DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548
81-1 CPD 369

FILE: B-199755.2 DATE: May 11, 1981

MATTER OF: Colorado Research and Prediction Laboratory, Inc. -- Reconsideration

DIGEST:

1. Protest regarding insufficiency of information in amended solicitation, allegedly included in protester's proposal dated one day before next closing date for receipt of proposals, cannot be regarded as timely protest (filed before time for receipt of revised proposals) to contracting agency, since there is no obligation that agency read or evaluate proposals until after amended closing date.

2. Incumbent contractor's selection for award does not prove that protester had insufficient information to prepare competitive proposal, but only that incumbent has been evaluated as having superior technical proposal.

3. There is no requirement that Government equalize competitive advantage gained by incumbent or past contractor unless it results from preference or unfair action by Government.

4. Regulations require that contracting agency conduct written or oral discussions with all responsible offerors whose proposals, considering price or cost, technical, and other salient factors, have reasonable chance of being selected for award.

In Colorado Research and Prediction Laboratory, Inc., B-199755, March 5, 1981, 81-1 CPD 170, we denied a part and dismissed the remainder of a protest regarding the Air Force's award to an incumbent contractor, Megapulse,

of a contract for a study involving low frequency and very low frequency radio propagation parameters. The protester requests reconsideration, alleging errors of both fact and law.

In its protest, Colorado Research had alleged that the Air Force never intended to have a real competition, but had used Colorado Research to induce Megapulse to lower its price and to give the appearance of open competition. In addition, the protester alleged that Megapulse lacked the theoretical background needed for the studies being procured, and that Colorado Research had been denied data, proprietary to Megapulse, which would have enabled it to write a competitive technical proposal.

We found that the record contained no evidence of preferential treatment of Megapulse or unfair action toward Colorado Research, and stated that the Government is not required to compensate for the advantage of an incumbent contractor unless it somehow contributes to it. We denied the protest on this basis. We also found that the solicitation, read as a whole, indicated that the work would be experimental, rather than theoretical, but that in any case we would not review the Air Force's decision regarding Megapulse's ability to perform the studies, since this was an affirmative determination of responsibility and none of the exceptions leading to our review applied here.

With regard to denial of information needed to prepare a competitive proposal, we stated that by amendment to the solicitation, the Air Force had provided Colorado Research with schematic diagrams for two transmitters which were to be modified under the contract. The next closing date for receipt of proposals was February 14, 1980. Under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1980), protests regarding alleged improprieties in an amended solicitation must be filed before the next closing date following the amendment. Since Colorado Research's allegation that the information provided was insufficient was not filed with our Office until July 27, 1980, the protest on this basis was untimely, and we did not consider it on the merits.

Requesting reconsideration, Colorado Research states that only one schématic diagram for one transmitter was provided. The other transmitter, the firm states, was built by Megapulse, which maintained that the diagram

for it was proprietary. Colorado Research also states that it did protest the unavailability of data to the Air Force on page 4, item 4 of its proposal dated February 13, 1980 (it has not, however, provided us with a copy of this portion of its proposal). The firm further states that it could not appeal to our Office earlier since it had been told by the contracting officer that it had all data which other offerors had, and had no proof that this was not the case until July 25, 1980, when it was informed that Megapulse had been selected for award. The protest to our Office therefore is timely, the firm implies, since it was submitted within 10 days after the basis for it was known.

With regard to schematic diagrams, an Air Force letter to our Office dated December 4, 1980, states in pertinent part:

> "* * * The equipment to be modified for use in the study * * * consisted of two transmitters both of whose operating range were to be extended. One unit, a TE Power Line Transmitter, contained a component (Mod. TPP-1 Transmitter) built by Megapulse. Operating manuals for this component are with the unit at Thule AB, Greenland. The other components forming this TE transmitter consisted of HP 5060A Cesium Beam Freq. Std. and a RADC laboratory built Pulse Rate Generator for which CRPLi [Colorado Research] was provided a schematic diagram by Amendment 0001 to the RFP. None of the components in either piece of equipment contained any proprietary information. Notwithstanding CRPLi's allegation, the manuals for the Megapulse transmitter were not necessary for the development of an acceptable proposal. The CRPLi proposal satisfactorily addressed this requirement. The second transmitter to be modified * * * is an Air Force built TM tower transmitter. All schematics and information relating to this transmitter were provided to CRPLi via Amendment 0001. CRPLi's proposal on this item was very general."

