

DECISION



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

10,072

FILE: B-191871

DATE: May 9, 1979

MATTER OF: Guardian Electric Manufacturing Company--
Request for Reconsideration

DHG 00253

DIGEST:

[Protest of Army Determination that Competitor's Proposal Was Acceptable]

1. Where protester files timely request that GAO reconsider prior decision but does not timely file required detailed statement concerning factual or legal basis to modify or overturn prior decision, request for reconsideration is untimely. However, prior decision is explained in view of apparent need for clarification.
2. Protester's contention, made for first time as part of request for reconsideration, even though basis for contention was previously known to protester, is untimely and will not be considered.
3. Active participation by interested party during bid protest proceedings has effect of tolling its bid acceptance period until final resolution of protest.
4. Evaluation and overall determination of technical adequacy of proposal submitted under first step of two-step formally advertised procurement is primarily function of procuring activity's technical experts who are thoroughly familiar with agency's essential technical requirements and minimum technical needs.
5. Judgment of agency's technical experts will not be questioned merely because there are divergent technical opinions as to proposal acceptability.

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Guardian Electric Manufacturing Company (Guardian) requests reconsideration of our decision in Guardian Electric Manufacturing Company, B-191871, November 30, 1978, 58 Comp. Gen. ___ (1978), 78-2 CPD 376, in which we denied its protest concerning the Army's determination that a competitor's technical proposal was susceptible of being made acceptable and therefore qualified for discussions under step one of a two-step formally advertised procurement.

On December 12, 1978--7 working days after December 1, 1978, the date the protester's attorney of record received a copy of our decision--Guardian, appearing on its own behalf, filed a short telegram indicating general disagreement with our earlier decision. Guardian noted that details of the request for reconsideration would be forwarded later. On December 21, 1978--14 working days after the protester's attorney of record received a copy of our decision--a detailed statement of Guardian's grounds for reconsideration was filed with our Office.

Requests for reconsideration are governed by our Bid Protest Procedures, which provide as follows:

"(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

"(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term 'filed' as used in this section means receipt in the General Accounting Office." 4 C.F.R. § 20.9 (1978).

In this regard, we stated in Department of Commerce; International Computaprint Corporation, 57 Comp. Gen. 615 (1978), 78-2 CPD 84:

"* * * Timeliness standards for the filing of requests for reconsideration are purposefully more inflexible than those for filing protests or meeting intermediate case development or processing deadlines and, under our Procedures, there is no provision for waiving the time requirements applicable to requests for reconsideration. * * *

"Obviously, the requirement for a 'detailed statement' of the factual and legal grounds for reversal or modification is the sum and substance of a request for reconsideration. Without the detailed statement, our Office has no basis upon which to reconsider the decision. * * *

"When a protester, an interested party, or a contracting agency timely files a short note indicating general disagreement with an earlier decision and subsequently provides the required detailed statement after the expiration of the reconsideration period, an attempt to extend the time for filing the reconsideration request is evident. We cannot condone such action because to do so would open the door to potential protracted delays possibly resulting in circumstances negating recommended remedial action in the earlier decision."

In the instant situation, the 10 day time period within which a request for reconsideration could be filed commenced to run on December 1, 1978, the date our decision was received by the protester's attorney of record, its authorized agent and representative during the protest proceedings before our Office. See Ameco Electronic Corporation, ASBCA Nos. 7587, 7588, 8038, 8061 and 9336, February 17, 1965, 65-1 BCA ¶ 4677.

Since Guardian's proper request for reconsideration, with the required detailed statement, was filed on December 21, 1978, it is untimely.

Guardian also contends, for the first time on reconsideration, that certain informal notations and markings by the agency appear on solicitation drawings, indicating "loose specifications on which to make a fixed price bid." These drawings were available to Guardian during our consideration of its original protest. Since Guardian is therefore raising a new and independent ground of protest as an additional basis upon which reconsideration is requested, it is evident that this contention also does not satisfy the timeliness criteria of our Bid Protest Procedures, which require that protests be filed not later than 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 20.2 (b)(2) (1978).

