

DOCUMENT RESUME

03347 - [A2443591]

[Protest against Exclusion from Competitive Range]. B-187560.
August 31, 1977. 14 pp. + enclosure (1 pp.).

Decision re: Optimum Systems, Inc.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Environmental Protection Agency.
Authority: B-184926 (1976). B-183773 (1976). B-184518 (1976).
B-187547 (1977). B-184017 (1975). 4 C.F.R. 20.10.

The protester alleged that the agency's bias in evaluating their technical proposal was the sole cause of their omission from the competitive range. The protest was denied since there was no indication that the bias, even if it did exist, affected the protester's competitive standing. GPO will consider the merits of a protest after the protest has had a hearing in a United States District Court if the case has been dismissed without prejudice providing the protest was otherwise timely filed. (Author/SC)

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DECISION



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

**Bruce Kraker
Proc. I**

FILE: B-187560

DATE: August 31, 1977

MATTER OF: Optimum Systems, Inc.

DIGEST:

1. Argument that, as a matter of policy, GAO should not consider merits of protest after protester has had hearing in United States District Court which resulted in adverse findings and conclusions of law in denial of motion for preliminary injunction is not adopted. Since ruling on either TRO or preliminary injunction is not final adjudication of merits and if case is dismissed without prejudice, we will consider merits of the protest if otherwise timely filed.
2. Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied.

Optimum Systems, Inc. (OSI), raises one issue in its protest against its exclusion from the competitive range in connection with request for proposals (RFP) No. WA 75-2216, issued by the Environmental Protection Agency (EPA). OSI maintains that EPA's bias in its evaluation of OSI's proposal was the sole reason it was not considered in the competitive range. The RFP was for automatic data processing (ADP) services and was ultimately awarded to the Computer Network Corporation (Comnet).

PROCEDURAL BACKGROUND

OSI's protest was filed with our Office on October 4, 1976. OSI was informed by EPA that its proposal was not considered to be in the competitive range on August 16, 1976. By letter of August 27, 1976, OSI protested that action to EPA, which denied the protest by letter of September 22, 1976. At the time it filed its protest with our Office, OSI advised that a debriefing was scheduled shortly

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thereafter. Our Office acquiesced in OSI's request that it be permitted to submit the details of its protest after the debriefing. The debriefing on November 24, 1976, apparently failed to satisfy OSI's objections.

Consequently, on November 30, 1976, OSI filed its Complaint for Declaratory Judgment and Injunctive Relief in the United States District Court for the District of Columbia, Civil Action No. 76-2198. On that date, a temporary restraining order (TRO) was issued pending further order of the court and a hearing on the Application for Preliminary Injunction was set for December 6, 1976. After consideration of the complaint, depositions, memoranda, and testimony, United States District Court Judge John Lewis Smith, Jr., ordered on December 7, 1976, that the Motion for Preliminary Injunction be denied and the TRO be vacated and dissolved. Judge Smith found that OSI had "failed to satisfy the requirements for the granting of a preliminary injunction." Our consideration of the case was suspended during this period.

At that point, our Office informed OSI that, pursuant to 4 C.F.R. § 20.10 (1976) of our Bid Protest Procedures, we could not consider the merits of the protest while the case was before the court. Therefore, upon motion of OSI, Judge Smith ordered on February 24, 1977, that OSI's motion to dismiss without prejudice be granted. OSI then pursued its protest with our Office.

STATEMENT OF PROTEST

Essentially, OSI maintains that its omission from the competitive range was caused solely by an undue bias against it by the EPA evaluators, which manifested itself in the form of unwarranted low scores.

