

P.L. I 45  
M. Hordell

**DECISION**



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

9106

FILE: B-192193

DATE: February 9, 1979

MATTER OF: Antenna Products Division, DHV, Inc.

847

DIGEST:

*[Protest of Contract Award and Claim For Proposal Preparation Costs]*

1. Protester is determined to have been diligent in initiating request for information regarding acceptability of another offer where that was done following revocation of stop order which had been issued to permit consideration of protester's original complaint that it was low offeror.
2. Offer of antenna supported by tower was in compliance with specifications notwithstanding specifications set forth design, bracing and preservation requirements for pole supports, since tower was alternative in specifications.
3. Where contracting agency provides opportunity to protester to provide information to make alternate proposal acceptable and protester does not take advantage of opportunity, protester was prejudiced by decision not to furnish information rather than by contracting agency.
4. Claim for proposal preparation costs is denied where it is not reasonably certain claimant would have received award, absent contracting agency's mistakes in conduct of procurement.

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DEC.

On January 17, 1978, request for technical proposals (RFTP) No. NOO189-78-RFTP-0117 was issued by the Department of the Navy, Naval Supply Center, Norfolk, Virginia (Navy), as the first step of a two-step advertised procurement. The RFTP solicited technical proposals for inverted cone antennas, type I and type II (which differ in their frequency range characteristic), with related first article test reports, interim repair parts and technical data.

Three firms on or before the March 10, 1978, closing date submitted proposals in response to the RFTP:

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- a. Technology for Communications International (TCI)
  - b. Antenna Products Division, DHV, Inc. (DHV)
  - c. Granger Products (Granger)

An evaluation of the proposals was conducted on April 5, 1978, which resulted in the determination that the TCI and DHV proposals were deemed "acceptable" while the Granger proposal was initially viewed as being "susceptible of being made acceptable." The latter determination was changed to "unacceptable" and is not an issue in the protest. The evaluation team, notwithstanding its "acceptable" ratings for TCI and DHV, had several unresolved technical questions pertaining to both proposals. However, it was the team's opinion that answers to the questions were not required.

Subsequently, the second step of the procurement was issued on May 8, 1978, to TCI and DHV. At bid opening, May 26, 1978, one bid from each company was read and recorded which resulted in an inquiry by DHV as to why its alternate bid was not read and recorded. Navy responded that it was unaware of an alternate proposal.

DHV's bid contained two pages numbered 12, the first labeled "ALTERNATE I (WOOD POLE SUPPORTS)" and the second "ALTERNATE II (HOT DIPPED GALV. STEEL SUPPORT STRUCTURE)." Also, there had been included in DHV's first step technical proposal a paragraph numbered 2.3.5, entitled "ALTERNATE SUPPORT," which referred to a drawing setting forth the Alternate II support approach. The paragraph provided:

"During the preparation of this proposal, it became obvious that it would be extremely costly to ship wooden poles to some parts of the World. Not only do the poles require extra length containers, but also the poles are heavy and bulky. Therefore, it was felt that an alternate support for the antenna consisting of 10 foot sections of steel tower would be appropriate. The 10 foot sections of tower are insulated to prevent pattern distortion.

"Figure 2-21, sheet 5 shows the alternate support. It is envisioned that it might be desirable to have both supports available and the Naval Supply Center could designate a support for a particular location."

Shortly after TCI reviewed DHV's second step bid, it filed with the Navy a protest that DHV's alternate proposal for steel towers was nonresponsive. Navy awarded the contract to TCI.

DHV filed a protest with our Office on June 20, 1978, questioning the award of the contract to TCI. DHV contended that both of its first step proposals were "fully accepted without qualification" by the Navy and that, since its bid on alternate II was the apparent low bid, TCI's contract should be canceled and the award made to DHV.