In addition, Guardian urges that no award be made until it is determined by the Army that the low bidder under step two, Bendix Corporation (Bendix), had properly extended its bid. We note that Bendix, as an interested party, actively participated in Guardian's bid protest proceedings before our Office, and has submitted additional comments concerning the instant reconsideration request. Under the circumstances, notwithstanding the presence or absence of any formal extension of its bid acceptance period, we must conclude that Bendix's active participation as an interested party during these proceedings had the effect of tolling its bid acceptance period until after the final resolution of the protest. Mission Van & Storage Co., Inc. and MAPAC, Inc., a Joint Venture, 53 Comp. Gen. 775 (1974), 74-1 CPD 195.

Guardian also requested a conference in connection with its request for reconsideration. During our consideration of the matter, we received a letter from the Army's contract specialist, written as a "private citizen" and as a "taxpayer", expressing "disappointment" with our prior decision. Specifically, among other things, she expressed disagreement with the conclusions reached in our prior decision

and stated that the Army's desire for "competition at any cost caused the Army to make many serious errors in judgment".

Because of the implications of her letter and the unusual circumstances involved, we granted Guardian's request for a conference and invited the contract specialist to attend. It was conclusively demonstrated at the conference that she was not alleging fraud or favoritism by Army procuring officials. Rather, her expressions of concern, as she acknowledged, simply related to good faith differences in judgment between her and the contracting officer. We have carefully read and considered her letter but find no basis for altering the conclusions reached in our prior decision.

However, even though we dismiss Guardian's request for reconsideration as untimely filed, we think it is appropriate to comment at length upon the matter because it is apparent that Guardian, in good faith, does not understand the basis for our prior decision. See, e.g., American Air Filter Co.--DLA Request for Reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD 443.

In our prior decision, we found no basis to question the Army's determination that Bendix's technical proposal was reasonably susceptible of being made acceptable and therefore qualified for discussions under step one of this two-step formally advertised procurement for two configurations of a grip assembly for use in Black Hawk and Cobra Army helicopters.

In its initial protest and again during reconsideration, Guardian maintained that Bendix's initial technical proposal, as submitted, required basic changes to be made acceptable and therefore should have been rejected by the Army. In support of its position, Guardian directed our attention to Defense Acquisition Regulation (DAR) § 2-503.1(e) (1976 ed.), which provides:

"Technical evaluation of the proposals shall be based upon the criterion contained in the request for technical proposals * * *.

The proposals as submitted, shall be categorized as:

- (i) acceptable;
- (ii) reasonably susceptible of being made acceptable by additional information clarifying or supplementing, but not basically changing the proposal as submitted; or
- (iii) in all other cases, unacceptable."

Specifically, Guardian argued that Bendix's initial proposal was technically unacceptable because it did not provide access to the switch assemblies and proposed to mold the grips from butyrate material which is an unacceptable material. Because Bendix subsequently changed its engineering approach in these two areas, i.e. accessibility and material to be used, Guardian concluded that DAR § 2-503.1(e)iii mandated its rejection.

Two-step formal advertising is a method of procurement designed to expand the use and obtain the benefits of formal advertising where inadequate specifications preclude the use of conventional formal advertising. It is especially useful in procurements requiring technical proposals, especially those for complex items. DAR § 2-501. Since adequate specifications by definition are unavailable, two-step formally advertised procurements are often experimental in nature, requiring significant creative technical efforts on the part of offerors in submitting technical proposals, and, correspondingly, requiring hundreds, if not thousands, of complex and intricate technical decisions by the agency technical specialists and evaluators as to the ultimate acceptability of the technical proposals submitted. The more technically complex the item being procured, the more complex from an engineering and technical standpoint the judgment and decisions of the agency technical staff have to be.

