DECISION

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

60574

FILE: B-184315

DATE: February 13, 1976

098609

MATTER OF: RAI Research Corporation

DIGEST:

1. ASPR § 3-805.2(a) provides that where doubt exists as to whether a proposal is within competitive range such doubt should be resolved by including it therein. Therefore, contracting officer's determination that proposal was within competitive range for purpose of negotiations was reasonable where two initial evaluation reports prepared by activity's technical personnel reached different conclusions regarding technical acceptability of such proposal.

2. Fact that successful offeror during course of negotiations was requested by agency to submit additional technical information in support of its proposal while another offeror merely was requested to review its pricing, does not establish favored treatment since first offeror's initial technical proposal contained defects whereas other offeror's proposal was initially found technically acceptable.

3. Agency negotiators need not hold technical discussions with offeror who submits acceptable proposal offering to furnish brand name product referenced in RFP. Protester's argument that if such discussions had been conducted, it would have discussed less costly manufacturing approach is without merit since protester had ample opportunity during course of procurement to advance such a proposal.

4. Protest based on ground that successful offeror's equal equipment offered in response to RFP's brand name or equal purchase description was not commercially available and therefore offeror will not be able to deliver equipment within time required and at price proposed is denied. Evaluation and overall determination of technical adequacy of proposal is primarily function of procuring activity and judgment of agency's technical personnel will not be questioned where such judgment has reasonable basis.

5. Although protester's affiliate is owner of United States patent rights on brand name product referenced by solicitation's purchase description, possibility of patent infringement properly was excluded as cost factor in evaluating proposals submitted by other offerors.

6. Agency determination to award contract during pendency of protest on basis that immediate award would result in significant monetary savings to Government is within purview of ASPR § 2-407.8(b)(3)(iii), which permits award notwithstanding protest where prompt award will be otherwise advantageous to Government.

RAI Research Corporation (RAI) protests the award of a contract to ABA Electromechanical Systems, Inc. (ABA) under request for proposals (RFP) No. N61339-75-0051, issued by the Department of the Navy, Training Equipment Center (Center), Orlando, Florida, on April 17, 1975, for the purchase and installation of a "Day Record Fire Range Target System", including data and parts. Offerors were requested to submit their proposals on the basis of supplying "The Static DART System" as manufactured by Australasian Training Aids, Ltd. (ATA), or equal.

RAI contends that unfair consideration was given by the Center to ABA in that the firm was given the opportunity to discuss, modify or clarify its proposal while RAI was not afforded the same opportunity. RAI states that if it had been given the same opportunity, it could have proposed a "U.S. manufacturing plan for the DART system which could have made the equipment more competitive" than the brand name equipment it proposed. Furthermore, it is alleged that ABA does not have a commercially developed or available console to satisfy the RFP specifications and that the Center's technical evaluations did not fully consider whether ABA could deliver an acceptable system within the required period and at the price proposed. In addition, RAI states that its Australasian affiliate, ATA, holds patents covering the DART target system and that these patents, and the effect of a possible future liability with respect to these patents should have been considered in the evaluation of proposals.

For the reasons discussed below, the protest is denied.

As background, the record indicates that prior to the issuance of the subject RFP, two variations of the static DART system were procured from RAI, under an exclusive distributorship with ATA, on a sole-source basis. However, for the subject procurement, the procuring activity determined that a competitive solicitation could be developed for the purchase of its target system needs. The Center synopsized the proposed procurement in the Commerce Business

Daily on November 29, 1974, and requested technical qualifications of interested firms. A number of interested firms submitted qualification data in response thereto. Although five firms, including RAI and ABA, were found qualified for the procurement, only three of these firms (RAI, ABA, and Detroit Bullet Trap Corporation (Detroit)) submitted technical and cost proposals by May 15, 1975, the closing date for receipt of proposals.

Of the three cost proposals, ABA was low at an evaluated price of $742,953, while RAI and Detroit submitted prices of $1,845,634 and $1,157,644, respectively.