In addition, DHV objected to the Navy's August 2, 1978, telex which requested information to enable Navy to conduct what DHV characterized as a "technical re-evaluation" of the procurement. DHV argued that, because it was initiated after award, it "represent[ed] a blatant attempt by [Navy] to cover an obvious irregularity in procurement practices." The Navy telex provided:

"1. YOUR TECHNICAL PROPOSAL SUBMITTED IN RESPONSE TO REF (A) HAS BEEN EVALUATED IN ACCORDANCE WITH THE CRITERIA SET FORTH IN SECTIONS C AND D OF THE SOLICITATION (STEP ONE). THIS EVALUATION HAS RESULTED IN THE

DETERMINATION THAT YOUR FIRM SHOULD FURNISH A REVISION TO YOUR TECHNICAL PROPOSAL ADDRESSING THE FOLLOWING DEFICIENCIES:

"A. FAILURE TO FURNISH ECONOMIC TRADE-OFFS FOR INSTALLATION TOLERANCES AS WELL AS FAILURE TO COMMENT ON HOW THE ANTENNA PERFORMANCE WILL BE AFFECTED IN RELATION TO THE GRADING CRITERIA OF PLUS 3 FEET and 3 DEGREES.

"B. COMPUTER DATA FAILED TO INCLUDE GUY WIRE IN ITS ANALYSIS.

"C. FAILURE TO DEMONSTRATE HOW ANTENNA PERFORMANCE IS AFFECTED BY INSTALLATION TOLERANCES.

"D. FAILURE TO PROVIDE A SCHEDULING OR WORK FLOW SEQUENCE.

"E. FAILURE TO INDICATE POLE STEPS ON THE INSTALLATION DRAWINGS. CATENARY AND LATERAL CROSS BRACING GUY ATTACHMENTS TO WOODEN POLES ARE QUESTIONABLE IN AREAS OF TWIST, SLIPPAGE, AND RELIABILITY. WILL THESE ATTACHMENTS WITHSTAND 160 MPH WINDS? IF SLIPPAGE OCCURS, WHAT HAPPENS TO THE GALVANIZING BETWEEN THE TWO GALVANIZED RINGS? WHAT TYPE OF SEALANT PROTECTS THE JUNCTION FROM CORROSION? THE POLE EMBEDMENT DEPTH FOR 160 MPH WIND IS QUESTIONABLE.

"F. MORE PICTORIAL DATA IS NEEDED TO CLARIFY NODE AND MEMBER NUMBERS FOR A BETTER UNDERSTANDING OF COMPUTER DATA. THE STRUCTURAL ANALYSIS DID NOT INCLUDE GUY WIRES AND GROUND SCREEN.

"G. YOUR SUGGESTION TO USE METAL TOWERS VERSUS WOODEN POLES WAS SUPPORTED ONLY IN REGARD TO SHIPPING EASE. REQUEST YOU SUBMIT ALL DATA REQUIRED IN SECTION C OF THE RFTP TO FACILITATE EVALUATION OF YOUR PROPOSAL ASSUMING METAL POLES ARE USED AS THE ALTERNATE SUPPORT METHOD.

"2. PLEASE ADVISE IF CIRCUMSTANCES WILL PREVENT YOUR SUBMISSION OF INFORMATION BY 15 AUGUST 1978."

DHV refused to respond to Navy's telex because DHV was under the impression that "[the] questions were asked only for the purpose of attempting to discredit DHV after prices were revealed in Step Two." Also, DHV stated that there was "no indication that step two ha[d] been cancelled or step one reopened." Further, DHV argued that the Navy, even after being advised that DHV believed that the answering of the aforementioned questions was an academic exercise, would only offer DHV the "reassurance that this would result in a fair evaluation" and the information that a stop work order was being negotiated with TCI. DHV's refusal to respond was also based on its belief that 5 man-hour weeks would be required for a complete response. However, a later clarification (November 2, 1978) revealed that DHV could have responded to the aforementioned questions with respect to alternate II "in a matter of hours."

Finally, DHV advised that through counsel it filed a Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), request which resulted in DHV protesting that TCI's proposal was nonconforming to the RFTP. It is DHV's position that "TCI merely submitted its broadband monopole [antenna] configuration under the name of an 'inverted cone' in an effort to gain acceptance of its less costly nonconforming configuration." DHV contends that the issue, even though first raised on October 18, 1978, is timely.

A conference was held at our Office on November 2, 1978, during which the grounds for protest were clarified and set forth as follows:

- (1) Is DHV's protest concerning the technical acceptability of TCI's proposal timely filed with GAO?
- (2) Was TCI's proposal technically acceptable?
- (3) Were the Navy's actions in the instant procurement improper and/or prejudicial towards DHV?

