

Cunningham



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Le Don Computer Services, Inc.

File: B-225451.2; B-225451.3

Date: April 28, 1987

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### DIGEST

1. Protest alleging that contracting agency improperly waived equipment demonstration requirement for the awardee, permitted technical transfusion of some of the protester's proposal, engaged in improper price prompting, and entered into certain agreements only with awardee is denied. The Navy reasonably determined that the awardee's equipment met contract requirements based on performance under prior contract and trade show demonstration and protester has not alleged nor shown any prejudice resulting from waiver of the demonstration, and there is no evidence of improper technical transfusion, price prompting, or agreements.

2. Protester's request for reconsideration of prior decision is dismissed as academic where all issues addressed in the earlier decision, which is subject of reconsideration request, have been dealt with at length on the basis of an expanded record in the present decision denying the protest.

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### DECISION

Le Don Computer Services, Inc., has protested the award of a contract to Online Products Corporation (Online) under Request for Proposals (RFP) No. N00600-86-R-1660, issued by the Naval Regional Contracting Center, Washington, D.C., for hardware, software installation, and maintenance services for a computer-assisted medical instruction system for the Naval Health Sciences Education and Training Command.

Le Don alleges that the Navy: (1) effectively amended the RFP by improperly deleting a testing requirement; (2) improperly permitted technical transfusion of some of Le Don's proposal; (3) engaged in improper price prompting; and (4) improperly entered into certain agreements during negotiations only with Online.

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We deny the protest.

On February 18, 1986, the Navy issued the RFP seeking an indefinite quantity, fixed-priced contract for hardware, software, and maintenance support over a 5-year period for the computer-assisted medical instruction system. This system is used by Navy Medical Corps schools and hospitals in the United States and abroad. The purpose of this system is to reduce student attrition rates, to increase medical readiness, and to increase skill levels at Navy medical schools. This system also augments traditional training methods used in medical schools.

The RFP's initial closing date was March 18, 1986. Award was to be made to the offeror submitting the lowest overall technically acceptable offer. Four offerors submitted proposals by the initial closing date. In a technical evaluation dated May 9, 1986, the Navy subsequently found all four offers unacceptable as submitted but capable of being made acceptable. The Navy held discussions with all offerors to allow them an opportunity to correct deficiencies in their proposals. Subsequently, on May 20, 1986, the contracting officer requested final proposals which were submitted by May 30, 1986. Evaluation of the revised proposals showed that the proposals of Le Don and one other offeror were now considered to be acceptable. Le Don then requested that the Navy add an economic price adjustment clause to the RFP. The Navy added the requested clause to the RFP and thereafter afforded all offerors the opportunity to submit a second round of final proposals by September 22, 1986. In its second best and final offer, Le Don revised its approach to the maintenance of equipment used by Navy schools abroad and reduced its price from its initial offer of \$2,568,228 to \$1,463,138. On October 17, 1986, the contract was awarded to Online based on its low, evaluated price.

#### Waiver of "Operational Capability Demonstration"

Le Don argues that the Navy effectively waived for Online an "operational capability demonstration" (OCD) while requiring other offerors to perform this demonstration on their own systems. Le Don points out that clause M.7 of the RFP, Performance Validation, requires that all offerors had to perform an operational capability demonstration which would show that the "equipment and software proposed" can perform all mandatory requirements and evaluated optional features offered in the proposal. Further, the RFP stated that the demonstration should permit the Navy to unequivocally determine the presence and adequacy of each feature and capability. Yet, according to Le Don, Online's system, as finally proposed, was not so tested.

The Navy has replied to this ground of protest by arguing that it saw no need to perform a demonstration test on Online's finally-proposed system since the Navy had previously tested "essentially the same equipment" under a 1985 contract. According to the Navy, the Online system tested earlier demonstrated in the field its capability to fulfill the requirements of this RFP because the 1985 contract involved an "identical [system] application" for use at Navy hospitals and medical schools. Further, the Navy states that since the system under the 1985 contract was purchased and tested, the Navy has not required more stringent functional or performance capabilities.

In reply, Le Don argues that the prior Online system differs from the present system in several areas involving micro-computer, power considerations, printing functions, and hard disc. Further, Le Don argues that Online is proposing under this RFP a new microcomputer which has not yet been tested and a new disc player which had not been "formally announced" for business marketing purposes contrary to an RFP requirement. Moreover, Le Don argues that its understanding with the Navy was that the demonstration was to be an "on-site" demonstration of actual equipment, not a "technical evaluation of equipment literature."

