

Boyle, P.L.I

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**DECISION**



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

*[Protest of Navy Contract Award]*

**FILE:** B-198701

**DATE:** August 15, 1980

**MATTER OF:** Southwest Marine, Inc. DLG00114

**DIGEST:**

1. Where offeror protests that agency failed to indicate informational inadequacy of proposal during discussions in negotiation process but record indicates that, even if offeror was given maximum score for factor involved, it would not have made difference in selection of successful offeror, it is academic whether deficiency should have been brought to attention of offeror and issue will not be decided.
2. Protester contends that agency improperly used preaward survey to evaluate technical proposals. Contention need not be considered since, even if preaward survey results had not been used in evaluation, there would have been no significant difference in protester's score.
3. Protest against use of responsibility-type factors in RFP evaluation criteria relates to alleged solicitation improprieties which should have been known prior to closing date for receipt of initial proposals. Since this aspect of protest was not filed prior to closing date, it is untimely under 4 C.F.R. § 20.2(b)(1) (1980). Further, matter is not significant issue within meaning of 4 C.F.R. § 20.2(c) (1980) because GAO has considered issue in previous decisions.
4. Contention that preaward survey was used by agency to evaluate comparative responsibility of offerors and circumvent laws protecting small businesses is without

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merit because (1) record shows both offerors were determined to be responsible and neither was found to be more responsible, and (2) use of preaward survey to evaluate technical proposals did not affect selection of awardee.

5. Protester argues that agency may expend in excess of \$600,000 over protester's estimated cost by its award to other offeror. Since RFP did not indicate that award would be made to offeror submitting acceptable technical proposal at low estimated cost and since RFP's evaluation scheme gave appropriate consideration to realistic estimated cost, argument is without merit.
6. When new basis of protest is based on documents received not later than June 12, 1980, to be considered timely under 4 C.F.R. § 20.2(b)(2) (1980), matter must be raised within 10 working days of receipt of information. Matter not raised until July 2, 1980, is untimely and will not be considered on merits.

Southwest Marine, Inc. (SWM), protests the award of a cost-plus-fixed-fee contract to National Steel and Shipbuilding Co. (NASSCO) under request for proposals (RFP) No. N62791-80-R-0001 issued by the Navy for repair, modernization and overhaul of seven ships. SWM contends essentially that (1) the Navy recognized a deficiency in the critical path aspect of its proposal but failed to point it out in discussions, (2) without notice, the Navy used the preaward survey results to rescore technical proposals, (3) the Navy's use of the preaward survey was an attempt to circumvent the impact of laws and regulations protecting small businesses like SWM, (4) the Navy will spend \$600,000 more with NASSCO than with SWM, and (5) the Navy misapplied the RFP's evaluation criteria.

We have decided that the protest is without merit in part and untimely in part.

#### A. Critical Path Aspect

The RFP stated that a cost-plus-fixed-fee contract would be awarded to the offeror whose proposal was superior overall in these categories, in descending order of importance: management capability, available resources, technical competence, experience and past performance, and cost. Critical path analysis was one of nine subfactors included under the management capability category. The record indicates that, even if discussions were conducted with SWM on the critical path analysis aspect with the result that SWM was granted the maximum score possible for that subfactor, it would have improved the overall score for the total proposal by only 2.5 points. SWM would have had an overall score of 49.4, instead of 46.9, against NASSCO's overall score of 55.9. The Navy indicates that the change in score would have made no difference in the selection of the successful offeror. SWM argues that it was prejudiced by not having the opportunity to correct the deficiency because this area might have influenced the scoring in related areas. The Navy reports, however, that SWM was not downgraded in any other category because of the deficiency in the critical path analysis.

In the circumstances, [SWM was not prejudiced materially by the absence of a request from the Navy that SWM address the critical path deficiency. Therefore, it is academic whether the Navy should have brought the deficiency to the attention of SWM during discussions and we will not decide that issue.]

#### B. Use of Preaward Survey Results in Evaluating Proposals

A preaward survey was made of the offerors. The results were used to downgrade SWM's proposal.

SWM states that the preaward survey appears to have been in the nature of "discussions with offerors" rather than a responsibility survey. SWM contends that the Navy went about uncovering alleged deficiencies in the guise of a preaward survey without telling SWM that the survey results would affect the competition.

However, the Navy report indicates that, even if the few adjustments made in SWM's score because of the preaward survey results had not been made, there would have been no significant difference in SWM's score.

Since it appears that the Navy would have selected NASSCO over SWM based on the evaluation of proposals prior to the adjustments made after the preaward survey, we need not decide whether it was proper for the Navy to use the preaward survey results in evaluating proposals. Since this aspect of SWM's protest would not have affected the outcome of the award determination, it is academic and will not be considered.

#### C. Small Business Aspect

SWM contends that the Navy is attempting to sidestep the requirements of the Small Business Act, as amended, 15 U.S.C. § 637(b)(7) (Supp. I, 1977), by (1) using negotiation instead of formal advertising, (2) writing technical evaluation criteria to encompass responsibility factors, (3) finding all offerors in the competitive range to be responsible, and (4) disregarding cost as the controlling factor in the award determination. SWM believes that the Navy has designed this procurement to circumvent laws enacted to protect small businesses like SWM.