Timeliness

It is TCI's position that the protest concerning the technical acceptability of TCI's proposal is untimely. TCI contends that the question before us is not "whether or not the [additional grounds of] protest had been filed within ten days of [receipt of the FOIA information]," but "whether a protestant can delay for well over a month (possibly over 2 months) requesting information which might provide him with a basis for protest and, thereafter, claim his protest is timely filed because it was filed within ten days after he received the requested information."

In our view, DHV was timely in filing the protest against TCI's acceptability. As TCI has observed, the protest was filed within 10 days after DHV received the information it requested under the FOIA. See 4 C.F.R. § 20.2(2) (1978). The question is whether DHV was diligent in initiating its request under the FOIA. In that regard, we note that DHV's original protest was that it was entitled to award as the low bidder. As a result of that protest, a stop work order was issued against TCI. DHV would not furnish the Navy with the information it requested while the stop order was outstanding because it believed that as low bidder it was entitled to an award without it. Not until the stop order was rescinded was its claim as low bidder effectively denied. Up until that time, there was a possibility that TCI's performance would not be reinstated. When it was reinstated, the acceptability of the higher bid of TCI became relevant.

We know that a notice of the rescission of the stop order was issued to TCI on August 29, 1978, and that by September 13, 1978, DHV had initiated the FOIA request to the Navy. We do not know whether the rescission notice was communicated to DHV on August 29, 1978, or whether DHV made the FOIA request before September 13, 1978. No one has contended that DHV did not act promptly to obtain the information on the acceptability of TCI's proposal once the stop order was revoked. Moreover, by the Navy's reconsideration of DHV's alternate proposal there was, in effect, a reopening of the Step 1 negotiations. Accordingly, it would have been inappropriate for the Navy to have released TCI's technical proposal to DHV had DHV made such a request at that time. See

DAR § 3-507.2 (1976 ed.). Therefore, we will consider the protest to have been diligently pursued.

Technical Acceptability

Section C 53 of the RFTP provided in pertinent part:

"2. The data requested in the following paragraphs are required to enable formulation of a computer model of the antenna design submitted in response to a Request for Technical Proposal (RFTP). These data will be used to construct a computer model from which the proposed antenna performance characteristics can be calculated as a function of the specified operating frequency range. Results of the computer model computations, together with other information submitted under the RFTP, will provide the basis for evaluation of the proposal. Data is required as follows and is to be provided in tabular form:

"(a) \* \* \* The components shall include but not necessarily be limited to the following types:

"(1) Intentional radiating elements (e.g., wires, tubes, surfaces, towers)

"(2) Support structure components including conducting elements, such as towers, guy wires, tubes, surfaces; and any non-conducting structure used to support the antenna, (e.g., guys, poles).

"(3) Transmission lines, either open wire or coaxial, which are internal to the antenna, or without which the antenna will not provide the desired performance.

"(4) Insulators

"(5) Ground screens (wire or other)

"(6) Lumped constants either R, L, or C; including those used for impedance matching at the feed point."

Paragraph 2 of RFTP section F set forth the performance specifications as follows:

"2.1 A complete antenna, exclusive only of concrete and reinforcing rods shall be supplied in kit form for Government installation. It shall include, but not be limited to tower(s), pole(s), array curtain, guys, anchors, ground radials, matching unit, connectors, and miscellaneous hardware as necessary to provide the following characteristics:

