

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

26407

FILE: B-208694; B-208694.2 **DATE:** September 29, 1983**MATTER OF:** Crown Point Coachworks and R&D Composite
Structures; North American Racing
Company**DIGEST:**

1. Protests concerning alleged solicitation improprieties which are apparent prior to the closing date for receipt of proposals are untimely under GAO Bid Protest Procedures which require protests based upon alleged solicitation improprieties that are apparent prior to the closing date to be filed before that date and alleged improprieties which do not exist in the initial solicitation that are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals.
2. Protesters have not met their burden of proof where allegations that awardee had access to inside information and was treated preferentially are based solely on speculative statements.
3. Request for second round of best and final offers and agency decision not to call for a third round of best and final offers are not objectionable where valid reasons exist for action.
4. Selection of evaluators is within the contracting agency's discretion and, therefore, GAO will not generally object to the composition of the evaluation panel.
5. Protest of technical evaluation of proposals is denied where protesters have not shown evaluation to be unreasonable or arbitrary.
6. Protest challenging capability of awardee to perform contract relates to matter of responsibility which will not be reviewed absent a showing that the contracting agency acted fraudulently or in bad faith.

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Crown Point Coachworks and R&D Composite Structures (Crown Point) and North American Racing Company (North American) protest the award of a contract to Emerson Electric Company (Emerson) under request for proposals (RFP) No. DAAE07-82-R-4067 issued by the Department of the Army, Tank-Automotive Command (TACOM). The contract was for the 1-year lease of 80 dune buggies with a 1-year option and an option to increase the quantity. The dune buggies were to be used in the testing and evaluation of a new ultralight weapons carrier labeled the fast attack vehicle (FAV).

The RFP was issued on July 2, 1982, with July 16, 1982, as the closing date for receipt of proposals. Seven proposals were received and five were determined to be in the competitive range. Discussions were conducted and best and final offers were due by August 10, 1982. Because the contracting officer believed that Emerson was misled by a contract negotiator in the course of negotiations, it was determined to be in the government's best interests to reopen negotiations. Following a second round of best and final offers on August 17, 1982, award was made on August 18, 1982, to Emerson, which scored the highest technically and offered the lowest evaluated price.

We deny in part and dismiss in part the protests.

The RFP indicated that the Army wanted a lightweight, all terrain vehicle capable of high-speed, cross-country travel with high maneuverability and agility. The vehicle was envisioned as a weapons carrier/platform to provide antiarmor, reconnaissance, air defense, rear area combat operations and deep attack missions. The design fabrications, after market components and any modifications included, were required to have a proven history of performance and reliability in off-road racing competition.

The RFP stated that each proposal would be evaluated in the areas of technical and price, with technical being significantly more important than price. The technical area was further divided into three elements--vehicle performance and characteristics, test results and performance history, and technical and repair parts support. Within these elements, the RFP indicated that vehicle performance and characteristics was worth significantly more than test results and performance history, which in turn was accorded more weight than technical repair parts support. Numerical scores were assigned to the sub-subfactor level.

Timeliness

The Army contends that many of the allegations raised by both protesters are untimely since they involve the specifications and, as a result, should have been filed prior to the closing date for receipt of initial proposals. Both Crown Point and North American allege that the specifications were drafted by and around Emerson's "fun buggy" and were inadequate to meet the military mission and requirements. The protesters argue that the military standards and specifications utilized eliminated the most important state-of-the-art safety features that are standard items in off-road racing vehicles. Crown Point acknowledges that it recognized the specification deficiencies, but states that it hoped to obtain corrections and changes during the bidding process to remedy the deficiencies.

Our Bid Protest Procedures require that protests based upon alleged solicitation improprieties which are apparent prior to the closing date for receipt of initial proposals must be filed prior to that date. 4 C.F.R. § 21.2(b)(1) (1983). Both protests, initially raising these issues, were filed with our Office well after the closing date for receipt of initial proposals. Consequently, Crown Point's and North American's protests concerning the alleged deficiencies in the specifications are untimely and will not be considered. Q.S. Incorporated, B-203503, May 4, 1982, 82-1 CPD 417.

