

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

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**FILE:** B-214503**DATE:** July 3, 1984**MATTER OF:** GEO-CON, Inc.**DIGEST:**

1. In protests involving formally advertised two-step procurements, improprieties apparent under step two must be protested prior to the time set for the opening of bids.
2. Where a protester initially files a timely protest and later supplements it with a new and independent ground of protest, the later ground must independently satisfy timeliness requirements; such new ground is untimely when based on information available from the face of the awardee's bid but is only filed considerably later than 10 days after bid opening.
3. Although step one technical proposals are to be evaluated on the same basis under stated criteria, the agency's failure to do so is not legally objectionable where a particular proposal's deviation from the stated criteria has little or no effect upon the procurement.
4. An unsupported allegation of conflict of interest fails to meet the protester's burden of proving that the procurement was tainted by the disclosure of confidential agency information or otherwise improperly influenced.

GEO-CON, Inc. protests the award of a contract to Nicholson Construction Company under invitation for bids (IFB) No. K5140048, the second step of a two-step formally advertised procurement issued by the Department of the Interior, Office of Surface Mining (OSM). The procurement is for construction services to fill an

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abandoned coal mine in Barrackville, West Virginia, with grouting material in order to prevent further subsidence of the ground surface above the mine. The work involves drilling grout holes which are then filled with barrier grout (cement and stone or gravel) in order to support the roof of the mine; the remaining interior void is then filled with a large quantity of saturation grout (cement and flyash).

The protest is dismissed in part and denied in part.

As its bases for protest, GEO-CON contends that (1) the change in the step two IFB schedule, from requiring unit prices on the total quantities of saturation and barrier grout to be employed in the work, to requiring unit prices on the components of those grouts (i.e., flyash, cement, etc.), has the effect of forcing the eventual contractor to abide by the mixture ratios stated in its proposal, even though the work as it progresses might necessitate certain variations in the ratios; (2) the procurement approach allows Nicholson to alter its stated ratios for the components of the saturation and barrier grout and to claim appropriate contract adjustments if any particular ratio should need to be increased; (3) Nicholson's bid is unbalanced; (4) the flyash to cement ratio proposed by Nicholson for its saturation grout does not conform to OSM's stated requirements, as reflected by the agency's evaluation of GEO-CON's proposal; (5) GEO-CON's proposal under step one was improperly evaluated on a different and more stringent basis; and (6) a conflict of interest exists in the fact that one of OSM's original technical project officers is the wife of Nicholson's chief engineer.

#### Background

Two-step formal advertising is a hybrid method of procurement, combining the benefits of formal advertising with the flexibility of negotiation. The step one procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with formal advertising procedures, with the exception that the competition is limited to those firms that submitted acceptable technical proposals in step one. Federal Procurement Regulations, 41 C.F.R. §§ 1-2.501 to 1-2.503-2 (1983).

Step one was issued on November 28, 1983, requesting the submission of technical proposals which met certain criteria set forth in the RFTP [Request for Technical Proposals]. Pertinent here, section 4.2.1 specified various requirements for the mixture of grouting materials to be used in the project:

". . . The grouting mix shall consist of a mixture of suitable materials that can provide the desired compressive strength when installed in place and are compatible and durable with the mining environments. The mixture shall attain a 28 day compressive strength, of 700 psi [pounds per square inch] or greater as determined by [American Society for Testing and Materials standard] ASTM C39 . . . . The contractor shall provide test results from any independent testing laboratory documenting the strengths and set times of the proposed mixes as part of the proposal. . . ."

Twelve offerors responded to the RFTP by the January 9, 1984 closing date. OSM determined that nine of the technical proposals submitted were susceptible of being made acceptable through discussions, and clarification sessions were held with those firms on January 30 and 31. Revised technical proposals were then requested by February 13, and, as a result, additional offerors withdrew or were eliminated from further consideration. The second step IFR was issued on February 17, with the bid schedules tailored to accommodate each individual offeror's estimates of saturation and barrier grout quantities. By amendment No. 01, issued concurrently with the IFR, OSM required that bidders list unit prices for the individual grout components, rather than only listing prices for the total quantities of saturation and barrier grout to be used.

Bid opening took place on February 27, with the following bids received:

Nicholson Construction	\$ 746,777.00
GFO-CON, Inc.	815,113.50
Hydro-Group	878,236.00
Cementation	958,500.00
D'Appolonia	1,141,100.00

OSM awarded the contract to Nicholson, the low bidder, on February 28. On the same day, GFO-CON protested the award to OSM and this Office.