The three technical proposals were forwarded to a technical evaluation team. The team's initial technical evaluation of proposals, as reported by the Project Engineer on May 30, 1975, resulted in a determination that the RAI and Detroit proposals were technically equal (acceptable), but that the technical proposal submitted by ABA was unacceptable. However, a second proposal evaluation report of June 2, 1975, prepared by the Project Director, disagreed with the negative findings of the May 30 evaluation regarding ABA's technical proposal and recommended that "based on equivalency of all proposals, the offerors be considered technically equal and that a contract be awarded to the company with the lowest price." In this connection, the RFP provided that the award "shall be made on the basis of the lowest price of a technically acceptable proposal which meets the requirements of the Brand Name or Equal Provision of the solicitation."

Due to the divergent views of the evaluators regarding ABA's technical acceptability, the contracting officer decided that ABA should be included within the competitive range for the purpose of conducting negotiations. A technical clarification conference was held with ABA on June 4, 1975, at which time a list of "technical clarification" questions were prepared for the offeror to answer. ABA's responses to these questions (submitted in the form of an amendment to its proposal) were evaluated by cognizant technical personnel and resulted in a determination on June 11, 1975, signed by the Project Engineer's supervisor, that ABA's proposal was technically acceptable.

On June 13, 1975, the Center's contract negotiator conducted telephone conversations with each of the three offerors in the following order: RAI, Detroit and ABA. The file indicates that in the case of RAI, the contract negotiator advised the firm's representative (its marketing manager) that since RAI had proposed the brand name item there were no technical questions. However, RAI was asked why the

price of its system had increased so much compared to prior contract prices for the same system. According to the record, the RAI representative responded that the price increases were due to manufacturer increases to RAI. The contract negotiator then advised RAI to review the firm's proposed prices and to submit its best and final price not later than June 20, 1975. In the case of Detroit, the contract negotiator advised the firm to review its prices and to submit its best and final proposal by June 20, 1975. Finally, ABA was called and requested to furnish revised cost data resulting from the clarification conference held on June 4 (ABA had previously advised the Center that as a result of the clarification questions ABA would have to increase its proposed costs). ABA was advised to submit its revised cost proposal by June 16 and be prepared to negotiate the revisions with the Center on that date and to submit a best and final proposal by June 20.

These discussions were confirmed by a contracting officer's letter to ABA and two telegrams (to RAI and to Detroit) of June 16, 1975. By letter of June 18, ABA submitted its best and final proposal. On June 19, the President of RAI called the contracting officer to request the opportunity to conduct negotiations since, in his view, the company had not had the opportunity to negotiate for the procurement. He was advised by the contracting officer that negotiations had been conducted with the company on June 13, that final and best proposals were due June 20, and that no further negotiations would be conducted. By telegram of June 19, RAI submitted its best and final offer in the form of revised item prices. The best and final prices of the three offerors were as follows:

ABA	$ 827,301
Detroit	$1,125,000
RAI	$1,782,768

After the "best and final" offers were reviewed by the Center, the Deputy Director, Procurement Services Office, recommended that award be made to ABA on the basis that it had submitted an acceptable technical proposal at the lowest price. On June 30, 1975, we were advised of the Navy's determination to proceed with an award to ABA notwithstanding RAI's earlier protest (June 26, 1975) to our Office.

RAI contends that ABA should not have been given the opportunity to submit additional data in support of its initial proposal; rather, the proposal should have been rejected in accordance with section D, paragraph A1b of the RFP, which provides, in part,

> "Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this request for proposals will will require rejection of the proposal. Failure to furnish the descriptive literature by the time specified in the request for proposals will require rejection of proposal * * *".

Furthermore, RAI asserts that ABA received "favored treatment" in the negotiation process in that it was given the opportunity to discuss, modify and clarify its proposal. RAI states that had it been given the same opportunity, it was prepared to discuss domestic manufacturing of the DART system, resulting in possible lower costs to the Government.

