

**DECISION**



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

29956

**FILE:** B-214324

**DATE:** December 6, 1984

**MATTER OF:** Columbia Investment Group

**DIGEST:**

1. Where a solicitation provided, in effect, that offerors' energy consumption estimates would be accepted for purposes of price comparison without any realism analysis, a post-closing date protest contending that the agency should have questioned the awardee's estimates is actually an untimely protest concerning an alleged solicitation impropriety.
2. An independent protest allegation based on material sent to the protester after it filed its initial protest is untimely where the issue is first raised more than 1 month after the protester received the material.
3. Protester's contention that it was unfairly prejudiced in a procurement for a lease contract by an undisclosed change in the agency's estimate of the cost of government-provided utilities is denied where it appears that the change had only a slight effect on the price evaluation and, given the awardee's considerable technical advantage, did not affect significantly the overall relative standing of the proposals.

Columbia Investment Group protests the award of a lease for an office facility to Western Division Investments under solicitation for offers No. R6-83-172P, issued by the Forest Service. We deny the protest in part and dismiss it in part as untimely.

The solicitation stated that the Forest Service wished to lease between 14,500 and 15,000 net usable

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square feet of office space and additional related space in Lakeview, Oregon. The lease was to be for an initial term of 5 years, with three optional 5-year renewal terms. Offerors were required to submit proposals under which the lessor would provide all utilities, maintenance and other services, but were permitted to submit alternate proposals under which the government would pay for separately metered fuel, water or electricity. In evaluating prices for these alternate proposals, the Forest Service said it would include the estimated cost of the government-furnished utilities, based on "current utility rates" and the offeror's estimate of the energy efficiency of the proposed building. In this connection, the solicitation stated that the leased space had to be in a building that consumed 55,000 BTU's or less per square foot per year of energy input at the building boundary.

✓ The solicitation stated that the agency would evaluate all proposals using a formula under which price would be worth a maximum of 300 points and other factors, such as design, location and energy efficiency, would be worth a maximum of 200 points. Of these latter criteria, energy efficiency alone was worth 100 points. The solicitation provided that the totals of points for price and for other factors would be used as a guide by the contracting officer in determining which proposal would be most advantageous to the government, price and other factors considered.

✓ The Forest Service considered eleven proposals received in response to the solicitation and, after an initial evaluation, established a competitive range. Following negotiations and the submission of seven best and final offers, the agency evaluated the proposals again, ranking a proposal submitted by Western highest and Columbia's proposal sixth. Both Western and Columbia submitted proposals under which the government would pay for heat and electricity. The final scoring for these two proposals was as follows:

	<u>Western</u>	<u>Columbia</u>
Price	278	276
Other factors:		
Design	55	30
Location	35	35
Energy Efficiency	100	25
Environment/Safety	5	5
Community	5	5
	<u>478</u>	<u>376</u>

Columbia protested to this Office shortly after it learned that award had been made to Western, and has raised three issues in the course of its protest. First, Columbia complains that the energy consumption estimate in Western's proposal (12,614 BTU's per square foot per year) is unobtainable, and its use in calculating an estimate for the cost of lessee-provided utilities greatly distorted the price evaluation. Second, Columbia says that the agency changed the rate it used in calculating estimated utility costs from \$.75 in the initial evaluation to \$.98 in the evaluation of best and final offers. This change, says the protester, affected the relative standing of the price proposals and, in any event, should have been disclosed to the competitors. Finally, in its comments on the agency's report on this protest, Columbia raised a third issue involving the scoring of its proposal. Columbia complains that even though its best and final offer contained an improved energy efficiency estimate, the proposal received fewer points on this criterion than it had during the initial evaluation.

Columbia's complaint concerning Western's allegedly unobtainable energy efficiency estimate is untimely. The solicitation provided that each offeror was to include with its proposal a statement of the anticipated energy efficiency of its proposed facility and stated that this estimate (or the government's minimum requirement of 55,000 BTU's per square foot per year if no estimate were provided) would be used in connection with the price evaluation of those proposals providing for government payment of utilities. The solicitation also provided for the evaluation of energy efficiency under the heading, "Other Factors." It provided that proposals meeting the

minimum requirement would be assigned a minimum score while those exceeding the requirement would be assigned a proportionately higher score. The solicitation did not provide, however, for any preaward realism analysis with respect to the offeror's energy consumption statement. ✓  
Rather, 30 days after award, the successful offeror would be required to submit projected energy consumption data, prepared and certified by a registered professional engineer. In effect, therefore, the solicitation provided that an offeror's estimated energy consumption figures would be accepted, without any realism analysis, for purposes of price comparison. See Western Division Investments, et al., B-213882, et al., Sept. 5, 1984, 84-2 CPD ¶ 258.

The protester's contention that the agency should have questioned the figures Western provided with its proposal is actually an argument that the solicitation should have provided for a preaward energy consumption realism analysis. As such, the argument concerns an alleged solicitation defect which, under our Bid Protest Procedures, should have been raised prior to the closing date for receipt of initial proposals. ✓ 4 C.F.R. § 21.2 (b)(1) (1984). We dismiss this aspect of the protest as untimely. Western Division Investments, et al., supra; Martin Widerker Ing., B-213557, June 25, 1984, 84-1 CPD ¶ 664.

