

DOCUMENT RESUME

02976 - [A1953025]

[Request for Reconsideration of Untimely Protest]. B-187367.
July 11, 1977. 4 pp.

Decision re: West Electronics, 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
(805).

Organization Concerned: Department of the Navy: Naval Electronic
Systems Command; TM Systems, Inc.

Authority: 4 C.F.R. 20.2(b)(2). A.S.P.R. 3-805.3(d). A.S.P.R.
1-703(b)(1). 51 Comp. Gen. 479. 51 Comp. Gen. 481. 50 Comp.
Gen. 246. 50 Comp. Gen. 251. B-185933 (1976). B-187675
(1977). B-185103 (1976).

The protester requested reconsideration of a prior
decision which held that their protest against a contract award
was untimely. Since this protest was filed more than 10 days
after receipt of the previous decision, the protest against the
conditions of the prior decision was untimely. The prior
decision was affirmed. (Author/SC)

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DECISION



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

FILE: B-187367

DATE: July 11, 1977

MATTER OF: West Electronics, Inc.,--request for reconsideration

DIGEST:

1. Protester should have known upon receipt of GAO decision on previous protest, indicating that best and final offers would be requested, that competitor would be afforded opportunity to revise price. Accordingly, protest filed more than 10 working days after receipt of previous decision is untimely; therefore, subject decision is affirmed.
2. Notwithstanding that only offerors on unrestricted procurement were small businesses, contracting agency was not required to notify unsuccessful offeror of standing prior to award under ASPR § 1-703(b)(1) (1976 ed.), since regulation requires prompt notice only in small business restricted procurements.
3. Protester's burden of affirmatively proving allegation of impropriety in evaluation of proposals is not met where only evidence presented is protester's speculation.

West Electronics, Inc. (West), requests reconsideration of our decision in West Electronics, Inc., B-187367, April 14, 1977, 77-1 CPD 257, in which we held untimely a protest by West against the award of a contract to TM Systems, Inc. (TM), under request for proposals (RFP) No. N00039-76-R-0288(S), issued by the Naval Electronics Systems Command (NAVALEX) to procure 18 amplifiers, associated repair parts and options for additional repair parts.

In its protest, which was filed on March 7, West alleged that offerors' prices were improperly disclosed to each other by NAVALEX in that agency's report on a bid protest filed in our Office by TM against NAVALEX's determination to negotiate with West under the

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subject RFP. TM's protest was denied in our decision in TM Systems, Inc., B-187367, January 26, 1977, 77-1 CPD 61. West stated that it did not protest the disclosure when it received the report because the contracting officer had advised West that award would be made after this Office's resolution of TM's protest without further negotiation.

In our April 14 decision, we pointed out that in TM Systems, Inc., supra, we clearly indicated that further negotiations under the RFP were necessary, and that the Navy intended to request best and final offers. Since an offeror is free to revise its price proposal in response to a request for a best and final offer, we stated that "West should have known upon receipt of the decision that TM, allegedly in possession of West's prices, would be given the opportunity to change its proposed price." Thus, since West's protest to our Office was filed more than 10 working days after its receipt of that decision, we considered the protest untimely under section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), and declined to consider it on its merits.

In its request for reconsideration, West argues that despite the statement in our January 26 decision that further negotiations and a request for best and final offers were anticipated, West "corrected any conceivable deficiencies in its prior submissions" in a letter to NAVALEX dated February 8, 1977, thus obviating the need for further negotiations, and advised the Navy at that time that in view of the disclosure of prices there should be no request for best and final offers.

Notwithstanding West's view that because of its February 8 letter to the Navy it believed that further negotiations would not be conducted, we reiterate that our January 26 decision stated that negotiations and a request for best and final offers were in fact contemplated, and on that basis West should have known that TM would be afforded the opportunity to revise its offered price. Moreover, the Navy's acceptance of West's February 8 letter revising its proposal clearly constituted "negotiations" as contemplated by the RFP and procurement regulations. See 51 Comp. Gen. 479, 481 (1972). In such case, West should have realized that TM would necessarily be afforded a similar opportunity to revise its proposal after which a request for best and final offers would be required. See 50 Comp. Gen. 246, 251 (1970); ASPR § 3-805.3(d) (1976 ed.).

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Accordingly, the agency's consideration of West's February 8 letter should have alerted West to the fact that negotiations were being conducted pursuant to our January 26 decision. Further, as we stated in the April 14 decision, although West alleges that it did raise the matter of the price disclosure on February 8, West did not file a protest at that time.

In view of the above, our decision in West Electronics, Inc., supra, is affirmed.

West also raises certain other matters concerning the March 7 award to TM. First, West argues that NAVALEX failed to notify West before award to TM that West was an unsuccessful offeror, as required by ASPR § 1-703(b)(1) (1976 ed.); West contends that such failure prevented West from submitting a protest prior to the award, thus suspending the procurement until the protest could be resolved. Second, West alleges that it has only recently come to its attention that after an initial evaluation of TM's and West's proposals conducted by NAVALEX in August 1976, "West received a substantially higher score than did TM Systems, and the contracting officer determined that TM was not within the competitive range." West questions the basis on which, following our January 26 decision, that evaluation was "set aside," particularly since West's February 8 letter to NAVALEX could not have caused a lower evaluation of West's offer. Finally, and notwithstanding this last point, West questions the final evaluation on the following basis:

"* * * It is the present recollection of Mr. Marmarallis, the original contracting officer, that on the earlier evaluation TM was given a fairly low score on its ability to meet the contract schedule. How much confidence could an evaluator have on a reevaluation of this aspect of the procurement, faced with a price reduction of 20% or more. It would appear that either the entire scoring pattern was revised on this assumed reevaluation, or that there was a studied subversion of the ratings. * * *"

Concerning West's first argument, ASPR § 1-703(b)(1) (1976 ed.) requires prompt notice to unsuccessful offerors of an intended award only in a procurement "involving a small business set aside or otherwise involving small business preferential consideration * * *." Although both TM and West are small businesses, this procurement was not so restricted. Accordingly, the subject regulation is not applicable.

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In regard to the initial evaluation of proposals, we have been advised by NAVALEX that in October 1976 the contracting officer had recommended award to West on an urgency basis in light of TM's protest to our Office, but that such recommendation was never approved because the agency was able to make temporary arrangements to borrow the required equipment from another Navy unit. The Navy has also advised us that no competitive range determination was made at that time and, therefore, TM was not determined outside of the competitive range.

Moreover, concerning the final evaluation, it is not the function of our Office to evaluate proposals to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the burden of any difficulties incurred because of a defective evaluation. Accordingly, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and that such determinations are entitled to great weight and will not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. System Innovation & Development Corp., B-185933, June 30, 1976, 76-1 CPD 426, and decisions cited therein.

West has provided no evidence of bias in the initial or final evaluation of proposals, other than mere speculation, and, therefore, the protester's burden of affirmatively proving its case has not been met. See Hansa Engineering Corporation, B-187675, June 13, 1977; Reliable Maintenance Service, Inc., -- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In view thereof, the protest raised with West's request for reconsideration is denied.


Deputy Comptroller General
of the United States