

DECISION



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

FILE: B-197303

DATE: July 8, 1980

MATTER OF: A.R.&S. Enterprises, Inc.

DIGEST:

1. Protest after closing date for receipt of proposals that procurement for full food services should have been formally advertised rather than negotiated on basis of urgency is untimely under Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980), requiring that protest alleging impropriety in solicitation apparent prior to closing date for submission of proposals be filed prior to that date; protest does not satisfy "significant issue" exception to timeliness requirement since issue has been previously decided.
2. Whether contractor is performing in accordance with terms of contract is matter of contract administration for resolution by contracting parties and is not for consideration under Bid Protest Procedures.
3. Record contains insufficient evidence of Navy bad faith or partiality for successful offeror. Although several events cited by protester inured to benefit of successful offeror, mere speculation and conjecture as to Navy's motivations do not constitute independent proof required to sustain burden of proving case.
4. Agency properly amended RFP and reopened negotiations with all offerors to include minimum manning requirements to ensure adequate contract performance.
5. Failure of agency to comply with preaward notice requirements in DAR §§ 1-703(b)(5) and 3-508.2(b) is procedural deficiency which will not affect validity of otherwise proper award where protester was not prejudiced by absence of notice.

6. Although second option year was evaluated for price contrary to solicitation terms, no offeror was prejudiced since lowest acceptable offeror was low for base and first option year.
7. Request for proposal preparation costs is denied since protester submitted no evidence beyond allegations that agency action was arbitrary and capricious.

A.R.&S. Enterprises, Inc. (AR&S), protests the award of a fixed-price, indefinite-quantity-type contract for full food services to Meldick Services, Inc. (Meldick), under request for proposals (RFP) No. N00612-79-R-0372, issued by the Naval Supply Center (Navy), Charleston, South Carolina, for full food services at the United States Naval Home in Gulfport, Mississippi.

Initially, the procurement was offered to and rejected by the Small Business Administration as a small minority business (8(a)) set-aside. The Navy then attempted to procure from Meldick on a sole-source basis pursuant to a determination that procurement from a small minority business would be in the Government's best interest and that Meldick was the only known minority contractor capable of performing full food services. However, due to expressions of interest from other firms, the Navy issued amendment 0001, setting the procurement aside for small businesses and adding a 1-year experience requirement.

The solicitation provided for evaluation of the proposals for the base year plus 1 option year, although the Navy could extend the contract for a second option year. Award was to be made to the lowest responsive, responsible offeror.

Five firms were solicited and all responded. Meldick was the low offeror for the base and 2 option years at \$1,483,935.51, while AR&S was fourth low at \$2,084,884.66. The following manning levels were proposed by the offerors:

NAVY ESTIMATE Weekends/ Holidays	MELDICK	INDUSTRIAL MAINTENANCE SERVICES, INC.	INDUSTRIA LEASE, INC.	AR&S
127	70	101	97.5	140
Weekdays				
189.5	115	140.5	143	204.5

Negotiations were opened to all five offerors pursuant to amendment 0004 which requested best and final offers, revised the base year to 9 months (January 1, 1980, through September 30, 1980), and specified the Navy's minimum man-hour estimate as an additional requirement necessary to meet the Government's minimum needs for satisfactory performance of the services. Except for AR&S, the offerors were requested to propose sufficient man-hours. Industria Lease, Inc., submitted the lowest revised offer of \$1,828,517.61; Meldick was second low at \$1,848,457.30, and AR&S was fourth low at \$2,155,299.41.

Industria Lease's low offer was rejected for deficiencies in proposed menus and failure to demonstrate the requisite experience. Consequently, the contract was awarded to Meldick, the next lowest offeror.

The protester initially maintains that the procurement should have been formally advertised rather than negotiated since the award to Meldick was based solely on price, and the Navy's justification for negotiating in lieu of formally advertising was insufficient.