ABA's proposal was determined to be within the competitive range in accordance with ASPR § 3-802.2(a) (1975 ed.) which provides that when doubt exists as to whether a proposal is within the competitive range, that doubt should be resolved by including it. Since the contracting officer's technical evaluators disagreed as to whether ABA's initial proposal was technically acceptable, the contracting officer felt he had a duty to include the proposal within the technical competitive range. We think the contracting officer acted reasonably. Insofar as the RFP descriptive data clause is concerned, we agree with the contracting officer that this clause should be interpreted in a manner consistent with the regulations and procedures pertaining to negotiated procurements.

With respect to negotiations, ASPR § 3-805.3 (1975 ed.), requires that after receipt of initial proposals, written or oral discussions be conducted with all responsible offerors who submit proposals determined to be within a competitive range. We have held that in order to have meaningful negotiations within the intent of ASPR § 3-805.3(a) (1975 ed.), offerors should be advised of the deficiencies in their proposals and should be given a reasonable opportunity to correct or resolve the deficiencies and to submit such technical, price or cost revisions that may result from the discussions. 52 Comp. Gen. 161 (1972); 54 Comp. Gen. 60 (1974); 74-2 CPD 60. Gulton Industries, B-180734, May 31, 1974, 74-1 CPD 293. Therefore, once ABA was determined to be within the competitive range, the Center's request during the course of discussions with ABA that the offeror submit additional and clarifying technical information was proper. 53 Comp. Gen. 860 (1974), 74-1 CPD 252.

In contrast, the "negotiations" with RAI consisted of the telephone conversation referred to above and the confirming letter of the same date. The negotiations were confined to a discussion of RAI's proposed price. In this regard, the contracting officer states as follows:

> "As far as RAI's proposal, the Government determined that no technical discussions or negotiations were necessary concerning it, since the system offered thereby was the baseline or 'Brand Name' system. The Government is not required to engage in discussions or negotiations with an offeror if there is no meaningful reason for doing so. Now, protestant alleges that 'we [RAI] were prepared to discuss U. S. manufacturing of DART equipment at lower costs. We believe this would have been to the Government's best interest.' However, on the facts of record, it is apparent that protestant did not ever suggest, let alone explicitly propose, prior to 20 June 1975, that it had in mind a less costly manufacturing plan."

In our opinion, the record fails to support RAI's contention that ABA was given favored treatment. In reaching this conclusion, we have taken cognizance of the limited scope of the Center's negotiations with RAI, in comparison to those conducted with ABA. However, we believe that the circumstances of the instant procurement reasonably justified such a course of action, since there were no technical deficiencies in RAI's proposal which needed to be corrected or resolved. Therefore, the procuring activity's determination to restrict negotiations with RAI to its proposed price was reasonable. Moreover, we agree with the contracting officer concerning RAI's argument that it would have been prepared to discuss a less costly manufacturing plan if the subject had been raised by the Center. We find nothing in the record to indicate that the contracting officer should have been aware of this possibility since RAI did not raise the matter with the contracting officer at any time prior to the award announcement.

The next contentions advanced by RAI in support of its protest concern the Center's evaluation of ABA's technical proposal. Specifically, RAI contends that ABA does not have available an existing commercially developed remote controlled target console satisfying the requirements of the Government as set forth in the RFP's purchase description. It contends that in order to deliver the proposed equipment as represented in its proposal, ABA would have to initiate a major design and development effort, as opposed to making minor modifications to existing equipment. Thus, the protester alleges that since ABA's proposed system (console) is not commercially available, it follows that (1) the Center's technical evaluation was deficient in that it could not have fully considered

the ability of ABA to deliver and install the equipment at its quoted price and within the time required and (2) ABA could not have demonstrated the "equality" of its equipment with the referenced brand name product.

