

4. *Plat*, p. 2.

DECISION



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

7805

FILE: B-190247

DATE: September 21, 1978

**MATTER OF: RCA Corporation; Norman R. Selinger
& Associates, Inc.**

DIGEST:

1. Protest by large business concern against solicitation restricting procurement as total small business set aside, on basis that there were insufficient small business competitors; filed after closing date for receipt of step-one technical proposals is untimely filed under GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b) (1977 ed.).
2. Protest by Federal Supply Service (FSS) contractor, alleging procurement should have been effected under FSS, filed after closing date for receipt of step-one proposals is untimely filed and not for consideration on merits. Fact that procuring activity's requirements were not being purchased from FSS was apparent from Commerce Business Daily Notice and from face of step-one solicitation.
3. Large business concern's protest against agency's evaluation of its equipment (on basis of which small business offers were rejected as unacceptable) filed after closing date for receipt of step-one proposals is timely filed where evaluation was not publicly disclosed and record does not controvert protester's statement that it became aware of unfavorable evaluation only at time of issuance of step-two solicitation.
4. Protest questioning propriety of retaining set-aside restriction after evaluation of step-one technical proposals, filed after closing date for receipt of proposals is timely filed because price

reasonableness in two-step formally advertised procurement cannot be determined until after bid opening under step-two solicitation.

5. Award under two-step formally advertised procurement restricted as total small business set-aside may be made where there are only two small business offerors whose step-one technical proposals were found acceptable and were eligible to compete on step-two invitation for bids.
6. Technical evaluations are based on degree to which offerors' written proposals adequately address evaluation factors specified in solicitation. Request for technical proposals (RFTP) which does not require samples or include sample testing and evaluation criteria does not authorize procuring activity to acquire and test proffered equipment to determine acceptability of technical proposals.
7. RFTP statement: "THIS PURCHASE IS RESTRICTED TO SMALL BUSINESS" does not suffice to restrict procurement as total small business set-aside where RFTP does not also include clauses required for total set-aside by Armed Services Procurement Regulation (ASPR) §§ 1-706.5(c) and 7-2003.2 (1976 ed.).
8. Agency's acquisition and evaluation of equipment furnished by firm deemed ineligible to compete on step-one RFTP and rejection of six proposals on basis of such evaluation constitute complete departure from RFTP evaluation criteria.

Improper evaluation precluded 60 percent of offerors from competing on step-two solicitation to their prejudice. However, remedial action is not possible because of termination costs and urgency and gravity of program for which cameras are being purchased.

9. ASPR § 2-503.1(f) requires prompt notice to unsuccessful offerors; reasons for rejection may be given in general terms, notice requirement is procedural, and failure to comply is not legal basis for disturbing otherwise valid award. Notice merely stating offeror's item does not meet specification requirements is inconsistent with spirit and purpose of regulation, particularly where Agency furnishes more detailed reasons for rejection in denying offeror's protest shortly after issuing notice of rejection.

RCA Corporation (RCA) and Norman R. Selinger & Associates, Inc. (Selinger), have protested against the award of a contract by the Department of the Navy (Navy), Naval Air Development Center, Warminster, Pennsylvania, to General Electrodynamics Corporation (GEC) for closed circuit television cameras for alarm assessment in physical security systems, under request for technical proposals (RFTP) No. 62269-77-R-0448.

A Pre-Invitation Notice concerning the proposed procurement, published in the Commerce Business Daily (CBD) on June 15, 1977, advised that "[t]he TV cameras must be commercially available, off-the-shelf equipment," that the procurement would be conducted by two-step formal advertising, and that the step-one solicitation would be issued approximately July 15, 1977. Twenty-nine firms responded, requesting copies of the solicitation.

At some time during the early stages of the procurement the Navy purchased or received from manufacturers 10 cameras for inspection. RCA, for example, furnished a camera to the Navy on July 22, 1977. The parties offer conflicting accounts of this transaction

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which will be discussed below; it is mentioned at this juncture in order to establish the chronology of events in the procurement process.