OSI traces the prejudice to the predecessor contract which it was performing. OSI was awarded the ADP contract to provide a wide range of computer services on a fixed-price basis after a competitive procurement in 1973. The record indicates that a degree of dissatisfaction with OSI's performance existed within the EPA components served by OSI. These were primarily the Management Information and Data Systems Division (MIDSD) and its user group called the Storet Division, concerned with statistics and data on

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the nations waterways. The initial dissatisfaction was based upon the belief of the user community that OSI was reaping an inordinately high profit on the contract. In fact, a "Preliminary Comparison of Operating Costs for Application Run at the OSI and NCC Facility," prepared by MIDSD in October 1975, called OSI's monthly bill "juicy." (NCC is another EPA installation for ADP work.) The contract was awarded on a fixed-price per unit basis based upon the EPA estimated use in 1973. We note that the actual usage far exceeded that estimated, which gave rise to higher total profits for OSI than EPA expected.

OSI outlines other examples of what it terms bias against it. The history of these events may be stated briefly at this point. The first events occurred in January 1973 and concerned the undue withholding of information by the head of the Storet Division as to the location of EPA computer terminals. OSI maintains that knowledge of that information would have permitted it to meet the contract requirements in a more timely and responsive manner. The second occurrence was also in 1973 and involved alleged misuse of the computer system to disseminate to all EPA terminals the personal resume of an EPA computer official, causing embarrassment to the EPA official and damage to OSI's reputation for its inability to maintain the confidentiality of its systems. Third, in May 1974 the head of the Storet Division unsuccessfully tried to have work, properly the subject of the 1973 contract, transferred to another contract. Fourth, the head of the Storet Division, as moderator of a conference on Storet use held December 2-4, 1975, attended by a large segment of the EPA computer community, allegedly indicated that his preference to perform the protested contract was anyone other than OSI. It is further alleged that he said he would actively work to bring about that change. Allegedly, the remarks were spontaneous and delivered just prior to the submission of best and final offers for the instant RFP. (These allegations have been denied in a deposition taken in connection with the court proceedings.) Fifth, on December 17, 1975, an EPA employee entered certain commands into the OSI computer specifically designed to render the computer inoperable. This deliberate action occurred during OSI's benchmark test which must have been successfully completed to be eligible for further competition for the RFP. The individual who performed this act was in the Storet Division. Sixth, in February 1976, MIDSD published the EPA Systems News, which impliedly criticized OSI for the amount of its billings.

THE BLUE RIBBON PANEL

As a result of the accumulated effect of this chain of events, OSI lodged a formal protest with EPA on March 23, 1976, alleging bias against OSI in the conduct of the procurement. Essentially, OSI maintained that it could not receive a fair and impartial consideration of its proposal from the Technical Evaluation Committee (TEC) which was delegated the responsibility to evaluate the technical merits of its proposal. As a consequence, the source selection official (SSO) for the procurement in conjunction with the Assistant Administrator for Planning and Development appointed a Blue Ribbon Panel (Panel) to investigate the charges on May 24, 1976. The Panel was composed of two senior level ADP officials from the Department of Agriculture and the National Aeronautics and Space Administration. The charter of the Panel stated, in part:

"* * * Specifically, EPA management wants to know if the OSI proposal was evaluated fairly and objectively in spite of any personal feelings that might have been harbored by members of the evaluation panel.

"We are requesting, therefore, that the blue ribbon panel provide EPA with a written report of their findings so that the Agency can decide either (1) to let the evaluation stand, or (2) to begin the process anew. The panel is invited to examine any documents, interview any EPA personnel, and/or perform any task that in its judgment would be necessary to assure itself that the integrity of the procurement process has not been violated."

The Panel's investigation concluded on June 18, 1976, when it presented its formal report to the Assistant Administrator for Planning and Management. Pertinent portions of the report follow:

"1.2 Purpose and Scope of Report

"The purpose of this report is to document the findings of the authors on the question of bias and its effect on the procurement process.

This report has a limited scope. It deals specifically with the displeasure and concerns expressed in the OSI letter of March 23, 1976, to EPA. Having dealt with the basis for these OSI concerns and the question of their validity, the report goes on to deal with their effect on the equality of treatment guaranteed OSI by procurement laws and regulations in their responding to the Request for Proposal.