Notwithstanding Le Don's technical objections, the Navy insists that it has "indeed received assurance" that Online's finally-proposed system will perform as required by the specifications so as to fulfill, for all practical purposes, the RFP's statement that the demonstration is "intended to provide reasonable assurance to the Navy that the proposed system does, in fact, have the required capabilities." In this connection, the Navy points out that we previously have permitted an agency to waive a testing requirement where the waiver is not arbitrary or prejudicial to the protester. See Sperry-Univac, B-195028, Jan. 3, 1980, 80-1 C.P.D. ¶ 10 at page 4. We have taken this position because even if testing requirements are waived, the waiver does not affect the contractor's legal obligation to furnish a conforming system.

In response to the Navy's waiver argument, Le Don argues that the waiver was simply contrary to its reading of the RFP which Le Don considered to preclude the submission of substitute, untested equipment in its final offer. Nevertheless, Le Don does not allege that substituted equipment would have affected its proposed prices. Further, there is no indication in the record that Online knew this demonstration would be waived when it submitted its final offer and price.

Le Don specifically alleges that the Navy has not shown how Online demonstrated its capability to meet certain features required for the microcomputer, printer functions, the hard disk and power considerations. We disagree. The Navy has reasonably demonstrated, in our view, that it did obtain appropriate assurances that Online's finally-proposed system would comply with all requirements so as to render a formal demonstration unnecessary. In fact, with regard to certain of the essential equipment and required software the agency has actually seen the items perform. Specifically, with respect to the requirements to create, write and read from a ram disk, the printer buffer, print spooling capability, the hard disk and operations using foreign sources of power, the record indicates that the Online system's capability either had been demonstrated previously under the Navy's 1985 contract with Online for virtually the same system or was demonstrated at a computer trade show the previous year. We find that, although no formal demonstration under this RFP was conducted, the agency reasonably established the system's operational capability prior to awarding Online the contract.

Le Don also argues that the OCD could not be waived because Online is proposing use of a new microcomputer which is untested. The Navy states that the IBM-compatible computer proposed by Online merely enhances the computer used by Online in the system purchased under the 1985 contract. For example, the IBM compatible computer proposed in Online's second best and final offer and the computer that is part of the previously tested system both have an Entel 8,888 central processing unit and both can use a Microsoft disc operating system. The enhancements concern reduced power demand (65 watts versus 130 watts previously required). Also, the IBM compatible computer now proposed contains one 20 megabyte hard disc drive in addition to one 360 kilobyte floppy disc drive. The computer currently used only has a 360 kilobyte floppy disc. In these circumstances, since the earlier computer equipment demonstrated its ability to perform the same mission that is the subject of this procurement, we do not find unreasonable the Navy's finding that the enhanced equipment can also perform the mission.

Le Don also asserts that the disc player was not formally announced (commercially available) as required by the RFP. The Navy responds that the Pioneer LDV 4200 disc player proposed by Online in its second best and final offer is an enhancement of the LDV 1000 which Pioneer discontinued. The Navy further states that the LDV 4200 functions essentially the same as the LDV 1000 currently being used to perform Online's 1985 contract. The record shows that key features of the LDV 1000 and the LDV 4200 are identical. For example, both models have: full random access to 54,000 frames of

video (30 minutes); two sound channels; and variable play speeds. The enhancement in the LDV 4200 is that it can be controlled manually as well as by computer whereas the LDV 1000 is computer controlled and has no manual control.

The Navy's position is that the enhanced disc player's earlier version so demonstrated the acceptability of the player that there was no need for performance testing of the disc player. While Online's proposed disc player was not formally announced contrary to the express RFP provision that the equipment be "formally announced for marketing purposes on or before the closing date of the RFP," the apparent purpose of the provision was to prevent offerors from introducing technologically new equipment rather than to exclude unannounced equipment which, objectively, is merely enhanced equipment functionally and substantially equivalent to existing, previously-tested equipment. Thus, we do not question the Navy's acceptance of Online's disc player. Further, Le Don does not argue that it would have substituted unannounced "enhanced equipment" at a lower price had it known of the Navy's intent. Thus, Le Don was not prejudiced by the Navy's interpretation of this provision.

Based on this record, we do not consider this waiver of formal demonstration testing to be unreasonable or prejudicial since there is no allegation, let alone any showing by Le Don, that it would have offered acceptable substitute equipment at a price below that of the award price had it been permitted to revise its finally-proposed equipment.