The Navy justifies negotiation on the basis that award was required at the earliest possible date since "food is the only morale factor" in the lives of many of the Naval Home's elderly residents. The agency urges dismissal of the protest on this issue as untimely under our Bid Protest Procedures.

Our Bid Protest Procedures require that protests of alleged improprieties in any solicitation which are apparent prior to the closing date for submission of proposals be filed prior to that date. 4 C.F.R. § 20.2(b)(1) (1980). Since the alleged impropriety relates to the patent form of the solicitation, and AR&S did not file its protest until more than 2 months after the closing date, we concur with the Navy that

AR&S's protest as to this issue is untimely. See Ara Med Hawaii, B-196438, October 30, 1979, 79-1 CPD 1. We conclude further that this issue does not warrant consideration under the "significant issue" exception to our timeliness requirements, 4 C.F.R. § 20.2(c). Previously decided issues will not be deemed significant within the meaning of the exception. See A.C.E.S., Inc., B-182720, February 13, 1975, 75-1 CPD 97. We have decided the propriety of an agency's justification for negotiation due to urgency on many occasions. See Starlight Components, Inc., B-194367, December 5, 1979, 79-2 CPD 390. Also, we discussed the general matter of advertising vis-a-vis negotiation of Navy mess attendant service contracts in Gelber Food Services, Inc., et al., 54 Comp. Gen. 809 (1975), 75-1 CPD 186. Accordingly, the issue raised is not "significant" and will not be considered. The protest is dismissed as to this issue.

AR&S further alleges that the Navy is permitting Meldick to perform the contract without adhering to the "five cycle" menu contemplated by the solicitation. While it is submitted that this constitutes a violation of the "fundamental principle of Government contract law" that prohibits awarding a contract "whose terms and conditions are significantly different" from those advertised, the question raised actually concerns whether Meldick is performing in accordance with the terms of the contract. This is a matter of contract administration which is for resolution by the contracting parties and not for consideration under our Bid Protest Procedures since it does not relate to the propriety of the award. See Post Marketing Corporation, B-197472, January 28, 1980, 80-1 CPD 76; Racon, Inc., B-195824, September 17, 1979, 79-2 CPD 202. Consequently, the protest as to this issue is dismissed.

AR&S principally contends that Meldick was "the Navy's choice," as evidenced by the two attempts to make a noncompetitive award to that firm and a statement contained in a Navy memorandum, and that the Navy conducted the procurement in bad faith pursuant to a "master plan" designed to assure award to Meldick. AR&S contends that "the Navy clearly could have eliminated Meldick from the competitive range," and, therefore, from the procurement on the basis of Meldick's significantly deficient initial manning proposal. Instead, the Navy "came

to Meldick's rescue" by incorporating the minimum manning estimate as a solicitation requirement for best and final offers, thereby preventing the exclusion of Meldick. The "master plan" was complete, concludes AR&S, when Industria Lease's proposal was eliminated, and award was made to Meldick without first notifying the unsuccessful offerors of the intended award as required by the Defense Acquisition Regulation (DAR) §§ 1-703(b)(5) and 3-805.2(b) (1976 ed.).

Although it is clear that the Navy originally attempted to have Meldick perform the services without competition, the two attempts were reportedly undertaken pursuant to an interest in promoting minority business enterprises, and not in furtherance of an improper scheme. In any event, the Navy's efforts were ultimately abandoned and, thus, resulted in no prejudice to AR&S.

We also find no basis for concluding that the Navy's amending the solicitation indicates bad faith or partiality. On the contrary, we find the reopening of negotiations with all offerors by the issuance of amendment was proper to disclose the minimum manning requirements of the Navy to ensure adequate contract performance. See Palmetto Enterprises Inc., et al., B-193843, August 2, 1979, 79-2 CPD 74; Industrial Maintenance Services, Inc., et al., B-189303, B-189425, December 15, 1977, 77-2 CPD 466; Enviromental Enterprises, Incorporated, B-193090, March 9, 1979, 79-1 CPD 168.