Timeliness

GEO-CON complains that OSM's change in the step two bid schedule, requiring bidders to submit individual prices for the grout components, has the effect of "locking-in" the contractor to its stated mixture ratios, even though future developments in the work might necessitate certain variations to the ratios. According to GEO-CON, by being required to specify unit prices for the grout components in its bid, the firm, if successful, would have been bound to furnish the grout mixture in the exact ratios stated. If it had been able to state only a total price for the saturation grout, for example, the firm apparently contends that it could have altered the ratios if necessary (in order to improve hardness, setting time or flowability) as the work progressed, and yet still remain within its offered price for the entire quantity of saturation grout proposed for the project.

GEO-CON also argues that the requirement for unit prices for the components of the grout allows Nicholson the opportunity to alter its stated mixture ratios and claim appropriate contract price adjustments under the stated unit prices for the particular component whose ratio is increased.

Apart from the fact, as OSM points out, that these two assertions are mutually contradictory, the issues are untimely raised and will not be considered.

Our Bid Protest Procedures, 4 C.F.R. part 21 (1984), provide that protests based on alleged improprieties apparent in any type of solicitation must be filed prior to either bid opening or the closing date for receipt of initial proposals. In the case of a two-step procurement, improprieties apparent under step one must be protested prior to the closing date for receipt of proposals; improprieties apparent under step two must be protested prior to the time set for the opening of bids. See Colt Industries, Fairbanks Morse Engine Division, B-212241, Dec. 12, 1983, 83-2 CPD# 664; 4 C.F.R. § 21.2(b)(1).

Here, GEO-CON knew prior to the February 27 bid opening that the bid schedule had been amended to require that bidders provide unit prices for the grout

components.<sup>1</sup> However, the firm did not file its protest with OSM until the next day; as a result, any issues relating to the effect of that changed requirement are untimely raised and will not be considered. Colt Industries, Fairbanks Morse Engine Division, supra.

GEO-CON also asserts that Nicholson's bid is materially unbalanced, as principally evidenced by the fact that Nicholson charged much higher prices for the components of its offered barrier grout than did any other offeror. GEO-CON believes that this results from the fact that the procurement scheme allowed bidders to establish their own estimated quantities of material to be employed. If such quantities are unrealistic, then, according to GEO-CON, overruns are encouraged and the government in effect had no way of knowing what bid would actually result in the lowest price. This issue is untimely raised as well.

Although GEO-CON filed its original protest on February 28, it did not raise this particular issue until it filed its supplemental statement of protest on April 2. We have consistently held that where a protester initially files a timely protest and later supplements it with a new and independent ground of protest, the later ground of protest must independently satisfy timeliness requirements. Any such new ground is untimely when based on information available from the face of the awardee's bid but is only filed considerably later than 10 days after the protester is aware or should be aware of the basis for protest. Star-Line Enterprises, Inc., B-210732, Oct. 12, 1983, 83-2 CPD ¶ 450. Here, GEO-CON could have ascertained the contents of Nicholson's bid, both as to the firm's estimated quantities and component unit prices, prior to award. Since GEO-CON was aware that the contracting officer did not consider the Nicholson bid to be unbalanced at least as of the date of award (February 28), its supplemental statement of protest first raised on April 2 is untimely and will not be considered.

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<sup>1</sup>The record also strongly suggests that GEO-CON knew of the proposed change in the IFR schedule at least 1 day prior to the issuance of step two and the concurrent amendment on February 17, as the result of telephonic discussions between its engineer and the contracting officer. Although the engineer by affidavit relates that he voiced his concerns regarding the subject change at that time, nothing indicates that GEO-CON raised any sort of true objection so as to constitute a protest to the agency.

Nicholson's Proposed Saturation Grout Mixture

GEO-CON alleges that Nicholson's proposed saturation grout mixture of 16,651 tons of flyash to 2,079 tons of cement (an 8:1 ratio) is unacceptable in view of OSM's compressive strength and flowability requirements. In this regard, GEO-CON states that it had proposed a 5:1 ratio in its initial proposal, but was informed by OSM during discussions that such a ratio would not allow for sufficient flowability of the mixture when piped into the mine. Accordingly, GEO-CON asserts that in its revised proposal, it submitted a 4:1 ratio to meet the compressive strength requirement and to permit the addition of sufficient water to enhance flowability. GEO-CON argues that if its initial proposed ratio of 5:1 was unacceptable, then Nicholson's 8:1 ratio is clearly unacceptable as well.

