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DECISION

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

40977

FILE: B-179607

DATE: July 25, 1974

MATTER OF: Baganoff Associates, Incorporated

DIGEST: 1. Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety. See regulations and cases cited.

2. GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506.

3. GAO finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension

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for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors.

4. Protest that Air Force RFP violated protester's proprietary rights is untimely as protester made no attempt to object to alleged disclosure of data until after award of contract approximately five months after protester became aware of RFP's specifications. See cases and regulation cited.

5. Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3-805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion.

6. While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution.

7. Allegations first made after award of contract that RFP was ambiguous and that RFP's failure to procure transcribing equipment was arbitrary and exhibited favoritism are untimely pursuant to section 20.2(a) of GAO Interim Bid Protest Procedures and Standards, which provides protests based upon alleged improprieties in solicitation apparent prior to closing date for receipt of proposals shall be filed prior to closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1970).

Request for proposals (RFP) No. F33657-73-R-0859 was issued on June 28, 1973, by the Air Force Systems Command, Wright-Patterson Air Force Base, Ohio, for the design development and qualification of a Mechanical Airborne Strain Recorder System. The RFP provided for the procurement of 125 systems, fleet wide instrumentation, fleet monitoring services, a computer program, Aerospace Ground Equipment (AGE), 180 man-days of engineering services, and data for A-37B aircraft. The RFP also included option provisions for a 361 percent increase in the production quantity of the system and for a data transcriber. Under this system, the recorder is attached to the aircraft and measures in flight the stress history of the part being monitored. The stress data is read and converted by a data transcriber from the gage into usable form and is processed onto magnetic tape for subsequent analysis. The performance expected of the successful offeror was stated to be full qualification of a strain gage in accordance with the RFP's Development Exhibit and Statement of Work, installation of strain gages on all Air Force A-37B aircraft based in the continental United States, a fully operating operational data collection system including data reduction, and integration of the data into both the A-37B Aircraft Structural Integrity Program and Aircraft Structural Integrity Management Information System. The RFP also called for a firm-fixed-price contract.

The RFP provided that all technical proposals submitted would be evaluated according to the following five factors, listed in the order of importance:

(1) Special Technical Factors

(2) Understanding of the Problem

(3) Soundness of Approach

(4) Complaince with Requirements

(5) Ease of Maintenance

Elsewhere in the solicitation the above evaluation criteria were defined in greater detail. The solicitation stated that the required price and technical proposals would be judged on the basis of audit, price analysis, technical evaluation and a cost analysis (including Life Cycle Costing pursuant to Armed Services Procurement Regulation (ASPR) 3-800). The contract was to be awarded on the basis of the technical approach and price most advantageous to the Government. As special considerations, prospective offerors were advised to submit a strain recorder with

their proposals, and that, while Mechanical Strain Recorder (MSR) types A/A32A-36 (A-36) and A/A32A-37 (A-37) would be developed and qualified under the contract, only the A-37 type MSRs would be procured for the production quantity.

In response to the RFP, proposals were submitted by Baganoff Associates, Incorporated (Baganoff), Cessna Aircraft Company, Leigh Instruments, Ltd. (Leigh) (through the Canadian Commercial Corporation (CCC)), and Technology, Incorporated (TI). After an initial technical evaluation offerors were requested to submit additional information to clarify their proposals, and upon receipt of this information the Air Force conducted a further evaluation of the proposals. The result of the evaluations indicated that the technical proposals of Leigh, TI, Baganoff, and Cessna were acceptable, in that order. After conducting discussions with the offerors, the Air Force requested best and final offers. Subsequent to review of the final technical and price proposals, the Air Force awarded the contract to Leigh via CCC on December 7, 1973, on the basis that Leigh submitted the best technical approach and lowest price of the four proposals received.