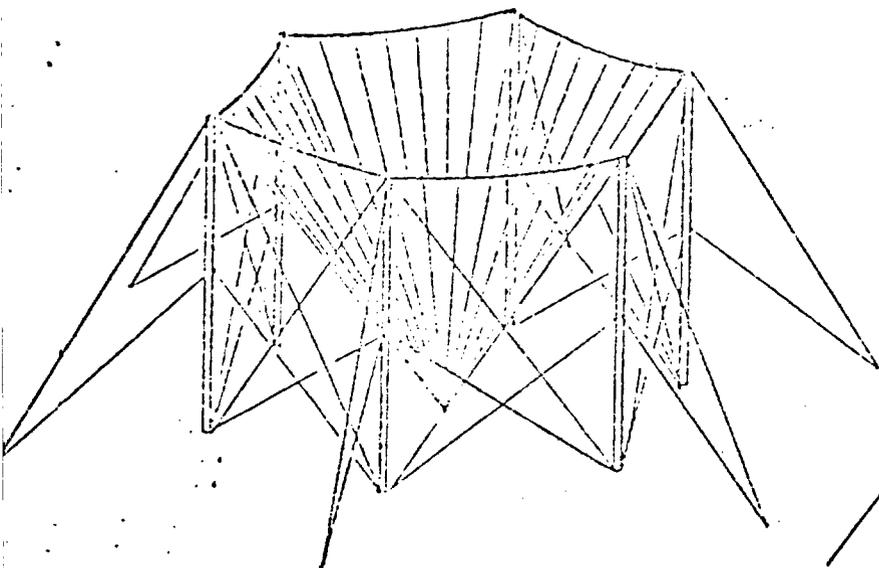
"Configuration:	Inverted cone
"Frequency Range:	Type I: 2 MHz to 30 MHz, minimum Type II: 2.5 MHz to 30 MHz, minimum
* * * * *	
"Azimuth Pattern	Omnidirectional with <u>+ 1 db</u>
"Ground System	A minimum of 60 radials, each 110 feet or longer, consisting of #10 AWG soft or medium drawn copper wire.
"Wind Load Capability (Per RS-222A)	160 MPH (minimum)
"Guys	Metallic
"Insulator Material	Ceramic
"Poles	Per all paragraphs of MIL-A-28766 with

Amendment #1, except for paragraph 3.2.6. Poles shall be designed for embedment in concrete, lateral cross bracing shall be supplied between the tops and bases of all adjacent poles. The preservative shall be Ammoniacal Copper Arsenate\* (ACA) as specified in AWPA P-5, in lieu of creosote Wooden poles shall not be spliced

"\*SUBJECT TO CHANGE"

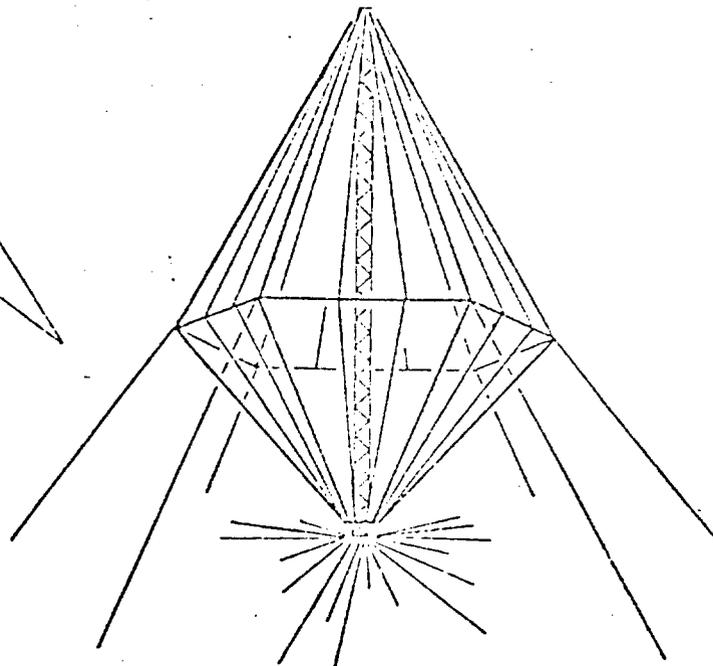
DHV contends that in order for an antenna configuration to be called an inverted cone antenna its apex and ground plane must be at the bottom and it must be supported by six poles on its perimeter with no support structure above the horizontal plane above the poles. DHV explains:

"In the 1960's there were two basic types of broadband omnidirectional antennas used for HF [high frequency] communications. These were classically called the inverted cone antenna [Figure 1], which was supported by six poles on the perimeter, and the conical monopole antenna [Figure 2], which was supported by a single center support pole. In the 1970's, as the state of the art of antenna design has improved, manufacturers have extrapolated from those basic antenna configurations to satisfy the requirements of different customers. These new configurations have taken on their own generic names such as monocone antenna [Figure 3] and the broadband monopole antenna [Figure 4]."



