

DECISION

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

FILE: B-217567 **DATE:** August 16, 1985
MATTER OF: Burtek, Inc.

DIGEST:

1. Allegation that the agency used the protester's proprietary technical data in revising specifications for step one of a two-step formally advertised procurement is untimely and not for consideration since facts on which the allegation is based should have been apparent prior to the closing date for receipt of technical proposals but the allegation was not raised until after award.
2. A preaward survey is not a legal prerequisite to the contracting agency's making an affirmative determination of responsibility. GAO will not review an agency decision whether to conduct a preaward survey or the agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith or a failure to apply definitive solicitation responsibility criteria.
3. The protester has the burden of proving bias on the part of an agency's procurement officials, and unfair or prejudicial motives will not be attributed to the officials on the basis of inference or supposition.
4. Protester was not prejudiced in a procurement for hardware and software by the acceptance of an offer of nonconforming software that, in violation of the RFP, appears to be usable only on the awardee's computer, where the software met the agency's real needs and the protester does not indicate that it could have offered software other than it actually did.
5. Agency's determination that awardee's computer meets the RFP requirement for commercial availability is reasonable where it is supported by evidence showing that the computer has been sold to commercial organizations and foreign governments, as well as to the agency itself in the past.

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Burtek, Inc. protests the award of two contracts to Educational Computer Corporation (ECC) under two-step formally advertised procurements issued by the Department of the Navy for simulated aircraft maintenance trainers.

Burtek contends: (1) the Navy's amendments to the procurements' step one requests for technical proposals (RFTPs) resulted in the infusion of technical data from Burtek to ECC; (2) the Navy's preaward survey on ECC's ability to perform was inadequate, particularly in view of ECC's extremely low bid prices under step two of these procurements; and (3) the procurements were conducted unfairly because one of the Navy's procurement officials was later employed by ECC, and may have disclosed Burtek's proprietary information to that firm. Burtek also contends that ECC's computers and computer programs for the trainers do not comply with certain specification requirements.

We dismiss the protest in part and deny it in part.

Background

Burtek and ECC were the only offerors who submitted technical proposals under the first step of each of the two procurements. The Navy evaluated the proposals and sent written requests for clarification to the companies. The Navy also conducted oral discussions with Burtek and ECC. After the Navy received answers to its clarification questions, Burtek and ECC were informed that none of their proposals were acceptable and that revised step one requests for technical proposals would be issued.

Both Burtek and ECC submitted proposals in response to the revised requests. Following evaluation, the Navy again sent clarification questions to each offeror. After responses were received, the Navy determined that both companies' proposals were acceptable, and issued step two invitations for bid (IFBs).

At bid opening, the Navy received the following bids from Burtek and ECC:

<u>Invitation 0003</u>	<u>Invitation 0004</u>
Burtek \$3,796,264	\$4,386,596
ECC \$2,456,000	\$1,648,000

In view of the large difference between the Burtek and ECC bids, the Navy sought and obtained written verification

from ECC of its bid prices. Because ECC had been awarded and successfully performed numerous Navy contracts over the past 10 years for similar trainers, the Navy determined that ECC was responsible and awarded the contracts to the company.

Following a protest of the awards to the Navy, which the agency denied, Burtek filed this protest with our Office.

Alleged Infusion of Burtek Data into the RFTPs

Burtek complains that the numerous technical data changes the Navy made when it revised its requirements for the step one RFTPs incorporated virtually identical technical features as those proposed by Burtek in response to the original RFTPs.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require that a protest based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed before that date. Likewise, alleged improprieties not contained in the initial solicitation, but which are later incorporated into the solicitation, must be protested by the next closing date for receipt of proposals following the incorporation.

Since Burtek did not object to the Navy's alleged use of the firm's technical data for the revised RFTPs until after the awards to ECC under the step two IFBs, Burtek's protest on this issue is untimely and, therefore, will not be considered on the merits.

Responsibility Determination

Burtek contends that the wide discrepancies between the prices it offered and the prices ECC offered should have led the Navy to conduct a thorough preaward survey into ECC's understanding of the agency's requirements as well as ECC's ability to perform any awarded contracts.

A preaward survey is not a legal prerequisite to an agency's affirmative determination of responsibility. Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 C.P.D. ¶ 264. Rather, contracting officials have broad discretion regarding whether to conduct a preaward survey, and we will not review such a decision or a subsequent affirmative determination absent a showing that the contracting officer may have acted fraudulently or in bad faith, or that definitive

responsibility criteria in the solicitation may not have been met. Id. While Burtek suggests that award to ECC was preordained, the company has furnished no direct evidence to show that the Navy acted fraudulently or in bad faith. Also, no specific responsibility criteria were established for the two protested procurements.

Bias

Burtek questions the fairness of the procurements in light of the fact that one of the Navy's procurement officials was employed by ECC immediately following the contract awards. According to Burtek, this individual was introduced by the Navy to Burtek during the course of the procurements as the official who would insure that proper procurement practices would be followed. Burtek further alleges that this individual had complete access to all of the documents that Burtek submitted. Burtek argues that the individual's employment by ECC, standing alone, raises questions about his impartiality as well as the possibility that proprietary information that Burtek submitted to the Navy in confidence may have been made available to ECC.

Where the subjective motivation of an agency's procurement personnel is being challenged, it admittedly is difficult for a protester to establish--on the written record which forms the basis for our Office's decisions in protests--the existence of bias. See Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. Nevertheless, the protester has the burden of proving its case, and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Dynalectron Corp., B-199741, July 31, 1981, 81-2 C.P.D. ¶ 70. We see no basis for Burtek's allegation of bias, since the record reveals that the former Navy procurement official had no role in either procurement in any of the step one evaluations of the offerors' technical proposals. As to the step two bids, both companies' bids were opened publicly at the same time and the prices publicly disclosed.