Thus, according to the Air Force, schematic diagrams for a component of one transmitter and for all elements of the second transmitter were provided to the protester; the Air Force submitted copies of these diagrams with its report.

Although our first decision could perhaps have been more precise on this point, Colorado Research's protest regarding lack of data is still untimely. A protest regarding the amount of information provided by a contracting agency is subject to the same timeliness rules as other alleged solicitation deficiencies which are apparent prior to the date for submission of bids or proposals. See, for example, Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130, in which we held that a protest alleging that the details required to effect, compose, and prepare a competent technical proposal for various elements of an ammunition feed system was untimely, since it had not been filed until after receipt of proposals.

Moreover, we do not believe an allegation included in a proposal can properly be regarded as a preopening protest to the contracting agency, since there is no obligation that an agency read or evaluate proposals until after closing date. Since the Air Force had no notice of the protest of the alleged information deficiency before the amended closing date, this was not a timely protest to the agency. See generally Amdahl Corporation, B-191215, March 28, 1978, 78-1 CPD 287, involving a protest alleging that specifications should be changed, first filed with initial proposals and therefore held untimely; Tymshare, B-188551, September 7, 1977, 77-2 CPD 178, involving a protest regarding cost evaluation methods first made in a best and final offer, also held untimely.

Moreover, we cannot accept Colorado Research's contention that learning of Megapulse's selection for award proved that it had insufficient information and thus provided the basis for a timely protest to our Office. The only thing this proves is that Megapulse, as noted in our first decision, had been evaluated as having a superior technical proposal.

The reason for strict construction of our timeliness rules is to allow us to consider protests while there is still time to take remedial action, if warranted. United States Contracting Corporation, B-198095, June 27, 1980, 80-1 CPD 446. For example, since it appears that the operating manuals which Colorado Research sought were not proprietary, but merely not conveniently available, a pre-opening request to the Air Force might have resulted

in their availability for use in proposal preparation. We cannot recommend such a remedy at this stage in the procurement.

In its request for reconsideration, Colorado Research further contends that we should not have dismissed its protest because proprietary data enabled Megapulse alone to submit a significantly superior proposal. It is true that Megapulse scored higher under criteria including past performance, compliance with scientific and engineering requirements, confidence level, understanding, soundness of approach, and special technical factors. Nevertheless, as we indicated in our original decision, we have long recognized that incumbents or past contractors may enjoy a competitive advantage over other offerors. There is no requirement to equalize this advantage unless it is the result of preference or unfair action by the Government. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192 at 15. Unless Megapulse's prior contracts required that all information be turned over to the Government for use in follow-on procurements, which does not appear to have been the case here, to the extent that it used proprietary data gained by virtue of its incumbency in preparation of its proposal, Megapulse may enjoy this advantage, since Colorado Research has presented absolutely no evidence of preference or unfair action by the Government.

Finally, the vice president of Colorado Research asks why, if the Megapulse proposal was rated superior, was Colorado Research subjected to a four month fruitless negotiating period that may yet force it into declaring bankruptcy? "Is this acceptable normal Government policy?" he asks in the request for reconsideration.

As a matter of law, in negotiated Federal procurements, written or oral discussions generally must be conducted with all responsible offerors whose proposals, considering price or cost, technical, and other salient factors, have a reasonable chance of being selected for award. As a matter of law, all such offerors must be advised of deficiencies in their proposals and offered a reasonable opportunity to correct or resolve the deficiencies and to revise their proposals. See Defense Acquisition Regulation § 3-805 (1976 ed.). Thus, the conduct of the negotiations to which Colorado Research

now objects was proper, since both Megapulse and Colorado Research had acceptable technical proposals and were responsible.

Our prior decision is affirmed.

Harry R. Van Cleve

For the Acting Comptroller General
of the United States