* * * * *

"1.4 Executive Summary

"As a result of our review and discussions, we have concluded:

- "(1) There was considerable dissatisfaction with OSI services. However, it has been stated to the authors that this dissatisfaction has diminished somewhat during the past year.
- "(2) There is considerable basis or at least the perception on the part of some EPA employees that EPA is being charged more for the services provided by OSI than under some other contractor or some more satisfactory contractual arrangement with OSI.
- "(3) At various times, this discontent with OSI services and the perceived (whether actual or not) overcharge by OSI has surfaced in explicit statements and outward manifestations. The motivation for these is difficult to uncover. However, the authors attribute this enmity primarily to 'the lack of co-located personnel and the resulting loss of communication and understanding.'
- "(4) The timeliness of these statements and activities has been most unfortunate, occurring as they have in the midst of a very sensitive and mutually critical procurement to EPA and OSI.

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- "(5) OSI, for its part, has seized upon issues as they have occurred to promote its best interests relative to the solicitation and potential contract to be awarded from RFP No. WA 75-E216.
- "(6) The technical evaluation panel has had an extremely difficult task. In addition to the ordinary duties of each member, it has been asked to devote an unexpectedly long period of time to the technical evaluation of a voluminous and sophisticated set of proposals. These have been made even more voluminous by the format requested by EPA in its RFP.
- "(7) In evaluating OSI and Comnet proposals relative to the EPA specifications, the technical evaluation panel appears to have been inconsistent in addressing some strengths and weaknesses of the two companies relating to the same requirements.
- "(8) It is the authors' belief that OSI's relative ranking among the offerors was not changed significantly through these inconsistencies."

The factual investigation centered on four types of influence that permeated the relationship between EPA and OSI: (1) role of audit reports; (2) relationship of OSI and NCC cost study and related newsletter; (3) impact of the "downing" incident on the benchmark test; and (4) other relevant activities, statement and attitudes. As the executive summary indicates, there existed a degree of dissatisfaction towards OSI within EPA. The Panel compared the equality of treatment of the OSI and Comnet proposals, as follows:

"3.1 Comparative Equity in Treatment of Optimum Systems, Inc., and Computer Network Corporation Throughout the Procurement Cycle

"From the comparative analysis referenced above, the authors determined that several inconsistencies exist in the way 'strengths and weaknesses' were

assigned to the two companies reviewed by the authors. Citing a particular example, something which was declared nonresponsive for both OSI and Comnet was treated differently when viewed under the 'strengths and weaknesses' area. After properly declaring it nonresponsive, OSI repeatedly was cited with a weakness for offering that item in its proposal. In the evaluation of Comnet, on the other hand, the item was never mentioned as a weakness beyond the point where it was originally declared nonresponsive. This treatment indicates a case of 'double jeopardy' for one offeror and not for the other. In other parts of the evaluation report, the technical evaluation panel members appear to be using 'style' and 'emphasis' in a manner which could be construed as favoring one vendor over the other. Specifically, in discussing the strength of the two vendors offering essentially the same item, the panel members, on the one hand, use considerable verbiage and use of adjectives to highlight the Comnet offering while, on the other hand, use only brief statements and routine adjectives in describing the same offering from OSI. Since this happens more than once, the cumulative effect cannot be overlooked as totally accidental.

"Another inconsistency seems to occur when essentially the same offering by the two vendors (Comnet and OSI) evoke contradictory responses from the panel as pertains to the two vendors. In responding to one section of the RFP dealing with the hardware capacity, both vendors essentially offered an IBM 370/168 configuration. Comnet did not have a 370/168 system at the time of their submission; OSI, on the other hand, had a 168 system for the use of the Federal Energy Administration (though not for EPA).

"The panel, however, gave Comnet a 'strength' while according OSI a 'weakness' in this particular area. In another area of the RFP, an uninterruptible power supply (UPS) is required. OSI already has a 'UPS' installed in its computer center. Comnet proposes to combine the 'UPS' and the motor generator

also requested. Both companies are given 'strengths' under 'UPS.' However, OSI is given this strength with approximately three words, whereas Comnet is accorded several lines of 'verbiage' to receive the same strength.