On July 25, 1977, the Navy's Small Business Specialist recommended that the procurement be set aside for exclusive small business participation. The contracting officer concurred, and an RFTP for 100 cameras, 100 manuals and an option quantity of an additional 100 cameras was issued on July 26, 1977, with the following legend atop the first page:

"THIS PURCHASE IS RESTRICTED TO SMALL BUSINESS."

By letter dated July 28, 1977, the Navy informed RCA, a large business concern, that the procurement was to be a total small business set-aside. RCA responded by letter of August 3, 1977, asking whether there was a sufficient number of small business competitors for a set-aside. The Navy replied in the affirmative two days later, and did not treat RCA's August 3 letter as a protest against the solicitation.

The Technical Proposals clause of the RFTP provided for the submission and evaluation of proposals as follows:

"Offerors are required to furnish a detailed technical proposal with sufficient information to show compliance with the requirements of the solicitation.

"Offerors are advised to submit proposals which are fully and clearly acceptable without additional explanation or information, since the Government may make a final determination as to whether a proposal is acceptable or unacceptable solely on the basis of the proposal as submitted and proceed with the second step without requesting further information from any offeror. However, if it is deemed necessary in order to obtain sufficient acceptable proposals to assure adequate price competition in the second step or if it is otherwise in its best interest, the Government may, at its sole discretion, request additional information from offerors of proposals which are considered

reasonably susceptible of being made acceptable by additional information clarifying or supplementing but not basically changing any proposal as submitted. For this purpose, the Government may discuss any such proposal with the offeror.

"In the second step (STEP TWO) of the procurement, only bids based upon technical proposals determined to be acceptable, either initially, or as a result of discussions, will be considered for award; EACH BID IN THE SECOND STEP SHALL BE BASED ON THE BIDDER'S OWN TECHNICAL PROPOSAL. Prospective Contractors submitting unacceptable technical proposals will be so notified upon completion of the technical evaluation as to the reasons why their proposal is considered unacceptable.

* * * * *

Ten technical proposals, including those of GEC and Selinger, were received on August 17, 1977, the closing date for receipt of proposals. RCA, however, did not submit a proposal.

Between August 26 and September 1, 1977, the Navy sent GEC a list of questions concerning the camera specifications and the firm's proposal. GEC supplied the requested information by telegram on September 6, 1977, which the Navy received on September 8, 1977.

The Navy states that technical evaluation of the proposals was completed on September 5, 1977, as a result of which only the GEC and Cochu, Inc. (Cochu) proposals were determined to be acceptable. The remaining 8 proposals were deemed unacceptable and not reasonably susceptible of being made acceptable by further clarifying information. Three days later the Navy sought additional information from GEC, which the firm furnished by telegram dated September 12, 1977.

The step-two invitation for bids (IFB) was issued to GEC and Cochu on September 14, 1977. On September 19, 1977, Selinger personnel telephonically ascertained from

the Navy that the firm's proposal had been found unacceptable, that it would not be permitted to compete on step-two, and that a letter so notifying Selinger had been prepared. (Letters notifying the unsuccessful offerors, pursuant to Armed Services Procurement Regulation (ASPR) § 3-508.4 (1976 ed.), were mailed on September 20, 1977.) During a second telephone conversation that day, the Navy asserts that Selinger was told the reasons why its proposal was rejected. Selinger submitted written protests to the Navy on September 19 and 26, 1977, which the Navy denied by telegram dated September 27, 1977.

At the bid opening on September 26, 1977, GEC was the low bidder at a unit price of \$1,786.75 per camera for the base quantity and \$1,751 each for the option quantity. Unit prices reported by the Navy are actually average unit prices for each group of 100 cameras, which are supplied with one of four types of lens, quoted at four different prices, for quantities per-lens-type of 60, 20, 15 and 5 units.

RCA and Selinger filed their protests with our Office on September 28, 1977. On September 29, 1977, the Navy made a Determination and Findings (D&F) of urgency, pursuant to ASPR § 2-407.8(L)(3) (1977 ed.), under which contract No. N62269-77-C-0448 was awarded to GEC on the same day.

