

**DECISION**



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

*Siegel  
PL-11*

*7604*

FILE: B-190719

DATE: September 11, 1978

MATTER OF: Applied Control Technology

**DIGEST:**

1. Contracting officer's request for a new preaward survey after receipt of proposals, although a prior preaward survey had previously been made on canceled IFB, was not improper. Determination of responsibility should be made on basis of information made available as closely as practicable to contract award.
2. Determination by contracting officer that small business concern failed to demonstrate its responsibility will not be questioned unless it is unreasonable.
3. Contracting officer's use of urgency exception to Certificate of Competency procedure, as provided by Armed Services Procurement Regulation § 1-750.4 (c)(iv), is sustained. 1977 amendments to Small Business Act which limits use of urgency exception is still under consideration and implementing regulations have not been issued.
4. Allegation that solicitation included data allegedly proprietary to protester is untimely and will not be considered where filed after closing date for receipt of proposals.
5. Where written record does not show evidence of unfair treatment of protester by agency officials, protester's bare allegation does not meet burden of proof.

6. Proposal preparation costs may be recoverable when it is shown that the Government's arbitrary and capricious action denied the claimant fair and honest consideration of its proposal. No such grounds are found in this protest.
7. Claims for damages and recovery of lost profits are not recoverable against Government by an unsuccessful bidder.

Applied Control Technology (ACT) protests the award of a contract under Request for Proposals N00123-77-R-1612 issued August 9, 1977, by the Navy Regional Procurement Office (NRPO), Long Beach, California for several Mobile Land Targets (MLT). The bases for Act's protest are:

- (1) the Navy's failure to find ACT financially responsible;
- (2) the Navy's determination regarding the urgency of the award;
- (3) the Navy's revealing of ACT's proprietary concepts; and
- (4) the conduct of Government personnel.

This requirement was initially solicited under formal advertising and ACT was the low bidder. A preaward survey was made of ACT which resulted in an initial negative recommendation but, upon reevaluation, a "Complete Award" was recommended. However, before award, ACT questioned whether the specifications were complete and described the minimum needs of the Government. The Navy concluded that the specifications were not adequate for formal advertising and canceled the solicitation.

Subsequently, MRPO issued the instant solicitation as a negotiated procurement. After ACT's proposal was received and evaluated, another preaward survey was requested. This survey recommended no award be made to ACT, because ACT had not affirmatively demonstrated that it had the financial capability to perform the proposed procurement on a timely basis. During the preaward survey, the sole proprietor of ACT was requested to furnish needed financial information. He failed to do so by the time the survey was completed and the award was made.

When ACT did not respond and because of other perceived deficiencies, the contracting officer concluded that award should be made to the second low offeror, Sandaire Incorporated, without delay and without referral of ACT's nonresponsibility to the Small Business Administration (SBA) for processing under the Certificate of Competency (COC) procedures. In accordance with Armed Services Procurement Regulation (ASPR) § 1-705.4, which provides that SBA's COC procedures need not be followed when the procurement is urgent, the contracting officer's proposed action was approved by higher authority within the agency, and SBA was notified of the circumstances, including the award to Sandaire.

Regarding the issue of ACT's financial responsibility, ACT first contends that because it received a favorable award recommendation as a result of the preaward survey for the earlier procurement, it was unreasonable to request another preaward survey on the second solicitation. While it is true that a preaward survey was made in connection with the initial solicitation which was canceled, that survey was performed several months prior to the survey requested for the instant proposal.

We have held that the contracting officer should not base his determination of responsibility on "stale" information, but on information made available as closely as practicable to the contract award. Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365; 53 Comp. Gen. 344 (1973). Accordingly, the contracting officer was justified in requesting the second preaward survey.

ACT contends that even if the second pre-award survey was proper, the contracting officer had no basis for finding that ACT was nonresponsible. ACT argues that it adequately demonstrated that it had sufficient capacity and finances to execute the contract.

The contracting officer disagreed. He found that ACT had demonstrated neither a performance history; sufficient resources to fund the project internally (which would necessitate progress payments); suitable accounting system to track any progress payments; sufficient tools and test equipment; sufficient facilities; payroll structure to handle additional needed employees; nor sufficient funding even if progress payments were available. While he had evidence that ACT intended to and may have been able to overcome these deficiencies after contract award, the contracting officer found that he could not assume such a risk in light of the solicitation's delivery requirements and the Navy's urgent need for the MLT's.

