DECISION

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

FILE: B-220459 **DATE:** March 17, 1986

MATTER OF: C&W Equipment Co.

DIGEST:

1. Improper technical leveling does not occur merely because an agency, during discussions, advises an offeror whose proposal is susceptible to being made acceptable that it does not meet certain specifications and requests it to address further particular aspects of its proposed system. Pointing out deficiencies is part of the agency's responsibility to conduct meaningful discussions.

2. Improper technical transfusion has not occurred where the record reveals no evidence that during discussions, the agency conveyed to an offeror, either directly or indirectly, a better technical approach that allegedly has been proposed by a protester.

3. Where an agency inadvertently discloses a protester's proposal to the only other offeror, but not until after award, the protester is not prejudiced by the error in the present procurement.

4. Competition in Contracting Act of 1984 provision generally requiring agencies to stay contract performance if the General Accounting Office (GAO) notifies them of a protest filed with it within 10 days of award does not apply to agency-level protests, so there is no legal basis for GAO to object to continued performance.

C&W Equipment Co. protests the award of a contract to International Laundry Machinery, Inc. under request for proposals (RFP) No. M6-Q88-85, issued June 28, 1985, by the Veterans Administration Marketing Center, Hines, Illinois. The solicitation covers furnishing and installation of a "complete and workable" laundry system for a new building at the VA Medical Center in Houston, Texas.

C&W primarily protests that in discussions with International, the VA engaged in technical leveling and technical transfusion in violation of the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 15.610(d)(1) and (2) (1984). C&W alleges that the VA improperly helped International to revise its proposal, initially found unacceptable, so that it met the agency's minimum needs, and improperly disclosed C&W's unique design details to International. C&W contends that the VA's disclosure of proprietary information (including providing International with a copy of its proposal as part of the agency report) precludes a fair recompetition. C&W therefore requests that we direct the VA to award a contract to it.

We deny the protest.

The record indicates that the VA found both C&W's and International's proposals, submitted on August 20, 1985, technically deficient. However, the contracting officer and the technical evaluation team determined that both proposals were susceptible to being made acceptable. The VA first requested additional technical information; it then requested best and final offers. C&W's final price was $3,001,154, and International's was $2,899,988. In accord with the solicitation, which stated that award would be based on the lowest price for an overall system meeting the VA's requirements, the agency awarded a contract to International on September 30, 1985.

C&W protested to the contracting officer, then to our Office, alleging that the VA's negotiation procedures were unfair. C&W contends that International is not technically capable of designing a workable laundry system for VA's Houston facility and that the VA actually directed International to make major changes in the size and configuration of its equipment, in several instances using C&W's design and technical information. According to C&W, its own higher-priced proposal merely required verification and minor changes.

Technical leveling is defined as helping an offeror to bring its proposal up to the level of the other proposals through successive rounds of discussions, for example by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing a proposal. See FAR, 48 C.F.R. § 15.601(d)(1); 51 Comp. Gen. 621 (1972); E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192. Technical transfusion is defined as disclosure by the government of technical information pertaining to a proposal that results in improvement of a competing proposal. FAR, 48 C.F.R. § 15.601(d)(2). In order for discussions to be meaningful, however, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in one of these prohibited practices. Joule Engineering Corp.--Reconsideration, 64 Comp. Gen. 540 (1985), 85-1 CPD ¶ 589. We do not believe that C&W has shown that the VA engaged in either technical leveling or technical transfusion here.

C&W bases its protest primarily on a VA document entitled "Report of Contact," dated August 21, 1985, which contains a list of 20 questions and comments that the VA submitted to International. For example, the VA pointed out that International's proposal offered only 7,200 pounds of flatwork storage instead of 10,000 pounds; one sewing machine instead of two; and a 40-foot sorting belt instead of the 42-foot belt specified.

