

DOCUMENT RESUME

03295 - [A2293426]

[Protest to Determination by Contracting Agency That Revised Proposal Was Late]. B-187639. August 15, 1977. 8 pp. + 2 enclosures (2 pp.).

Decision re: Rochester Univ: Center for Naval Analyses, Public Research Inst.; 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: Department of Labor: Employment and Training Administration.

Authority: F.P.R. 1-3.802-1(b). F.P.R. 1-3.805. A.S.P.R. 3-805.3(d). 4 C.F.R. 20.2(c). B-185910 (1976). B-182418 (1975). B-186719 (1976). B-178442 (1974). B-183851 (1975). B-183947 (1976). B-187958 (1976). B-187349 (1977). B-185103 (1975). B-186057 (1976). B-187116 (1977). 56 Comp. Gen. 107.

Protester contended that contract award was made to an offeror at a higher proposed cost and that its protest would have been timely if it had received the cost information. Since protester was advised orally that its revised proposal was not considered because it was received late, it knew the basis for protest before receiving letter with cost information. As issues involved in protest were not considered significant, and conflicting statements of protester and agency constituted the only available evidence, the untimely protest was not considered. (HTW)

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DECISION



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

*9/11 Doyle
PWT*

FILE: B-187639

DATE: August 15, 1977

MATTER OF: The Public Research Institute of the Center for
Naval Analyses of the University of Rochester

DIGEST:

1. When protester was orally advised by contracting agency that its revised proposal was not considered because it was received late, protester then knew complete basis for protest without waiting to receive letter containing amount of cost-reimbursement contract awarded and, to be timely under GAO Bid Protest Procedures, protest should have been filed here within 10 working days of oral notification. Further, consultation with counsel prior to filing protest here is not valid basis for extending 10-day time limitation.
2. Protester argues that protest filed here untimely should be considered under 4 C.F.R. § 20.2(c) (1977) as raising issues significant to procurement practices and procedures. Since merits of protest involve issue which has been considered in previous decision, issue is not significant.
3. Where, as here, conflicting statements of protester and contracting agency--concerning whether protester's proposal was within competitive range and whether protester was invited to negotiate--constitute only available evidence, we do not believe that protester has met burden of affirmatively proving its case.
4. Based on GAO's in camera examination of all documents relating to evaluation of proposals, no support is found for protester's belief that proposals were improperly evaluated or that evaluation panel chairmen were prejudiced against protester.

The Public Research Institute of the Center for Naval Analyses of the University of Rochester (CNA) protests awards for certain study projects made under Department of Labor, Employment and Training Administration, request for proposals (RFP) No. ONP 76-7 (UIS 76-1).

The RFP permitted offerors to submit proposals on one or more of the following projects:

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<u>Project No.</u>	<u>Description</u>
7	An analysis of delayed and never filers
7a	The effect of alternate partial benefit formulas on beneficiary part-time work behavior
7b	The relationship between exhaustion rates and state unemployment insurance laws and economic factors
7f	Impact of experience rating on the demand for labor by individual firms

CNA submitted proposals on each of the above projects but was unsuccessful on each one.

PROJECT 7a

CNA submitted a timely initial proposal, was advised by the Department of Labor's contract specialist that its proposal was within the competitive range, and was invited to participate in negotiations. On August 23, 1976, representatives of CNA met with the contract specialist and a technical representative of the Department of Labor. In the course of discussions CNA realized that its proposal, while excellent technically, contained a cost which was far too high. Labor recommended certain deletions and modifications to reduce the proposed cost. During the meeting, CNA says that the contract specialist gave CNA 1 week to submit a revised proposal. Labor says that CNA indicated that it would not submit a revised proposal. After the meeting, a CNA representative called the contract specialist to advise that CNA would submit a revised proposal. The cut-off date for receipt of the revised proposal was established in that telephone conversation. Labor says the cut-off date was August 24 and CNA says the cut-off date was August 27. No contemporaneous written statements of either party were made and no written letter of confirmation of the cut-off date was prepared.