By April 14, 1978, GEC had delivered 8 cameras to the Navy. During evaluation of the firm's production items, however, the Navy noted a lack of contrast under certain low light conditions, which GEC has proposed to solve by modifying the camera's configuration. The Navy has, therefore, suspended further delivery under the contract pending evaluation of GEC's modification proposal.

RCA Protest

RCA essentially contends that the procurement was inappropriately set aside for small business and should have been resolicited without the small-business restriction, that the Navy improperly evaluated an RCA preproduction model camera on the basis of which it wrongfully rejected technical proposals by Selinger and 5 other offerors which offered RCA cameras, and that the Navy should have purchased its requirements from RCA's Federal Supply Schedule (FSS) Contract No. GS09S-38172.

TIMELINESS

The Navy takes the position that RCA's protest is untimely filed and not entitled to consideration on the merits, citing § 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R., part 20 (1977 ed.), which provides as follows:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals. * * *"

In this regard, the Navy asserts that the fact that the procurement was to be a total set-aside was apparent from the RFTP and that RCA was expressly so advised by the Navy's July 28 letter. Because RCA's protest was filed with our Office 29 working days after the August 17 closing date for receipt of technical proposals, the Navy therefore contends that it was not timely filed.

RCA, however, states that it relied on the Navy's August 5 assurances concerning the sufficiency of small business competitors, that it had no indication to the contrary until the IFB was issued to only two bidders, and that its protest was therefore timely filed within 10 working days of the issuance of the IFB. See 4 C.F.R. § 20.2(b)(2) (1977 ed.).

A total small business set-aside is prohibited absent a determination that there is a reasonable expectation of offers from a sufficient number of small business concerns to assure that award will be made at a reasonable price. ASPR § 1-706.5 (1976 ed.). The contracting officer's decision to set aside a particular procurement exclusively for small business should be made on the basis of the circumstances which exist at the time the decision is made. B-172165, September 3, 1971; DeWitt Transfer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180. These decisions are basically business judgments which require the exercise of broad discretion by the contracting officer. Hawthorne Melody, Inc., B-190211, November 23, 1977, 77-2 CPD 406. Thus, the actual reasonableness of the expectation will not be reevaluated in retrospect, and

our Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of discretion. Allied Maintenance Corporation, B-188522, October 4, 1977, 77-2 CPD 259.

Because the alleged defect, the small business restrictive method of procurement chosen, was apparent from the RFTP and unequivocal from the Navy's July 28 letter, and RCA did not protest this alleged impropriety until after the August 17 closing date, its protest on this ground is untimely. See Jaybil Industries, Inc., B-188230, March 23, 1977, 77-1 CPD 143.

With regard to RCA's reliance on the Navy's assurance, the Government cannot guarantee the number of proposals that will be received in response to a solicitation, let alone the number of acceptable proposals, nor does RCA's reliance make a timely protest against allegedly unduly restrictive specifications which prevent the firm from competing unnecessary. Mobility Systems, Inc., B-191074, March 7, 1978, 78-1 CPD 179. More specifically, we have held that a protest against such a set aside on the basis that there was not a sufficient number of small business competitors, filed after the closing date for receipt of initial proposals, is untimely filed according to the above-quoted provision of our Bid Protest Procedures. CDI Marine Company, B-188905, November 15, 1977, 77-2 CPD 367; see Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350.

Even assuming arguendo that RCA's August 3 letter constituted a protest to the Navy, the Navy's August 5 reply constituted "adverse agency action" requiring a timely protest to our Office within 10 working days. 4 C.F.R. § 20.2(a) (1977 ed.). Furthermore, the Navy's receipt of proposals, as scheduled, on August 17, 1977, without amending the RFTP in response to RCA's inquiry must be considered adverse agency action. See Documentation Associates, B-190238, March 23, 1978, 78-1 CPD 228. Because RCA's protest concerning the propriety of the set-aside was not filed with our Office within the requisite period subsequent to either adverse action, characterization of the protester's August 3 inquiry as a protest to the procuring activity would not have otherwise affected the untimeliness of the protest on this ground. See International Harvester Company, B-189794, February 8, 1978, 78-1 CPD 110.

