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DECISION

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

[Protest of Air Force Contract Award]

FILE: B-199755 DATE: March 5, 1981

MATTER OF: Colorado Research and Prediction Laboratory, Inc.

DIGEST:

1. Government is not required to compensate for advantage gained by incumbent contractor unless it results from preference or unfair action by Government.
2. Speculation as to contracting agency's motives does not, without independent proof, sustain protester's burden of affirmatively proving charges that it was "used" to reduce contract price or that procurement was "wired" for incumbent.
3. GAO will not review affirmative determinations of responsibility absent showing of fraud or misapplication of definitive responsibility criteria.
4. When agency amends solicitation to include all available information requested by protester, protest that data was insufficient for preparation of competitive technical proposal is untimely unless filed before next closing date for receipt of proposals.
5. Under most recent standard announced by Court of Claims, proposal preparation costs are not available unless Government's actions are arbitrary and capricious and offeror is harmed by them.

Colorado Research and Prediction Laboratory, Inc., protests the award of a contract by the Electronic Systems Division, Air Force Systems Command, Hanscom Air Force Base, Massachusetts. Under request for proposals No. F19628-80-R-0053, a small business set-aside, the Air Force sought a 30-month study to

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determine Very Low Frequency and Low Frequency radio propagation parameters and to improve long range communication, navigation, and detection techniques.

For the reasons outlined below, we are denying a portion of the protest and dismissing the remainder as either untimely or not for review by our Office. We have no legal objections to the proposed award to the incumbent contractor, Megapulse, Incorporated.

Colorado Research alleges that the Air Force never intended to have a real competition and that it "used" Colorado Research to obtain a reduction in Megapulse's contract price and to give the appearance of open competition. It contends that the fact that no other firms competed for the nearly \$1 million set-aside is evidence that all were convinced that the award was "wired" for Megapulse.

Colorado Research interprets the solicitation as indicating that the Air Force wished to redirect its efforts from experimental to theoretical studies, and argues that Megapulse lacks the necessary background for such studies, while Colorado Research is "uniquely capable" of conducting a theoretical program.

In addition, Colorado Research alleges that it was denied data, proprietary to Megapulse, which would have enabled it to write a competitive technical proposal. It states that if the data could not be furnished so that all offerors would be on an equal footing, the Air Force should have awarded a sole-source contract to Megapulse.

The protester asks that we direct the Air Force to award it a contract or, alternatively, to compensate it for proposal preparation costs, including a four-month "fruitless negotiating period." The Air Force's actions may otherwise force Colorado Research into declaring bankruptcy, the firm concludes.

The Air Force denies all allegations and simply states that Megapulse submitted a superior technical proposal. The procurement was fully competitive, the Air Force continues, with 18 firms solicited, and a sole-source award to Megapulse could not have been justified. Negotiations

were conducted with both offerors between March and June 1980, and any advantage which Megapulse had because of its incumbency, such as familiarity with the broad range of propagation measurements required, could not have been avoided, the Air Force adds.

We agree. We have reviewed the record for this procurement, and we find no evidence of preferential treatment of Megapulse or unfair action toward Colorado Research. There is no showing, for example, that prices were disclosed during negotiations or that these negotiations were not conducted in good faith.

The Air Force has a more than 10-year history of competitive procurement for this project, and its solicitation of 18 firms complies with the requirements for obtaining the maximum number of qualified sources under 10 U.S.C. § 2304(g) (1976) and the Defense Acquisition Regulation § 3-101(b) (1976 ed.). Colorado Research merely speculates as to the reasons why the other small businesses solicited did not choose to respond.

As the Air Force states, Megapulse engineers and technical staff were beyond the "learning curve" associated with this study, which may have aided the firm in preparation of its proposal. We consistently have stated, however, that the Government is not required to compensate for the advantage gained by an incumbent contractor unless it results from preference or unfair action by the Government. Telephonics Corporation, B-194110, January 9, 1980, 80-1 CPD 25.

We requested and obtained the technical evaluation team report for this procurement from the Air Force (it was not made available to Colorado Research or to Megapulse because award has not yet been made). The report reveals that while both proposals were "acceptable," Megapulse was rated "significantly superior" to Colorado Research in all categories. These included relevant past performance, compliance with the scientific and engineering requirements of the solicitation, confidence level (an evaluation of the offeror's capability to meet these requirements, as shown by previous related work or selection of personnel with appropriate training and experience), understanding, soundness of approach, and special technical factors (new and ingenious

ideas which might significantly advance knowledge of long wave propagation). Colorado Research, according to the report, was only average, with a number of specific weaknesses and assumptions which the technical evaluation team questioned. We find the evaluation was reasonable and in accord with listed criteria.

We therefore conclude that there is no merit to Colorado Research's claim that it was "used" to reduce prices or that the procurement was "wired" for Megapulse. Speculation as to the Air Force's motives does not, without independent proof, sustain the firm's burden of affirmatively proving its case on these issues. See A.R.&S. Enterprises, Inc., B-197303, July 8, 1980, 80-2 CPD 17; Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29.

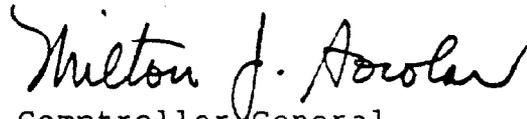
As for theoretical vs. experimental work, it appears that Colorado Research has relied on the first sentence in the description of work, which states that the contractor will conduct "theoretical and experimental" studies to determine radio propagation parameters. The specific tasks described, however, appear to be experimental in nature. For example, the contractor is to conduct an experimental investigation into the long path survivability of Transverse Electric propagation under severe disturbance conditions, to develop the instrumentation required to investigate Very Low Frequency/Low Frequency vertical field strength profile structure as a function of ground conductivity using aircraft flights, and to conduct an experimental investigation into the stability of Very Low Frequency ionospheric reflections from the C-layer of the lower ionosphere as a function of range, ionospheric incidence angle, solar illumination, solar-lunar aspect, and magnetic azimuth. Read as a whole, the description of work supports the Air Force's statement that approximately 90 percent of the work under this contract will be experimental in nature. Colorado Research's protest on this ground also is without merit.

To the extent that Colorado Research is questioning the ability of Megapulse to conduct theoretical studies, the protest is not reviewable. Our Office does not review affirmative determinations of responsibility except where there is a showing of fraud or misapplication of definitive responsibility criteria. Security Assistance Forces and Equipment International, Inc., B-195196, July 10, 1980, 80-2 CPD 24.

Nor will we consider whether sufficient information was provided to Colorado Research to enable it to prepare a competitive technical proposal. The Air Force states that, in response to a request by Colorado Research, available information, including schematic diagrams for two transmitters which were to be modified to extend their operating range, was provided in an amendment to the solicitation. Failure to provide all necessary data is an alleged impropriety in the amended solicitation and, under our Bid Protest Procedures, 4 C.F.R. 20.2 (1980), should have been protested by the next closing date for receipt of proposals, February 14, 1980. Since Colorado Research's protest was not received in our Office until July 29, 1980, it is untimely.

Proposal preparation costs are not available to Colorado Research under the most recent standard announced by the Court of Claims in Burroughs Corporation v. United States, No. 25-178 (Ct. Cl. March 19, 1980), since it has not shown that the Government's actions were arbitrary and capricious and/or that Colorado Research was harmed by them. Prototype Development Associates, Inc.--Reconsideration, B-193595, September 22, 1980, 80-2 CPD 214.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States