

DECISION



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

60526

FILE: B-185060

DATE: February 17, 1976

MATTER OF: Datawest Corporation

98599

DIGEST:

Although proposal was found technically acceptable decision to exclude it from competitive range and from further negotiations was not arbitrary or unreasonable since award was to be made based on lowest price of technically acceptable proposal and to have believed protester would have decreased its \$491,373 offer by over \$200,000 during negotiations would be highly unlikely.

The Datawest Corporation protests the failure of the United States Army Test and Evaluation Command to include it in negotiations for award of a fixed-price contract under request for proposals No. DAAD01-75-R-0076 and the award by that Command to another firm.

Proposals were submitted by five firms. Two firms were determined to have submitted technically unacceptable proposals; those firms determined to have submitted technically acceptable proposals were:

	<u>Proposed Price</u>	<u>Technical Rating (Maximum - 10.0)</u>
DBA Systems, Inc	\$295,346	7.15
Purvis Systems, Inc.	352,784	6.73
Datawest, Corp.	491,373	7.93

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Section "D" of the General Instructions of the solicitation provided that:

"D-3. BASIS FOR AWARD

"ANY AWARD TO BE MADE WILL BE BASED ON THE BEST OVERALL PROPOSAL WITH APPROPRIATE CONSIDERATION GIVEN TO THE MAJOR AREAS OF TECHNICAL AND COST/PRICE. TO RECEIVE CONSIDERATION FOR AWARD, THE PROPOSAL MUST BE ACCEPTABLE IN MEETING THE GOVERNMENT'S REQUIREMENTS IN EACH AREA. THE RELATIVE IMPORTANCE OF EACH OF THE MAJOR AREAS IS:

TECHNICAL

ONLY THOSE PROPOSALS DETERMINED TECHNICALLY ACCEPTABLE WILL BE CONSIDERED FOR AWARD.

COST/PRICE

ANY AWARD TO BE MADE WILL BE BASED ON THE LOWEST OVERALL PRICE TO THE GOVERNMENT OF A PROPOSAL DETERMINED TO BE TECHNICALLY ACCEPTABLE."

In view thereof, relative technical superiority was not considered to be a factor in award selection. Therefore, the fact that Datawest received the highest technical rating was not determinative in establishing the competitive range.

Because of the large price differential between the Datawest offer and the other two offers, the contracting officer considered the Datawest proposal to have no reasonable chance of being selected for award, and Datawest was, consequently, not selected for further negotiations. To have negotiated further with Datawest, it is stated, would have resulted in fruitless additional expense to Datawest and to the Government. Negotiations were conducted, and the best and final offers received by the appointed day were: DBA - \$282,300; Purvis - \$321,420. An acceptance of the DBA offer was signed the following day; however, further action was postponed due to the Datawest protest. Award was eventually made notwithstanding the protest since it was determined that prompt award would be advantageous to the Government.

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Datawest believes that the manner in which the procurement was carried out was unethical and illegal and should not be condoned. First, it is contended that the contracting activity had a duty to request a best and final price from all technically qualified vendors. The Datawest offer was technically acceptable, and yet Datawest was not requested to enter into price negotiations. Secondly, the president of Datawest visited the contracting officer the day best and final offers were due and asked why Datawest had not been requested to negotiate. He was informed that due to the large price difference between the Datawest offer and the other offers negotiations with it would have been pointless. He was also allegedly informed of the exact award price and the name of the successful offeror prior to the public release of this information, thereby negating any opportunity that Datawest might have had to submit a best and final offer. Within the 4 days following this instant event procurement activity officials by telephone and telegram attempted to determine the relief sought by the protester and whether Datawest desired an opportunity to negotiate a best and final offer. As regards these events, the contracting officer denies that he mentioned the award price or the name of the awardee. He believes rather that he told the Datawest president that Datawest was not initially requested to submit a best and final offer because the original low offer was some \$200,000 lower than that of Datawest.

First, as regards the determination of what constitutes a "competitive range" and which proposals fall within that range, we have stated that such a determination is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or unreasonable. 52 Comp. Gen. 382 (1972); Pacific Training & Technical Assistance Corporation, B-182742, July 9, 1975, 75-2 CPD 22. Further, paragraph 3-805.2 of the Armed Services Procurement Regulation (ASPR) (1975 ed.) provides:

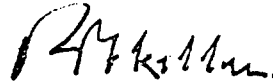
"(a) The determination as to which proposals are in a competitive range shall be made by the contracting officer. The competitive range shall be determined on the basis of price or cost, technical and other salient factors and shall include all proposals which have a reasonable chance of being selected for award. * * *" (Emphasis supplied)

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Thus, in determining whether a proposal falls within the competitive range, the price, as well as the technical acceptability, of an offer is to be considered, and it is possible that price may, as here, emerge as the dominant factor in such a determination.

In the instant case we do not consider the decision of the contracting officer to be arbitrary or unreasonable in determining not to include Datawest in negotiations. The two offerors with whom negotiations were conducted had submitted offers approximately \$196,000 and \$139,000, respectively, lower than the Datawest offer. To have believed that Datawest would during negotiations have reduced its \$491,373 price by \$200,000 or more would have been highly unrealistic.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States