RCA has asserted, in the alternative, that the procuring activity should have effected the procurement under the firm's Federal Supply Schedule contract. The fact that the Navy's requirements were not being purchased from the FSS was readily ascertainable from the CBD Pre-Invitation Notice and from the face of the RFTP. The appropriate time to protest against this aspect of the procurement was, therefore, at least prior to the closing date for receipt of technical proposals. See Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308. This ground of the protest, filed with our Office after the August 17 closing date, is untimely filed and will not be considered on the merits. 4 C.F.R. § 20.2(b)(1) (1977 ed.).

Timely Grounds of Protest

We cannot, however, agree that RCA's protest is untimely in its entirety. The purpose of the "reasonable expectation" determination is to ensure that awards to small business concerns will be made at reasonable prices. For this reason the contracting officer is permitted to reassess the propriety of and to withdraw a set-aside determination prior to award of a contract if he considers that the procurement would be detrimental to the public interest (e.g., because of unreasonable price). ASPR § 1-706.3(a) (1976 ed.); see Swedlow, Inc., B-189751, December 21, 1977, 77-2 CPD 489. Because the instant procurement was conducted by two-step formal advertising, the number of vendors eligible to submit bid prices was not ascertainable until proposal evaluation was completed; hence, a price reasonableness determination could not be made until bids were opened under the step-two IFB. To the extent that RCA's protest questions the propriety of retaining the set-aside restriction subsequent to evaluation of technical proposals, it is timely. See DeWitt Transfer and Storage Company, *supra*. Our Office has, however, recognized the right of a procuring activity to make an award under a total small business set-aside where there are as few as two acceptable offers, CDI Marine Company, *supra*, and even where there is only one responsive bid. B-173371, December 17, 1971; Berlitz School of Languages, *supra*. Moreover, RCA has not

presented any evidence to refute the Navy's apparent determination of price reasonableness. Kinnett Dairies, Inc., B-187501, March 24, 1977, 77-1 CPD 219; Hawthorn Melody, Inc., supra. We are, therefore, unable to conclude from the record that these administrative determinations lacked a reasonable basis in fact or constituted an abuse of discretion.

The protester contends that the Navy evaluated an RCA camera on the basis of which the technical proposals of six offerors were improperly rejected. RCA states that it had no information concerning the suitability of its camera until the time of the step-two IFB (issued September 14, 1977) and that company personnel telephonically verified the Navy's evaluation on September 27, 1977.

The conduct of the evaluation was not publicly disclosed and the record is devoid of any objective evidence contrary to the protester's statement as to when it became aware of the Navy's unfavorable evaluation. See Burroughs Corporation, 56 Comp. Gen. 142, 147 (1976), 76-2 CPD 472, aff'd sub nom. Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256. Consequently, this issue of the protest is timely filed and will be considered on the merits. 4 C.F.R. § 20.2(2) (1977 ed.).

As mentioned above, the parties offer conflicting accounts of the camera and the circumstances under which it was provided to the Navy. RCA avers that the camera was furnished in response to the Navy's July 21, 1977, request for a "hands on" look at an RCA model TC 1006 camera, without indicating any intention to evaluate the camera. As that model was not available at the time of the request, RCA sent a preproduction engineering model of the TC 1006 with a list of anticipated modifications, and so advised the Navy. The camera, furnished "as is," did not contain all the design and performance features of the production model, and had not been finally tested and adjusted prior to delivery to the Navy. RCA further states that the camera furnished was, therefore, not appropriate for technical evaluation, and would not have been provided if the Navy had disclosed its intention to use that model to evaluate the firm's TC 1006 camera against the specifications of the RFTF or of any other solicitation.

The Navy states that on July 22, 1977, RCA submitted its TC 1006 camera "for test and evaluation * * *." According to the Navy's September 6, 1977, technical evaluation report, the proposals of 3 companies, including Selinger, offering the RCA TC 1006 camera (which the Navy describes as a TC 1005 camera in an RCA fabricated housing) were unacceptable due to discrepancies in focus stability and lack of lens support. The Navy further advises that the list of proposed modifications furnished with the camera by RCA failed to address the backlash problem previously experienced with the RCA TC 1005 model.

