

*Luster*

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**DECISION**



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

**FILE:** B-217202 **DATE:** May 21, 1985  
**MATTER OF:** Weinschel Engineering Co., Inc.

**DIGEST:**

1. Where a solicitation provides that award will be made to the technically acceptable offeror offering the lowest price and the protester's proposal is technically acceptable, the procuring agency properly may conduct detailed technical discussions with a technically deficient offeror while only affording the protester an opportunity to furnish a best and final offer; an agency need conduct detailed discussions only with offerors whose proposals contain technical uncertainties.
2. A statement from the procuring agency to the low offeror following submission of best and final offers does not constitute improper discussions where award is to be made to the low technically acceptable offeror; the offeror already had been found technically acceptable; and the statement thus was not part of an effort to determine the acceptability of the offeror's proposal.
3. Allegations that (1) the agency should have canceled the solicitation after relaxing technical requirements; (2) the amended solicitation contained an ambiguous specification; and (3) the 30 days allowed to prepare best and final offers was insufficient are untimely and not for consideration since the facts on which the allegations are based should have been apparent prior to the final closing date, but they were not raised until after that date.

Weinschel Engineering Co., Inc. (Weinschel), protests the award of a contract to Hewlett Packard Company (Hewlett) under request for proposals (RFP) No. N00123-84-R-0070 issued by the Department of the Navy. The RFP contemplated the award of a fixed-price contract for 14 microwave signal

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generator calibrators. Weinschel contends that, due to several procurement deficiencies, the award to Hewlett was improper. We deny the protest in part and dismiss it in part.

Weinschel and Hewlett were the only companies that submitted proposals in response to the December 15, 1983, RFP. Following a technical evaluation, the Navy found Weinschel's proposal to be technically acceptable and Hewlett's to be technically unacceptable. Hewlett challenged this determination in a May 7, 1984, letter, explaining how it intended to meet the Navy's requirement. After reviewing this letter, the Navy determined that the company's proposal, while still technically unacceptable, was susceptible of being made acceptable. The Navy meanwhile determined that certain of the RFP's technical specifications should be revised to reflect more accurately calibration requirements for the signal generators identified in the solicitation, and that the award criteria should be modified to provide that award would be made to the responsible, technically acceptable offeror proposing the lowest price. In a letter dated July 19, the Navy informed Weinschel of the intended specification and award criteria changes and stated that all competitive offerors would be allowed to submit best and final offers. The Navy informed Hewlett at the same time that its proposal was found capable of being made technically acceptable.

By letter of September 19, the Navy requested that best and final offers be submitted by October 19. Both companies submitted timely responses--Weinschel choosing, however, to let its original proposal stand without revision. The Navy evaluated Hewlett's best and final as technically acceptable and, because Hewlett's revised price was lower than Weinschel's, prepared to make award to Hewlett. Although Weinschel protested prior to award, the Navy made a determination to proceed with the award on April 26, 1985.

Weinschel charges that the Navy violated the statutory mandate of 10 U.S.C. § 2304(g) (1982) to hold discussions with all offerors in the competitive range by failing to hold discussions with Weinschel at any time prior to making the decision to award to Hewlett. At the same time, Weinschel contends, the Navy conducted detailed technical

discussions with Hewlett after initially finding its proposal technically unacceptable. Weinschel considers this unequal, improper treatment.

We have held that a mere request for best and final offers will satisfy the discussions requirement where a proposal contains no technical uncertainties. Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76. Here, since Weinschel's proposal was found technically acceptable under both the original and revised specifications, there were no technical deficiencies or uncertainties that required discussion. As Weinschel's offered price apparently was not deemed unreasonable, the Navy simply had nothing to discuss with Weinschel. Under these circumstances, the Navy's request for Weinschel's best and final offer was sufficient to satisfy the requirement for discussions with that firm.

Our conclusion is not altered by the fact that the Navy's communications with Hewlett regarding the acceptability of its proposal may have constituted detailed discussions. Applying the same rule as above, since Hewlett's proposal was viewed as technically deficient, the Navy could not merely request Hewlett's best and final offer without first informing Hewlett of the deficiencies. An agency is not required to hold the same detailed discussions with all offerors, since the degree of proposal weaknesses or deficiencies, if any, obviously will vary. See Bank Street College of Education, B-213209, June 8, 1984, 84-1 C.P.D. ¶ 607. It thus was not improper or unfair for the Navy to conduct technical discussions with Hewlett.

Weinschel also asserts that the Navy told the company that it was the only offeror in the competitive range and that further negotiations would be held with it following the Navy's receipt of its best and final offer. Weinschel claims that, relying on this information, it did not submit its lowest price in its best and final offer and argues that, since it was misled, it should now be afforded a second opportunity to modify its price.