Baganoff Associates has protested the award to Leigh on the grounds that the award and the procedure used in evaluating Leigh's offer violated the Buy American Act; that the Air Force evaluation of the Leigh proposal was arbitrary and capricious and exhibited favoritism; that the Air Force improperly aided other offerors in the submission of proposal revisions; that the Air Force evaluation team was biased against the Baganoff proposal; that any award under this RFP would violate the proprietary rights of Baganoff; that other offerors were allowed to submit revised proposals and Baganoff was prejudiced because it was not extended this opportunity; that Leigh is nonresponsible in certain respects; and that the RFP was ambiguous in certain respects and improperly deleted requirements for items which would have strengthened Baganoff's proposal evaluation score. The protester therefore requests that this Office set aside the award to Leigh, order an impartial team to re-evaluate the proposals, and make a new award on the date submitted.

For reasons discussed below, the protest is denied.

In regard to its contention that the procedure used in evaluating proposals under this RFP and making an award to Leigh violated the Buy American Act, 41 U.S.C. §§ 10a-10d(1970), the protester notes that the Act, as implemented by regulations,

gives a preference to the procurement of domestic source end products for public use, and that when a domestic small business concern is competing with a firm offering foreign goods, a 12 percent evaluation factor must be added to the price of the foreign firm. ASPR 6-104.4. It contends that since Leigh is a Canadian Corporation proposing to supply Canadian products through CCC, the 12 percent factor should have applied to Leigh's price. In addition, the protester contends that the ASPR provisions which exempt Canadian products from the Act improperly injure domestic business; that the Secretary of the Air Force improperly allowed foreign companies to be put on the same basis as domestic concerns; that it is unequal protection of the law to allow a small business to obtain a preference against a domestic corporation but not against a foreign business; and that operation of these provisions violates Baganoff's rights under the 14th Amendment to the United States Constitution. Additionally, Baganoff questions whether the Leigh MSR is a listed end product and whether Leigh is being subsidized by the Canadian Commercial Corporation.

Part 5, section 6, of ASPR sets forth the Department of Defense Policy concerning alleviation of the restrictions of the Buy American Act with respect to procurements of Canadian Products. ASPR sections 6-506 and 6-507 set forth basic agreements underlying this policy. With regard to the agreement set forth in ASPR 6-507, we have noted that this agreement is an extension of arrangements between the United States and Canada of various steps which have been taken during and since World War II to coordinate their economic efforts in the common defense. See, e.g., Statement of Principles For Economic Cooperation between the United States and Canada, 1 UST 716, T.I.A.S. No. 2136, 132 U.N.T.S. 247, cited in part in 52 Comp. Gen. 136, 138 (1972). In this regard, we have stated that the above-referenced "/A/greement was executed in 1963 by the Secretary of Defense in furtherance of recognized congressional and Executive policy. Congress is aware of the agreement and it has been operative continuously since 1963. To our knowledge, question has never been raised regarding its implementation. See Senate Hearings Before the Committee on Appropriations, Department of Defense Appropriations, Fiscal Year 1972, part 2, Department of the Army (pages 1477-1479, 92nd Congress, 1st session)." 52 Comp. Gen. at 138. In view of the above, we do not believe it appropriate for this Office to question the propriety of the ASPR provisions. 52 Comp. Gen. 136, 139 (1972).

Concerning the waiver of the Act's restrictions in this case, the RFP incorporated by reference the Buy American clause contained in ASPR 1-104.3. However, the Act's restrictions do not apply in those cases where the head of a Department determines it would be inconsistent with the public interest. See 41 U.S.C. § 10a (1970). In this regard, ASPR 6-103.5 provides in pertinent part:

> "(a) Listed. The Secretaries of the Departments have determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act with respect to certain supplies, which have been determined to be of a military character or involved in programs of mutual interest to the United States and Canada, where such supplies are mined, produced, or manufactured in Canada and either (i) are Canadian end products offered by the lowest acceptable bid or proposal or (ii) are incorporated in end products manufactured in the United States. Each Department maintains a list of these supplies, which is approved by the Secretary concerned. (The Departmental lists provide that parts and equipment for such supplies are considered to be included in the lists, even though not separately identified when they are procured under a contract that also calls for listed supplies.)
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> "(c) Application of Canadian Exception. The effect of (a) and (b) above may be summarized as follows.
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> "(2) Listed Canadian end products are treated as domestic source end products and neither duty nor the evaluation factors prescribed by 6-104.4 shall be used for evaluation."

