

DECISION

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

FILE: B-221292 **DATE:** April 7, 1986
MATTER OF: Heuristic Developments, Inc.

DIGEST:

1. Protest against inconsistencies in RFP and allegation that agency may have improperly disclosed protester's participation in competition to other vendors are untimely where bases for protests were known prior to initial closing date of solicitation, but not protested until more than 2 months after closing date.
2. Protester has not satisfied burden of demonstrating that rejection of proposal was improper where protester does not respond to specific deficiencies cited by agency as justifying rejection.
3. Protest that agency was biased and acted in bad faith in conduct of procurement is denied where protester has provided no evidence to support its conjecture or refute agency denial of allegations.
4. Where protester has failed to establish that agency was biased or exercised bad faith in conduct of procurement or improperly rejected protester's proposal, there is no basis upon which GAO might question protester's elimination from competition. Remaining issues in protest are therefore academic and will not be considered.

Heuristic Developments, Inc. (HDI), protests the rejection of its proposal in a procurement conducted by the Uniformed Services University of the Health Sciences (USUHS) under request for proposals (RFP) No. MDA-905-85-0100. The protest is denied in part and dismissed in part.

The RFP was issued initially on August 6, 1985, to acquire integrated computer programs to support administrative functions such as purchasing, order processing,

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finance, and the management of inventory, fixed assets and grants. The RFP required that the programs generally be fully developed and operational. Offerors were to specify the degree to which the software would need to be customized to satisfy USUHS's requirements, to explain the effort required, and to demonstrate the offeror's ability to provide this service. The evaluation criteria section of the RFP listed mandatory and desirable requirements in the form of a checklist of "necessary," "nice-to-have," and "nice, but not necessary," items. The evaluation was to be based on 60-percent technical factors and 40-percent cost.

A revised version of the RFP, bearing the same date, was issued within days of the initial release date. USUHS states that the purpose of the revision was to correct typographical and editing errors. HDI submitted a number of questions regarding the RFP to which USUHS responded in a letter to HDI dated August 29, 1985. The closing date for receipt of proposals was September 6.

On September 25, USUHS wrote to HDI advising that a preliminary assessment of all offerors had been completed and providing questions and requesting a meeting to "participate in discussions required to determine your responsiveness to the mandatory technical requirements and other terms and conditions set forth in the solicitation." This meeting was held on October 1, 1985. HDI states that it thereafter contacted USUHS on a weekly basis to ascertain whether or not any decision had been made. HDI also states that on November 19, it contacted an official of USUHS and inquired about the possibility of a best and final offer. While the substance of the conversation is disputed, it appears that HDI submitted a revised price proposal on November 20. On December 3, HDI contacted USUHS and was advised that the selection had been made, that final negotiations had been completed, and that a contract with American Management Systems (AMS) was in process.

On December 4, 1985, HDI filed a protest with our Office in which HDI contended that the RFP was self-contradictory and inconsistent, and that the revised RFP was not issued with sufficient time for HDI to prepare its proposal. HDI additionally asserted that USUHS's response to HDI's questions, contained in a letter addressed only to HDI and identifying HDI as a competitor, may have been provided to other vendors, giving them a competitive advantage. In a letter dated December 13, 1985, HDI expanded its protest to include allegations that AMS did not meet the requirements of the RFP, that AMS's products are

more expensive than those of HDI, and that USUHS used HDI's proposal as leverage to negotiate a lower price with AMS while failing to conduct discussions with HDI. In its response to USUHS's report on the protest, HDI asserted that it was never advised that its proposal was technically unacceptable and that the rejection of its proposal was based on information not in the proposal. HDI also suggested that the procurement was biased and, in support of this contention, pointed to a mention in the initial RFP of a specific vendor's product which was removed in the final version, although the requirement with which it was associated remained.

Our Bid Protest Regulations, 4 C.F.R. part 21, require that protests against solicitation improprieties apparent before the closing date of an RFP be filed prior to the next closing date of the solicitation. 4 C.F.R. 21.2(a)(1) (1985). The bases for HDI's contentions regarding the RFP's alleged deficiencies, the issuance of the revised RFP, and the conjectured disclosure of USUHS's answers to HDI's questions were all apparent prior to the closing date of the RFP. HDI's objections were not filed with our Office until almost 2 months after the closing date. These contentions are untimely and will not be considered. White Horse Assoc., B-218872, May 21, 1985, 85-1 CPD ¶ 581.

With regard to HDI's challenge to USUHS's assessment of its proposal, we have held that a protester has the burden of affirmatively proving its case. Automation Management Consultants Inc., B-219342, Sept. 24, 1985, 85-2 CPD ¶ 328; Motorola, Inc., B-218888.3, Aug. 22, 1985, 85-2 CPD ¶ 211. The USUHS evaluation report noted that HDI's software does not satisfy the requirement that it currently be operating on a VAX 11/780 and cites six specific areas in which HDI's software does not support features required by the RFP. The report also notes that extensive modifications to HDI's software would be needed to satisfy the requirements of the RFP. HDI responds that it demonstrated the software to USUHS on a VAX 11/750 and states that software that runs on a VAX 11/750 also runs on a VAX 11/780. HDI, however, has not specifically contested any of the other deficiencies which USUHS noted about its software, except by expressing mere disagreement with the agency's evaluation and broadly accusing the agency of bad faith.

Since HDI has not contested the specific deficiencies which USUHS found in its software, we conclude that HDI has not affirmatively demonstrated that USUHS's evaluation was unreasonable. Moreover, since the agency properly found HDI's proposal technically unacceptable, it did not have any obligation to conduct discussions with HDI. Logistic Services International, Inc., B-218570, Aug. 15, 1985, 85-2 CPD ¶ 173.

Similarly, HDI has not provided any evidence to support its allegations of bad faith, that AMS did not meet the RFP's requirements, and that the agency was biased in favor of another firm. In this last respect, the initial RFP's mention of a specific vendor was contained in a description of a feature based on a specific MSA (Management Science America, Inc.) product. We note, however, that MSA was not a competitor for this contract and HDI was not prejudiced by this apparently inadvertent mention. Also, USUHS has denied HDI's allegation that it used HDI's proposal as a lever to negotiate a lower price with AMS or improperly disclosed HDI's participation in the procurement to a competitor. In these circumstances, HDI has not carried its burden of proving its case.

Since HDI has not demonstrated that USUHS was unreasonable in rejecting HDI's proposal or that USUHS was biased or exercised bad faith in its conduct of the procurement, we find no basis upon which we might question HDI's elimination from the procurement. The remaining questions raised by HDI are therefore academic and will not be considered. Total Maintenance, Inc., B-218487.2, Apr. 30, 1985, 85-1 CPD ¶ 489; BOW Industries, Inc., B-216512, Apr. 17, 1985, 85-1 CPD ¶ 436. Moreover, HDI's complaint that it was never apprised of the technical unacceptability of its proposal reflects a procedural deficiency which does not affect the legality of the award. Digital Radio Corp., B-216441, May 10, 1985, 85-1 CPD ¶ 526

The protest is dismissed in part and denied in part.

for *Seymour Spos*
Harry R. Van Cleve
General Counsel