

**DECISION**



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

27554

**FILE:** B-212792

**DATE:** March 1, 1984

**MATTER OF:** Austin Company, Advanced Technology  
Systems

**DIGEST:**

1. Protest alleging that agency used proprietary information in developing request for proposals (RFP) and that award of the contract to other than protester under an RFP issued on a competitive basis constitutes an infringement on its proprietary rights is untimely when filed more than 3 months after the RFP closing date.
2. In view of the objective of bid protest function to insure full and free competition for government contracts, protest that an agency should procure an item on a sole-source basis will not be reviewed.
3. Protest that a competitor allegedly used in its proposal the protester's proprietary data presents a dispute between private parties that is not for consideration under the Bid Protest Procedures.
4. Agency decision not to exclude firm from competitive range is primarily a matter of administrative discretion and will not be disturbed absent a clear showing that the decision lacked a reasonable basis. Where record indicates that agency made judgment that with clarifications a firm's proposals had reasonable chance of being selected for award, and that proposal's exclusion would have resulted in only one offeror remaining in competitive range, agency decision to include proposal in competitive range is not objectionable.
5. GAO will not question the contracting agency's evaluation of the awardee's technical and cost proposal since it had a reasonable basis.
6. GAO does not review affirmative responsibility determinations in absence of exceptions not present in immediate case.

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7. GAO will not conduct investigations under its bid protest function to establish the validity of a protester's speculative statements.

Austin Company, Advanced Technology Systems (ATS), protests against the Department of the Navy's award of a contract to KFO Associated, Inc. (KFO), under request for proposals (RFP) N61339-83-R-0037. ATS alleges that the award to KFO violates certain of ATS's patent rights and that ATS, in essence, is the sole qualified source for the procurement. ATS also challenges certain aspects of the technical and cost evaluation, and contends that KFO's proposal was improperly included in the competitive range and improperly determined a technically acceptable offer. Finally, ATS asserts that KFO is not competent to perform the contract.

We dismiss the protest in part and deny it in part.

The procurement is for experimental, developmental and research work for a wide angle virtual image display system. The RFP was issued to eight companies, two of which responded. Proposals were evaluated and both offers were found to be within the competitive range. Discussions were held and both firms submitted best and final offers. The evaluation criteria and respective scores of the firms were as follows:

	ATS	KFO
a. Understanding Problem	27.5	25.7
Design Approach		
b. Personnel's Capabilities	20.2	24.3
c. Firms Computer Capabilities	17.5	11.3
d. Facilities for Fabrication	13.0	13.8
e. Testing Approach	8.7	7.5
	<u>86.9</u>	<u>82.6</u>

The RFP stated that the Navy would evaluate proposed costs on the basis of cost realism, that the technical proposal was more important than the cost proposal, and that the award could be made to other than the low technically, acceptable offeror.

The Navy reports that while ATS scored higher than the awardee on its technical proposal, ATS's cost proposal was approximately twice that of the low offeror (\$363,897 compared to \$178,857). The awardee's lower proposed cost was determined to be realistic and was awarded the maximum 100 points. ATS's cost proposal was scored at 49.2. As a

result, on final evaluation, when the final scores were weighted by doubling the technical scores, the final scores favored KFO by 265.2 to 223. The award was made to KFO.

ATS initially protests that award of the contract to another offeror constitutes an infringement of ATS's proprietary rights. ATS further protests that it submitted a confidential unsolicited proposal which was used improperly by the agency in preparing the instant RFP. In our view, these protest issues are untimely raised. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based upon alleged improprieties in an RFP which are apparent prior to the closing date for receipt of initial proposals be filed with GAO or the contracting agency prior to the closing date. ATS's allegations that the RFP improperly contains patented information and information based on ATS's unsolicited proposal submitted before the issuance of the RFP concern solicitation improprieties and, as such, should have been filed no later than the RFP closing date of April 4, 1983. However, ATS did not protest these issues until a letter to the Navy dated July 21, 1983, and thus these protest issues are filed untimely. See Educational Technology & Services, Inc., B-211231, April 22, 1983, 83-1 CPD 449.

ATS also argues that, based on its prior work in this area and based on its unsolicited proposal, ATS should have been considered the sole source qualified to perform this work and there should have been no competitive procurement. However, in view of the objective of our bid protest function to insure full and free competition for government contracts, we have declined as a general matter to review a protest that an agency should procure an item from a particular firm on a sole-source basis. Group W Cable, Inc., B-212597, October 25, 1983, 83-2 CPD 496.