"In one case, the panel charged a weakness to a vendor erroneously when it declared that the particular vendor in question had not made any mention of a specific requirement requested by EPA. The vendor had actually offered the required item (which was relatively minor in nature) and the net result was a misapplication of strengths and weaknesses to that particular vendor. In this case the vendor was Comnet.

"In addition to the inconsistencies illustrated above regarding the treatment accorded OSI and Comnet, there is one other possible impropriety which should be surfaced at this time. It is that a disproportionate number of advisors were utilized for scoring the various sections of the proposals. Notwithstanding the fact that there were at various times approximately 30 members of the technical advisory group, only two of these technical advisors scored one of the sections. It should be pointed out that these two technical advisors did evaluate and score all offerors' written proposals for this section. Secondly, detailed technical knowledge in the area covered by this section of the requirements is not widespread amongst the ADP community. Consequently EPA may not have had more knowledgeable technical expertise available. The technical evaluation panel members have stated that they required the technical advisors to defend their scorings of this section through the same freedom of expression interchange discussed elsewhere in this report.

"In summary, from a review of the strengths and weaknesses accorded OSI and Comnet, and the overall treatment accorded both vendors during the evaluation and procurement cycle, the authors find:
(1) There were a disproportionate number of technical advisors who scored the various sections of the proposals. It does not appear to have caused

unequal treatment of any vendor. (2) Some inconsistencies in the treatment of 'strengths and weaknesses' have been found. While individually these seem to be of minor importance, if viewed cumulatively, they could be construed as a tool to weaken the position of OSI and strengthen that of Comnet. While the scores were not individually correlated with each strength and weakness, thus precluding the authors from making a judgment as to the degree that these inconsistencies actually hurt OSI or helped Comnet, it is felt that the relative rankings of these vendors in relationship to each other, would not have been altered."

In addition, the Panel presented EPA with a three page, unofficial observation concerning related matters which surfaced during its investigations. The Panel has stated that this format was used because the observations were considered inappropriate for inclusion in the official report. The Panel stated that the matters were excluded because they were considered outside of the scope of the charter and might "restrict management's flexibility if made a part of the official report." Five observations were offered:

- "1. The technical evaluation panel may have exceeded its authority in declaring 'unacceptable' all proposals offering shared computer systems.
- "2. It was probably a mistake to have only two technical advisors as sole evaluators of the telecommunications portion. The scores and rankings of these two evaluators were accepted by the panel totally. These two individuals did not attend the orals of the incumbent contractor OSI and did attend the orals of Comnet.
- "3. Within the group of 'acceptable offerors', the panel established a subgroup called 'above the competitive range' for purposes of further negotiation. When asked, the panel members almost unanimously stated that those acceptable offerors which were below the established competitive range could perform the requirements specified in the RFP though only with greater probabilities of difficulty or greater management risks. This delineation while perhaps legal may be questionable.
- "4. In scoring the vendor proposals, a range of points are given for adjective delineators such as '1-25 points; poor, 26-50; average or okay.' In the final rankings

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some vendors with 'average' or 'good' strengths or weaknesses were recommended to be excluded from further negotiation. Not to negotiate further with a vendor after describing his offerings with the adjective delimiters poor, average, good or outstanding may be difficult to explain on the part of the Agency.

- "5. It appears that EPA concentrated so much effort in the security area that some questionable procurement practices may have been introduced such as those mentioned above."

The Panel also offered suggestions relative to the observation designed to remedy the noted deficiencies for use on the current effort and future procurements.

EPA ACTIONS

EPA concluded its initial evaluation of proposals on April 26, 1976, when the TEC transmitted to the SSO its final technical evaluation report. Of the three sections in the RFP, OSI was rated sixth of seven in computing services (section I), third of four in telecommunication services (section II) and fifth of seven in user support services (section III). In all three cases, the report indicated the TEC's conclusion that OSI's proposal was "outside the competitive technical range." The ratings were arrived at by the TEC members after reviewing written comments of technical advisors and their own review of the proposals.