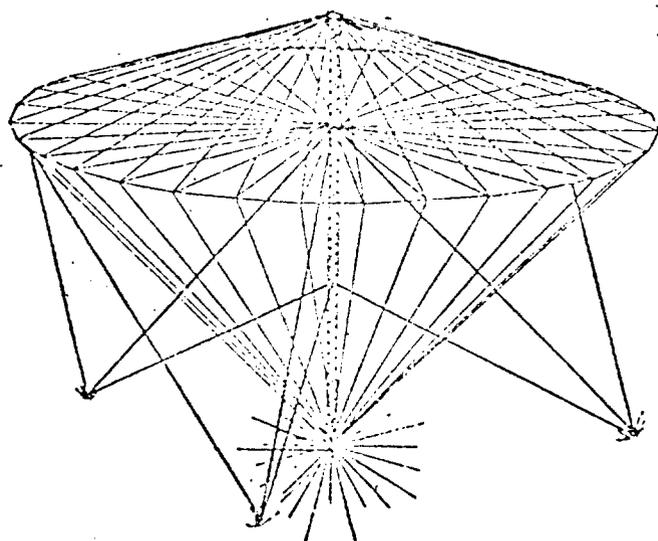
INVERTED CONE

FIGURE 1



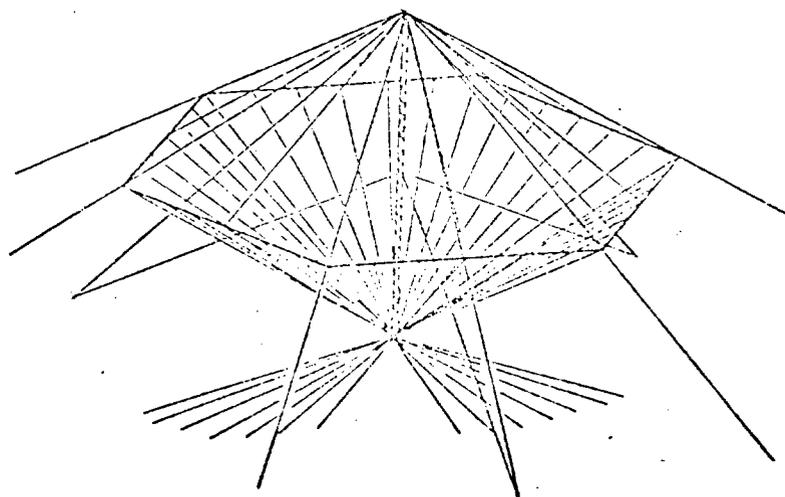
CONICAL MONOPOLE

FIGURE 2



MONO CONE

FIGURE 3



BROADBAND MONOPOLE

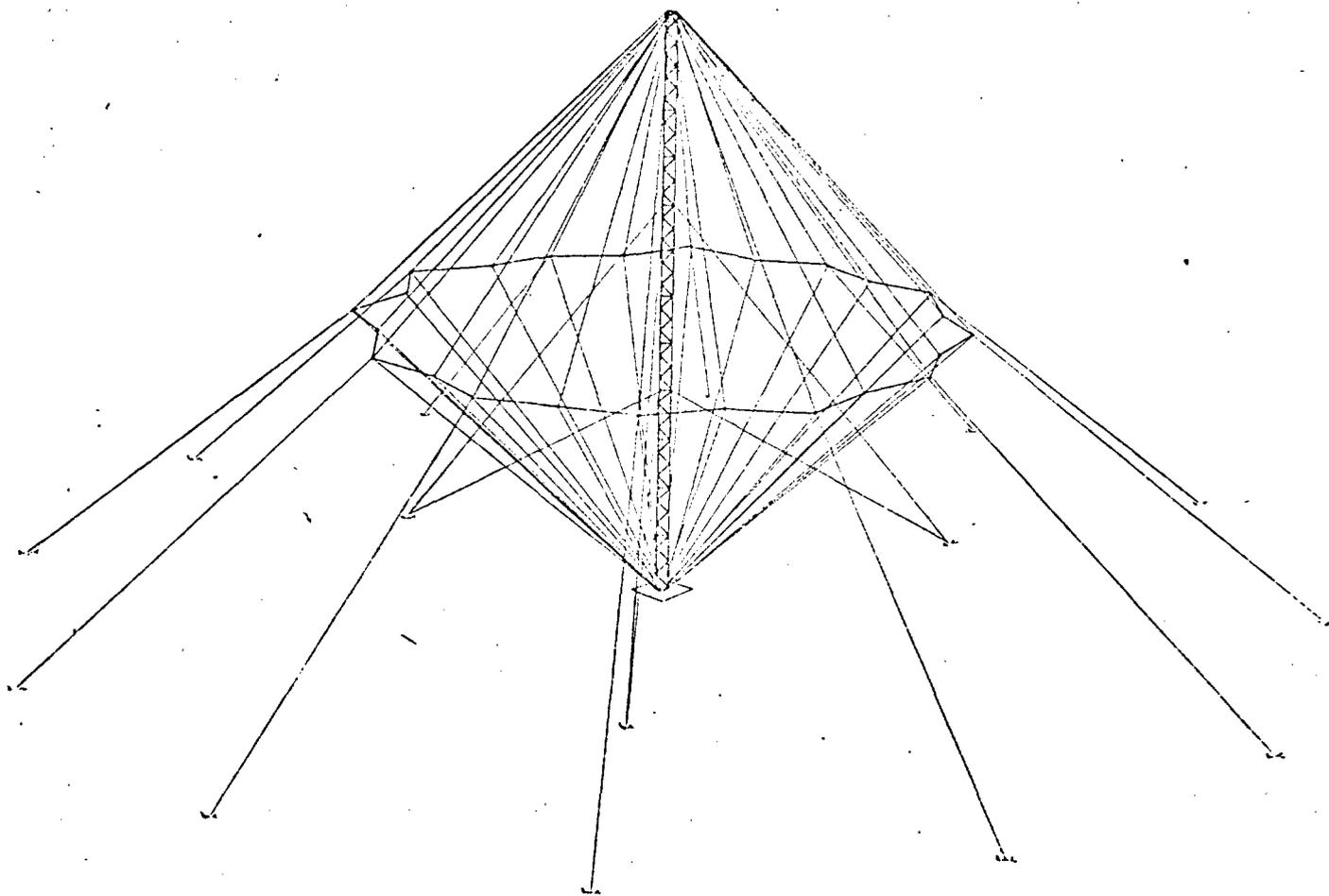
FIGURE 4

DHV contends that TCI's proposal is technically unacceptable because it does not conform to an inverted cone antenna configuration.

At the conference, the Navy, through its technical expert, advised that there was "no true definition of an inverted cone antenna and thus, no hard and fast division between the different types of antennas." Further, the Navy advised that "its anticipation was the traditional 6 pole inverted cone antenna," as described by DHV above. But, the Navy continued to explain that this would not preclude the acceptance of a nontraditional inverted cone antenna.

We note that the descriptive terms utilized by various companies in the industry appear to describe their antennas as a combination of configurations with no real consistency among them. For example, Granger has a "Model 794 Series, Monocone Vertically-Polarized Antenna" which DHV would characterize as an inverted cone antenna, but Granger also has a Model 1794 Series, with which it uses the same descriptive terms, that has a single central tower. Apparently, the only difference is the support structure since Granger's literature states Series 1794 has the "[s]ame electrical properties as Series 794." Another example is the HyGain Communications Systems (HyGain) "Vertically Polarized Monocone Antennas" which HyGain describes as an inverted cone antenna. The picture shows this antenna as one having a single central tower as part of its support structure.

TCI has a Model 505 antenna which it calls an "Inverted Cone Broadcast Antenna" which has the 6 poles as DHV contends it must. In addition, TCI has Model 550 [Figure 5], called a "Single Tower Inverted Cone Antenna," which is the antenna in question here and which its literature states is "similar to the widely used [Model] 505, except that it has only a single, central, metallic tower instead of six wooden spars or poles." We are advised that Model 550 was included in TCI's 1977 General Services Administration Federal Supply Schedule price list and was described as a single tower, inverted cone antenna. Accordingly, DHV's suggestion that TCI's literature on Model 550 was prepared only with the instant procurement in mind need not be given any further attention by our Office.



TCI Single Tower Inverted Cone Antenna

FIGURE 5

The Navy's evaluation team considered TCI's proposal acceptable. However, in August 1978, the Navy requested additional information from TCI. While TCI acceded to the Navy's request, its response was basically that all the information requested was either not required by the RFTP, was provided in the proposal or will be provided as part of contract performance. The Navy reviewed TCI's response and, after substantially agreeing with it, concluded that TCI's proposal and response were "acceptable as submitted."