Essentially, SWM is protesting the use of responsibility-type factors in the RFP's evaluation criteria. The protest relates to an alleged solicitation impropriety which should have been known prior to the closing date for receipt of initial proposals. Under 4 C.F.R. § 20.2(b)(1) (1980), such protests must be filed prior to the initial closing date in order to be timely. Thus, this aspect of SWM's protest is untimely. Further, contrary to SWM's contention, the protest against the use of responsibility-related evaluation criteria does not present a significant issue within the meaning of 4 C.F.R. § 20.2(c) (1980) because our Office has considered the issue in Electro-space Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264, and other decisions. We have held that, where the merits of a protest involve an issue which has been considered in previous decisions, the issue

is not significant within the meaning of 4 C.F.R. § 20.2(c) (1980). CSA Reporting Corporation, 59 Comp. Gen. \_\_\_\_ (B-196359, March 27, -1980), 80-1 CPD 225.

In connection with this aspect of the protest, SWM contends that the preaward survey was used to evaluate the comparative responsibility of NASSCO and SWM. This contention is without merit. First, the record shows that both offerors were determined to be responsible and neither was found to be more responsible than the other. Second, as indicated in section "B," supra, to the extent that the results of the preaward survey were used to evaluate technical proposals, the selection of the successful offeror was not affected.

D. NASSCO's Higher Estimated Cost

SWM argues that the Navy may be expected to expend in excess of \$600,000 in public funds over SWM's estimated cost by award to NASSCO. In response, the Navy states that in cost-type contracts estimated costs should not be considered controlling and that instead the primary consideration is which offeror can perform the contract in a manner most advantageous to the Government.

The Navy notes that the RFP placed cost as the least important evaluation criterion. Accordingly, in the Navy's view, it was under no obligation to award to the low offeror, especially where NASSCO's technical proposal was deemed superior overall and where NASSCO's cost proposal itself was deemed superior overall.

We note that the RFP did not indicate that award would be made to the offeror submitting an acceptable technical proposal at the low estimated cost. Thus, to the extent that SWM is arguing that the RFP should have been structured to make realistic estimated cost more important in the awardee selection determination, it is untimely since it involved an apparent solicitation impropriety and it was not filed prior to the closing date for receipt of initial proposals. Otherwise, this aspect of SWM's protest is without merit since the Navy followed the RFP's disclosed evaluation

scheme and made award to the highest scored offeror after giving appropriate consideration to the realistic estimated cost of both offerors. Further, we note that the difference in realistic estimated cost was only \$62,797 (less than 1 percent) in SWM's favor.

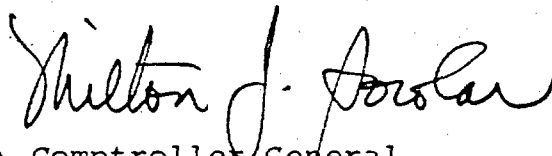
E. Misapplication of RFP's Evaluation Criteria

SWM states that--based on documents received not later than June 12, 1980--the Navy misapplied the RFP's evaluation criteria by considering experience in every category, whereas it was intended to be considered in only one. In response, the Navy denies SWM's contention on the merits and contends that SWM's argument is untimely because the basis of the allegation became known to SWM when its Washington counsel received the Navy documents on June 10, 1980, but this basis of protest was not raised until July 2, 1980, more than 10 working days after the basis of protest was or should have been known. In reply, SWM argues that the rules on timeliness should have no application in the context of an ongoing protest. Further, SWM states that its west coast counsel did not receive the documents until June 16, 1980, which would have necessitated filing the new basis of protest on July 1, 1980; however, with the approval of GAO, SWM presented its comments on the Navy's reports dated June 12 and 20 in one submission to be filed on July 2. The July 2 submission also contained this new basis of protest. In this regard, SWM explains that on or about June 12 it merely picked up certain documents and these documents had to be sent to the west coast counsel for analysis. SWM states that it was unaware that any time limit began to run when its Washington counsel received the documents.

First, SWM's argument that the timeliness rules have no application to an ongoing protest is without merit because we have held that each basis of protest must independently meet the timeliness requirements. James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129, and decisions cited therein. For example, in Holmes and Narver Inc., B-196832, February 14, 1980, 80-1 CPD 134, where the protester learned of a new basis of protest from information in the agency report, we held that the filing of

that basis of protest more than 10 working days after it was or should have been known rendered that aspect of the protest untimely under 4 C.F.R. § 20.2(b)(2) (1980). Second, SWM's June 12 submission states that it received the documents in question; further, the Navy reports that SWM had the documents on June 10. The fact that SWM's west coast counsel may not have received these documents until June 16 does not provide a basis to extend the time for filing a new basis of protest since SWM's Washington counsel had the documents before that date. See Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. Third, while we agreed that SWM could respond to the Navy's June 12 and 20 reports on July 2, we were not requested to extend the time for filing a new basis of protest. Moreover, the Bid Protest Procedures do not provide for extensions of time to file initial basis of protest or additional basis of protest. Thus, this aspect of SWM's protest is untimely and will not be considered on the merits.

Accordingly, SWM's protest is denied in part and dismissed in part.



For The Comptroller General  
of the United States