On August 27, CNA submitted the revised proposal, Labor personnel received it, and gave CNA a receipt indicating the time and date of

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receipt. The contract specialist retained a revised proposal, later permitted it to be used by the technical adviser, and did not promptly notify CNA that Labor considered CNA's proposal to be late as required by Federal Procurement Regulations (FPR) § 1-3.802-1(b) (1964 ed. amend. 153).

On September 21, 1976, CNA learned by a telephone conversation with the contract specialist that the cost-reimbursement contract was awarded to another offeror. On September 24, 1976, representatives of CNA met with the contracting officer, the contract specialist, and other Labor personnel and were advised that the revised proposal was not considered because it was late. On September 28, 1976, CNA received a letter from Labor stating that the cost-reimbursement contract awarded was based on proposed costs of \$60,246, compared to CNA's revised proposed costs of \$51,990. After consultation with counsel, CNA filed a protest here on October 13, 1976.

Timeliness of CNA's Protest

Labor contends that CNA's protest is untimely under our Bid Protest Procedures (4 C.F.R. § 20.2(b)(2) (1976)), which provide that protests shall be filed here not later than 10 working days after the basis for protest is known or should be known in order to be considered on the merits. Labor argues that CNA knew on September 20 that the revised proposal was deemed late, forming the complete basis of protest. Accordingly, to be timely, it is Labor's position that CNA's protest must have been filed here on or before October 8.

CNA contends that the basis for protest was not that the revised proposal was deemed late but that award was made to an offeror at a higher proposed cost, information that CNA first learned from Labor's September 20 letter received on September 28. Thus, CNA concludes that the protest would be timely since only with the cost information did it become clear that Labor's rejection of the revised proposal denied CNA the contract. In support, CNA argues:

"This is not the same situation as existed in Micronics International, Inc., B-185910, May 11, 1976, 76-1 CPD 308, because CNA was not fully informed of the basis for its protest at the September 24 meeting and, in fact, was told by Labor to await receipt of the September 20 letter to obtain some of the

information which formed the basis of CNA's protest. Consequently, this protest was timely. See, e.g., Torotron Corporation, B-182418, January 30, 1975 (agency representation that letter containing additional information would follow oral advice of basis of rejection justified delay by protester in filing protest); VAST, Inc., B-182844, January 31, 1975 (no basis existed for protest until protester aware of award to another offeror)."

The Micronics International, Inc. decision held that an unsuccessful offeror, orally advised of the complete basis for the procuring agency's denial of its protest, could not extend the time for filing a protest here by waiting to receive a letter of confirmation. The Torotron Corporation decision held that a protest, filed here by an unsuccessful bidder, orally advised of the general basis for its protest and also advised that a letter detailing the specific basis for its rejection would be forthcoming within 10 days, would not be untimely because the protest was filed within 10 days of the expiration of that waiting period. The VAST Inc. decision held that the protest against an award in a negotiated procurement based on an alleged conflict of interest involving the successful offeror filed here the day after award was timely because until award the protester was not on notice that the successful offeror submitted a proposal and was being considered for award.

The VAST Inc. decision is not helpful to our resolution of the timeliness of CNA's protest since there the identity of the awardee was critical to the basis of protest in that decision. Here the identity of the awardee is irrelevant. The Torotron Corporation decision is also inapplicable here because the protester was not led to believe that further details specifically explaining the agency's rationale for determining its bid nonresponsive would be contained in a subsequent letter. Instead, just as the situation in the Micronics International, Inc. decision, CNA was orally advised of the complete basis of protest in the meeting of September 24 and was not required to wait to receive the announcement of award letter on September 28 before knowing the basis of protest.

Moreover, we find CNA's argument that the proposed cost of the successful offeror must have been disclosed before the complete basis

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Our protest was known unpersuasive because under the RFP evaluation scheme proposed cost was worth only 10 of 100 maximum points. Furthermore, CNA's consultation with counsel prior to filing a protest here is not a valid basis for extending the 10-day time limitation. Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. Accordingly, CNA's protest was not filed here timely.