Also, we note that several other allegations raised by the protesters are untimely. Crown Point and North American have questioned the legality of the contracting officer's actions in requiring all offerors to spread cost and profits over a 2-year lease period when the actual contract was only for 1 year. Amendment 0002 made this change and required that the first year of the contract could not exceed 75 percent of the total contract cost. This change was made on July 29, 1982, and under our Bid Protest Procedures, any protest of this requirement should have been filed prior to the August 10, 1982, closing date for the receipt of the first round of best and final offers.

Further, North American's protest concerning the deletion of a requirement for the submission of a NATO Mobility Model with each proposal is untimely. Amendment 0002 deleted this requirement and any protest of this action

should also have been filed prior to the August 10 closing date for receipt of the first round of best and final offers.

Finally, we find the protesters' allegations that they were given insufficient time to prepare proposals and respond to the Army's requests for best and final offers and the allegation that the procurement should have been set aside for small business to also be untimely. Allegedly insufficient response time to prepare a proposal is a solicitation impropriety which must be filed prior to the closing date for receipt of initial proposals. Allegedly insufficient response time for best and final offers must be protested not later than the next closing date for receipt of proposals. Institute of Gerontology, University of Michigan, B-205164, March 3, 1982, 82-1 CPD 191. Also, it was apparent from the solicitation that the procurement was being conducted on an unrestricted basis. Any protest of this decision should have been filed prior to the closing date for receipt of initial proposals. Accordingly, these allegations are untimely and will not be considered on the merits.

Alleged Unequal Treatment

Both Crown Point and North American allege that Emerson was given preferential treatment through inside information concerning TACOM's plans to exercise the options, about the Army's future plans for the FAV concept, and advance knowledge of the specifications and award date. Further, it is alleged that Emerson had access to test evaluation data of preliminary tests of the FAV that the Army conducted at Fort Lewis, Washington. Also, both protesters complain that only the Emerson vehicle was included in that preliminary testing and that "offers by Crown Point and North American to supply their vehicles for comparative testing were summarily refused." Finally, both protesters question the contracting officer's decision to call for a second round of best and final offers and relax the delivery schedule requirements after Emerson submitted a best and final offer which did not conform to the initial delivery requirements. Crown Point also protests the contracting officer's refusal to call for a third round of best and final offers because of its own confusion over the delivery schedule changes that were made.

In response, the Army claims that it was careful to treat all offerors alike and at no time was Emerson provided any inside information during the procurement process. The Army acknowledges that Emerson may have had access to certain information from the Fort Lewis test site; however, any such information would have been obtained in accordance with the terms of a preexisting agreement that the Army had with Emerson. With respect to the testing of the protesters' vehicles, the Army contends that there was no existing methodology for evaluating such tests and that the urgency of the procurement did not permit additional testing.

The Army claims that it was in the government's best interests to conduct a second round of negotiations. Apparently, Emerson was asked to submit a proposal with "their" best delivery dates rather than the delivery dates required in the solicitation. The Army argues that, in order to ensure fairness and equal treatment for all offerors, it was decided to reopen negotiations. At that time, the Army also decided to obtain the most lenient delivery dates possible and use that delivery schedule for the second round of best and final offers. The Army states that all offerors were notified by telephone, with a confirming teletype, of the request for a second round of best and final offers, the change in the delivery schedule and other minor changes. Finally, the Army states that it did not know that Crown Point was confused by the new delivery dates and had no reason to believe a third round of best and final offers was necessary.