Our Office has upheld this exercise of discretion in determining public interest. B-159495, September 9, 1966; B-151395, August 22, 1963. Moreover, we have upheld the exercise of discretion in the assembly and composition of the supply lists. B-157916, November 24, 1965. Since the report indicates that the Leigh MSR was approved by the Air Force as a listed Canadian product, the Air Force acted properly in not applying "Buy American" preferences in this case. B-173819, October 6, 1971; B-150183, April 17, 1963.

With regard to whether Leigh is subsidized by the Canadian Commercial Corporation, we note that the CCC is wholly owned by the Government of Canada and was established in 1946 in order to, among other things, assist in the development of trade between Canada and other nations. The CCC provides varied services to the Department of Defense (DOD), and acts as the prime contractor on any bid or proposal submitted through it to DOD and subcontracts 100 percent of the contract to the Canadian firm submitting the offer. The CCC also confirms and endorses in its own name the bid or proposal of the Canadian supplier. Such actions are authorized pursuant to ASPR 6-501 and 6-504. As CCC's actions under this procurement conformed to those activities outlined in ASPR there is no basis for objection by our Office. B-175496, April 28, 1972.

Baganoff Associates also contends that the Air Force evaluation of Leigh's proposal was arbitrary, capricious, and exhibited favoritism, that the Air Force guided Leigh in its price revisions, that certain time extensions were effected to benefit Leigh, that Leigh was nonresponsible in certain respects, and that Leigh's proposal constituted a "buy-in". To substantiate its contentions, the protester alleges that the Leigh MSR system has not been operational, and that its proposed data transcriber has not yet been manufactured. Baganoff alleges it was arbitrary for the Air Force to choose such an unproven system when the Baganoff approach has been utilized for a number of years and incorporates the Prewitt-type MSR which the Air Force has also used. The protester questions how the Air Force could determine that the Leigh system will meet its reliability and maintainability standards when the Leigh gage has no operational record. Moreover, the protester queries how a nonoperational system can provide accurate manufacturing cost on which to base a proposal. Baganoff questions how, in view of the above, the Leigh system will reliably provide the Air Force with the higher system accuracy, higher data capacity, and greater transcribing speed the Air Force attributes to the system. Baganoff also alleges that the Leigh gage cannot withstand the Air Force environmental and qualification tests. Finally, the protester alleges that as Leigh would not have a data transcriber available for actual data reduction during the qualification and preproduction tests, the Air Force will be unable to substantiate whether Leigh's equipment meets the RFP's system accuracy and threshold requirements. Thus, Baganoff contends the Air Force choice of Leigh for technical reasons was unsupported.

The Air Force contends that the technical evaluation was performed in strict accordance with the evaluation criteria contained in the RFP, and concluded that the Leigh proposal contained the best technical approach to the problem and had the best chance of meeting the RFP's performance specifications. The Air Force explains that the Leigh approach was unique and from a technical standpoint bore no relationship to the other proposals. The Leigh approach was considered a technical breakthrough within the state-of-the-art. It appears that Leigh initially proposed two gages to meet the RFP's requirements, but that its unique design exceeded the RFP's gage requirements for accuracy, sensitivity, capacity, and transcription speed, and thus required only one gage to meet both ranges of MSR performance.

A review of the record shows that the RFP contemplated the development and qualification of an acceptable system based upon specified performance specifications, as commercial developmental models were not considered adequate. The Air Force points out that the RFP did not require that the hardware proposed have been aircraft tested prior to submission, nor did the RFP require prior performance to establish reliability and maintainability of the proposed hardware. Such requirements were to be established under the resulting contract. The Air Force reports that its evaluation of Leigh's projected failure modes and wear-out times data submitted with its proposal indicated satisfactory performance and were realistic. Regarding Leigh's lack of automatic data transcriber ability, the Air Force points out such ability under the basic contract was not needed, and in fact no data reduction technique was specified under the program's preproduction test portion. While the accuracy of the Leigh MSR was obtained from Leigh's analytical calculations and not operational data, we note that operational data was not required. Moreover, the Leigh System's data capacity and transcribing speed were also determined from analytical data submitted with the proposal and such data was considered adequate and reliable. Our analysis of the record indicates that Leigh's technical approach was considered unique, and while more complex than the other methods proposed, it presented the Air Force with a greater operational capability. From our review of the evaluation report, it is clear that the evaluators considered Leigh's proposal as containing sound technical justification for the approach selected and a proposed system exceeding the specified performance. As a result, Leigh received a technical rating of 62.5, compared to Baganoff's rating of 63.5. In view of the above, and as we believe that the evaluation was performed in accordance with the listed factors, we do not consider it to be unreasonable. B-171349, November 17, 1971.

