



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Mictronics, Inc.  
**File:** B-228404  
**Date:** February 23, 1988

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### **DIGEST**

1. Protest that solicitation evaluation criteria are unfair is untimely when it is not filed with either the procuring agency or the General Accounting Office before bid opening. Alleged improprieties that are apparent on the face of a solicitation must be filed by that date.
2. Award on the basis of initial proposals to the firm judged to be most advantageous under the evaluation factors listed in the solicitation but proposing second lowest cost offeror was proper where the only lower-priced proposal would not have been in the competitive range.
3. Protester alleging bias on the part of procurement officials must submit virtually irrefutable proof since contracting officials are presumed to act in good faith.
4. The determination of the merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness or that the agency violated procurement statutes or regulations.

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### **DECISION**

Mictronics, Inc. protests the award of a contract to ERC International, DSG Field Services Corporation under request for proposals No. N00612-87-R-0195 issued by the Naval Supply Center, Charleston, South Carolina, for the Navy Shore Electromagnetic Environmental Effects Program.

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

The Navy issued the solicitation on February 4, 1987. After numerous extensions, the closing date for receipt of initial proposals was set for May 11, 1987. The Navy awarded the contract without discussions to ERC on June 11, 1987. Mictronics protested after receiving a notice of award on October 16, 1987.

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Mictronics first complains that two of the evaluation criteria, a 3-year experience requirement and a security clearance requirement, are restrictive.

Our Bid Protest Regulations require that protests based on alleged improprieties apparent on the face of the solicitation be filed either with the procuring agency or our Office before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1987). The record shows that Mictronics did not protest the evaluation criteria prior to the closing date for receipt of initial proposals. Accordingly, this ground of protest is untimely filed and we will not consider it. Allied Sanitation, Inc., B-225988, Jan. 30, 1987, 87-1 CPD ¶ 104.

Mictronics also contends that it should have received the award because its price was the lowest. We have held that an agency may not accept an initial proposal that is not the lowest considering only cost and cost-related factors listed in the RFP where there would be at least one lower-priced proposal within the competitive range. Hall-Kimbrell Environmental Services, Inc., B-224521, Feb. 19, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 187. The Competition in Contracting Act of 1984 (CICA) requires that in negotiated procurements, agencies must conduct discussions with all responsible offerors who submit proposals within the competitive range except "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the government." 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985). Offerors in the competitive range are those whose proposals have a reasonable chance for award. FAR § 15.609 (1986).

The Navy received five proposals. The technical portions were evaluated and scored by a four-person panel, which assigned the following scores to the proposals:

Mictronics	45.935
TDS	49.56
Milcom	61.62
ERC	78.19
ARC	78.25

The highest number of points possible was 80.

As shown above, Mictronics' proposal was ranked lowest out of the five proposals received. The Navy did not establish a formal competitive range, but it made a determination that Mictronics' proposal was technically unacceptable due to weaknesses which could not be remedied. For example,

Mictronics received no points from three of the evaluators in ~~two~~ categories for corporate experience. In addition, after examining Mictronics proposal, we note that none of the previous contracts from which date of award could be discerned were within the past 3 years, as required by the solicitation, paragraph 3.1.1. Mictronics does not complain in its protest about the Navy's evaluation of its corporate experience, and admits that the majority of its experience was beyond the 3 year requirement. Since Mictronics apparently submitted a complete statement of its corporate experience, we agree with the Navy's determination that the inadequacies in Mictronics' proposal could not have been remedied had discussions been held. See Cosmos Engineers, Inc., B-220000.3, Feb. 24, 1986, 86-1 CPD ¶ 186. Mictronics also received low scores from most of the evaluators for personnel requirements and for technical approach for antenna modeling.

The competitive range is determined by comparing the relative merits of all of the proposals on a particular procurement and even acceptable proposals can be eliminated from the competitive range when it is determined that they have no reasonable chance for award. Cosmos Engineers, Inc., *supra*. Given Mictronics low technical score and the fact that three proposals were rated much higher, we believe that Mictronics had no realistic possibility for award, even if discussions had been conducted with it. Thus, Mictronics lower price would not have required that it be included in the competitive range. An agency is not required to conduct discussions with an offeror clearly outside the competitive range. Delcor International, B-221230, Feb. 13, 1986, 86-1 CPD ¶ 160.

Mictronics further argues that the evaluators were biased and arbitrary in their evaluations of Mictronics' proposal. Mictronics infers that its proposal should have been more highly rated, stating that its proposals for technical approach and management plan "were clearly defined and addressed each facit properly." It is well settled, however, that this Office will not substitute its judgment for that of the agency by making an independent technical evaluation unless the agency's action is shown to be arbitrary or in violation of procurement statutes or regulations. APEC Technology, Ltd., 65 Comp. Gen. 230 (1986), 86-1 CPD ¶ 81. The fact that a protester does not agree with an agency's evaluation does not render the evaluation unreasonable or contrary to law. Dalfi, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ 24.

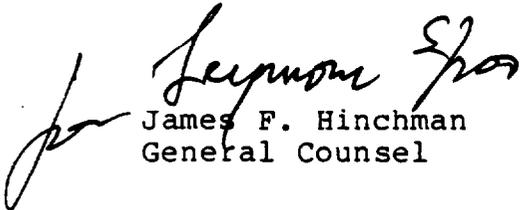
The record contains no support for the protesters assertions. Mictronics proposal was reviewed and point-scored by each member of the technical panel, and it does not appear that Mictronics' proposal was treated any differently than all the others.

Where a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the award, the protester must submit virtually irrefutable proof that contracting officials had a specific and malicious intent to harm the protester, since contracting officials are presumed to act in good faith. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition. Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153.

We see no evidence of bias or favoritism in the record. Mictronics claims that the Navy's actions in other procurements, such as issuing a small number of delivery orders on a previous Mictronics contract and awarding a sole-source contract to another firm for allegedly the same item as called for under the Mictronics' contract, indicate that the Navy preselects its contractors. The Navy's alleged actions in prior procurements, however, are not evidence that it did not act in good faith in this procurement. See Porter-Cable Corp., B-227401, June 19, 1987, 87-1 CPD ¶ 618.

Mictronics also observes that the evaluators gave another proposal a higher technical score than ERC's proposal received. That technical proposal, however, was rated only .06 points higher than ERC's, while its cost proposal was \$454,796 higher and received 2.85 less points than ERC's. In this situation, the agency reasonably determined that the slight technical difference was not worth the extra cost, and thus made the award to an essentially technically equal, lower cost offeror. See ICOS Corporation of America, B-225392, Feb. 10, 1987, 66 Comp. Gen. \_\_\_\_\_ (1987), 87-1 CPD ¶ 146.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel