

R. K. Korman
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DECISION

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

9147

FILE: B-193252

DATE: February 14, 1979

MATTER OF: Nanex Systems Corporation DLG 00883

DIGEST: *[Protest Alleging Impropriety by Contracting Agency]*

1. Protester has burden of affirmatively proving its case. That burden has not been met where, as here, protester has not provided any evidence of impropriety and agency denies any wrongdoing.
2. Contracting officer did not abuse discretion by canceling solicitation where it appeared that Government's legitimate needs would not be met because of inadequate or defective specifications.
3. Contract need not be awarded to small business or labor surplus area firm where procurement was not set aside for either.
4. Determination of relative desirability and technical adequacy of proposals is within sound discretion of procuring agency and where, as here, there is no clear showing that procuring agency acted arbitrarily or capriciously in rejecting proposal, we will not substitute our judgment for that of procuring agency. Fact that protester does not agree with judgment of procuring agency does not invalidate it.
5. Contract may be awarded to higher rated, higher priced offeror where solicitation sets forth technical factors and not cost as being of paramount importance in selection of awardee.
6. Procuring agency is not required by Federal Procurement Regulations § 1-3.103(b) to advise low offeror why its proposal was rejected unless explanation is requested.

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On July 10, 1978, the Internal Revenue Service (IRS) issued request for quotations (RFQ) IRS-78-108 for the procurement of 30 public service radio spot announcements concerning various tax subjects for the 1979 income tax filing season. Several proposals were received.

During the review of the proposals, the IRS determined that the RFQ did not go into sufficient detail concerning its needs. To be more specific, the IRS contends that the offers exhibited confusion as to the number, type, and quality of the talent required. The IRS also concluded that it had not fully described the authority of the IRS project officer to approve all talent finally selected by the contractor. Consequently, the IRS determined that cancellation of the RFQ and the issuance of an RFQ setting forth its legitimate needs in more detail would not only be in the best interests of the Government, but it would also be fair to all offerors. Accordingly, RFQ IRS-78-108 was canceled on September 8, 1978, and on September 12, 1978, RFQ IRS-78-128 was issued in its place. The RFQ provided in part as follows: "The technical portion of the proposal will be the most important single consideration in the award of the contract and should be as complete and specific as possible." Proposals were to be evaluated in accordance with stated evaluation factors, with a maximum total score of 100 points. Seventy-five points were allotted to technical factors, and 25 points were allotted to cost.

Eight proposals were received. Each of the proposals was evaluated on the basis of the technical factors set forth in the RFQ. The contracting officer determined that only the four highest rated offerors were in the competitive range, and the price scores were computed for those offerors.

Technical scores ranged from a low of 7 points to a high of 64 points. The protester, Nanex Systems Corporation (Nanex), received the second lowest technical score of 19 points and, as a result, its proposal was not considered to be within the competitive range. Ads Audio Visual Productions, Inc. (Ads), received not

only the highest technical score, but it also received the highest composite technical and price score. Consequently, the IRS awarded the contract to Ads on September 28, 1978.

Subsequent to award, Nanex filed a protest with our Office alleging as follows:

1. The IRS conducted a preaward survey under RFP IRS-78-108 in a manner which embarrassed Nanex.
2. The IRS canceled RFQ IRS-78-108 after Nanex had apparently won the competition because of its low offered price.
3. The IRS awarded a contract to a firm which was neither a small business concern nor located in a labor surplus area.
4. The contract was not awarded to the low offeror. The contract award price was \$12,856 or 396 percent higher than Nanex's offered price of \$3,240.
5. Nanex could have performed the contract at a substantially lower price and, inasmuch as the rejection of Nanex's offer was arbitrary, IRS has given the impression that it was biased, that is, it gave Nanex a low score so that it could award the contract to Ads, which had been preselected.
6. The IRS did not furnish any reasons as to why Nanex's proposal was unacceptable.

IRS Position

The IRS emphatically denies that it committed any wrong or acted other than in a professional manner in evaluating Nanex's ability to perform any contract under the first RFP. It is reported that the questions asked of the trade references furnished by Nanex were related to a determination of Nanex's responsibility as a prospective contractor.

Nanex's argument that it had won the competition under RFQ IRS-78-108 is pure speculation since no offeror had been determined responsible and entitled to award before the RFQ was canceled. Moreover, the

contracting officer has broad discretionary powers as to whether a solicitation should be canceled or amended. Since it appeared to the contracting officer that the services to be provided under RFQ IRS-78-108 may not meet the needs of the IRS, the contracting officer did not abuse his discretion in canceling the RFQ.

