

DOCUMENT RESUME

02082 - [A1232210]

[Protest against Use of Price Factor in Contract Award].
B-187073. April 27, 1977. 3 pp.

Decision re: Market Facts, Inc.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Abt Associates, Inc.; Department of
Transportation: Transportation Systems Center.

Authority: 4 C.F.R. 20.2(b)(1)(2). B-173137(1) (1971). B-185103
(1976).

The award of a Department of Transportation (DOT) contract was protested because of contentions that price was not indicated as a factor in the solicitation and that DOT had negotiated with other offerors. Although the language of the solicitation was not considered misleading, the agency was advised to clarify future procurements. Protests based on inappropriate use of price and discussions with other offerors were untimely. (HTW)

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DECISION



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

FILE: B-187073

DATE: April 27, 1977

MATTER OF: Market Facts, Inc.

DIGEST:

1. RFP provision advising offerors that award would be made to offeror who could perform contract in manner most advantageous to Government, all factors considered, reasonably connoted to offerors fact that price would be factor in award determination. However, since RFP failed to reveal relative importance of price in relation to technical factors, agency is advised to avoid such defects in future procurements.
2. GAO will not object to selection of lower priced of two essentially technically equal proposals.
3. Protest of agency's use of price as factor in award determination process filed after closing date for receipt of initial proposals is untimely pursuant to Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1975), which provide that protests based upon alleged improprieties in solicitation must be filed prior to closing date for receipt of initial proposals.
4. Where protester alleges that it was denied opportunity of upgrading technical proposal through negotiating process and offers no evidence or elaboration beyond mere allegation, protester has burden of proof and GAO is unaware of any basis to conclude that protester was in fact denied opportunity.
5. Protester's contention that agency should not have held discussions with other offerors and should have awarded contract to it on basis of initial proposal is untimely pursuant to Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1975), since protest was not filed within 10 working days after it became aware of such discussions.

Market Facts, Inc., (Market), has protested the award of a contract to Abt Associates, Inc. (Abt), under request for proposals RFP TSC/230-0087-GF issued on July 21, 1975, by the Department of Transportation (DOT), Transportation Systems Center.

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Market has stated numerous grounds of protest which we have segregated into the following major contentions: (1) Market reasonably construed the RFP as indicating that price would not be a factor in choosing between competing technically qualified proposals; (2) DOT was not justified in awarding to the lowest-priced (by approximately \$26,000), technically qualified offeror in view of the fact that the RFP did not specifically indicate that price would be a factor in any award determination; (3) because of the hypothetical nature of the research problem as stated by the RFP, costs were estimated and not actual; hence, even assuming that the RFP provided that price would be a factor in any award determination, it was inappropriate for DOT to in fact use price as a factor; and (4) DOT should not have negotiated with other offerors or requested best and final offers because such a process gave other offerors an opportunity to improve their technical ratings while in effect denying the same opportunity to Market; hence, award should have been made to Market on the basis of its highest-rated, initial technical proposal.

Under "Proposal Instructions," "General Information," the RFP provided:

"The Award, if any, resulting from this solicitation will be negotiated with the Offeror who can perform the contract in a manner most advantageous to the Government, all factors considered. Award may be properly influenced by the proposal which promises the greatest value to the Government in terms of possible performance, technical competence, growth potential and other factors rather than the proposal offering the lowest price (fixed price, cost reimbursement, or cost-plus-a-fixed-fee, as applicable). The Government reserves the right to make an award without discussion of the proposal."

While the RFP failed to properly reveal the relative importance of cost in relation to technical evaluation factors, we believe that the terms "most advantageous to the Government" and "all factors considered," quoted above, reasonably connoted to potential offerors the fact that price would be a factor in any award determination. Hence, we are not persuaded by Market's assertion that it was in effect affirmatively misled by the language of the RFP into believing that price would not be a factor in any award determination. However, we are bringing this matter to the attention of DOT to avoid such defects in the drafting of future RFP's for similar services.

As to Market's second contention, as we have noted above, it is our opinion that the RFP advised offerors of the fact that price would be a factor in any award determination. Additionally, DOT has

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characterized the successful proposal as essentially technically equal to Market's proposal (DOT has requested that we not release the respective technical point ratings). In this regard, we have specifically approved of award to the lower-priced offeror where competing proposals were judged by the procuring activity to be "essentially technically equal." See B-173137(1), October 8, 1971. Thus, we cannot object to DOT's selection of the lower priced of two essentially technically equal proposals.

With regard to Market's third contention, our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1975), provide that protests based upon an alleged impropriety in a solicitation must be filed prior to the closing date for receipt of initial proposals. Here, Market essentially is questioning the use of price as a factor in the award determination process in view of what Market describes as the hypothetical nature of offeror's costs. To be considered timely Market's protest of this issue must have been filed prior to August 25, 1975, the closing date for receipt of initial proposals. As Market's protest was filed July 16, 1976, it is untimely and cannot be considered on the merits.

Finally, we are unaware of any basis to conclude that the instant negotiating process denied Market the opportunity of upgrading its technical proposal. We note, in this regard, that although the protestor has the burden of affirmatively proving its case, see Reliable Maintenance Service, Inc., B-185103, May 24, 1976, 76-1 CPD 337, Market has offered no evidence or elaboration beyond the mere allegation.

As to Market's contention that DOT should not have held discussions and should have awarded to Market on the basis of its initial proposal our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1975), provide that protests must be filed within 10 working days after the basis for the protest is known. Since Market did not file this portion on its protest within 10 working days of becoming aware of DOT's intent to negotiate (written questions were mailed to Market on October 14, 1975), it is untimely and cannot be considered on the merits.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States