DECISION

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

60837
98985

FILE: B-185715 DATE: May 4, 1976

MATTER OF: T M Systems, Inc.

DIGEST:

1. If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique.

2. Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), GAO does not object to contracting officer's determination that fair and reasonable price under ASPR § 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed.

3. Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information.

4. Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award.

PUBLISHED DECISION
55 Comp. Gen. .....

98985 - U98985

T M Systems, Inc. (TM), has protested to our Office against the proposed award of a contract to Vogue Instrument Corporation (Vogue) by the Naval Regional Procurement Office, Philadelphia, Pennsylvania, under request for proposals (RFP) No. N00140-76-R-0503.

Background

On December 10, 1975, TM and Vogue submitted initial proposals priced as follows:

	Total Price
TM	$198,000.00
Vogue	212,832.70

Both offers were considered acceptable and price was the determining factor for award in this procurement. On December 11, 1975, the contracting officer erroneously released TM's unit and total prices to Vogue. There is no indication that this action was anything other than a good-faith error on the contracting officer's part.

Shortly after disclosure of TM's prices, Vogue alleged that it had made a pricing mistake in its proposal and requested that its price be corrected to an amount lower than TM's initial price. Vogue stated that its allegation of a pricing mistake was entirely unrelated to the disclosure of TM's prices. It does not appear from the record that the contracting officer made any determination whether Vogue's allegation was correct. Instead, the contracting officer considered what action to take in the procurement in light of the erroneous disclosure of TM's prices.

The contracting officer recognized that the disclosure of TM's prices created a serious problem, because it gave Vogue a significant competitive advantage. He analyzed the situation as follows:

> "All available alternatives as to how to proceed with the procurement were given exhaustive consideration. The alternative of awarding on the basis of the most favorable initial offer pursuant to ASPR 3-805.1 (a)(v) was examined. However, this alternative required a clear demonstration that the initial offer represented a fair and reasonable price. In this case, the most favorable initial offer [$198,000.00] was much higher

than the Government estimate [$134,602.00]. Furthermore, TM, the company submitting the most favorable initial offer, had advised the Contracting Officer that the initial offer was based on estimates which were too high when compared with actual quotes from prospective subcontractors and suppliers. Also, the other offeror had submitted a revised offer which was * * * lower than the most favorable initial offer. Therefore, there was no basis for concluding that acceptance of the most favorable initial offer would result in a fair and reasonable price.

"The second alternative examined was that of going forward with negotiations, but precluding any further participation on the part of Vogue, the recipient of a competitive advantage. This would have resulted in negotiating exclusively with TM. The use of this alternative is inconsistent with ASPR [1-300.1] which requires full and free competition.

"The third alternative considered was that of making full disclosure of the prices submitted by both offerors in their initial offers in order to overcome the competitive advantage possessed by Vogue. A disclosure of the prices would involve an element of the auction technique. ASPR 3-805.3(c) does not permit the use of auction techniques in pricing contracts."

The contracting officer reasoned that although none of the alternatives was fully in compliance with ASPR, the third alternative was the most logical. By letters dated December 31, 1975, TM and Vogue were informed of the Navy's intention to solicit best and final offers. These letters also advised the parties of TM's and Vogue's unit and total prices. TM advised the Navy that it would submit a best and final offer, but that this action was without prejudice to its protest to our Office, which it filed on January 14, 1976.

The Navy has not publicly disclosed the amount of the best and final offered prices, except to indicate that both best and final offers were approximately 10 percent less than the lowest initial price proposal (i.e., 10 percent less than $198,000, or about $178,000). Vogue's best and final price was lower than TM's. No award has been made.

Also, we have been advised that on April 5, 1976, TM filed an action in the U.S. District Court in Connecticut, seeking a temporary restraining order. Apparently, the order was sought to preclude an award to Vogue prior to our decision, or subsequent to any decision of our Office adverse to the protester. We understand that the court, in connection with the hearing on the temporary restraining order, indicated its interest in receiving our decision in this matter. Accordingly, we will consider the protest on the merits. See Dynalectron Corporation et al., 54 Comp. Gen. 1009 (1975), 75-1 CPD 341, and decisions cited therein.