DHV argues that TCI's technical proposal was not in compliance with the performance specifications in the RFTP and, therefore, when the Navy decided to accept the TCI configuration it should have provided all offerors with an opportunity to submit proposals on the same basis. It is DHV's position that in order to be in compliance with the performance specifications the antenna proposed had to be supported by poles, since that is specified in paragraph 2.1, see above. Although poles are listed under the antenna characteristics, the listing is preceded by the statement that the antenna kits "shall include, but not be limited to tower(s), pole(s), \* \* \* as necessary" which would lend the specification to an interpretation that tower(s) was a viable alternative and that the inclusion of "poles" under the characteristics section was not to preclude antennas without poles, but for the purpose of setting forth how poles, if used, should be designed, braced and preserved. Accordingly, we find that TCI's offer of a tower configuration was within the terms of the specification and, therefore, in compliance and that all offerors had the same opportunity to make a similar offer under the specification.

#### Navy's Actions - Improper/Prejudicial ?

DHV has taken the position that the instant procurement contains numerous irregularities and that the Navy's attempt to correct them was nothing more than an "administrative sham." DHV believes Navy's failure to recognize both of DHV's proposals pursuant to the RFTP and its failure to accept both of DHV's bids pursuant to step two must result in the cancellation of the contract awarded to TCI and the reopening of step one.

DHV, in support of its position, cites an August 1978 intraoffice memo (Naval Supply Systems Command (NAVSUP), Washington, D. C., to Naval Supply Center (NSC), Norfolk, Virginia) which stated in pertinent part:

"1. \* \* \* NAVSUP in reviewing the NSC administrative report to GAO recognized that corrective action was required prior to forwarding to GAO. \* \* \*

"2. Review of the tech portion of this procurement indicates Step One was never completed. \* \* \* The KO did not recognize that DHV had offered an alternate tech proposal as well as a conforming proposal. The KO was also not aware that TCI submitted only an alternate tech proposal, offering metal vice wood towers. \* \* \*

"3. Protest report of KO represents an award of the contract which is not defensible before GAO.

"4. In order to preclude cancellation of the procurement which would result in delays to the antenna program at Guam, NAVSUP advised NSC to reopen discussions on step one to cure the deficiencies in both TCI and DHV proposals. \* \* \*"

DHV contends that Navy's actions were directed toward "send[ing] a defensible report to GAO, not to ensure a fair and equitable competition between the bidders." Also, DHV states that it was neither advised of any indication to return to step one nor that, if it corrected the alleged deficiencies under step one, it would lead to a submission of bids under a new step two and possibly an award to DHV. Further, DHV contends that it received "no assurance whatsoever about the course of action which the Navy intended to pursue." With respect to the alleged lack of assurances, DHV stated:

"Without these assurances, correction of the 'deficiencies' in its primary proposal for wood poles was a useless act because the proposal was already higher than TCI's regardless of whether the 'infirmities' were corrected. With regard to Antenna Products' metal pole proposal, the company had no way of knowing what treatment it would subsequently receive even if the discrepancies were corrected."

The Navy's position is that "DHV did not make clear in their technical proposal that an alternate proposal was being offered." Initially, the Navy viewed DHV's alternate II as nothing more than a suggestion. The Navy states that had the contracting officer recognized alternate II as an alternate proposal during step one, it is probable that it would not have been deemed acceptable under Defense Acquisition Regulation (DAR) § 2-503.1(e) (1978), since DHV did not provide data which would have enabled the Government to evaluate the technical feasibility of substituting metal poles for wood poles around the perimeter of the antenna configuration. On the other hand, the Navy submits that TCI, even though its proposal included the use of metal which was for a single metal tower in the center of the antenna configuration, did provide sufficient technical data to evaluate the acceptability of the proposal.

In addition, the Navy, in its report dated October 11, 1978, presents the following discussion explaining the Navy's actions once it became aware that DHV had intended to submit two proposals:

"At the end of Step 2, when it was first discovered that DHV had intended their suggestion as an alternate proposal, the alternatives facing the Contracting Officer were to cancel the IFB and resolicit Step 1 or to award to the low bidder who had submitted an acceptable technical proposal. In selecting the second alternative, the Contracting Officer considered the impact on the bidders of resoliciting after bid prices had been exposed and the impact in terms of cost and delay on this critical Navy project.