OSM responds that the RFTP did not require any particular mixture ratio, only that any mixture proposed had to meet the 700 psi compressive strength test requirement, which Nicholson's 8:1 ratio in fact met. OSM states that:

" . . . GEO-CON settled upon using a grout design for the initial submission that would provide well above 700 psi by inference, as no test results were submitted for a 5:1 flyash, cement mix. It is possible that the actual psi could well have exceeded 700 psi, and that the mix could have been adjusted further to GEO-CON's cost advantage, while still meeting the 700 psi requirement. The results listed within Triad's testing report [Triad is the independent testing laboratory employed by both GEO-CON and Nicholson] . . . indicate it recommended that 5:1 ratio as the mix GEO-CON should use, whereas, it provided Nicholson with results that indicate an 8:1 ratio would meet the 700 psi requirement."

OSM further states, that based upon Triad's initial testing report,<sup>2</sup> it expressed concern to GEO-CON about the flowability of the firm's proposed 5:1 mix. Triad then indicated to GEO-CON in a subsequent testing report

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<sup>2</sup>It appears that Triad's initial test of GEO-CON's 5:1 mixture only tested flowability.

that a 4:1 ratio would be more acceptable in response to OSM's requirements for flowability, and GEO-CON accordingly adopted that ratio in its revised proposal. By lowering the flyash to cement ratio from 5:1 to 4:1, GEO-CON states that it was able to increase the water content of the saturation grout from 30 percent to 40 percent, thus improving flow characteristics, while at the same time conforming to the stipulated 700 psi compressive strength requirement.

In our view, GEO-CON's decision to finally propose a 4:1 mixture ratio was a matter of the firm's technical judgment, as per the advice of its testing laboratory. It was GEO-CON's own decision to go to a richer mixture so that the water content could be increased in order to meet the flowability requirements. It is clearly possible that GEO-CON could have successfully offered a less rich mixture that would have conformed to the compressive strength and flowability requirements. Its decision not to do so, however, cannot be viewed as the result of any improper action on the part of OSM. Moreover, as we point out below, nothing in the record indicates that GEO-CON was evaluated on a different basis from, or more stringently than, any other offeror. Here, Nicholson proposed an 8:1 mixture ratio for its offered saturation grout and, in conformity with the RFTP criteria, furnished a successful test result for the minimum required compressive strength of 700 psi.<sup>3</sup> Where Nicholson's 8:1 mixture was acceptable within the confines of the RFTP criteria,<sup>4</sup> we see no merit in GEO-CON's assertion to the contrary. See Harris/Ragan Management Corporation, B-209823, Aug. 2, 1983, 83-2 CPD ¶ 154.

#### Alleged Bias in Evaluation

GEO-CON alleges that OSM demonstrated bias against the firm during the evaluation process. In this regard, GEO-CON raises essentially two objections: (1) that OSM

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<sup>3</sup>Nicholson's mixture passed only one of the two compressive strength tests conducted by Triad nearly a year earlier regarding another contract. As OSM correctly points out, however, section 4.2.1 of the RFTP did not require multiple successful tests.

<sup>4</sup>One other bidder under step two, D'Appolonia, offered an acceptable 8:1 saturation grout mixture. The record shows that this mixture passed three separate compressive strength tests with a psi well above 700 for each one.

required GEO-CON to include a price for rapid set grout in its step two bid (as alternatively offered in the firm's technical proposal), whereas Nicholson did not offer rapid set grout even though the RFTP criteria called for it; and (2) Nicholson's compressive strength tests were not conducted in accordance with ASTM C39, as required by section 4.2.1.

In its initial proposal, GEO-CON offered to provide a mixture of 69 tons of limestone sand and 17 tons of cement as a rapid set grout. The record is not clear as to the intended use for this grout, but GEO-CON apparently offered it for alternate application as a water seal. OSM comments that GEO-CON was never required to provide quantities and prices for this grout<sup>5</sup>; in fact, OSM states that although GEO-CON had offered the grout in its initial proposal, the firm also indicated that it did not intend to use it except in an alternative application. OSM's technical evaluation committee requested that GEO-CON decide prior to submitting its revised proposal whether the rapid set grout would be utilized. If it were not to be used, OSM asked that it be eliminated from the proposal; if it were to be used, OSM required that GEO-CON submit appropriate test results regarding the characteristics of the proposed mixture. GEO-CON decided to offer the grout and it was therefore priced in its step two bid. GEO-CON asserts that the required inclusion of a price for the grout put the firm at a competitive disadvantage under step two. OSM disputes GEO-CON's position, stating that the decision to incorporate rapid set grout into its offer rested solely upon GEO-CON's own initiative. The issue is academic.