We further note that, to the extent ATS alleges that the awardee firm, or its employees, formerly employees of ATS, violated restrictive agreements and improperly used information proprietary to ATS in the preparation of its proposal, this presents a dispute between private parties that is not for consideration under the Bid Protest Procedures. SETAC, Inc., B-209485, July 25, 1983, 83-2 CPD 121. We also understand that these issues are a matter of a civil suit in the United States District Court, New Jersey, in The Austin Co. v. Kenneth F. O'Connor, Steward P. French, KFO Associated, Inc.

With regard to the technical evaluation of KFO's proposal, ATS argues that KFO's initial proposal should have

been excluded from the competitive range without discussions. In support of this argument, the protester indicates that it submitted a proposal which required no clarification while KFO's proposal required 28 pages of clarification. ATS also points to specific areas of clarification which it contends show a serious lack of understanding of the work to be performed. ATS also suggests that KFO's subsequent clarification was accomplished because it was given the ATS approach by the agency.

As the agency points out, once a proposal is determined to be technically unacceptable, it generally is proper to exclude it from the competitive range. The determination of whether a proposal is in the competitive range, however, particularly with respect to technical consideration, is primarily a matter of administrative discretion. This will not be disturbed by our Office absent a clear showing that the determination lacked a reasonable basis. All Star Dairies Inc., B-209188, January 31, 1983, 83-1 CPD 107. The agency also notes that we have recognized that, where a competitive range determination will result in only one offeror being included in the competitive range, this Office will scrutinize closely such a determination. Coherent Laser System, Inc., B-204701, June 2, 1982, 82-1 CPD 517. The agency also refers to applicable Defense Acquisition Regulations which state that proposals in the competitive range should be those which have a reasonable chance of being selected for award and that any doubt as to whether a proposal should be included or excluded should be in favor of considering the proposal. The Navy contends this is particularly true where, as here, only one offeror would otherwise have been included in the competitive range. Thus, the Navy asserts it acted properly in holding discussions with KFO.

With regard to the specific areas of KFO's proposal to which ATS objects, the protester has not shown the proposal in these areas were so deficient as to require rejection of the proposal. One involved KFO's misinterpretation of the intent of a specification which, after it was brought to KFO's attention through discussions, resulted in KFO's adding \$30,000 to its price which was a 20-percent increase to its proposal. However, ATS has not shown this misinterpretation required rejection of the initial offer, especially since the record shows the problem was easily communicated to KFO by clarification request and remedied. Another point raised by ATS involved the erroneous placement of an alignment hole which involved an adjustment to the drawings in response to discussions. Finally, ATS argues that the KFO proposal did not address testing procedures.

However, KFO's initial technical and cost proposals contain sections on test and evaluation, quality assurance and component testing.

Thus, in our view, we have no basis to question the Navy's decision to include KFO in the competitive range.

ATS also argues that KFO's proposal was clarified by permitting KFO to examine and borrow information from ATS's proposal. The contracting officer denies this allegation and the protester has not presented any evidence to support its contention. Under these circumstances, we must reject this contention on the basis that the protester has failed to meet its burden of proof. See Freund Precision, Inc., B-209785, January 24, 1983, 83-1 CPD 83.

ATS argues that KFO's proposal was awarded an excessive number of points in several evaluation areas.

At the outset, we note that it is not the function of this Office to reevaluate technical proposals or resolve disputes over the scoring of technical proposals. The determination of the government's needs and the best method of accommodating those needs is primarily the responsibility of the procuring agency. Consequently, it is the procuring agency which is responsible for the overall determination of the relative desirability of proposals. In making such determinations, contracting officers enjoy a reasonable range of discretion in determining which offer should be accepted for award and their determinations will not be questioned by our Office unless there is a clear showing of unreasonableness, abuse of discretion, or a violation of the procurement statutes or regulations. Diversified Data Corporation, B-204969, August 18, 1982, 82-2 CPD 146.

In this connection, we have held that a protester's disagreement with the contracting agency over the relative merits of specific aspects of a competitor's proposal is not sufficient to prove that the agency's evaluation of that proposal is unreasonable. Biological Monitoring, Inc., B-209431, April 13, 1983, 83-1 CPD 395.