The Navy concedes that the RFTP clearly did not require bid samples and, we think fairly, frames the issues thus raised by the protesters as an evaluation of proposed cameras constituted a departure from the evaluation procedure stated in the RFTP and whether such evaluation or prior knowledge was improper.

Initially, an RFTP is required to contain "the criteria for evaluating the technical proposal," ASPR § 2-503.1(a)(iv) (1976 ed.), and "[t]echnical evaluation of the proposal shall be based upon the criteria contained in the request for technical proposals * * *" Id. at (e) (emphasis added). Bid samples are samples required by the IFB to be furnished as a part of the bid and are to be used only to determine the responsiveness of the bid. ASPR § 2-202.4(a) (1976 ed.). If an IFB does not require samples, but samples are furnished with a bid (i.e., unsolicited samples), they are not to be considered as qualifying the bid and are to be disregarded unless the bid or supporting documents clearly indicate that the bidder intended to so qualify the bid. Id. at (g).

The Navy, however, offers the following explanation concerning its camera evaluations:

* * * Prior to the instant procurement [the procuring activity] purchased an RCA model TC 1005 camera and * * * also obtained on a loan basis from RCA a TC 1006/H camera for evaluation. Additionally, cameras had been obtained previously from other potential sources for this procurement. The purpose of the evaluation of the

actual cameras to confirm a determination that the camera was a commercial off-the-shelf model as required by the solicitation and to confirm the technical evaluation of the written proposals that the camera proposed met all the requirements of the solicitation."

Because the protester's contentions and the Navy's response regarding the camera evaluations are inter-related, we will address the issue as it applies to both protesters. The Navy states that unlike the lengthy, detailed technical proposal submitted by GEC, Selinger's proposal was 5 pages long, merely reiterated the Government's specifications, and included a 2-page brochure about the RCA TC 1006/H camera. The procuring activity notes that our Office has recognized the propriety of rejecting technical proposals because they lack sufficiently detailed information concerning how work will be performed or solicitation requirements will be satisfied, citing Servrite International Limited, B-187197, October 8, 1976, 76-2 CPD 325; General Exhibits, Inc., B-182669, March 10, 1975, 75-1 CPD 143; Phelps Protection Systems Inc., B-181148, November 7, 1974, 74-2 CPD 244. The Navy contends that it was clear from the terms of the RFTP that offerors were required to furnish detailed proposals with sufficient information to show compliance with the RFTP requirements, that offerors submitting incomplete or otherwise deficient written proposals did so at the risk of being found unacceptable, that Selinger's proposal was "superficial and totally lacking in every detail" as to how the proposed camera was to comply with the specifications, and that Selinger's proposal was, therefore, properly rejected.

Under these circumstances, the Navy states that it could not determine from the face of Selinger's proposal whether the camera offered was technically acceptable.

"Rather than rely on a determination that a written technical proposal submitted by
* * * Selinger was technically unacceptable,
* * * Selinger and all other offerors proposing the RCA cameras, were given the benefit of an additional and separate evaluation of the actual cameras proposed by those firms to

determine whether, notwithstanding the technical unacceptability of the written proposal, the camera proposed satisfied the requirements of the specifications. The only way the written proposal of * * * Selinger could be evaluated was to rely on the personal knowledge of the technical evaluators and the evaluation of the camera itself."

The first step of a two-step formally advertised procurement is a negotiation process whereby through discussions, changes, etc., technical proposals are found acceptable for the second-step bidding process. 50 Comp. Gen. 346, 352 (1970); 51 *id.* 85, 88 (1971). Technical evaluations are based upon the degree to which the offeror's written proposals adequately address the evaluation factors specified in the solicitation. Servrite International Ltd., supra; Didactic Systems, Inc., B-190507, June 7, 1978, 78-1 CPD 418. We find the Navy's proposal evaluation procedures singularly inappropriate to an RFTP which neither required samples nor included sample evaluation or testing criteria. For the reasons discussed below, we agree with the protesters that an evaluation of proposed equipment was not authorized by the RFTP and that it did not constitute an evaluation factor determinative of the acceptability of the technical proposals. 45 Comp. Gen. 357, 360 (1965).

