

DOCUMENT RESUME

08128 - [C3408508]

[Untimely Allegation of Restrictive Specifications]. B-192700.
December 1, 1978. 4 pp.

Decision re: Ocean Electric Corp.; by Robert F. Keller, Deputy
Comptroller General.

Contact: Office of the General Counsel: Procurement Law I.

Organization Concerned: Armco, Inc.; Department of the Navy:
Naval Air Station, Norfolk, VA.

Authority: 4 C.F.R. 20. B-190752 (1977). E-190231 (1978).

B-190445 (1978). B-190270 (1978). B-190089 (1978). E-186842
(1978).

The protester alleged that the solicitation specifications were restrictive of competition and that the low bidder won the award through use of improper and collusive practices. The protest regarding the solicitation specifications was untimely since it was filed after bid opening. Support for the allegations of improper conduct was insufficient to satisfy the protester's burden of proof where such evidence conflicted with that of the agency and of the low bidder. (Author/SC)

DECISION



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

A. Doldor
Proc. I
8508

FILE: B-192700

DATE: December 1, 1978

MATTER OF: Ocean Electric Corporation

DIGEST:

1. Protester's allegation of restrictiveness of specifications is untimely pursuant to 4 C.F.R. § 20.2(b)(1) since it relates to apparent improprieties known prior to bid opening and should have been protested to our Office prior to bid opening.
2. Support for allegations of improper conduct by low bidder resulting in contract award is insufficient to satisfy protester's burden of proof where such evidence conflicts with that of agency and low bidder.
3. GAO is not appropriate forum to make request for documents under Freedom of Information Act.

Ocean Electric Corporation protests the award of a contract to Armco Inc., under invitation for bids (IFB) No. N62470-76-B-6634, for repair of the Mason Creek Flood Control Channel, Naval Air Station, Norfolk, Virginia. Ocean Electric, the second lowest bidder, raises four issues concerning the actions of Armco Inc. that form the bases of the protest.

Armco is the only manufacturer of the steel pipe arch required by Division 2, Section 02501, Paragraph 4.1X of the IFB. First, Ocean Electric alleges that Armco controlled the price of this material to all bidders, bid the project through the Armco construction unit quoting a more favorable price to its subsidiary for the pipe arch than the other bidders could obtain from Armco, and was awarded the contract by virtue of this unfair competitive advantage. In support of this contention, the protester

calls attention to the fact that three bidders were within 1.5 percent of one another, but all were still \$100,000 over the low bid by Armco. The second allegation is that Armco assisted the Government in preparing the specifications to require its steel product. Third, the protester asserts that Armco either developed or had knowledge of the Government estimate since that estimate was only \$1,000 above the Armco bid. Finally, the protester submits that while an aluminum pipe arch could have been substituted under the applicable specifications, the requirements for this alternative were so restrictive that bidders other than Armco were at a competitive disadvantage.

In its reply to these allegations, the Navy seeks dismissal of the entire protest as untimely pursuant to our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978), which require that protests of apparent improprieties in solicitations be made prior to bid opening. In the alternative, the Navy asserts that the claims made by Ocean Electric, especially those accusations of improper relationships between Armco and the Government, and collusion between Armco's own divisions, are matters of speculation and conjecture.

Ocean Electric contends that its protest is timely since none of the bases for its claims were discernible prior to the opening of the bids. Therefore, its protest filed with our Office on August 23 was within the 10-day filing period permitted pursuant to 4 C.F.R. § 20.2(b)(2).

We believe the protester's contention that bidders other than Armco were at a competitive disadvantage because of the allegedly restrictive pipe arch specifications is untimely. The appropriate time to question the specifications' alleged restrictiveness was prior to bid opening since it was apparent on the face of the solicitation. 4 C.F.R. § 20.2(b)(1). See Lamson Division, B-190752, December 14, 1977, 77-2 CPD 463, reconsidered on other grounds, January 31, 1978, 78-1 CPD 82.

The second contention by Ocean Electric is that Armco won this award through the use of improper and collusive practices. Allegedly, Armco assisted the

Government in preparing the solicitation so that it specified Armco's steel pipe and included requirements concerning the aluminum substitute that made it an economically infeasible alternative. This allowed Armco to control the pricing of an essential component of the project. Armco is also accused of having knowledge of the Government estimate, giving it another improper advantage in preparing its bid. Thus, Ocean Electric asserts that "Armco's bid should [have been] rejected in that it assisted in preparations of plans and specifications and colluded with other divisions of Armco to obtain this contract."

These allegations are timely since they are based on evidence derived from the bidding results and a comparison of the Government estimate which was not available until August 15, 1978, and the protest was filed August 23, 1978, within 10 days thereafter. 4 C.F.R. § 20.2(b)(2).

With regard to these allegations, the protester has the burden of affirmatively proving its case, Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1; Vintage Services, Inc., B-190445, January 11, 1978, 78-1 CPD 25. Ocean Electric appears to base its allegations on the numerical closeness of Armco's bid and the Government estimate, and the percentage closeness of three of the losing bids (all within 1.5 percent of each other) which were all at least \$100,000 more than Armco's successful bid. Ocean Electric also asserts it was informed by Armco representatives that its company knew the Government estimate before bid opening. These circumstances allegedly demonstrate the improper relationships between Armco and the Government and between the divisions of Armco which resulted in the award to Armco.

In defense of its award to Armco, the Navy offers as evidence the Certificate of Independent Price Determination and Armco's statement denying knowledge of the estimate and refuting such an interpretation of the bidding results. The certificate has been held by our office to be strong evidence against accusations of collusiveness in the bidding process. Vintage Services,

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Inc., B-190445, January 11, 1978, 78-1 CPD 25; Southern Maryland General Contractors, Inc., B-190270, February 13, 1978, 78-1 CPD 121. Furthermore, Armco denies that it had knowledge of the Government estimate or that it offered one price to its competitors and another to its own contractor. The more allegation by Ocean Electric to the contrary is not sufficient to satisfy its burden of proof. Kessel Kitcher Equipment Co., Inc., B-190089, March 2, 1978, 78-1 CPD 162.

We also note that Ocean Electric has demanded of our Office that complete copies of certain edited correspondence be forwarded to the company for comment. We have held that this Office is without authority under the Freedom of Information Act (FOIA) to determine what records of another agency must be released upon request. The protester must apply to the agency concerned for release of the correspondence demanded. Systems Research Laboratory Inc., Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341. However, our Office has considered the unedited correspondence in reaching our decision and does not find any support therein for the protester's contentions.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States