In addition to questioning the technical analysis of Leigh's proposal, Baganoff also alleges that Leigh's prices are too low and that in fact Leigh's proposal is a buy-in. As a basis for this allegation, the protester compares its final price ($448,270) and breakout costs with those of Leigh ($421,841.70, plus $10,000 transportation allowance). For example, under item 0002AA and AL of the Schedule, the protester states that Leigh's price of $226.50 for one MSR and two cassettes is much too low, as Leigh's MSR is considerably more complex than the Frewitt MSR offered at $174.00. Under item 0003AD, Baganoff states that Leigh's price for servicing Tinker Air Force Base does not reflect actual cost, as its cassette price is comparable to Baganoff's MSR-disc price yet the cassette is again more complex. Baganoff also alleges that Leigh's offer on item C of the option for Fleet Monitoring of five bases in the United States is equal to Baganoff's travel costs alone for the same service and that this is also true in regard to the service for the Vietnam bases. On these facts, and on the basis of other price comparisons under the RFP, Baganoff alleges the Leigh pricing proposal is unreasonably low, and that the Air Force therefore acted arbitrarily in accepting it.

The Air Force concluded that the Leigh technical approach allows it to incur substantially less costs for the required services. As stated by the Air Force, Leigh's unique design, the type of materials to be used, and its low cost production processess significantly reduce Leigh's costs. In view of the data transcriber's high speed and the resulting small number of tapes thus required, Leigh's prices in this respect do not appear unreasonable. Leigh was also able to achieve a significant cost savings because its unique design exceeded the overall requirements for accuracy, sensitivity, capacity, and transcription speed, thereby requiring a single type gage and qualification of 20 rather than 40 gages as required for Baganoff's proposal. These features of Leigh's design also resulted in a life cycle costing analysis which showed the Leigh system to be significantly more cost effective. Moreover, we note that pursuant to ASPR 6-506 the Canadian Commercial Corporation certified Leigh's prices as fair and reasonable and submitted a Certificate of Price. Therefore, the agency's analyses have established that Leigh's prices are realistic and reasonable.

With regard to the contention that Leigh is not a responsible prospective contractor, such determination is within the discretion of the contracting officer and an affirmative determination of responsibility will not be disturbed by our Office in the absence of fraud. Since no fraud has been alleged or demonstrated we will not consider this matter further.

Concerning the protester's contention that the Air Force "coached" Leigh and TI on line item price revisions, Baganoff alleges that the Air Force desired Leigh as its contractor and that accordingly Leigh was given advice to insure that its revised prices would indeed be low. Baganoff further alleges that Technology, Incorporated, was given the same aid so as to place it in line for award if Leigh's MSR cassette design failed for some reason. As its basis for this contention, the protester indicates that the final prices of Leigh, TI and Baganoff were so close as to be more than coincidence, and that this result becomes more suspicious when viewed in light of the fact that the Cessna Corporation, which builds the A-37B aircraft, was substantially higher in price than any of the other offerors. The protester also questions whether the 60 day time extension for award under the RFP was issued solely to benefit Leigh. It contends that while the award under this RFP was scheduled to be made by October 15, 1973, the Air Force extended this date until December 15, 1973, in order to evaluate the Leigh revisions.