The complexity of the item presently being procured is apparent. Literally dozens of highly technical drawings, with hundreds of minute tolerances and specifications, are involved. Among the many qualification tests which this item will be required to meet, the following three examples are illustrative:

"1.4.3 Dielectric Test. Each switch, when installed in the grip assembly, shall be subjected to a 60-cycle frequency having a potential of 1060 volts root-mean-square (RMS). For final qualification testing the length of time shall be 1 second. Test as follows:

- a. Between all terminals and exposed or grounded metal parts.
- b. Between all adjacent terminals of different poles, if any.
- c. Between all open terminals and corresponding pole.

These tests shall be performed with the switch in the normal position, and shall then be repeated for all switch positions. Any evidence of arcing, flashover, breakdown of insulation, or current flow in excess of 1 milliamp shall be an indication of failure."

* * * * *

"1.4.6.2 Vibration. During vibration tests, there shall be no closing of switch contacts, as determined by a monitoring device such as a thyatron circuit or an oscillograph which would indicate any closure, of a duration in excess of ten microseconds. The major resonance dwell test will be conducted at +71°C (160°F) and -54°C (minus 65°F) for 15 minutes per axis at each temperature. Vibration cycling shall be conducted at +71°C (160°F) and -54°C (minus 65°F) as well

as the atmospheric conditions 1.4.1.1. At the conclusion of the vibration tests, the grip assembly shall be tested as described in 1.3, 1.4.2, 1.4.3 and 1.4.4.1."

* * * * *

"1.4.6.4 Altitude. While the grip assembly is at the lowest pressure condition of 13.75 inches Hg, it shall be tested as specified in 1.4.3 at a reduced potential of 500 volts. The rate of pressure change during decompression shall be 1.5 inches of mercury per minute."

We agree with Guardian that a clearly unacceptable technical proposal (category iii) cannot be classified by an agency as reasonably susceptible of being made acceptable (category ii). However, where, as here, the item being procured is of a highly technical nature, the determination as to the category in which it should be classified involves exceedingly difficult and complex technical decisions by the agency's technical evaluators. Our Office has consistently held that questions as to whether technical proposals submitted under two-step procedures are deficient and whether they are reasonably susceptible of being made acceptable without major revisions are basically matters requiring the judgment and expertise of technically qualified personnel. METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44.

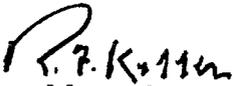
Even if we were to independently review the Bendix proposal, our simple disagreement as to whether the proposal was reasonably susceptible of being made acceptable without basic changes would not resolve the matter. The Army's technical evaluators have been involved for many years in the technical aspects of the Army's helicopter program and only they are intimately familiar with that agency's essential technical requirements and minimum technical needs. Of course, if technical experts cannot reasonably disagree

that a proposal is unacceptable on its own technical merits without requiring basic revisions, that proposal must be rejected as unacceptable. Here, however, the Army's technical specialists on the evaluation panel have submitted the following statement to our Office:

"Finding of Evaluators. There were no significant technical changes to Bendix's proposals from first submittal to the 22 March 1978 revision. All changes were a result of clarification on either the part of the offeror or the Government. The reason for the 22 March 1978 revision of the Bendix proposal was to achieve the Government's desire to obtain from each offeror, by response to Step One, a definitive specification, defining their design to the extent that the specification could be used as a portion of the procurement package in Step Two."

In view thereof, we believe that at most Guardian has established a good faith difference of opinion as to the nature and magnitude of the technical changes that had to be made to Bendix's initial proposal as a whole. This provides no basis for our Office to question the reasoned and considered technical judgment of the agency's experts as to such complex technical matters. It is well established that the existence of differences of opinion as to whether a particular product or technical approach will satisfy the agency's needs does not establish the unreasonableness of the agency's position. Struthers Electronics Corporation, B-186002, September 10, 1976, 76-2 CPD 231; Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87. This is especially so in the context of the experimental and flexible nature of two-step formal advertising where basic changes have to be viewed in light of the creative and experimental engineering approaches inherently involved in this type of procurement.

For the reasons stated, the request for reconsideration is dismissed.


Deputy Comptroller General
of the United States