Award on Basis of Initial Proposals

Several of our decisions indicate that where initial proposals are received and pricing or technical information in the proposals is improperly disclosed, the contracting agency should make an award, if possible, on the basis of the initial proposals. See RCA Corporation, 53 Comp. Gen. 780 (1974), 74-1 CPD 197; Cf. 53 Comp. Gen. 253, 258 (1973). The reason is that to conduct negotiations and obtain revised proposals may constitute a prohibited auction.

However, making an award on the basis of the initial proposals--an exception to the general requirement that written or oral discussions be conducted--is permissible only in certain limited circumstances. See ASPR § 3-805.1(a) (1975 ed.). ASPR § 3-805.1(a)(v) provides that an award on an initial proposal basis may be made where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience that a fair and reasonable price would result.

In the present case, the most favorable initial proposal ($198,000) was 47 percent in excess of the Government estimate ($134,602). In light of this fact alone, we see no basis to object to the contracting officer's determination that a fair and reasonable price would not be obtained by making an award on the basis of the initial proposals.

TM argues that the Navy's $134,602 estimate is unrealistic, as evidenced by the fact that the estimate left one of the items (the technical data package) uncosted. TM points out that its price for this item was $10,000 and Vogue's price was $29,808. We are unpersuaded by this argument. Even assuming that the technical data package should be costed at the average of the two quoted prices (i.e.,

$19,904), making the Navy estimate $154,506, TM's initial proposal price is still 28 percent in excess of the estimate.

TM next contends that the estimate is unrealistic because the Navy is prepared to accept Vogue's best and final offer (about $178,000) as representing a reasonable price. Accepting, again, $154,506 as a better estimate of the Government's requirements, we do not believe that a proposed contract price of about $178,000 (a 15-percent overage) convincingly shows that the estimate is erroneous, particularly in light of the fact that the $178,000 price results from a request for best and final offers rather than the submission of initial proposals.

In view of the foregoing, we see no basis to recommend that award be made on the basis of the initial proposals in the present case.

Request for Best and Final Offers

TM's second argument is that the Navy's request for best and final offers created an auction, which, the protester points out, is strictly prohibited by ASPR § 3-805.3(c) (1975 ed.). TM believes that the Navy should have excluded Vogue from the competition and negotiated solely with it.

TM primarily relies on 50 Comp. Gen. 222 (1970) (cited by the protester as B-170093, September 28, 1970). In that decision, we stated that because vital information concerning the successful proposal had been revealed to the protester, the contracting officer could not have entertained any further modifications to the protester's proposal, since this would compromise the integrity of the Federal procurement system by allowing an auction to be held.

We note that 50 Comp. Gen. 222 involved a factual situation dissimilar to the present case--i.e., the "inside" information had been revealed to the protester with the implicit understanding that negotiations were closed and its proposal was no longer in line for award. We do not believe 50 Comp. Gen. 222 must be read as establishing a general rule that an offeror which obtains improperly disclosed information must always be excluded from further competition. Compare, in this regard, B-174550, December 1, 1971. In that case, certain information had been improperly disclosed to one of the offerors. We held that the offeror's continued participation in the competition could be permitted, provided that it acquiesced in the disclosure of its proposal configuration to each of the other offerors. In

the present case, Vogue has acquiesced in the Navy's release of its prices to TM prior to the receipt of best and final offers.

There is also for noting The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 194 (cited by the parties as B-182560, September 26, 1975). There, we pointed out that information which had been improperly disclosed should not be allowed to accrue to the protester's possible competitive advantage. Our decision went on to state:

> "* * * We are, however, mindful of the need to maximize competition and to give all interested parties an opportunity to compete for the contract. Where circumstances permit, we have favored eliminating an undue advantage to one bidder--because he was improperly provided information not available to other bidders--by resoliciting with information needed to compete intelligently made available to all interested parties. * * *
>
> "We think it is desirable, where it can be done without compromising the Government's needs, to eliminate in this manner any improper advantage which may have been gained by a competitor, since the advantage is thereby eliminated without reducing competition. * * *"

Consistent with B-174550 and The Franklin Institute, supra, we believe the Navy's basic approach in the present case--in releasing to each offeror the other's prices, and thereby attempting insofar as possible to eliminate any unfair competitive advantage--is not subject to objection. Cf. 53 Comp. Gen. 253, supra. It is also pertinent that exclusion of Vogue from the competition would leave TM as the only remaining offeror. While TM alleges that submission and analysis of cost or pricing data could assure the Navy that a reasonable price would be obtained, we are reluctant to recommend the exclusion of Vogue and thereby create a sole-source procurement. We are unaware of any precedent, nor has any been cited by TM, which would support this resolution of the case.