In response to the above, the contracting officer states in pertinent part, as follows:

> "ABA does have a commercially developed and demonstrated console. More specifically, ABA's proposal offered complete use of commercially available target mechanisms, displays, printers, computer processors and memory for automatic target system control and operation. The target mechanism was demonstrated to the Government and it was concluded that only minor modifications to it were needed to satisfy specified requirements. Accordingly, it was the Government's evaluation and determination that ABA would (and will) not have to embark on a significant 'design and development' effort in jeopardy of the technical and delivery requirements of the RFP. Admittedly, as the record indicates, of the three offerors, ABA was considered to pose the highest risk of performance achievement because 'their target mechanism has not been production engineered or tested and because ABA has limited experience in developing a complete target system of this type.' In effect, the Government had some concern with ABA's interfacing the basic target mechanism and the manual control during installation. However, that risk was only considered 'moderate' and not enough to justify a conclusion that ABA could not timely and fully perform. Risk determinations and appropriate actions based on them are the prerogatives of the Contracting Officer."

It is not the function of our Office to evaluate proposals and we will not substitute our judgment for that of the contracting officials by making an independent determination as to which offeror in a negotiated procurement should be considered acceptable and thereby receive an award. Applied Systems Corporation, B-181696, October 8, 1974, 74-2 CPD 195. Since determinations as to the needs of the Government are the responsibility of the procuring activity concerned,

the judgment of the activity's specialists and technicians as to the technical adequacy of proposals submitted in response to the agency's statement of its needs ordinarily will be accepted by our Office. B-175331, May 10, 1972. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness. Ohio State University; California State University, B-179603, April 4, 1974, 74-1 CPD 168; B-176077(6), supra. This is particularly the case where, as here, the procurement involves equipment of a highly technical or scientific nature and the determination must be based on expert technical opinion. See 46 Comp. Gen. 606 (1967).

RAI's allegations regarding the acceptability of ABA's proposed system, specifically concerning the commercial availability of the system's control console, are not supported by the record. The protester has failed to provide a convincing rebuttal or present any concrete evidence to controvert the procuring activity's position that ABA's proposed target system consists, in part, of a commercially available control console. Moreover, we are not in a position to say that ABA will not be able to deliver its proposed equipment as required and at its proposed price. While RAI emphasizes the fact that two separate evaluations resulted in contrary conclusions regarding the acceptability of ABA's initial proposal, we do not find this to be persuasive since ABA's revised proposal was found acceptable. Under these circumstances, we see no basis for questioning the procuring activity's determination that ABA's proposal was technically acceptable.

RAI also cites the fact that its affiliate, ATA, is the owner of the Unites States patent rights on the brand name product referenced by the subject RFP. The protester believes that these patent rights should have been taken into consideration in the evaluation of cost proposals. Essentially, RAI is suggesting that the Government's purchase of a target system equal to its brand name model could potentially expose the Government to a claim of patent infringement and, therefore, such possible liability should have been a factor for consideration in the Navy's evaluation of the other cost proposals submitted in response to the RFP. However, we have held that possible patent infringement liability as a result of a procurement action should not be considered. 45 Comp. Gen. 13, 16 (1965); Radiation Systems, Inc., B-180268, June 11, 1974, 74-1 CPD 318. Under the circumstances of the instant procurement, the matter of infringement is speculative, at best, since there is no way of knowing for certain whether a delivered system will infringe a patent. Furthermore, we have construed the words "or equal," when used in conjunction with a brand name purchase description, to mean that an alternate item must be equal to the product specified only insofar

as the needs of the procuring agency are concerned, but not necessarily an exact duplicate thereof in detail or performance. B-172497, June 14, 1971 and decisions cited therein. Therefore, we believe that possible patent infringement liability properly was excluded as an evaluation factor in the award determination.

Finally, RAI questions the agency's determination to award the contract to ABA prior to resolution of its protest by our Office. The Center's justification for the immediate award to ABA was based on its determination that the procurement and installation of new automated range equipment would result in a savings to the Government of approximately $20,000 per month. Such an award is within the purview of ASPR § 2-407.8(b)(3)(iii), (1975 ed.), which permits award notwithstanding a protest before award where a prompt award will be otherwise advantageous to the Government. In the circumstances, the award of the contract during the pendency of the instant protest does not appear to have been inappropriate. Moreover, since we have found no merit to the protest, the award has not worked to the detriment of RAI.

Accordingly, there is no legal basis to question the propriety of the award to ABA.

Deputy Comptroller General
of the United States