Even though we decline to consider this issue on the merits, we are concerned nevertheless about the evaluation scheme used both here and in the procurement discussed in Western Division Investments, et al., supra. In both instances, the solicitations stated that the agency would evaluate prices by, in essence, adding the estimated cost of government-paid utilities to an offeror's proposed rental rate. The solicitations stated further that, for purposes of calculating an estimate of the cost of utilities, the agency in effect would accept at face value an offeror's energy efficiency estimate. In our view, however, by using offerors' energy efficiency estimates without determining whether these estimates were realistic, ✓ the agency could not conclude with confidence that the figures used in comparing prices were reliable estimates of the total amounts the government actually would pay over the terms of the proposed leases. Since use of this

evaluation scheme does not appear to have been an isolated event, we are informing the Secretary of Agriculture of our view, and we suggest that the agency consider amending this scheme for future procurements of this nature to incorporate some sort of realism evaluation of an offeror's energy efficiency estimate. In addition, we are informed that the agency's Inspector General currently is investigating related matters involving the same region of the Forest Service responsible for these solicitations. We are sending the Inspector General a copy of this decision and of our decision, Western Division Investment, et al., supra.

✓ Columbia's complaint concerning the evaluation of its own proposal in the area of energy efficiency is also untimely. This complaint, which was not raised in Columbia's initial protest submission filed here on February 8, 1984, is based on Columbia's examination of the composite scoring sheets the agency prepared after both the initial and the best and final evaluations. The protester does not indicate when it first learned of this basis for the protest; however, the contracting officer has informed us that he sent copies of the scoring sheets to the protester on or about March 2 along with his response to the February 8 protest to this Office. The protester called this Office on March 16 and acknowledged having received the contracting officer's report, but did not raise this issue as a basis for its protest until April 27 when it submitted its comments on the official Forest Service administrative report. Since each separate basis for a protest must satisfy independently the timeliness requirements of our Bid Protest Procedures, see Air Tech Industries--Reconsideration, B-211252.2, June 28, 1983, 83-2 CPD ¶ 37, and since those procedures require that protests based on other than alleged solicitation improprieties be filed within 10 days of when the basis for the protest is known or should have been known, 4 C.F.R. § 21.2(b)(2), this basis for the protest, first raised on April 27, is untimely and will not be considered. See Stroh Corp., B-209470, Feb. 8, 1983, 83-1 CPD ¶ 143.

Finally, the protester contends that it was unfairly prejudiced by an undisclosed change in the government's estimate of lessee-provided utility costs. As indicated,

both Western and Columbia submitted proposals that would require the government to pay for heat and electricity. The Forest Service evaluated both offerors' initial proposals using \$.75 per square foot as an estimate of the cost of government-paid utilities, but changed this figure to \$.98 in the final evaluation. The agency explains that in the initial evaluation it used only an estimate of the cost of utilities, but in evaluating the best and final offers it contacted the local utility company to obtain actual utility rates. The agency says that the change had only a slight effect on the price evaluation and adds that, due to the potential for manipulation of proposals, its standard practice is not to disclose to offerors information regarding energy costs until after award.

Notwithstanding what the Forest Service says is standard practice regarding preaward disclosure of estimated utility costs, Columbia says that during discussions the agency provided it with a copy of the agency's price evaluation calculations which indicated use of a \$.75 utility rate. The protester acknowledges the agency's right to change its utility cost estimate in the evaluation of best and final offers, but insists that it should have been notified of any such change. Columbia says that had it known of a change it would have revised its proposal to make it more price competitive. Columbia seeks to demonstrate the significance of the change in this case by showing that if \$.75 were used instead of \$.98 as the estimate for the cost of utilities, Columbia's best and final proposal would have been evaluated at a lower price than Western's. Finally, Columbia says that based on the experience of the Forest Service's current lessor, \$.75 is actually the "current utility rate," not \$.98.

The essence of Columbia's complaint on this issue is that by disclosing the \$.75 utility rate, the Forest Service led Columbia to believe that the same rate would be used in the best and final evaluation and that Columbia relied to its detriment on this representation in preparing its best and final offer. Although there is apparent disagreement over whether the \$.75 rate actually was disclosed to the protester during discussions, we need not resolve this discrepancy, for even if we assume that the \$.75 rate was disclosed, the protest is without merit.

Based on the computations that Columbia submitted with its protest, it appears that had the agency used a \$.75 utility rate in the evaluation of best and final offers, Columbia's evaluated price would have been slightly lower than Western's (\$75.45 per square foot versus \$75.57). When a \$.98 utility rate is used, Western's price is slightly lower than Columbia's (\$76.23 versus \$76.87).<sup>1/</sup> Regardless of which utility rate is used, therefore, these two price proposals were virtually equivalent, a fact that is reflected in the closeness of the scoring of these price proposals. We agree with the agency that the change to a \$.98 utility rate had very little impact on the scoring. In addition, although Columbia complains that the change to a \$.98 utility rate resulted in Western, not Columbia, being the low offeror, we note that even if the \$.75 figure were used, three other proposals would have had lower evaluated prices than Columbia's. Moreover, the solicitation stated that award would be based on a combination of price and technical factors, not on price alone. When technical factors are also considered, Western's proposal was rated some 100 points higher than Columbia's. Thus, even though Columbia says its proposal would have been more price competitive had the agency informed it that a \$.98 utility would be used, Columbia would have had to offer a substantially lower evaluated price in order to overcome Western's technical advantage. In short, it appears that the change to a \$.98 utility rate did not affect significantly the overall relative standing of Columbia's proposal. Finally, given the insignificant impact on the evaluation of using \$.98 rather than \$.75, there is no reason for us to decide which figure is more accurate.

We deny the protest in part and dismiss it in part.

*for*   
Comptroller General  
of the United States

<sup>1/</sup> This reversal in the relative positions of the price proposals, even though the same utility rate is used in evaluating both proposals, is due to the effect of using the offerors' energy efficiency estimates in computing the evaluated prices: the higher the estimated utility rate, the greater the impact of a more efficient energy estimate. Western's proposal contained a more efficient energy estimate than Columbia's.