In respect to this allegation, the Air Force has denied that it aided either Leigh or TI in any form of price revision. An examination of the price negotiations reveals no irregularity which in any way supports the protester's allegations, especially since Leigh's price did not vary significantly from initial to final offer. While TI's price was substantially reduced during negotiations, we can not find any indication that this was the result of anything other than the regular negotiation process. Regarding the extension of the schedule for award from October 15, 1973 to December 15, 1973, the Air Force reports that this extension was necessary to permit the Air Force to properly evaluate the information requested in its September 28, 1973, letter to all offerors requesting clarification or information concerning their proposals. Also, all offerors were properly notified of the extension, and in fact by letter of October 23, 1973, Baganoff agreed to this extension. Pursuant to ASPR 3-805.1 and 3-805.3, contracting personnel are authorized to request

clarification and to seek to obtain through discussions the proposal most advantageous to the Government. An extension of time to permit the contracting agency to make a fair, impartial and complete evaluation is proper and frequently necessary. See, e.g., B-178122(2), February 25, 1972; B-164726(2), September 3, 1968. The record does not reveal, nor does the protester point out, any documentation or other data which substantiates its claim of coaching or preferential time extensions. Thus, we consider the Air Force actions in this respect to be proper.

The protester next alleges that the Air Force violated its proprietary rights in data by issuing the RFP and by making an award thereunder to a firm other than Baganoff. The data in question concerns the Baganoff-Previtt Associates method of recording aircraft stress information, extracting the data, and reducing it to usable form. The protester states that its associate, Previtt, introduced the Air Force to the concept of using MSRs for stress recording. In 1969, the Air Force personnel allegedly asked the protester if there was some means of extracting information from the Previtt-type MSR discs (as opposed to the Leigh-type MSR cassettes). The protester reports that it then detailed a concept whereby the recording media would be interrogated by using the principle of reflected or refracted light, and a computer would be used for automatic processing of the data. The protester asserts that it developed this process with its own funds, and that it presented this data to the Air Force under an Air Force Proprietary Data Material Agreement. Baganoff states that patents for the Baganoff-Previtt method have been applied for, and that such patents will shortly be issued. The protester has detailed a history of disputes with the Air Force over the years concerning these allegations. The protester's differences with the Air Force culminated in a protest to this Office by Baganoff under RFP No. F33657-72-R-0772, issued on March 27, 1972, by the same installation. Although we denied its protest that TI should be precluded from competing under that RFP, B-175634, May 18, 1972, Baganoff filed for reconsideration and alleged that the RFP, which it contends was essentially the same as the RFP in question here, was an infringement of the Baganoff proprietary process. While the protester then withdrew the protest, it alleges that its action in protesting forced the Air Force to cancel that RFP. Baganoff contends that the Air Force is once again disclosing this process under the subject RFP and requests this Office to protect its proprietary rights by setting aside the award.

The Air Force takes the position that its RFP and award did not violate the protester's data rights. It points out that the design of the Leigh and Baganoff-Prewitt units are totally different, and the recording media bear little or no relationship to one another. The Air Force also notes that the RFP's specifications were of the performance type and contained no design details. The Air Force contends that its analysis of the Leigh and Baganoff proposals indicates no technical transfusion by the Air Force from Baganoff to Leigh. In the area of patent infringement, the Air Force indicates that to the best of its knowledge only two patents apply to this procurement and both were issued to Prewitt. After a review of these patents, the Air Force concludes that the RFP does not infringe these patents.

In factual disputes of this type, because of the scientific and engineering concepts involved, we have traditionally afforded a significant degree of finality to the administrative position. 46 Comp. Gen. 585, 589 (1967). Furthermore, we note that the RFP was issued on June 28, 1973, that the protester submitted a timely proposal, that it participated in negotiations under this RFP, and that it extended its offer until December 15, 1973. The protester had ample time before award (December 7, 1973) to study the RFP's specifications and to discover and protest that it allegedly disclosed proprietary data. This is especially true in view of the Baganoff protest under the prior RFP and its contention that this RFP is basically a reissuance of the cancelled solicitation. There is no indication, however, of Baganoff's protesting under this RFP until it had learned that it would not be awarded the contract.

Courts have generally taken the position that for a party to maintain its proprietary rights in information, it must take reasonable action to prevent or suppress its unauthorized use. See, e.g., Ferroline Corp. v. General Aniline Film Corp., 207 F. 2d 912 (7th Cir. 1953), cert. denied, 347 U.S. 953 (1954). While the protester, prior to the issuance of this RFP, did protest against the alleged Air Force disclosure of its data, Baganoff made no attempt after the issuance of the RFP and prior to the award of the contract to renew its protest against the allegedly improper disclosure. Under these circumstances, we must conclude that Baganoff's protest on this ground is untimely. B-179822, March 25, 1974. Except in extraordinary circumstances, not shown here, this Office will not grant relief where the data owner participates in the competition for the procurement and does not raise any objection until it appears that the contract will be awarded to another.