Significant Issue

Our Office may consider any protest which is not filed timely when it is determined that a protest raises issues significant to procurement practices or procedures. 4 C.F.R. § 20.2(c) (1977). CNA argues that our Office should consider the protest because it "raises issues significant to procurement practices or procedures." CNA has alleged that Labor's treatment of its revised proposal as "late" is a fabrication designed to restrict competition so that Labor could award the contract to a higher-priced, lower-rated offeror. In CNA's view, nothing would be more significant to the entire Federal procurement system than assuring that the integrity of such system is maintained, that maximum competition is fostered, and that the public receives the benefit of contracts performed by the best qualified offerors at the lowest price. CNA concludes that these issues are presented by CNA's protest and are of the type intended to be covered. CNA argues that the following decisions support the contention that this matter presents a significant issue: RCA Alaska Communications, Inc., B-178442, June 20, 1974, 74-1 CPD 336 (allegation that the agency improperly failed to obtain competition was a significant issue justifying consideration); LTV Aerospace Corporation, B-183851, October 1, 1975, 75-2 CPD 203 (untimely protest considered, because of, inter alia, issue relating to the propriety, fairness, and equality of the evaluation given to proposals submitted); Inflated Products Company, Inc., B-183947, March 11, 1976, 76-1 CPD 170 (protester alleged grossly misleading information was purposely provided to it by a contracting activity).

In our view the ultimate issue here is when was the cut-off date for receipt of the revised proposal established in a telephone conversation between a CNA representative and the contract specialist. As CNA points out, our Office considered an identical factual situation in B-176683, December 21, 1972, where, while we found no basis for sustaining the protest, we recommended that the Armed Services

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Procurement Regulation (ASPR) be amended to provide that whenever feasible, requests for best and final offers and the establishment of cut-off dates should be confirmed in writing. Our recommendation has been implemented. ASPR § 3-805.3(d) (1976)

Where the merits of a protest involve an issue which has been considered in previous decisions, that issue is not significant within the meaning of 4 C.F.R. § 20.2(c). D.A. Cruciani and Frank A. Agrone, B-187958, December 21, 1976, 76-2 CPD 518; Berz Ambulance Service, Inc., B-187349, June 8, 1977. Further, in Michael O'Connor, Inc., 56 Comp. Gen. 107 (1976), 76-2 CPD 456, we considered an untimely protest containing a significant issue and agreed with the protester's position but we refused to provide a remedy because the protest was untimely. See Berz Ambulance Service, Inc., supra. Since we have considered the issue previously, it is not "significant" and, accordingly, will not be considered.

In order to avoid possible confusion and future misunderstandings of this nature, we are recommending by letter of today that the Administrator of General Services amend FPR § 1-3.805 to provide that whenever feasible, requests for best and final offers and the establishment of cut-off dates be confirmed in writing.

PROJECT 7b

In the initial protest letter CNA stated that its technical proposal for this project was the highest rated but CNA was excluded from the competitive range and thereby precluded from revising its proposal. In two subsequent letters to our Office, copies of which were provided to Labor, CNA repeatedly contended that it was improperly excluded from the competitive range. After our Office reviewed the evaluators' score sheets and noted that only one point separated CNA from the highest-rated technical offeror, we asked Labor whether negotiations were held. In response, Labor stated that:

"Negotiations were held on proposals relating to RFP item 7(b) with those offerors in the competitive range. CNA was in the range and therefore invited to negotiations. [A representative] * * * of CNA was requested to come in; however, he said if we were only inviting him in to discuss his costs, he would not reduce them and, therefore, had nothing to discuss with us. Also, CNA's costs for this project were \$101,030, and the award was made to Mathematica for \$56,361. * * *"

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Labor advises our Office that there is no written evidence advising offerors as to whether they were included or excluded from the competitive range.

CNA argues that: (1) upon being invited to negotiate on two other projects under the RFP, CNA readily accepted the invitation and actively participated; therefore, it would be inconsistent for CNA to refuse to negotiate on this project; and (2) Labor's failure to deny CNA's repeated allegations of improper exclusion from the competitive range casts doubt on its credibility.