Burtek's allegation that confidential information it submitted in connection with the procurements may have been disclosed to ECC is based only on unsupported suspicion, since the protester has presented us with no evidence showing an actual disclosure. Therefore, we must regard the allegation as mere speculation and, as such, it provides no basis on which to question the awards. Kisco Company, Inc., B-216646, Jan. 18, 1985, 85-1 C.P.D. ¶ 56.

Acceptability of ECC's Technical Proposal

Burtek contends that the Navy accepted computer software from ECC in one of the procurements that was not responsive to solicitation requirements. Burtek argues that the solicitation required the offeror's propose higher order programming language to comply with MIL-STD-1644 and thus to be FORTRAN; Burtek alleges that the programming language offered by ECC for one procurement was other than FORTRAN.

The Navy points out that for one of the two protested procurements ECC proposed the identical computers and FORTRAN computer language that Burtek did. As to the other procurement, the Navy notes that ECC proposed an EC3 computer with a "Trainer Language Compiler" program (TLC), not FORTRAN. Nevertheless, the Navy argues that the solicitation in question specifically advised bidders that the FORTRAN programming language referenced in MIL-STD-1644 was not a requirement. We agree. While the solicitation did incorporate a large portion of the military standard, it also made it clear that the military standard was modified to require only that the programming language for the trainers' computer system be a higher order language, but not necessarily FORTRAN.

Burtek alternatively argues that: (1) the higher order languages that could be offered were limited to six by Department of Defense (DOD) Instruction 5000.31, "Interim List of DOD Approved Higher Order Programming Languages," and (2) the TLC programming language offered by ECC actually was a lower order, rather than a higher order language, because TLC was machine dependent in that it could not be used on computers other than the EC3. In this respect, MIL-STD-1644 defines a higher order language as one having:

"A full repertoire of instructions and statements having formal syntax and lexical rules, usable in composing machine-independent source programs."^{1/}

^{1/} The instructions provided by a lower order language are tailored to the particular microprocessor involved, and manipulate the microprocessor's own instruction set directly in one-to-one correspondence. A higher order language is not tailored to a specific microprocessor, so that it can, with some modification, be used on other computers; also, each instruction in a higher order language results in the execution of more than one microprocessor instruction.

As stated above, there was no limitation in the solicitation on the higher order programming language that had to be provided. Also, there is no reference in the solicitation to the cited instruction. Therefore, we find no merit to Burtek's position that the acceptable higher order languages were limited to the six listed in the instruction.

With respect to Burtek's argument that, contrary to the Navy's view, ECC's proposed TLC program was not a higher order one, the Navy states that in evaluating ECC's TLC program it determined:

"The TLC compiler computer language uses English language source level coding to be compiled, linked and form load modules into a run time object code program. The EC3 compiler language provides compression of computer instructions such that one [higher order language] statement represents many machine language instructions. . . . Based on the discussions above, the EC3 computer system TLC language is in full compliance with the requirements of MIL-STD 1644 software engineering development process. MIL-STD 1644 also requires documenting each phase of software development and ECC proposed to meet all the documentation requirements."


We find nothing in the above quoted language that indicates the TLC is not machine independent. While it may be true, as alleged by Burtek, that the TLC can not be used on any computer except the EC3, this would be, as also noted by Burtek, because necessary translator programs known as compilers do not exist to change the TLC into another computer's particular machine language. However, the commonly accepted meaning of the term "machine independent" is that the program can be run on computers with different machine languages without the program itself having to be rewritten. See Encyclopedia of Computer Science and Engineering (2d ed. 1983), at 1227. Burtek has not shown that if the necessary compilers did exist to allow it to be run on other computers, the TLC itself would also have to be rewritten in order to do so.

Burtek also contends that the EC3 computer offered by ECC failed to meet the solicitation requirement for a commercially available computer currently in production by the manufacturer. Burtek alleges that the EC3 is not a commercially available computer because it has been sold only to the government--the Navy in particular--and not the general public. Burtek also alleges that the EC3 has never been sold alone, but rather has been a component of an overall system. Burtek argues that the EC3 therefore does not fit within any normal or accepted definition of commercial availability. The Navy, on the other hand, states that it has used the EC3 extensively on many trainers over the past 10 years. The Navy further states that the computer has been incorporated into training systems that have been and currently are being purchased by commercial organizations and foreign governments, a list of which the Navy also provides. The Navy emphasizes that the purpose for requiring commercial availability and current production was to assure that the training devices would have current units for which repair and spare parts could be obtained.

We believe the Navy's response provides sufficient evidence to support its determination of commercial availability. Moreover, because the Navy's purpose for the commercial availability requirement was only to insure that spare parts could be obtained, we reject Burtek's argument that the EC3 is not commercially available merely because it may not have been sold by itself to many of the commercial organizations and governments listed by the Navy. See Amdahl Corp., et al., B-212018, et al., July 1, 1983, 83-2 C.P.D. ¶ 51.

Finally, Burtek alleges that the contracts in fact were awarded to ECC after Burtek filed its protest with the agency, and that the Navy thus improperly failed to withhold award pending the protest's resolution. We find no merit in Burtek's position since the applicable regulation provide only for the withholding of award pending protests filed with out Office, not protests filed with the agency. See Defense Acquisition Regulation, § 2-407.8.

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

for 
Harry R. Van Cleve
General Counsel