40 Comp. Gen. 885 (1967). See also 49 Comp. Gen. 134, 138 (1969); B-175741, May 14, 1973. Moreover, insofar as Baganoff's contention in this regard is based upon an alleged impropriety in the RFP, it is untimely under our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.2(a) (1970), as it was not filed prior to the closing date for receipt of proposals.

Baganoff Associates also raises a question about the actions of the Air Force during the negotiation phase under the RFP. After receipt of the proposals, by letter of September 28, 1973, the Air Force furnished all offerors with certain changes to the RFP and requested clarification concerning certain points in each proposal. Baganoff alleges that, pursuant to this process, the Air Force permitted Leigh to totally revise its delivery schedule concerning services and engineering and its pricing on each applicable line item. Baganoff contends that the primary revision in the schedule under Leigh's proposal was the deletion of the requirement for furnishing 20 A-36 MSRs (item 0001AA) and the attendant testing services. The protester alleges that, while it attempted to do so, it was not allowed to either revise its proposal or effect the same reduction in equipment as Leigh. Baganoff contends that, as a result of this action, it was unable to compete on an equal level with Leigh and was prejudiced in the consideration of its proposal. The protester argues that this is another example of Air Force bias against it.

The record shows that in its letter of September 28, 1973, to Leigh, the Air Force requested clarification concerning whether the MSR proposed for the A-37 MSR requirement (item 0001AB) would also meet the requirements for the A-36 MSR. This question was prompted by the Air Force's technical evaluation which indicated that since Leigh's proposed data capacity was so much greater than the RFP's requirements, one MSR was adequate for both ranges. The Air Force advised Leigh that if the answer was affirmative then it would delete as to Leigh the requirement for the A-36 MSR. In response to this request, Leigh informed the Air Force that its A-37 would meet the A-36 requirement. Therefore, Leigh revised its price for the 20 A-37 preproduction MSRs and deleted the price for the 20 A-36 MSRs. Leigh also submitted a nonrecurring price provided that only the A-37 recorder would require testing. The Air Force disagrees with the protester's characterization of this revision. It asserts each offeror in the competitive range was given an equal opportunity to submit technical clarification and priced revisions. It contends that no change to the delivery schedule or supplies and services was requested or permitted. The Air Force contends that Leigh was not required to offer on both A-36 and A-37 gages because the Leigh MSR provided enough sensitivity and data capacity to cover both ranges. It explains that based upon the known commercial models the A-36 and A-37

gages were required to cover both ranges; one gage to accurately measure strain cycle data from high load factor aircraft (A-36), and one for low load factor aircraft (A-37) because of the trade-off between sensitivity and capacity. However, it was determined and confirmed that Leigh's unique and innovative design was adequate for both ranges. The Air Force did not delete the requirement for two MSR gages and 40 preproduction models for other offerors, including Baganoff, because their proposed designs required two gages to cover both ranges and the differing mechanical characteristics of the two gages necessitated qualification testing.

Although the applicable regulation provides that when the proposal considered most advantageous to the Government involves a departure from the stated requirements other offerors must be given an opportunity to revise their proposals based upon the revised requirements, it also provides that this should be done without revealing to the other offerors the design proposed in the departure. ASPR 3-805.4. The Air Force engineers report that Leigh's approach to the mechanical strain recorder system was a technical breakthrough within the state of the art. We find no basis on which to disagree with this analysis. Thus, we believe that providing Baganoff and the other offerors an opportunity to submit revised proposals based upon Leigh's design would have involved technical transfusion contrary to the caveat of the regulation and was not, therefore, required.