We fail to see how GEO-CON can realistically argue that it was put at a competitive disadvantage by incorporating prices for the rapid set grout into its step two bid. The offered price for the grout was \$6,140, whereas the difference between Nicholson's low bid and GEO-CON's was more than \$68,000. Regardless of the exact circumstances leading to the incorporation, the firm's competitive position clearly was not prejudiced

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<sup>5</sup>A position which is confirmed by the language of section 4.2.1 of the RFTP:

". . . The grout shall not be fast setting except when used as a seal and approved by the TPO [Technical Project Officer]."

since deletion of the price for the rapid set grout from GEO-CON's bid still leaves Nicholson the low bidder by a wide margin. See R.H.G. Systems, Inc., R-209238, March 10, 1983, 83-1 CPD ¶ 244.

GEO-CON also alleges that the evaluation of technical proposals was fundamentally unfair because Nicholson's saturation grout mixture was not properly tested in accordance with ASTM C39, as required by section 4.2.1 of the RFTP. In this regard, GEO-CON states that ASTM C39 mandates that the mixture being tested for compressive strength be in the form of a cylinder, whereas Nicholson's sample was not in cylinder form, but rather in cube form. According to GEO-CON, the use of a cube form will give higher psi results, and it is therefore possible that Nicholson's 8:1 saturation grout mixture would not have passed the compressive strength test if in fact it had been tested in cylinder form as mandated by ASTM C39.

OSM responds that its technical evaluation committee recognized that Nicholson's tests were not run in accordance with ASTM C39, but decided to accept these results because, in their opinion, there were no significant differences between the two testing methods. (The record reveals that other acceptable proposers who ultimately participated under step two also furnished test results showing that the cube method had been utilized.) We note that OSM has provided no specific rationale in support of its evaluators' opinion.

Our analysis of the issue, however, leads us to conclude that OSM did not act improperly in accepting Nicholson's compressive strength test result, even though the method of testing was not strictly in accordance with ASTM C39. Knowledgeable sources<sup>6</sup> substantially agree with GEO-CON's assertion that the cube method of testing will produce a higher psi result than the cylinder method, but only on the order of approximately 10 percent. Thus, OSM's apparent failure to evaluate Nicholson's technical proposal under the criteria set forth in section 4.2.1 is only material if the firm's 8:1 mixture most probably would not have met the 700 psi requirement if tested by the cylinder method.

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<sup>6</sup>In order to conduct our analysis, we contacted experts at ASTM itself, as well as the National Bureau of Standards and the Portland Cement Association.

Nicholson's mixture obtained a result of 850 psi on one successful test under the cube method--reducing that figure to account for the 10 percent variation, albeit hypothetically, would still result in a compressive strength in excess of the 700 psi requirement of the RFTP. Although a technical proposal under step one of a two-step procurement is to be evaluated on the same basis as all other proposals unless the other offerors are advised of the agency's relaxation in its requirements, Baird Corporation, R-193261, June 19, 1979, 79-1 CPD ¶ 435, the failure to do so is not legally objectionable where the proposal's deviation from stated RFTP criteria has little or no effect upon the procurement. See Essex Electro Engineers, Inc., B-213892, April 17, 1984, 84-1 CPD ¶ 434. Therefore, we will not object to OSM's relaxation in the ASTM C39 requirement.

#### Conflict of Interest

GEO-CON alleges that a conflict of interest exists in the fact that one of OSM's original technical project officers is the wife of Nicholson's chief engineer. We find no merit to the allegation.

As OSM readily acknowledges, the individual in question is in fact the wife of Nicholson's chief engineer and participated in the project up to the time of the pre-proposal conference in December 1983. However, at that time she removed herself as a technical project officer because she knew that Nicholson would be involved, and was replaced by another officer. OSM states that she had arranged in writing, several months prior to the issuance of the RFTP, to remove herself as a technical project officer from any contract awarded to Nicholson, and from this particular RFTP, if Nicholson decided to participate. Additionally, OSM points out that the technical evaluation committee did not communicate or consult with her during the evaluation process. On the basis of this information, and with no other evidence apart from its bare allegation to support its charge of conflict of interest, GEO-CON clearly has failed to meet its burden of proving that the procurement was tainted by the disclosure of confidential agency information or otherwise improperly influenced. See J. Allen Grafton, B-212986, March 5, 1984, 84-1 CPD ¶ 263.

B-214503

The protest is dismissed in part and denied in part.

*for*   
Comptroller General  
of the United States