No action was taken on this report pending the outcome of the Panel's investigation. After the Panel's report was received, the SSO requested the TEC to reconvene to rank all proposals numerically, which had been omitted in the April report. This was accomplished by amendment No. 1 to the technical evaluation report, dated July 12, 1976. On July 27, 1976, the Chairman of the TEC sent a memorandum to the SSO to clarify the use of the "technical competitive range" used in the report. The Chairman indicated that the TEC used the term to connote technical acceptability of the proposals in the competitive range, while those considered outside of the competitive range were deemed unacceptable.

Thereafter, in August the SSO reviewed both reports of the TEC and the Panel's report, as well as the report of the committee which evaluated the cost and business proposals. Also, the SSO questioned the TEC members, analyzed the point ratings of the proposals and reviewed the proposals himself. Based upon this review, the SSO established a final competitive range consisting of two firms, excluding OSI. On August 16, 1976, OSI was notified of its exclusion from the competitive range.

PROCEDURAL ASPECTS

Comnet, the successful offeror, initially contends that our Office should not consider the merits of OSI's protest. Comnet correctly notes that our Office will not consider the merits of a protest when it is pending before a court of competent jurisdiction, or where there has been a final decision on the merits by the court. 4 C.F.R. § 20.10 (1976). Comnet urges our Office to extend this policy to the situation at hand, i.e., where the court has issued findings of fact and conclusions of law on the merits of a motion for preliminary injunction, even though the case is later dismissed without prejudice. While recognizing that the findings of the court in denying a preliminary injunction are not tantamount to a disposition on the merits, Comnet asserts that a policy of discouraging forum shopping and avoiding unnecessary and possibly embarrassing confrontations with the court will ultimately serve to expedite the orderly process of Government procurement. Indeed, Comnet states that it has found no previous instance where our Office has considered a protest after a court decided the merits of the factual contentions in ruling on a Motion for Preliminary Injunction.

The factual situation presented here does appear to be a case of first impression. However, we have had occasion to rule on the merits of a protest following the denial of a Motion for a Temporary Restraining Order and the voluntary dismissing of the action by the plaintiff-protester. Planning Research Corporation Public Management Services, Inc., B-184926, March 29, 1976, 76-1 CPD 202. While counsel for Comnet attempts to distinguish that case from the facts at hand, since the ruling on either a request for a TRO or Preliminary Injunction is not a final adjudication of the merits, we believe that Comnet's position that we not consider the merits of the protest is not to be adopted.

DISCUSSION

Was OSI's proposal evaluated fairly? This is the central issue presented by this protest. As OSI states, this case fundamentally presents no technical issues at all. The first inquiry is whether the alleged bias exerted an unwarranted influence upon the evaluation of the proposals. If there is no competitive impact as a result of the alleged bias, then we are aware of no statute or regulation that has been violated. Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 263. We have held that even where evaluators were aware that one offeror had issued reports critical of the agency, there is no basis to object in the absence of evidence that their opinions were unduly influenced. Ackco, Inc., B-184513, September 14, 1976, 76-2 CPD 239. Thus, even assuming the validity of an allegation of bias, our inquiry has centered upon the manner in which the bias is manifested. To establish the existence or nonexistence of the effect of the bias, the protester must show by clear evidence that there was no rational basis for the evaluation. Joanell Laboratories, Incorporated, B-187547, January 25, 1977, 77-1 CPD 51. In this vein, one of the ways to demonstrate the irrationality or unreasonableness of the evaluation is to inspect the relative merits of the proposals. Economic Development Corporation, B-184017, September 16, 1975, 75-2 CPD 152.