Industria Lease's low revised proposal was rejected due to deficiencies in proposed menus and its failure to satisfy the 1-year prior experience requirement. We consider it relevant that Industria Lease did not protest the rejection of its proposal and have detected no impropriety in this determination. Similarly, we do not find the memorandum entitled "Request for Authority to Contract," evidence of a Navy preference for Meldick. That memorandum, prepared after submission of initial proposals, requests that the business clearance requirement be waived and that award be made to Meldick "if the relative standing of offers remains unchanged" (emphasis added). Although this statement presumes that Meldick's revised proposal will conform to the solicitation requirements, it does

not appear to have been intended for the improper purpose of influencing source selection officials to select Meldick. Rather, the Navy was apparently attempting to avoid postaward delays by securing in advance a waiver of the requisite business clearance, based on speculation that Meldick would remain the low acceptable offeror upon receipt of revised proposals. In this regard, the Navy could not possibly have known with certainty which offeror would be acceptable and low in view of the competition generated.

As for the Navy's failure to give unsuccessful offerors advance notice of the intended award to Meldick, DAR §§ 1-703(b)(5) and 3-508.2(b) require notice in advance of award in small business set-aside procurements to permit protests against the small business status of the selected offeror. Provision is made for exceptions to this requirement where a delay would be contrary to the public interest. The Navy justified its noncompliance under this public interest exception on the ground that a delay in award would have necessitated extension of the existing AR&S contract at a \$6,292 higher monthly cost, while depriving Meldick of necessary preparation time. We do not find this justification unreasonable.

To the extent that the protester contends the Navy's noncompliance with the notice requirement warrants cancellation of the award, we note that even if the noncompliance was unjustified, the failure to provide such notice is merely a procedural matter which will not affect the validity of an otherwise proper award, where the protester was not prejudiced. Meldick Services, Inc., B-194829, January 16, 1980, 80-1 CPD 48. The record indicates that Industrial Maintenance Services, Inc., another unsuccessful offeror, lodged a technically untimely protest of Meldick's size status with the Small Business Administration (SBA). Even though untimely, it was rejected on the merits. AR&S neither appealed this determination nor attempted to file an independent protest and, therefore, was not in fact prejudiced by the failure of notice.

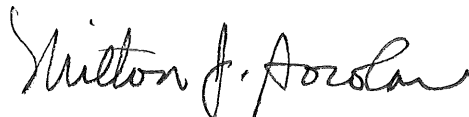
We have carefully reviewed the record and find insufficient evidence to support the existence of a "master plan" or other pattern of partiality in the events leading to the award to Meldick. While several of these events apparently inured to the benefit of Meldick as alleged, the protester's speculations as to the Navy's motivations

do not, without independent proof, sustain its burden of affirmatively proving its case on this issue. See Ronald Campbell Company, B-196018, March 25, 1980, 80-1 CPD 216; Dictaphone Corporation, B-194128, June 19, 1979, 79-1 CPD 439.

The Navy has advised that contrary to the solicitation, the second option year was evaluated for price. However, we agree with the Navy that, since Meldick's offer for the base and first option year was the low acceptable offer, no offeror appears to have been prejudiced by the option evaluation.

AR&S claims proposal preparation costs in view of the Navy's actions in connection with this procurement. In order to recover such costs, however, a claimant must show that, but for the Government's arbitrary or capricious action, it would have been awarded the contract. McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1979); Northland Anthropological Research, Inc., B-195184, November 5, 1979, 79-2 CPD 320. As previously indicated, we find insufficient evidence to establish that the Navy's actions in this procurement were arbitrary, capricious, or otherwise unreasonable. Therefore, the proposal preparation cost claim is denied.

The protest is dismissed in part and denied in part.



For the Comptroller General
of the United States