ATS questions the evaluation of KFO's personnel capabilities, arguing that ATS's records dispute the stated accomplishments of KFO's staff and that certain names given were not current employees of the firm. We have stated that, as a general rule, personnel proposed in an offer need not be presently employed by the offeror to be considered in proposal evaluation. AAA Engineering and Drafting, Inc.,

B-204664, April 27, 1982, 82-1 CPD 387; Panuzio/Rees Associates, B-197516, November 26, 1980, 80-2 CPD 395. In Kirschner Associates, Inc., B-187625, June 15, 1977, 77-1 CPD 426, we held that the agency's evaluation of an offeror's key personnel, even though some were changed after award, was not objectionable since the names were submitted in good faith by the offeror with the consent of the respective individuals. In Bokonon Systems, Inc., B-189064, April 19, 1978, 78-1 CPD 303, the protester argued that the agency's technical evaluation of the proposals was improper because few, if any, of the personnel whose resumes were submitted by the successful offeror were utilized in performing the work. We determined that the agency's evaluation of the proposals on the basis of personnel reflected therein was unobjectionable in view of the absence of an RFP provision specifically requiring offerors to furnish evidence of personnel commitments. See also OED Systems, Inc., B-189410, December 15, 1977, 77-2 CPD 467.

The agency reports it evaluated both proposals on the basis of information contained in the resumes and accepted it as accurate. Thus, while ATS disagrees with the Navy's evaluation of personnel capabilities, we have no basis to disturb the agency's evaluation.

With regard to KFO's computer capabilities, ATS argues that the TRS-80 provided by KFO is significantly less capable than ATS's "VAX" computer to perform the work and that the computer programmer listed has no computer programming experience. Thus, ATS argues that KFO was awarded too many points in this area relative to ATS's allegedly superior computer capability. The Navy responds that the TRS-80, while slower than the "VAX," can perform the work with the proper program. Furthermore, the Navy reports that the firm has represented it has the necessary program and other software adaptable to the TRS-80. We find the Navy's explanation reasonable.

Also, ATS challenges the points awarded to KFO for product fabrication. The Navy points out that the "greatest portion of the fabrication effort--the Fresnel lens cutting" is to be done by the same subcontractor under both offers. The Navy further states that after the lenses are cut they are to be placed into a boxlike enclosure for support and that the KFO offer contained drawings for the manufacture of this enclosure and access to machine shop facilities. Also, the Navy points out that, while it recognizes ATS's claim that it has greater available floor space and number of employees, the requirements are for a few square feet of

space for assembly and testing. Based on our standard of review noted above, we have no basis to disturb the Navy's evaluation.

ATS questions whether KFO's cost proposal of \$178,857 realistically reflects the scope of work and whether a thorough evaluation to establish cost realism has been conducted. Our review of a cost realism assessment is limited to a determination of whether an agency's evaluation was reasonably based. Vinnell Corporation, B-203806, August 3, 1982, 82-2 CPD 101. Here, the agency prepared an independent estimate consisting of the number and type of labor hours needed to perform each contract line item and an estimate of materials and subcontract effort. KFO proposed 2,356 hours. ATS proposed 9,501 hours. The agency estimated that 2,441 hours was needed and the Navy determined ATS's estimate of hours needed to perform the contract was in excess of what was needed. Although ATS contends that the labor hours proposed by ATS is more in line with the actual hours needed to accomplish the work to be performed, it has not presented any empirical evidence to show the government estimate is erroneous. At best, this is a technical disagreement between the parties which is not sufficient to prove that the cost realism determination was unreasonable.

ATS also challenges KFO's competency to perform the contract. Here, a preaward survey of KFO's ability to perform was conducted and resulted in a recommendation of award to KFO. Based on this survey and his own review, the contracting officer made an affirmative determination of responsibility. Our Office does not review challenges to an agency's affirmative determination of a firm's responsibility absent a showing that the contracting officer acted fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were misapplied. Mica, Inc., B-208848.5, September 23, 1982, 82-2 CPD 264. Neither exception has been alleged here.

Finally, ATS requests that we investigate the various assertions made by ATS against unspecified actions by Navy officials which favored KFO in this procurement. However, it is not our practice to conduct investigations under our bid protest function for the purpose of establishing the

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validity of a protester's speculative statements. Decision  
Sciences Corporation, B-205582, January 19, 1982, 82-1 CPD  
45.

*for Milton F. Fowler*  
Comptroller General  
of the United States