We note that the District Court viewed the same record now before our Office under the same standard as we do:

"* * * In considering the first of the four requisites for an issuance of a preliminary injunction, likelihood of success on the merits, in a case as that here, the guideline for judicial review was articulated in M. Steinthal & Co. v. Seamans, 147 U.S. App. D.C. 221, 455 F.2d 1289 (D.C. Cir 1971). In Steinthal, the Court made it clear that in this case

"courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's action. [Id. at 147 U.S. App. D.C. 233, 455 F.2d 1301.]"

Under this approach, the court concluded in pertinent part:

"11. Neither the pleadings, the affidavits nor the testimony introduced at the hearing indicate any basis for concluding that the procurement decision challenged lacks a firm factual predicate. To the contrary, the testimony of the Source Selection Official, and members of the Blue Ribbon Panel rebut any notion that the procurement decision was motivated by any improper consideration. In short, the record before this Court demonstrates that there was a rational basis for the procurement action challenged.

"12. The Request for Proposals and the responses thereto were scrutinized by technical personnel both from an automatic data processing vantage as well as from a cost and business vantage. The technical sections of the proposals were each point scored and each of the cumulative point scores were compared in the final analysis. Those cumulative scores revealed (See Exhibit A to the Defendant's Opposition Memorandum) that OSI's best proposal ranked eighth with regard to computer service, third of four proposals with regard to telecommunications service and fifth of seven proposals with regard to user support services. The successful offeror, COMNET, ranked first in each of the technical sections. Additionally, the testimony of the Source Selection Official indicated that there was substantial weakness in the cost and business aspects of OSI's proposals. The procedure set forth in the Request for Proposals and utilized in the evaluation process provided a rational basis upon which the Source Selection Official could make his determination. The record before this Court demonstrates that the Source Selection Official utilized the procedure established and made a determination consistent with results of that procedure.

"13. The Court concludes that Plaintiff OSI has failed to demonstrate a likelihood of success on the merits, having failed to show that the procurement decision which it attacks lacked a rational basis or was in some other regard 'illegal.'

* * * * *

"18. Based on the above, it appears to this Court that Plaintiff has failed to satisfy the requirements for the granting of a preliminary injunction. OSI has not demonstrated a strong likelihood of success on the merits. In fact, it appears that the decision challenged was properly based on the evaluation factors set forth in the Request for Proposals and was not the product of any improper consideration, including 'bias.' * * *"

We also do not find any evidence of specific competitive prejudice to OSI. Rather, OSI, relying upon the report of the Blue Ribbon Panel, has taken the position that the existence of bias is per se an indication that the proposal was not fairly considered. However, while conceding the existence of "considerable dissatisfaction with OSI services" within EPA, as well as inconsistencies in the evaluation rating of Comnet and OSI, the Panel concluded that OSI's "relative ranking among the offerors was not changed significantly through these inconsistencies." In other words, any preconceived bias or dissatisfaction with OSI was not translated to the evaluation process in a manner that affected OSI's competitive posture. While OSI has attempted to impeach the validity of the Panel's procedures in reviewing the ratings of Comnet vis-a-vis OSI as opposed to reviewing every proposal, we cannot at this point call the investigation of the Panel unreasonable or consider the results of their inquiry impeached. Moreover, the evidence is that the SSO, as well as the TEC, realized the existence of the dissatisfaction and made allowance in their reviews for the situation.

On the record, OSI has failed to present clear evidence that the evaluation was not reasonable. Therefore, the protest is denied.

Deputy


Comptroller General
of the United States



Bruce Kraker
Proc. I

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

IN REPLY
REFER TO:

B-187560

August 31, 1977

The Honorable Douglas M. Costle
Administrator, Environmental Protection
Agency

Dear Mr. Costle:

Enclosed is a copy of our decision of today Optimum Systems,
Inc., denying its protest against award of a contract under request
for proposals WA 75-E216, for computer services.

The matter was the subject of a report dated April 21, 1977,
from your Acting Assistant Administrator for Planning and Management.

Sincerely yours,

Bruce Kraker
Deputy Comptroller General
of the United States

Enclosure