#### Technical Transfusion

Le Don argues that the Navy disclosed aspects of Le Don's offer to Online during the contracting process because several items in Online's final proposal are allegedly too similar to items proposed by Le Don to be simply the result of coincidence. For example, Le Don complains that the integration and test procedure submitted by Online in its final offer is very similar to that proposed by Le Don during a preaward facilities audit, which required a description of Le Don's quality assurance procedure. Additionally, Online's final offer completely changed its maintenance concept to allegedly contain the major components of the mail-in, mail-back maintenance system proposed by Le Don.

In reply, the Navy states that the maintenance method finally proposed by these offerors is neither unique nor proprietary and, in fact, is widely known. Also, the contract negotiator, contracting officer, and technical evaluator, by affidavits, deny they informed Online of Le Don's maintenance strategy or of Le Don's integration and test procedure.

Given the absence of any evidence of a leak, recognizing that the Navy denies that any leak took place, and given the Navy's position that the maintenance system proposed is neither proprietary nor unique, which Le Don does not dispute, we deny this ground of protest.

#### Price Prompting

Le Don points out that in a Navy evaluation report there appears the statement that "Online is encouraged to propose the best price/performance system meeting the specifications" and that this statement is not found in the evaluation of any other offeror's proposal. Le Don suggests that this statement reflects impermissible price prompting on the Navy's part and resulted in a drastic revision of Online's price and technical proposal as transmitted at the final offer stage.

However, the Navy insists that neither the contract negotiator, the contracting officer, nor the technical evaluator disclosed Le Don's prices or informed Online of its relative price standing. Specifically, the Navy states that offerors received evaluation reports which addressed technical deficiencies only and that the notice of deficiencies to Online contained no express suggestion--nor hint of suggestion--that Online should reduce its price. --

We do not think that the statement quoted above, encouraging Online to submit its best price and performance system was improper, but merely good advice which should have been obvious to all offerors without the Navy's specific statement. Le Don does not allege nor does the record indicate that the Navy disclosed to Online or any offeror any firm's prices or competitive standing. While the record does not contain an explanation for Online's price reduction in its second best and final offer, we have no basis to conclude that the price reduction resulted from any improper agency action. Therefore, we deny this ground of protest.

#### Improper Negotiation of Agreements

Le Don also alleges, and the Navy denies, that the Navy improperly entered into certain understandings with Online regarding maintenance and installation assistance without giving similar assurances to Le Don, which gave Online an unfair competitive advantage.

Le Don suggests that the Navy gave Online a fixed delivery schedule without giving Le Don the same information. There is no support for Le Don's allegation in the record. Amendment four of the RFP contained a delivery schedule which

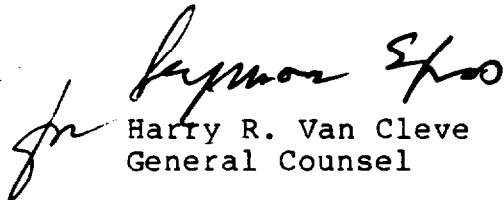
indicated the schedule was for evaluation purposes only and that the schedule did not obligate the Navy to order the equipment in the time periods shown. Moreover, the Navy denies that it did otherwise "firm-up" the RFP delivery schedule. There is no indication that Online based its offer on any information other than that contained in the RFP.

Le Don also suggests that the Navy gave improper assurance to Online that the Navy would assist with installation. The Navy points out that the RFP clearly stated that the contractor was ultimately responsible for installation. Also, the Navy insists that it did not give any other informal assurance to Online about installation. Also, Online states in its offer that it "understands that it is responsible for the successful installation of the . . . system, irrespective of the installation support being given by the Navy." Although Online's proposal contains a statement that the Navy would provide installation, which the Navy agrees is contrary to the RFP statement, it is clear that when Online's other statement is considered, that Online understood it was ultimately responsible for the installation, regardless of the extent of Navy support.

#### Reconsideration Request

Finally, Le Don asks that we reconsider our dismissal in Le Don Computer Services, Inc., B-225451, Jan. 9, 1987, 87-7 C.P.D. ¶ \_\_\_\_\_, which involved basically the same issues denied above, although on the basis of a more limited record than that now before us.

Since we have considered and found without merit Le Don's protest under the expanded record before us now, we consider Le Don's request for reconsideration to be academic and we dismiss it.

  
Harry R. Van Cleve  
General Counsel