It is well established that the protester has the burden of affirmatively proving its case and that our Office will not conduct investigations to establish the validity of a protester's speculative statements. Louis Berger & Associates, Inc., B-208502, March 1, 1983, 83-1 CPD 195. Where conflicting statements of the protester and the contracting agency constitute the only available evidence, the protester has not met this burden. Arsco International, B-202607, July 17, 1981, 81-2 CPD 46. There is nothing in the record to substantiate the protesters' speculative statements that Emerson was given inside information about the FAV procurement or that Emerson was given advance notice of the award date. Further, we note that the protesters have no basis for complaint regarding information Emerson may have obtained from the Fort Lewis test site. The Army had leased two dune buggies from Chenoweth, an Emerson

subcontractor, and under the terms of the contract, Chenoweth was present during portions of the testing at Fort Lewis. Any information Chenoweth received was obtained in accordance with the terms of that agreement. In these circumstances, we believe that the protesters have failed to meet their burden of affirmatively proving their allegations.

We recognize that there is some evidence which indicates that Emerson may have assisted the Army in developing the specifications. However, since this argument is based on the specifications in the solicitation, this protest ground concerns an impropriety apparent from the face of the solicitation which was untimely filed. In any event, we note that a specification written around a particular product is not in and of itself improper as long as the agency establishes that the specification is reasonably related to its minimum needs. Amray, Inc., B-208308, January 17, 1983, 83-1 CPD 43.

Finally, we reject the protester's argument that the Army acted improperly in not performing comparative tests between the Emerson vehicle and the protesters' vehicles. The Army's testing of the two dune buggies supplied by Chenoweth was performed under a separate agreement. Therefore, any advantage Emerson may have gained in this procurement was not improper. Further, given the urgency of the procurement and the fact that the solicitation made no provision for the comparative testing of different vehicles, we cannot find that the Army acted improperly in refusing to test additional vehicles.

With respect to the reopening of negotiations, our Office has held that, after negotiations and best and final offers, negotiations should not be reopened unless it is clearly within the best interests of the Government. ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. We have upheld agency determinations to request a second round of best and final offers when a valid reason exists for the action. Tymnet, Inc., GTE Telenet Communications Corporation, B-209617, B-209617.2, April 12, 1983, 83-1 CPD 384. Both protesters allege that the contracting officer requested a second round of best and final offers in order to change the delivery requirements and permit the Army to accept Emerson's nonconforming proposal.

On the record before us, we cannot find that the decision to reopen negotiations was arbitrary or without a reasonable basis. The contracting officer determined that a second round of best and final offers was in the government's best interests and was necessary in order to ensure the fair and equal treatment of all offerors. We view this action as falling within the permissible grounds of discretion.

Similarly, we find that the contracting officer acted within his discretion in deciding not to call for a third round of best and final offers. Crown Point argues that it was confused by the new delivery requirements and could have substantially lowered its price if it had taken into account the Army's new schedule. We note that all offerors were orally given the same information concerning the changes made in the delivery schedule and that written verification followed. We are unable to conclude that the Army knew or should have known that Crown Point had misunderstood the new requirement. In any event, it is up to the contracting agency to decide when the negotiation and offer stage of a procurement will end so that a firm has no legal right to insist that negotiations be reopened after best and final offers are submitted. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, December 23, 1982, 82-2 CPD 571. We cannot find that the Army abused its discretion by failing to call for a third round of best and final offers.

Technical Evaluation of Proposals

Crown Point and North American raise several questions concerning the evaluation of their proposals. Both protesters allege that the evaluation team was incompetent and inexperienced. Crown Point contends that the Army improperly judged its proposal to be in nonconformance with the specifications. North American also disputes the Army's finding that its proposal was deficient in certain areas and cites five specific areas where it felt its proposal was improperly evaluated. Also, both protesters allege that the Emerson vehicle is technically inferior and contend that they should have been given additional points in areas where they exceeded the specifications.

This Office has consistently held that the composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object to the panel

makeup in the absence of evidence of fraud, bad faith, conflict of interest or actual bias. Westec Services Inc., B-204871, March 19, 1982, 82-1 CPD 257. The Army indicates that the evaluation board was comprised of individuals with extensive tank-automotive experience. There is no evidence to indicate that any member of the evaluation board was not qualified or that any evaluator failed to exercise independent judgment in his or her evaluation of proposals.