This decision was made after considerable discussion with the technical personnel, experienced contracting personnel in the Regional Procurement Department and NSC Norfolk legal counsel.

"Upon review of the subject protest, the Naval Supply Systems Command (NAVSUP) recommended that NSC Norfolk reopen discussions on step one of this two-step formally advertised procurement to resolve deficiencies in technical proposals of both DHV and TCI. Additionally, it was recommended that a stop-work order be negotiated with TCI pending the outcome of discussions.

"TCI and DHV were requested \* \* \* to submit by 15 August 1978 answers to unresolved technical questions raised in the evaluation of technical proposals. A stop-work order was incorporated into the contract \* \* \*.

"TCI provided a response to the technical questions \* \* \*, which was forwarded to Naval Electronics Engineering Center (NAVELEXENGECEN) Portsmouth for evaluation. [The response and results of evaluation are referred to above.]

"DHV did not respond to the technical questions by 15 August 1978. The Contracting Officer contacted DHV by telephone on 17 August 1978 to determine whether DHV intended to respond and advised DHV that a response was necessary by 21 August 1978. \* \* \* DHV did not respond on 21 August 1978. On 22 August 1978, DHV was again contacted to determine whether a response had been submitted but not received by NSC Norfolk. DHV advised that the company did not intend to respond \* \* \*.

"Due to DHV's refusal to furnish the requested technical information, the Contracting Officer was unable to complete the

evaluation of DHV's alternate proposal and therefore determined that DHV's alternate proposal must be rejected as technically unacceptable. The Contracting Officer concluded that award of the contract should be made to the low responsive responsible offeror (TCI) and rescinded the stop-work order \* \* \*.

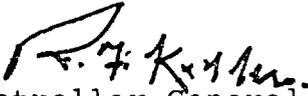
"DHV alleges \* \* \* that NSC Norfolk was attempting to discredit DHV's proposal in an effort to 'cover an obvious irregularity in procurement practices.' The Contracting Officer attempted to convince DHV in all discussions that the action being taken by NSC Norfolk was a good-faith effort to resolve the protest. DHV was advised that the stop-work order issued to TCI was evidence of our intentions to resolve the protest, and action being taken was not simply to rationalize the award to TCI. DHV insisted on some assurance that the contract with TCI would be cancelled and awarded to DHV. The Contracting Officer could not give that assurance since it could not be predicted that DHV's alternate proposal would be acceptable and that DHV would be entitled to award."

From our review of the record, it appears that after DHV protested, the Navy became aware that it had not paid proper attention to DHV's first step alternate proposal and that it attempted to correct the situation by providing DHV with an opportunity to furnish the additional information deemed necessary to make the proposal acceptable. On the latter point, DHV has furnished no evidence that the Navy had any other intention. Only because DHV refused to furnish the requested information to make the proposal acceptable did the Navy revoke the stop order issued and proceed with the award originally made. By not taking advantage of the opportunity the Navy offered, DHV essentially precluded itself from corrective action. In the circumstances, it would appear that DHV was prejudiced by its decision not to furnish the information rather than by the action of the Navy.

Regarding DHV's claim for an unspecified amount for proposal preparation costs, the courts and our Office have allowed recovery of bid or proposal preparation costs where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Condur Aerospace Corporation--Claim for Proposal Preparation Costs, B-187347, July 14, 1977, 77-2 CPD 24; National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192. However, Government action, to be arbitrary or capricious, must result from something more than "ordinary" or "mere" negligence. Groton Piping Corporation and Thames Electric Company (joint venture) - Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. Moreover, proposal preparation costs may not be recovered unless it is reasonably certain that the disappointed offeror would have received the award had it not been for the complaint of Government action. International Finance Economics, B-186939, October 25, 1977, 77-2 CPD 320; Morgan Business Associates, supra,

Based upon our review of DHV's alternate proposals (alternate I was priced higher than TCI's proposal; alternate II, while priced lower than TCI's proposal, lacked the technical data necessary to make a determination concerning whether or not it was technically acceptable), we cannot conclude that, absent Navy's mistake in the conduct of the procurement, it was reasonably certain that DHV would have received the award. Therefore, we find no basis for allowing DHV's claim.

Accordingly, the protest and the claim for proposal preparation costs are denied.

  
Deputy Comptroller General  
of the United States