The protester also alleges that the Air Force military and civilian personnel at Wright-Patterson Air Force Base, and particularly those in the Structural Engineering Department, are prejudiced against the protester and that these individuals structured the RFP and evaluated the proposals submitted thereunder so as to insure that the protester's proposal would not be selected for award. The protester contends that this bias grew out of a conspiracy on the part of Air Force personnel to disseminate to Baganoff's competition information relative to the protester's development of a data transcriber process. Furthermore, the protester argues that this conspiracy also led the Air Force, in conjunction with certain contractor personnel, to determine on the basis of self-interest who would be awarded the initial contracts to develop the Scratch Gage System for the Air Force. The protester bases its allegation on the theory that a certain Air Force Captain learned of the Baganoff process while in the Air Force, transmitted this information to Technology, Incorporated, arranged civilian employment with TI while in the Air Force, and then left the Air Force to work for TI in this very same conceptual area.

The protester alleges that this action constituted a conflict of interest and that it prejudiced Baganoff. To relate these allegations to the present procurement, the protester contends that the former Air Force Captain has now rejoined the Air Force in a civilian capacity and has been working with the same engineering group at Wright-Patterson in which he was formerly employed; that he has influenced the project head under this RFP against the protester; and that as a result the evaluation of the Baganoff proposal was biased. Furthermore, Baganoff contends that the project head is further prejudiced against Baganoff because protest action by Baganoff in the past against certain of his actions resulted in his being "retired" from Air Force active duty.

In response to these allegations, the Air Force denies any prejudice or bias against Baganoff. It maintains that Mr. Baganoff's allegations are unfounded and that while the former Air Force Captain has returned to the Air Force in a civilian capacity, he has been working on another program in California. The Air Force further denies the existence of any conspiracy to either prejudically evaluate Baganoff's proposal or disseminate its proprietary data.

It is the responsibility of Government contracting personnel to fairly and impartially evaluate offerors' proposals so that the Government will select for award the most advantageous proposal and that the integrity of the competitive procurement system will be maintained. In relation to this procurement, the record does not reveal prejudice or bias on the part of the Air Force in the evaluation of proposals or selection of Leigh's proposal for award. We note that the protester has not presented any documentary evidence to support its contention of prejudice. Our review of the Air Force evaluation of these proposals indicates that its selection of Leigh was not improper, biased, or based upon prejudice. Furthermore, we note from the record that these similar charges by Baganoff were investigated by the Federal Bureau of Investigation and the Office of the United States Attorney for the Southern District of Ohio. It appears that, as a result of these investigations, the Office of the United States Attorney determined that no grounds existed for prosecution. We note that Baganoff Associates also filed suit against Technology, Incorporated, in the United States District Court for the Southern District of Ohio (Western Division) concerning similar charges. Such allegations were also before this Office at that time as a result of a protest by Baganoff Associates in a prior procurement. As Baganoff and TI by mutual agreement subsequently dismissed Baganoff's civil action against TI, and as counsel for Baganoff stated that in his opinion this Office was without jurisdiction over the remaining matters in question, we closed our file on the protest. B-174329, March 23, 1973. On the basis of the foregoing, we conclude that the record fails to support Baganoff's charges in this respect.

Finally, Baganoff Associates raises two additional grounds of protest which are untimely because they were initially raised after the closing date for receipt of proposals. It alleges that in certain instances the RFP was ambiguous, that this ambiguity influenced its proposal, and that action should be taken to remedy this influence. As examples of this ambiguity, Baganoff points to the type of engineering support to be provided under item 0003AB (Fleet Monitoring) of the schedule and the meaning of the RFP's technical evaluation factors. The protester also alleges that the RFP purposely omitted any requirement for the procurement of a data transcriber under the basic contract, that the previous RFP contained such a requirement, and that the deletion of the transcriber requirement was arbitrary and indicated favoritism. Pursuant to section 20.2(a) of our Interim Bid Protest Procedures and Standards, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1970). The record indicates that initial proposals in response to this RFP were to be submitted by August 10, 1973, that clarification was to be submitted by October 15, 1973, that best and final offers were to be received by the Air Force no later than November 30, 1973, and that award of the contract was made on December 7, 1973. As both of these grounds of protest concern the constitution of the RFP itself, and as they were not asserted until after award of the contract, they are untimely and will not be considered. 52 Comp. Gen. 184, 188 (1972).

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States