filed in our Office on September 8, is untimely.

Proceeding to the merits of the timely issues presented by TM, and regarding the time of receipt of West's offer, although the offer was submitted after May 14, the closing date for receipt of TM's proposal under the sole-source solicitation, upon evaluation it was determined, as indicated below, that West's proposal offered and could be shown to meet the Government's requirements within the time

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constraints of the procurement. In such circumstances, an agency would be justified in either canceling the sole-source solicitation and procuring the requirement on a competitive basis, or amending the sole-source RFP to provide for competition. In this connection, Delta Scientific Corporation, B-184401, August 3, 1976, 76-2 CPD 113, should be construed to the same effect. Thus, the Navy's consideration of West's proposal, and the resultant issuance of Amendment 0001, were proper.

Concerning the first three alleged deficiencies in West's offer that TM argues render the offer nonresponsive, the concept of "responsiveness" is not applicable in negotiated procurements. B-174125, March 28, 1972. The fact that an initial proposal may not be fully in accord with specifications or other RFP requirements is not reason to reject the proposal if the deficiencies are reasonably subject to being made acceptable through negotiations. In fact, we have stated that the basic purpose of the negotiated procurement is to determine whether deficient proposals are reasonably subject to being made acceptable through discussions. B-176089, September 26, 1972. Accordingly, West's failure to complete the clean air and water certification, and to submit the documentation at issue properly have not been considered by the Navy as reasons for rejection of West's proposal. In so stating, we have been advised that the Navy intends to request best and final offers pursuant to Armed Services Procurement Regulation (ASPR) § 3-305.3(d) (1976 ed.), at which time the subject requirements may be complied with.

In regard to TM's fourth argument, concerning West's failure in its response to Amendment 0001 to accept the terms, conditions and provisions of the RFP initially issued to TM, since West's offer of June 23 based on that RFP could properly be considered by the contracting officer, the only response necessary upon receipt of Amendment 0001 was submission of a revised proposal by August 25 in accordance with the terms of the amendment.

TM's final two arguments concerning West's "responsiveness" in effect deal not with "responsiveness" as it applies to formally advertised procurements, but with the Navy's evaluation of West's responses to the first two evaluation factors set forth in Amendment 0001, and with West's technical ability to insure interchangeability and to meet the delivery schedule. In this connection, since award has not yet been made, we must consider TM's protest on these issues as being against the Navy's decision to even negotiate with West on the basis of West's initial and revised proposals.

ASPR § 3.805-1(a) (1976 ed.) requires that after the receipt of initial proposals, discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price

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and "other factors" considered. The term "other factors" includes the technical acceptability of proposals. See Economic Development Corporation, B-184017, September 16, 1975, 75-2 CPD 152. The determination, made on the basis of a solicitation's established evaluation criteria, of whether a proposal is technically and otherwise acceptable and therefore within the competitive range is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or unreasonable. See Contract Support Company, B-184845, March 13, 1976, 76-1 CPD 184.

TM essentially contends that West's reliance on Government-furnished amplifiers and drawings cannot result in a product consistent with the requirements of the RFP, and that even "reverse engineering" cannot yield interchangeable equipment. TM specifically points out that West, in discussing electrical interchangeability in its revised offer, stated in part that "procurement of electrical parts will be compatible with the GFP, as assured by substitution;" TM argues that "compatible" equipment does not meet a requirement for "interchangeable" equipment.

However, in its report responsive to the protest, the Navy states:

"It is the opinion of this Command that West Electronics could meet the Navy's interchangeability requirement. The amplifiers to be produced are not technologically complex items. The only component that is unique to this particular amplifier is the transformer, and that item is available from other manufacturers. In fact, all the components of these amplifiers could be purchased, leaving the prime contractor with only an assembly function. This assembly could be completed by technicians experienced with this type of equipment.

"\* \* \* The solicitation at issue does not require identity of parts between the GFP and the amplifiers to be produced. The use of standard engineering practices with regard to tolerances would be sufficient to result in end items that meet the Navy's required level of interchangeability. The Navy also expects to furnish the successful offeror a copy of the drawings which TM Systems is to provide as a deliverable on the 1968 contract \* \* \*

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These drawings contain the tolerances of all components, and though the drawings would not have been verified, they should be useful to a contractor, even if provided only for informational purposes.

Government technical personnel have determined that reverse engineering of the Government furnished equipment, along with the technical manual, is sufficient to produce an end item meeting the Navy's requirements. \* \* \*

In addition, the Navy has determined that West is "technically responsible."

In view of the Navy's findings and judgment, we do not say that the inclusion of West within the competitive range for the purpose of negotiations was unreasonable. The fact that TM does not agree with the Navy's evaluation does not invalidate it. See System Innovation & Development Corp., B-185933, June 30, 1976, 76-1 CPD ¶ 6.

Based on the above, the protest is denied.

Deputy

*R. F. K. 112*  
Comptroller General  
of the United States