We find that the pointing out of such deficiencies was part of the VA's responsibility to conduct meaningful discussions with an offeror that was in the competitive range because its proposal had been determined to be reasonably susceptible of being made acceptable. We note that the VA pointed out similar deficiencies in C&W's proposal. For example, the VA's "Report of Contact" shows that the agency advised C&W that it had not included either a central vacuum system or water system tanks on its equipment list, although both were specified. In addition, the VA asked C&W whether its proposed system included two required 20-horsepower air compressors and requested that the firm show their location on its drawings.

In our opinion, the questions submitted to International did not constitute improper coaching with the intent of bringing International's proposal up to C&W's level. See System Development Corp. et al., B-204672, Mar. 9, 1982, 82-1 CPD ¶ 218 at 27. We therefore deny C&W's protest with regard to technical leveling.

With regard to the technical transfusion issue, C&W complains, for example, that the VA transfused its design for patient clothing conveyor rails to International. The record does not support this contention. The RFP did not call for a specific design for this equipment, and the "Report of Contact" indicates that the VA merely advised International that "Conveying uniforms and patient clothing needs to be addressed."

C&W also alleges that the VA improperly disclosed proprietary data concerning its proposed placement of laundry folding tables at a 90-degree angle to small piece folders. According to the protester, the VA directed International to redesign its system using the same arrangement. The "Report of Contact," however, indicates only that the VA advised International that "Small piece folders [should be] in tandem with folding tables." A reasonable reading of this advice is that the VA wished the tables to be used in conjunction with the folding equipment, but did not necessarily require a particular angle of placement. In any event, there appear to be only a limited number of possible arrangements, and we do not believe that the VA's advice to International in this regard rises to the level of technical leveling. Although C&W presents other examples of alleged technical leveling, we find them without support. We therefore deny C&W's protest on this basis.

C&W also protests the VA's handling of proprietary information and requests that our Office direct the VA to establish proper procedures for handling such material. C&W advised the agency in a cover letter attached to its original proposal that "many aspects of our bid are proprietary . . . and no portion or concept may be disclosed or utilized either directly or indirectly to elements outside of the government." As noted above, C&W alleges that despite this restriction on disclosure, evaluators improperly revealed portions of its proposal during discussions. In addition, C&W complains that the agency improperly sent its complete proposal to International as an attachment when disseminating copies of its report to our Office to interested parties.

A protester must prove by clear and concerning evidence that proprietary rights have been violated. Andrulis Research Corp., B-190571, Apr. 26, 1978, 78-1 CPD ¶ 321. To meet this burden, the protester must demonstrate that (1) the material was marked proprietary or confidential or was disclosed in confidence; and (2) the data involved

significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 CPD ¶ 249.

In this case, although C&W attempted to establish the proprietary nature of its proposal in a cover letter, individual pages of the proposal were not marked as proprietary, and we note that a substantial number were copies of standard manufacturers' literature and clearly cannot be considered proprietary. In this regard, it is up to offerors to mark clearly those portions of a proposal that they wish to restrict, rather than expect agency officials to make this decision for them. As also noted above, the VA denies that evaluators disclosed C&W's restricted materials during negotiations, and C&W has merely speculated that disclosure occurred at this time. In these circumstances, C&W has not satisfied its burden of proving that its proprietary rights were violated prior to award.

It appears, however, that the VA, in disseminating copies of its report to our Office to interested parties, as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1985), inadvertently sent International a copy of C&W's proposal. In view of our resolution of C&W's protest, we cannot conclude that C&W was prejudiced in this procurement by the erroneous transmittal of its proposal. (In fact, it appears that C&W may have received a copy of International's proposal, as well as of evaluation sheets that the VA asked us to review in camera, with its own copy of the VA report.) To the extent that C&W alleges that it will be prejudiced in future procurements, we are aware of no appropriate remedy. See Youth Development Associates, B-216801, Feb. 1, 1985, 85-1 C.P.D. ¶ 126.

Finally, C&W protests that the VA improperly permitted International to continue contract performance despite the fact that the firm protested to the agency within 10 days of award. The Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(d)(1) (West Supp. 1985), generally requires agencies to stay performance if our Office notifies them within 10 days of award of a protest filed here. The provision does not apply to agency-level protests, however,

and we therefore have no legal basis for objecting to continued performance.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel