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

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November 26, 1973

B-179446

Don Lee Electronics Company, Incorporated
c/o Haas and Hajarian
Attorneys at Law
451 Jackson Street
San Francisco, California 94111

Attention: Louis H. Haas, Esquire

Gentlemen:

Reference is made to your letters of August 10, 1973, and September 21, 1973, protesting against the rejection of the technical proposal submitted jointly by you and another concern under step one of a two-step procurement under invitation for bids (IFB) No. N66314-73-D-1404, request for technical proposals, issued on February 14, 1973, by the Navy Regional Procurement Office (NRPO) Oakland, California. The procurement is for a Centrally Controlled Interconnection System (CCIS) which is to be installed and interfaced with the Combat Systems Maintenance Training Facility now under construction at the Mare Island Naval Shipyard, Vallejo, California. In addition you have submitted a claim for \$20,000 on the basis that your proposal was not fairly considered by the procuring activity. For the reasons stated below we conclude that your protest is untimely and with respect to your claim, we must decline to consider it.

As background, the Request for Technical Proposals (RTP) for step one issued on February 14, 1973, encouraged offerors to submit multiple technical proposals presenting different approaches. Prospective offerors were advised that upon final determination by the Government as to the acceptability of the technical proposals received, the IFB would be issued to those firms submitting acceptable technical proposals and that the bids to the second step must be based on the bidder's own technical proposal. The RTP stated that a pre-technical proposal conference would be held on March 7, 1973, to explain the CCIS specifications and requirements. Offerors were asked to submit in writing, any questions regarding the specifications and requirements at least seven days prior to the pre-technical proposal conference. Offerors were further advised that the questions would be discussed at the conference and that individual replies would not be made. Four attachments were appended to the RTP including: (1) a Description of the Supplies/Services and Instructions and Information for Offerors; (2) a Development Specification for the

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[Protest of Technical Proposal Rejection]

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B-179446

CCIS; (3) the Requirements for Technical Proposals; and (4) Criteria For Evaluation of Technical and Management Proposals. Attachment (4) included 15 criteria for evaluation of technical proposals and 7 criteria for evaluation of management proposals. Offerors were informed that technical proposals would be given 75 percent weight and that management proposals would be given 25 percent weight.

The pre-technical proposal conference was held as scheduled on March 7, 1973, and a number of questions relating to the specifications were discussed at the conference. Amendment 0002 dated March 15, 1973, addressed these questions and other matters.

Four concerns, including yours', submitted proposals by the closing date for receipt of technical proposals on April 9, 1973. One of your technical/management proposals was referred to as Proposal A and the other as Proposal B. On May 7, 1973, the Naval Electronics Systems Command, Western Division (WESTNAVELEX) which is the cognizant technical activity, forwarded comments to NRPO, concerning the evaluation of proposals. Your Proposal B was rated as unacceptable. Your Proposal A was rated as "not satisfactory" in both the management and technical aspects. The comments concerning Proposal B were that your management proposal did not address certain paragraphs of the requirements section (attachment 3 to the RTP) and that your technical proposal was incomplete and misleading in a number of instances, and you were so informed in a letter of May 18, 1973. By letter of May 17, 1973, the contracting officer advised you that your Proposal A had been categorized as "reasonably susceptible of being made acceptable by additional information clarifying or supplementing, but not basically changing the proposal submitted." The letter then listed the supplemental information and explanations that were required in the management and technical areas of your proposal before the review of your proposal could be completed. The deadline for the receipt of the supplemental information was June 6, 1973. Meanwhile, on June 1, 1973, a meeting was held at NRPO with your representatives to discuss the various problem areas of your Proposal A. The Navy reports that discussions were also held with the other offerors submitting proposals which were categorized as reasonably susceptible of being made acceptable.

The following is a summary computed by WESTNAVELEX of the final evaluation scores of all offerors based on the evaluation factors in attachment 4 to the RTP:

B-179446

	<u>Management</u>	<u>Technical</u>	<u>Total</u>
Bidder A: (1)	24.2	73	97.2
(2)	24.7	73.5	98.2
Bidder B:	24.6	71.5	96.1
Bidder C:	24.1	68.5	92.6
Bidder D: (Don Lee)	20.5	58.25	78.75

After the evaluation of all the revised technical proposals the contracting officer and the Contract Review Board determined on July 9, 1973, that your revised proposal was unacceptable and that in view of your low technical merit score, further discussions with you would not be feasible. It was further determined that there were sufficient acceptable proposals to assure adequate price competition under step two and that the time and effort to make additional proposals acceptable was not in the best interests of the Government because of the urgency of procuring and installing the CCIS in the Combat Systems Maintenance Training Facility. The procuring activity relied on Armed Services Procurement Regulation (ASPR) 2-503.1(e) as the legal authority for this determination. We have been advised that bids under step two were opened as scheduled on September 14, 1973.

By letter of July 9, 1973, you were advised that your proposal as revised on June 6, 1973, had been categorized as unacceptable and that further revisions would not be considered. The Navy reports that while the letter to you was in general terms with respect to the deficiencies in your proposal, the contracting officer would have been willing to meet with you to point out the deficiencies which made your proposal unacceptable. Apparently you did not notify the contracting officer that you were dissatisfied with the rejection letter.

The record indicates that subsequent to the rejection notice you met with a WESTNAVELEX representative on July 26, 1973, to discuss the rejection of your proposal. You apparently indicated that you intended to protest the rejection of your proposal and you were advised that any such protest should be filed with NRPO, the contracting activity. About the same time you had a telephone conversation with another individual at WESTNAVELEX to set up a meeting with a Captain Feit. You were advised on July 30, 1973, that while Captain Feit would meet with you, he could not discuss the subject procurement with your representatives and that any such discussions would have to be with NRPO. Apparently you had no further contact with either WESTNAVELEX or NRPO, nor did you file any protest until your letter of August 10, 1973, to our Office, which was received on August 31, 1973.

B-179446

First you have protested the adequacy of the specifications in the solicitation contending that they were misleading and confusing. Since any alleged improprieties in the specifications should have been apparent prior to the closing date for receipt of technical proposals under step one, we consider your protest against such improprieties at this time untimely. See section 20.2 of our Interim Bid Protest Procedures and Standards, and 52 Comp. Gen. 184, 188 (1972). Furthermore, the proper time for resolving this type of objection would have been at the pre-technical proposal conference referred to above, which was designed for such purpose.

The second aspect of your protest concerns the rejection of your proposal as unacceptable. In this regard, you have offered rebuttal arguments to the technical deficiencies found in your proposal by Navy. In addition, you have anticipated that your protest on this issue may not be considered timely. In this regard, you argue that since notice of the rejection on July 9, 1973, you have been seeking clarification of the reasons for the rejection but that you did not pursue this with the contracting officer "because of the conclusive nature of the letter dated 9 July 73, and * * * past experience with the Procurement Office, which collectively established that further dialogue with administrative personnel would be futile." You assert that the timeliness standards regarding protests should be relaxed in two-step procurements in view of the complexities therein to give protesters the opportunity to "thoroughly exhaust all matters of protest with the procuring agency before protesting to GAO." You further assert that this is a case of "good cause shown" since you continued to pursue the matter with the procuring activity and consideration of your protest at this time would not be prejudicial to the Government or the other offerors. In this regard, you have cited 43 Comp. Gen. 255 (1963). Finally, you have asserted that inducing an offeror to revise its proposal when the agency knew or had reason to know that the revised proposal would not be seriously considered raises an issue significant to the procurement process.

Section 20.2 of our Interim Bid Protest Procedures and Standards, supra, provides:

" * * * In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse

B-179446

agency action will be considered provided the initial protest to the agency was made timely * * *.

"(b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

It is our view that the basis for protest became known as of the date you received the letter of July 9, 1973, advising that your proposal was rejected as unacceptable. We believe that the "conclusive nature" of the rejection of your proposal was reasonable notice that any attempt to administratively resolve the matter, particularly by contacting personnel unrelated to the cognizant procuring activity, would be futile. Since you did not protest to either the cognizant procuring activity or to our Office until over a month after you were advised of the basis for protest, your protest is untimely. See B-177592, May 16, 1973. Furthermore, even if we consider your contacts with personnel at WESTNAVELEX for the purpose of obtaining explanations and information as to the basis for rejecting your proposals as a timely protest to the contracting agency, your protest to our Office was not filed within 5 days after being advised that Captain Feit would not discuss the subject procurement and was therefore untimely. Section 20.2, Interim Bid Protest Procedures and Standards, supra. Finally, we find no basis for making a special exception to the timeliness requirement in this type of case since the technical problems related to the rejection of a proposal under step one of a two-step procurement are no greater than in negotiated procurement where no such exception applies. B-177592, supra.

"Good cause shown" generally refers to some compelling reason beyond the protester's control which has prevented him from filing a timely protest. See 52 Comp. Gen. 20, 23 (1972). You have not offered any reason as to why you did not protest within five days after the basis for your protest became known, except that you wished to pursue the matter with WESTNAVELEX personnel. We do not consider this to be sufficient to meet the criteria where, as in this case, there is no reasonable basis to assume that this would serve any useful purpose.

In 43 Comp. Gen. 255, supra, cited by you, an agency rejected a proposal as unacceptable but failed to give prompt notice of this

determination to the offeror. Upon being advised of the unacceptability of its proposal after the closing date for receipt of revisions, the offeror nevertheless submitted an amendment making its proposal acceptable prior to opening of the step two bids. Since the agency's failure to give prompt notice of the rejection was found to be the prime factor which prevented the company from submitting its revisions in a timely manner, we found no objection to considering the revisions even after the date set for submitting such revisions. In our view, the instant case is not one where some agency action prevented you from protesting in a timely manner; therefore, we do not consider the cited case to be applicable here. At any rate, as noted above, your protest after the adverse action by WESTNAVLEX was not timely. Furthermore, considering that bids have now been opened and that any further delay would jeopardize the scheduled installation of the equipment upon completion of the facility at Vallejo, California, it cannot be said that consideration of your protest at this time would not be prejudicial to the other bidders or to the Government.

Finally, you have contended that the charge that you were in bad faith induced to submit a revised proposal comes within the exception to the timeliness rule as it is an "issue significant to procurement practices or procedures," citing section 20.2 (b) of our Interim Bid Protest Procedures and Standards, which we have interpreted as referring "to the presence of a principle of widespread interest." 52 Comp. Gen. 20, supra. For support of your charge of bad faith you refer to the letter of May 17, 1973, which you have categorized as a "conditional acceptance" and the meeting of June 1, 1973. You state that it was agreed at the meeting that your "serial" approach was "perfectly sound" and that your proposed project manager for the CCIS was "enthusiastically accepted."

The Navy's response is that while your project manager was listened to attentively, he was not "enthusiastically accepted"; that the "serial mode" proposed by you was considered an acceptable alternative if specification requirements such as the speed of transmission would be met; that it was stressed by Navy that the "ifs" had to be removed from your proposal; and that you were advised that "it was imperative that the specifications be met and that the quality indicated be achieved since it was expected that the system would be in use for at least 25 years." The Navy denies that it made any statements calculated to mislead you into believing that you would be assured of qualifying for step two.

ASPR 2-503.1 sets forth the procedures for evaluating technical proposals in a two-step procurement. Under the procedure set forth in ASPR 2-503.1(a) proposals under step one may be placed in one of three categories: (1) acceptable, (2) reasonably susceptible of being made acceptable, and (3) unacceptable. The record indicates that your proposal was initially placed in category (2) in good faith based on advice from WESTHAVELIX technical personnel that your proposal was "not satisfactory" in certain areas. Placing a proposal in category (2) is not a conditional acceptance as you contend, but merely indicates that in its present form the proposal cannot be definitely placed in either of the other two categories. The cited regulation provides for requesting additional information from the offeror for purpose of further evaluation. In this case, after acting in accordance with the procedure set forth in the regulation, it was determined based on an evaluation of the additional information furnished by you that your proposal should be categorized as unacceptable. Legally there is nothing to preclude the agency from determining your revised proposal unacceptable if after evaluation of your revisions it is determined that it does not conform to the essential requirements or specifications even though initially it was considered reasonably susceptible of being made acceptable. This constitutes an exercise of discretion which will not be questioned by our Office unless shown to be arbitrary, capricious or in bad faith. Based on our review, we do not find that the record supports the assertion that you were induced into submitting a proposal when the Navy knew or should have known that it would not be fairly considered. Consequently, insofar as you dispute the validity of the technical determination your protest is untimely and not therefore for consideration as an exception under the cited provision of our regulation as a "significant issue."

With respect to your claim for damages you have cited Neyer Products Co., Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956) and 177 F. Supp. 251 (Ct. Cl. 1959). While the courts have recognized that bidders or offerors are entitled to have their bids or proposals considered fairly and honestly for award, they have also held that any failure of the contracting agency in this regard would give rise to a cause of action by the aggrieved bidder or offeror to recover only preparation expenses. See Neyer Products Co., Inc. v. United States, *supra*; Keeco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); and Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971). Therefore, this Office could not allow a claim in the nature of anticipated profits.

B-177489, December 14, 1972.

B-179446

With regard to a claim for bid or proposal preparation expenses, standards and criteria to be applied in allowing such a claim have not been established to our knowledge. Accordingly, this Office must decline to attempt settlement of claims for preparation costs until appropriate standards or criteria are judicially established. See Longwill v. United States, 17 Ct. Cl. 283 (1881); Charles v. United States, 19 Ct. Cl. 316 (1884); E-179085, November 5, 1973 (53 Comp. Gen. _____).

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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