The Navy denies it told Weinschel that further negotiations would be conducted following the submission of best and final offers and states that it informed Weinschel from the very beginning that the procurement was competitive. The record shows, furthermore, that the Navy informed Weinschel in its July 19 letter that while at one point the company was the only offeror in the competitive range,

Weinschel and "other offerors" were going to be allowed to submit best and final offers. We thus do not understand how Weinschel reasonably could have expected further negotiations after the submission of best and final offers.

In any case, it long has been our view that offerors rely on oral advice at their own risk, Trident Motors, Inc., B-213458, Feb. 2, 1984, 84-1 C.P.D. ¶ 142, and we have specifically held this rule applicable to oral representations that negotiations will be reopened after receipt of best and final offers. See Asgard Technology, Inc., B-215706, Aug. 13, 1984, 84-2 C.P.D. ¶ 171. Thus, when an offeror is asked to submit a "best and final" offer, it is responsible for assuring that it submits just such an offer, even if the offeror believes it is in a sole-source position. An offeror certainly will not be afforded a second chance to reduce its price where it did not do so in its initial best and final offer simply because the offeror believed there would be no price competition.

Weinschel also contends it must be allowed to submit a new best and final offer because the Navy negotiated with Hewlett subsequent to the submission of best and final offers. The Navy apparently contacted Hewlett after best and finals to ask whether the company understood that it would be bound by the RFP terms and conditions and to inform Hewlett that the Navy would hold its "feet to the fire" on the technical specifications. Weinschel argues that this had the effect of eliciting information essential for determining the acceptability of Hewlett's proposal and, thus, constituted discussions.

Weinschel is correct that discussions may not be conducted with one offeror after best and final offers without conducting discussions with all offerors in the competitive range. ABT Associates, Inc., B-196365, May 27, 1980, 80-1 C.P.D. ¶ 362. Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal, or information requested and provided is essential for determining the acceptability of the proposal. Alchemy, Inc., B-207338, June 8, 1983, 83-1 C.P.D. ¶ 621. The record shows that while the Navy initially wanted further clarification from Hewlett, it ultimately decided on its own that the company's best and final offer was technically acceptable as submitted. Thus, the Navy's communication with Hewlett was not for the purpose of determining the acceptability of Hewlett's proposal and, thus, did not constitute discussions necessitating reopening negotiations.

Weinschel raises several arguments we find to be untimely. Weinschel argues that after determining that some of the solicitation's technical specifications could be relaxed, the Navy should have canceled the RFP and resolicited the requirement instead of amending the RFP. Weinschel takes the position that cancellation and resolicitation were necessary to comply with the statutory requirement to maximize competition. Weinschel also argues that the RFP should have been canceled because one of the changed specifications was ambiguous. Finally, Weinschel believes it should be given a chance to submit a new best and final offer because the 30 days allowed for preparing its initial best and final were insufficient.

Under our Bid Protest Procedures, alleged solicitation improprieties which do not exist in the initial solicitation, but which subsequently are incorporated therein, must be protested no later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). The fact that the Navy did not plan to cancel and resolicit should have been apparent to Weinschel from the September 19 best and final offer request, which set forth the changed specifications and award criteria. Likewise, this September 19 request also put Weinschel on notice of any allegedly ambiguous specification and any inadequacy in the time allowed to respond.<sup>1/</sup> Weinschel did not raise any of these arguments until mid-November, however, 1 month after the closing date for submitting best and final offers. More specifically, Weinschel did not raise these matters until it learned that

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<sup>1/</sup> We have recognized an exception to the requirement that alleged ambiguities be raised prior to the closing date where the protester was not aware, before that date, that its interpretation was not the only reasonable one possible. A November 16 telex from Weinschel to the Navy indicates that Weinschel was previously aware of alleged problems with one of the changed specifications (involving the required measurement accuracy of the calibrators), however, and Weinschel has not responded to the Navy's express assertion that any ambiguity in this specification should have been apparent to Weinschel prior to the October 19 closing date. The exception to our timeliness requirements thus is inapplicable.

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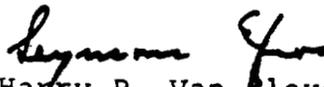
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the Navy intended to award to Hewlett. We will not now consider these untimely allegations. See Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268.

Finally, Weinschel objects to the Navy's awarding of a contract prior to the resolution of its protest. While an award ordinarily must be withheld pending resolution of a protest, we have consistently held that the alleged failure to follow regulatory requirements in making an award notwithstanding a pending protest is merely a procedural defect which does not affect the validity of an otherwise valid award. Creative Electric Inc., B-206684, July 15, 1983, 83-2 C.P.D. ¶ 95.

Weinschel's protest is denied in part and dismissed in part.

*for*   
Harry R. Van Cleve  
General Counsel