ACT also challenges whether, in fact, there was an urgent need for the MLT's which precluded the Navy from allowing ACT to establish its responsibility. We note initially that for the majority of reasons why the Navy found ACT to be nonresponsible, ACT had offered to cure the deficiencies only after the contract was awarded. Accordingly, such deficiencies as lack of

accounting system, lack of facilities, insufficient number of employees, and insufficient tools and test equipment would not have been affected by the timing of the award. In any event, the record shows that the Navy was literally running out of MLT's and that it needed a guaranteed delivery date of February 18, 1978 in order not to jeopardize naval aviator proficiency training. In order to meet such a delivery date, the contract had to have been awarded no later than November 18, 1977. (The contract was awarded on November 17, 1977.) We have no basis to disagree with the urgency determination or the timing of the award.

Finally, ACT argues that even if the award were urgent, the Navy gave ACT no notice of that fact, and, because of prior delays, ACT had every reason to believe that no such urgency existed. We do not find ACT's arguments to be persuasive.

The only deficiency which ACT intended and attempted to remedy prior to award was the insufficiency of required funding. (The financial commitments sought by the Navy did not reach the contracting officer until after award). Assuming ACT's demonstrating the necessary finances to complete the contract would have resulted in the contracting officer's finding ACT to be responsible, the record shows that the Navy made repeated attempts to secure this information prior to ACT's proposal acceptance expiration date of November 8, 1977. Although ACT contends that it did not believe the information was urgently required, we do not see how ACT could reasonably risk the Navy's not making an award on or prior to November 8, 1977.

In view of the evidence supporting the deficiencies found with respect to ACT's responsibility, and the urgency of making award, we cannot find that the contracting officer acted unreasonably in determining that ACT was nonresponsible. 45 Comp. Gen. 4 (1965); Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127.

We note, however, that Section 501 of the Small Business Act Amendments of 1977, Pub. L. 95-89, 91 Stat. 557, effective August 4, 1977, provides that no small business concern may be precluded from award because of responsibility without referral of the matter to SBA for a final disposition under the COC procedures. Thus, there is an apparent conflict between the terms of the Small Business Act, which makes no exception for urgency as a ground for not referring the question of ACT's responsibility to the SBA, and ASPR § 1-705.4, which does.

We have been advised that SBA is still considering the implementation of Section 501. Until appropriate implementing regulations are issued, this Office is unable to consider the actions of contracting officers who have relied on the provisions of ASPR § 1-705.4 grounds for overturning an award of a contract. X-Tyal International Corp., B-190101, March 30, 1978, 78-1 CPD 248.

ACT contends that the request for proposals contained proprietary information which ACT had supplied in its response to the canceled IFB. Our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1) (1977), provide that protests based on alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals shall be filed prior to such closing date. ACT's protest is against an alleged impropriety which was apparent from the solicitation; therefore, it had to be filed prior to September 9, 1977, the proposal closing date, Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120. Since ACT did not protest the alleged inclusion of proprietary data to this Office until September 18, 1977, the protest is untimely. Francis & Jackson, Associates, B-190023, January 31, 1978, 78-1 CPD 79.

Act has alleged that Government officials conducted themselves improperly regarding the procurement in question, which conduct demonstrated the Navy's prejudice Against ACT.

Initially, ACT contends that the procurement was not conducted fast enough to keep ACT's offer from expiring. (ACT also alleged improprieties with respect to the earlier canceled procurement and subsequent to the Navy's award of the contract. Even if proven, they would have no necessary bearing on the instant solicitation.) Even if Navy personnel could have acted faster in awarding the contract, we do not see how ACT was prejudiced. The circumstances of the case indicate that the Navy never intended, nor did it in fact, rely on ACT's proposal expiration as the basis for finding ACT ineligible for award. Had the Navy done so, it would not have relied on its finding that ACT was nonresponsible in order to justify its award to the next lowest priced offeror.

Second, ACT cites a Navy letter dated September 1, 1977 as demonstrating the Navy's "demeaning, haughty, and misleading" conduct toward ACT. The protester, however, has not made this letter a part of the written record; accordingly, we are unable to consider whether such letter is probative of ACT's allegation.

ACT also claims proposal preparation costs as well as expenses in this proceeding and lost profits.

With regard to ACT's claim for preparation costs, bid or proposal preparation costs may be recoverable when it is shown that the Government's arbitrary and capricious action towards a claimant has denied the claimant fair and honest consideration of its bid or proposal. Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215. We see no evidence of arbitrary and capricious action.

Concerning ACT's claim for damages and recovery of anticipated profits, there is no legal basis for allowing any unsuccessful bidder to recover such items.

Finally, ACT alleged that the contract awarded to Sandaire was materially different from the one for which competition was held. However, ACT has not specified what the alleged difference is. Therefore, we have no basis on which to question the award. Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1.

Accordingly, ACT's protest and claims are denied.

*R. Z. K. 11a*  
Deputy Comptroller General  
of the United States