With regard to the protesters' contentions that their technical proposals were not evaluated fairly, we have held that it is the evaluators' function, not this Office's, to determine the relative merits of technical proposals, and they have considerable discretion in making that determination. Therefore, we will not question an agency's technical evaluation unless the protester shows that the agency's judgment lacked a reasonable basis, was an abuse of discretion, or otherwise was in violation of procurement statutes or regulations. Centurion Films, Inc., B-205570, March 25, 1982, 82-1 CPD 285; Art Services and Publications, Incorporated, B-206523, June 16, 1982, 82-1 CPD 595.

The Army indicates that Emerson met or exceeded all of the performance requirements and that both Crown Point and North American met or exceeded most performance requirements. However, Crown Point failed to meet the physical dimension criteria, wheel travel requirements and did not propose to mount all instruments on the dash as was required. North American did not meet the physical dimension criteria for the vehicle, failed to comply with the angle of approach for the vehicle required by the specification, failed to provide a list of high-risk and long lead-time items and, in the Army's view, only offered rearsway control as an option.

We find no basis for concluding that the Army's overall evaluation of proposals was arbitrary or otherwise inconsistent with the stated evaluation criteria. Our review of the record indicates that both Crown Point and North American were scored lower for failing to satisfy well-defined specification requirements that were clearly set forth in the RFP. Although both firms question the RFP requirements, we have no legal basis to question the Army's judgment at this juncture. The specifications were apparent on the face of the solicitation and any objections to the basic RFP requirements at this time are untimely. 4 C.F.R. § 21.2(b)(1) (1983).

With respect to the protesters' argument that they should have been awarded additional points, we note that it is not the function of our Office to rescore proposals. We will not make independent judgments as to the numerical scores that should have been assigned. Blurton, Banks and Associates, Inc., B-206429, September 20, 1982, 82-2 CPD 238. Rather, we limit our review to an examination of whether the procuring agency's evaluation of proposals was in accordance with the listed evaluation criteria. Id.

In this regard, as noted above, the evaluation criteria indicated that each proposal would be evaluated in two major areas, technical and price, with technical being significantly more important than price. The technical area was further subdivided and numerical scores were assigned to the subfactor level. Our review of the record indicates that the Army, in fact, did follow this evaluation scheme. Although the protesters argue that they should have received a higher point score for certain aspects of their proposals, the Army indicates that it did not award additional points where a proposal exceeded the requirements of the specification. The fact that the protesters disagree with the scoring of their proposals does not establish that the evaluation had no reasonable basis. Diversified Data Corporation, B-204969, August 18, 1982, 82-2 CPD 146; RDW Systems, Inc., B-204707, July 20, 1982, 82-2 CPD 61. Based on the record, we cannot find that the Army evaluation lacked a reasonable basis and, accordingly, this protest ground is denied.

Responsibility of Emerson

Both protesters have alleged that Emerson does not meet the experience criteria of the RFP in that the Emerson vehicle has not been produced and sold in the marketplace for 1 year. It is alleged that Emerson will be unable to meet the delivery schedule and that Emerson's proposal price is so unrealistically low that the Army should have rejected the proposal under section M.3.1 of the RFP, which states that any proposal which is unrealistically high or low will be deemed reflective of an inherent lack of technical competence or indicative of a failure to comprehend the complexity and risks of the borrower's requirements.

The Army states that Emerson did offer to furnish a vehicle which has been produced and sold in the marketplace for 1 year and that it believes Emerson's price to be fair and certainly not so low as to be deemed reflective of an inherent lack of technical competence. We find no basis to question the Army's determinations in these matters and, accordingly, the protesters have failed to meet their burden of proof on these issues.

With regard to Emerson's ability to perform the contract, the Army indicates that a preaward survey was conducted and that Emerson was determined to be a responsible offeror. This allegation relates to responsibility which will not be reviewed by our Office absent a showing that the contracting officer acted fraudulently or in bad faith. Educational Technology & Services, Inc., B-211231, April 22, 1983, 83-1 CPD 449. It is not alleged that either exception is present here and, accordingly, we have no basis for reviewing this matter.

The protests are denied in part and dismissed in part.

for 
Comptroller General
of the United States