In the past 3 to 5 years, the IRS has awarded contracts for spot announcements to firms which were small business concerns. Therefore, there was no necessity to set aside the procurement for small businesses. Further, the procuring activity is given a great deal of latitude in determining whether a procurement should be set aside for small businesses or labor surplus area firms. The IRS was neither required to nor did it set aside the procurement. Therefore, there was no requirement that the award be made to a small business concern or to a labor surplus set-aside firm, as Nanex alleges would be proper. At any rate, Ads certified itself to be a small business concern.

The terms of the RFQ show that technical factors were considered to be of much greater importance than price. If Nanex's position were followed, Ads' highest rated proposal would have to be rejected in favor of Nanex's lower priced and lower rated offer. The Comptroller General has held that it is improper to solicit offers on the basis of technical factors and then reject them for a technically inferior proposal because of lower price.

DECISION

As indicated, Nanex alleges that it was embarrassed by IRS's preaward survey, while IRS denies any wrongdoing. The protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.,-- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. We do not believe that burden has been met where, as here, the allegation is unsupported by any evidence and the agency denies any wrongdoing.

We agree with IRS that the contracting officer did not abuse his discretion by canceling RFQ IRS-78-108. We will not object to the cancellation of a solicitation containing inadequate or defective specifications where it appears that the products or services to be submitted in response to the solicitation may not satisfy the Government's legitimate needs. Communications Design, Incorporated, B-182843, May 15, 1975, 75-1 CPD 298; Stahl Soap Corporation, B-186663, October 22, 1976, 76-2 CPD 359. See also section 1-2.404-1 (1964 ed. Circ. 1) of the Federal Procurement Regulations. It appears that this was the reason why the IRS canceled RFQ IRS-78-108. We find nothing in the record before us to indicate that the RFQ was canceled simply because the IRS did not want to award the contract to Nanex.

As the IRS correctly states, the procurement of spot announcements was not set aside for either small business concerns or labor surplus area firms. Consequently, we find no violation of law or regulation, even assuming, arguendo, that Ads was neither located in a labor surplus area nor was it a small business.

Nanex protests that the rejection of its proposal was arbitrary. In this connection, we have consistently held that it is not the function of our Office to evaluate proposals or to substitute our judgment for that of the contracting officials by making an independent determination as to which offeror should receive an award. The relative desirability and technical adequacy of proposals are matters within the discretion of the procuring activity, and we will not substitute our judgment for that of the procuring agency absent a clear showing that it acted arbitrarily or capriciously. Augmentation Incorporated, B-185137, March 16, 1976, 76-1 CPD 179; Rantec Division, Emerson Electric Co., B-185764, June 4, 1976, 76-1 CPD 360. The fact that the protester does not agree with the judgment of the procuring agency does not invalidate it. Systems Innovation & Development Corp., B-185933, June 30, 1976, 76-1 CPD 426. Based on our review of the record, and the lack of any evidence by Nanex, there is no clear showing that the rejection of Nanex's proposal was unreasonable.

With regard to the award to Ads, we have held that our review of such decisions is limited to the test of rationality. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. More specifically, an award determination will be questioned by our Office only upon a clear showing of unreasonableness or a violation of procurement statutes or regulations. Riggins & Williamson Machine Company, Inc., 54 Comp. Gen. 783 (1975), 75-1 CPD 168.

In the instant case, the evaluation scheme in the RFQ clearly sets forth that the technical factors were of paramount importance. As noted, Ads received not only the highest technical rating, but it also received the highest composite score. Under the circumstances, we cannot conclude that the IRS acted improperly in awarding the contract to Ads, despite the fact that Ads did not submit the low offer. To reiterate, technical factors and not price were the prime determinants in selecting an offeror for award. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

Finally, Nanex protests that it was never advised by IRS why its proposal was rejected. The controlling regulation here is section 1-3.103(b) (1964 ed. Circ. 1) of the Federal Procurement Regulations, which provides as follows:

"(b) Promptly after making award in any procurement in excess of \$10,000, the contracting officer normally shall give written notice to the unsuccessful offerors that their proposals were not accepted. Upon request, unsuccessful offerors whose offered prices were lower than those of the contractor which received the award shall be furnished the reasons why their proposals were not accepted; but in no event will an offeror's cost breakdown, profit, overhead rates, trade secrets, or other confidential business information be disclosed to any other offeror."

In the instant case, we cannot fault the IRS for not providing Nanex with an explanation as to why its offer was rejected, since no explanation was requested.

In summary, it appears that the protested procurement actions were proper. Accordingly, the protest is denied.



Deputy Comptroller General
of the United States