Where, as here, conflicting statements of the protester and the contracting agency constitute the only available evidence, we do not believe that the protester has met the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 20, 1976, 76-1 CPD 337; Microcom Corporation, B-186057, November 8, 1976, 76-2 CPD 385. Although CNA's arguments imply that Labor personnel acted in less than good faith and while the circumstances cast some doubt on Labor's position, the written record on which our decisions are based provides no basis to support CNA's argument. See Sperry Rand Corporation, B-187116, January 31, 1977, 77-1 CPD 77.

PROJECTS 7 and 7f

With regard to project 7f, CNA believes that the initial written report on the technical evaluation of proposals was not circulated to all of the members of the evaluation panel and as a result evaluators may have been denied the opportunity to review the accuracy of the report. CNA also believes that panel members did not review the technical ratings given to the various offerors after the cost ratings were included. Based on those beliefs, CNA concludes that there could not have been a fair determination as to whether proposals--like CNA's--which were broader in scope than the RFP contemplated, and thus higher in cost, could have been modified, through negotiation, to become more competitive.

With regard to both projects 7 and 7f, CNA believes that all of the evaluation panel chairmen were prejudiced against CNA and such prejudice caused them in several instances to rate CNA below other offerors and below the ratings of other panel members on the technical evaluation.

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At CNA's request, Labor provided our Office with all documents relevant to the technical evaluation and the summaries of the cost evaluation of all proposals for the projects for our in camera examination. With regard to project 7, our examination shows that: (1) the panel chairman rated CNA slightly higher than the average of the other three evaluators; (2) all evaluators rated each proposal; (3) the final technical rating was an average of the four ratings; (4) a score for proposed cost--a maximum of 10 points out of 100 total points--was added to the technical rating by the contracting officer; and (5) the competitive range was reasonable. With regard to project 7f, our examination shows that: (1) the panel chairman rated CNA exactly the same as the average of the other three evaluators; (2) all evaluators rated each proposal; (3) the final technical rating was an average of the four ratings; (4) a score for proposed cost was added to the technical ratings by the contracting officer; and (5) an award was made to the offeror submitting the highest evaluated proposal without negotiation. After reviewing the RFP's evaluation scheme, the evaluators' comments and ratings, and the contracting officer's determinations, we find no basis to disturb the awards made on those projects.

CONCLUSION

While we have declined to consider CNA's protest concerning project 7a, and we have denied CNA's protests concerning the other projects, we are bringing to the attention of the Secretary of Labor the various deficiencies noted in the handling of this procurement for corrective action in future procurements.


Deputy Comptroller General
of the United States



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

R. Douglas

B-187639

AUG 15 1977

The Honorable Joel W. Solomon
Administrator, General Services Administration

Dear Mr. Solomon:

Enclosed is our decision of today, The Public Research Institute of the Center for Naval Analysis of the University of Rochester, B-187639, in which we recommend that Federal Procurement Regulation § 1-3.805 (1964 ed. amend 153) be amended in a manner similar to Armed Services Procurement Regulation § 3-805.3(d) to require written confirmation of oral discussions establishing a deadline for the receipt of proposals.

We request that you advise us of any action taken on the recommendation.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

Enclosure

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

F. Doyle
Pres. F.

AUG 15 1977

B-187639

The Honorable
The Secretary of Labor

Dear Mr. Secretary:

Enclosed is our decision of today, The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, concerning request for proposals No. ONP 76-7 (UIS 76-1) issued by your Employment and Training Administration. While we have declined to consider the protest concerning project 7A and we have denied the protests concerning the other projects, various deficiencies were noted in the handling of the procurement. We recommend that you initiate action to correct the deficiencies noted in the decision for future procurements.

We would appreciate being informed of the actions taken.

Sincerely yours,

R.F. KEGLER

(Deputy)

Comptroller General
of the United States

Enclosure

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