TM additionally contends that an award cannot be made by accepting Vogue's best and final offer because the resulting contract would be void. TM's argument is that ASPR § 3-805.3(c), supra, prohibits auctions; that ASPR has the force and effect of law; and that, under the standards described in 52 Comp. Gen. 215 (1972), an award in these circumstances would be a knowing violation of the

regulations. Therefore, the award would not be merely improper and voidable, but plainly illegal, i.e., void ab initio.

We note that while ASPR prohibits auctions, it does not describe any legal penalties or consequences attaching to an award resulting from an auction. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, we have also stated that we see nothing inherently illegal in the conduct of an auction in a negotiated procurement. See 48 Comp. Gen. 536, 541 (1969). See, also, 53 Comp. Gen. 253, supra, where we declined to hold that an award resulting from an auction was either improper or illegal. We see no merit in TM's argument. We believe that an award following the recommendation described infra will be legal and proper.

Conclusion and Recommendation

Two additional points raised by TM must be considered. First, the protester points out that, at the time the Navy requested it to submit a best and final offer in early January 1976, it was not informed that Vogue had alleged a pricing mistake in its initial proposal and had requested that its initial proposal price be corrected downward to an amount lower than TM's initial price. As far as TM knew, Vogue had only submitted an initial offer, priced at $212,832.70. Second, TM also complains of the disparity between the time Vogue learned of TM's prices (December 11, 1975) and the time it learned of Vogue's prices (January 5, 1976). Since best and final offers were due January 14, 1976, for both offerors, TM alleges that it was at a disadvantage under these circumstances.

While we are sympathetic to TM's complaint that Vogue had a greater amount of time to prepare its best and final offer, we believe that some inequality of this kind is unavoidable. A more important consideration is TM's contention regarding Vogue's mistake in proposal claim. As indicated previously, where best and final offers are sought in a case of this kind, the contracting agency must attempt to equalize the competition and to eliminate insofar as possible any offeror's unfair competitive advantage. We believe the Navy's failure to advise TM of Vogue's mistake in proposal claim did place TM in a less than equal competitive position. This conclusion does not depend on Vogue's motivation for alleging a pricing mistake in its proposal, whether the mistake could be substantiated, or whether the allegation of mistake should have been rejected as a late modification to Vogue's initial proposal. The salient fact is simply that Vogue indicated its willingness to accept an award at a price below its initial proposal

price and TM's initial proposal price--and that TM, in preparing its best and final offer, was unaware of this fact. We believe this is a sufficient degree of inequality in the competition to warrant corrective action.

Accordingly, we recommend that the Navy proceed as follows in the procurement. The release of Vogue's mistake in proposal claim (enclosure 4 to the Navy's report) should be made a condition of Vogue's continued participation in the procurement. That is, the Navy should advise Vogue that it intends to release this information to TM; if Vogue is unwilling to promptly agree to this, its proposal should be eliminated from consideration, and an award made to TM based on its best and final offer of January 14, 1976.

If Vogue agrees to the release of its mistake in proposal claim, this information should be provided to TM. The Navy should then, after a reasonably brief interval, obtain one additional round of best and final offers from both offerors and proceed with an award.

The objective of our recommendation is to attempt to place the offerors in the relatively equal competitive positions they should have occupied prior to the submission of best and final offers on January 14, 1976. Accordingly, we do not believe it is either necessary or desirable to disclose to the offerors the prices or any other information contained in their best and final offers submitted on January 14, 1976.

We understand that the Navy has an urgent requirement for the supplies being procured here. However, we think the foregoing recommendation can be carried out without any undue delay. Both offerors are well apprised of the overall procurement situation. It should be possible to carry out the recommendation and make an award within a matter of days.

By letter of today, we are advising the Secretary of the Navy of our recommendation.

To the extent indicated above, the protest is sustained.

R. F. Keller

Deputy Comptroller General
of the United States