

# DECISION



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

FILE: B-184064

DATE: December 30, 1975

MATTER OF: Halifax Engineering, Inc.

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## DIGEST:

1. Protester who in violation of ASPR § 3-507.2(b), was improperly told its initial proposal was low but proceeded with negotiation conducted with it without raising matter until it did not receive award cannot later complain about course of action in which it participated.
2. Decision whether to award a contract on the basis of initial proposals under 10 U.S.C. § 2304(g) (1970), is determination wholly discretionary with procuring activity.
3. Contention that procurement should have been formally advertised rather than negotiated, not filed until after award, is untimely under GAO Bid Protest Procedures and will not be considered.

Halifax Engineering, Inc. (Halifax) protests the award of any contract pursuant to request for proposals (RFP) DAAH03-75-R-0160, for on-site preventive and remedial maintenance of electronic recorders and instrumentation at the U. S. Army Missile Command, Redstone Arsenal, Alabama (Army).

Proposals were opened on June 12, 1975. On June 13, 1975, Halifax telephoned the individual designated in the RFP as the contact point for information concerning the procurement. The memorandum of that call prepared by the Army on June 26, 1975, states:

"\* \* \* Halifax Engineering called the day after the opening of the solicitation and asked about their (Halifax's) proposal. I inadvertently told him that his proposal was low. However, final negotiations had not been completed and they had not been asked for their final offer."

On June 25, 1975, Halifax was contacted by the Army to ascertain how it intended to meet the contract's technical requirements,

particularly the requirement that any successful offeror must have an office within 30 miles of Redstone Arsenal. Halifax represented at that time that it had placed an advertisement in a local newspaper for personnel and that an office would be established if an award was received.

On June 26, 1975, the Army telephonically contacted all four firms that had submitted proposals to discuss their price and call for their best and final offers. As a result of these telephone calls, only one firm, Systems Service Corporation (the eventual contractor), reduced its price from \$2,913 per month, to \$2,650. This displaced Halifax's low offer of \$2,841. Thereafter, contract No. DAAH03-75-C-0274 was awarded to Systems Service Corporation on June 28, 1975. Halifax protested the award to GAO by telegram filed on July 3, 1975.

Halifax maintains that once the Army disseminated information to Halifax that its proposal was low, no further discussions should have ensued. Rather, since award was predicated on price alone, in Halifax's view, the Army should have cut off all discussions and awarded the contract on the basis of initial proposals, as provided in section 10(g) of Standard Form 33A. In this vein, Halifax cites 50 Comp. Gen. 67 (1970) for the proposition that where price is the sole evaluation factor, award on the basis of initial proposals to other than the low offeror is prohibited. Halifax also alleges that this procurement should have been formally advertised.

Halifax's reliance on 50 Comp. Gen., supra, is misplaced. In that case, the contracting officer awarded a contract on the basis of initial proposals to other than the low offeror when price was the only stated evaluation factor. We held that the exception to the requirement of 10 U.S.C. § 2304(g) (1970) for holding discussions with all offerors determined to be in the competitive range did not permit the contracting officer's actions. We did not hold that an award must be made on the basis of initial proposals when the conditions for such conduct are present, i.e. adequate competition or accurate prior cost experience resulting in fair and reasonable prices after notification in an RFP of the possibility of such action. The decision whether to award on the basis of initial proposals when all necessary conditions are present is wholly discretionary with the procuring activity.

We think the Army correctly asserts that Halifax's protest, as it concerns the determination to negotiate rather than advertise, is untimely under our Bid Protest Procedures, 40 Fed. Reg. 17979, April 24, 1975. Section 20.2(b)(1) thereof provides that

protests based upon alleged improprieties which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for receipt of proposals. Since Halifax's protest was not filed until after award was made, it is untimely and will not be considered on its merits.

The Army admits that the conversation of June 13, 1975, violated the requirements of Armed Services Procurement Regulation (ASPR) § 3-507.2(b) (1974 ed.) which prohibits the furnishing of any information to a potential supplier which alone or together with any other information may afford him an advantage over others. However, the Army asserts that Halifax's protest concerning the conduct of discussions from June 13 on (i.e. manner of discussions as well as their existence) is untimely under our Procedures. The applicable provision in our Procedures, section 20.2(b)(2), requires that protests other than those based upon improprieties in the solicitation must be filed within 10 days after the basis for protest was known or should have been known, whichever is earlier. Under this provision, Halifax's protest being filed on July 3, 1975, or 5 days after the discussion subsequent to the June 13 disclosure (June 25), is timely and will be considered on its merits.

When a violation of ASPR § 3-507.2 (1974 ed.) occurs, our Office is initially concerned whether the course of conduct operated to one offeror's advantage vis-a-vis its competitors, or whether the integrity of the competitive negotiation system appears compromised. Willamette-Western Corporation; Pacific Towboat & Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259. A situation similar to this one arose in Datawest Corporation, et. al., B-180919, January 13, 1975, 75-1 CPD 14. There a non-Government member of a source evaluation board requested, in a highly irregular manner, certain revised cost estimates from the protester. Protester interpreted the irregular acts as favorable to its competitive position and complied with the request without complaint. When it appeared that the protester would not get the award, a complaint was filed with GAO. We stated:

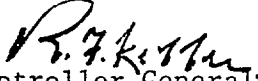
"The timing of Datawest's protest is significant since we are concerned with competitive prejudice and its possible effect upon the competitive negotiation system. \* \* \* Datawest cannot participate in an irregular course of action and then later be heard to complain about that course of action."

Subsequent to imparting the information to Halifax that it was the low offeror, the Army conducted discussions with all offerors, including Halifax. Halifax was contacted on June 25 and 26. The receipt of these contacts was clear indication that award was not contemplated on the basis of initial proposals. Halifax was afforded an opportunity to revise its price with its best and final offer on June 26. We have held that even the mere opportunity to revise one's price satisfies the requirement of 10 U.S.C. § 2304(g) to hold the discussion with all offerors determined to be in a competitive range. B-172946(1), December 23, 1971.

We fail to see how this situation prejudiced Halifax's competitive opportunity for an award. If anything, its competitive position was enhanced because it alone knew its relative price standing. While Halifax alleges that its price was leaked to Systems Service Corporation there is nothing in the record to substantiate this allegation. A reduction in price during negotiation does not imply that the offeror lowering its price had access to the prices submitted. Hydrosystems, Inc., B-184176, November 28, 1975. As we said in Datawest Corporation, *supra*: "An unsubstantiated allegation that prices may have been disclosed, even coupled with an opportunity for such conduct, is not sufficient to require an affirmative conclusion."

Finally, the Army recognizes that the request for best and final offer was not confirmed in writing as required by ASPR § 3-805.3(d) (1974 ed.) due to the short time between the request and the needed services (June 26-July 1). We agree that this is a procedural deficiency that does not affect the validity of the award, but should not be repeated in the future.

In view of the above, the protest is denied.

  
Deputy Comptroller General  
of the United States