The acceptability of the written technical proposals was to be determined from their content alone. According to the terms of the RFTP, additional information was to be requested only for proposals deemed susceptible of being made acceptable by the submission of clarifying information; none of the proposals, however, was so characterized by the Navy. See Smoke Detectors, B-191459, August 1, 1978. If, as the Navy suggests, the proposals could not be evaluated without recourse to the actual equipment, the RFTP should either have been amended to require samples and include evaluation criteria, or canceled and the requirements resolicited under a solicitation requiring samples.

Where the procuring activity determines that pre-award sampling is necessary, samples should be required from each offeror. 55 Comp. Gen. 648, 651 (1976). The fact that the Navy, instead, requested cameras from

a manufacturer which it considered ineligible to compete on even the step-one solicitation, is inconsistent with the rationale for requiring samples, as well as the purported set aside character of the procurement. Moreover, both protesters assert that the camera which the Navy evaluated was not, in fact, the camera which Selinger offered in its proposal.

We find the Navy's inability to determine the acceptability of Selinger's technical proposal from the face of the proposal largely a problem of the Navy's own creation and one inappropriate for resolution by technical evaluation of equipment furnished by a firm other than the offeror. We have long recognized that the flexibility of two-step advertising does not obviate the necessity for adherence to stated evaluation criteria and basic specification requirements. 53 Comp. Gen. 47, 51 (1973). The Navy improperly intended to and did rely on its examination of proposed equipment rather than on an evaluation of the technical proposals or on step-one negotiation procedures to determine the acceptability of what was being offered. Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404. Acquisition, testing and evaluation of cameras under a solicitation devoid of sample requirement and evaluation provisions therefore constitutes a total departure from the evaluation criteria stated in the RFTP. The evaluation and "prior knowledge" so acquired by the Navy were improper bases upon which to determine the acceptability of technical proposals, proposals evaluated in this manner were evaluated contrary to the requirements of ASPR § 2-503.1 (1976 ed.), and the Navy's rejection of proposals on these grounds was without a reasonable basis. Moreover, the Navy's camera evaluation and resultant technical proposal evaluation precluded six of the step-one offerors from competing for the procurement under the step-two IFB on the basis of evaluation factors not included in the RFTP. See Smoke Detectors, supra. Effective competition, however, requires that all prospective contractors have the opportunity to prepare their offers on the basis of the evaluation factors to be used in making the award.

The Navy's acquisition and evaluation of cameras was tantamount to prequalifying cameras without providing potential suppliers an opportunity to qualify

their equipment, placed offerors on an unequal competitive footing, and was contrary to the Government procurement policy to promote full and free competition. General Electrodynamics Corporation--Reconsideration, B-190026, August 16, 1978.

We believe that the Navy's evaluation process failed to preserve the required equality of competition among the offerors, and that under these circumstances the award to GEC was improper. Although the effect of competition conducted in a manner consistent with the foregoing discussion can be ascertained only by recompeting the Navy's requirements, we must determine whether it is in the Government's best interests to resolicit the existing requirements and, if necessary, terminate GEC's contract for the convenience of the Government. In so doing, we must consider certain factors, such as the seriousness of the procurement deficiencies, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact on the Navy's mission. 51 Comp. Gen. 423, 425 (1972); Honeywell Information Systems, Inc., 56 Comp. Gen. 505, 510 (1977), 77-1 CPD 256.

In light of the costs which would be involved (an estimated \$250,000 in relation to a total contract price of \$353,776), the continuing urgency of the procurement and the gravity of the program for which the cameras are being procured, we cannot conclude that recommending recompetition of the Navy's requirements would be in the best interests of the Government.

We note, however, several additional deficiencies which should be corrected in future procurements. Initially, any difficulties the Navy experienced in evaluating the acceptability of the technical proposals was compounded by its failure to include in the RFTP the Notice of Small Business Set-Aside clause, ASPR § 7-2003.2 (1976 ed.), required in each solicitation in total small business set-aside procurements by ASPR § 1-706.5(c) (1976 ed.) The clause defines "small business concern" for the purposes of the procurement and advises bidders or offerors that " * * * a manufacturer or a regular dealer submitting offers in his own name must agree to furnish * * * end items manufactured or produced by small business concerns * * *." ASPR § 7-2003.2(b) (1976 ed.). If the RFTP was intended to be a small business set-aside, notice of that fact, pursuant to ASPR §§ 1-706.

5(c) and 7-2003.2(b) (1976 ed.), should have been included in the RFTP. W.O.H. Enterprises, Inc., B-190272, November 23, 1977, 77-2 CPD 408; UCE Incorporated, B-186668, September 16, 1976, 76-2 CPD 249. The Navy states that doubt existed as to Selinger's status as a small business manufacturer because the firm was ostensibly offering RCA equipment, a concern also expressed by GEC. Although the step-one set aside was effected in contravention of the aforementioned regulatory provisions, we find it unnecessary to pursue this issue because Selinger's proposal was not rejected on this basis and the step-two IFB included the required clause.

Finally, the Navy exercised an option for 100 percent of the base quantity simultaneously with the award of the contract. The IFB notified bidders, pursuant to ASPR § 1-1504(b), of that possibility by incorporating by reference the clause required by ASPR § 7-2003.11(a), Defense Procurement Circular No. 76-6, January 31, 1977. The IFB Option Quantity provision, however, reserved the right to award the option quantity within 120 days from the effective date of the contract. Where, as here, a protest was filed with and denied by the procuring activity and the agency's urgency D & F and award were made after protests were filed with our Office, we believe the more prudent course of action was to exercise the option during the 120-day period provided rather than at the time of the award of the base quantity.

SELINGER PROTEST

Selinger, in addition to asserting that its technical proposal was improperly evaluated and rejected, also contends that the Navy failed to timely advise the firm of the reasons why its proposal was unacceptable. For the reasons stated above, we agree that the firm's technical proposal was evaluated contrary to the terms of the RFTP and applicable procurement regulations and was improperly rejected as unacceptable on the basis of the Navy's camera evaluations.

When two-step formal advertising is used, unsuccessful offerors shall be so advised in the following manner:

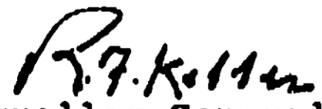
"Upon final determination that a technical proposal is unacceptable, the contracting

officer shall promptly notify the source submitting the proposal of that fact. The notice shall state that revision of his proposal will not be considered, and shall indicate, in general terms, the basis for the determination for example, that rejection was based on failure to furnish sufficient information or on an unacceptable engineering approach. Upon written request, and at the earliest feasible time after contract award, such source(s) shall be debriefed in accordance with 3-508.4." ASPR § 2-503.1(f) (1976 ed.) (Emphasis added.)

While we feel that the Navy's September 20 letter advising Selinger merely that a review of its proposal indicated that the camera offered did not meet the Government's specification requirements was overly general in comparison to the findings available in the Navy's September 6 evaluation memorandum and the reasons given for denying Selinger's protest in the Navy's September 27, 1977, telegram, we cannot conclude that Selinger was prejudiced by notice which the Navy provided.

We have held that similar regulatory notice requirements are procedural in nature and a procuring activity's failure to comply with such a requirement does not provide a legal basis for disturbing an otherwise valid award. See, e.g., Wakeman Watch Company, Inc., B-187335, January 28, 1977, 77-1 CPD 72; Century Brass Products, Inc., B-190313, April 17, 1978, 78-1 CPD 291.

Accordingly, Selinger's protest is sustained and RCA's protest is sustained to the extent it pertains to the Navy's camera evaluation. Also, the above-mentioned deficiencies are being called to the attention of the Secretary of the Navy by letter of today.


Acting Comptroller General
of the United States