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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: International Marine Products, Inc.

File: B-296127

Date: June 13, 2005

Robert A. Landman for the protester.
Scott Garner, Esq., and George Brezna, Esq., Military Sealift Command, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Receipt on Saturday of an agency-level protest decision by a vice-president for the protester did not constitute actual or constructive knowledge of adverse agency action on that date, where Saturday was not a business day for the protester and the envelope containing the decision was not opened until Monday, the first business day after receipt.
 2. Protester's assertion that agency's evaluation of its technical proposal was flawed is denied where the record shows that the evaluation was reasonable and consistent with the solicitation, and the protester's contentions represent only its disagreement with the agency's judgment.
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DECISION

International Marine Products, Inc. (IMP) protests the award of a contract to Beach Panel Controls, Inc. under request for proposals (RFP) No. N62381-03-R-1003, issued by the Department of the Navy, Military Sealift Command for automation control system inspection, training, system services and repairs, as well as "emergent repairs." RFP at 2-20. IMP protests the evaluation of its proposal and alleges that the agency was biased in favor of Beach Panel.

We deny the protest.

The Navy issued the RFP on March 19, 2002. As amended, the RFP anticipated the award of an indefinite-delivery requirements-type contract with fixed unit prices, for a base year plus four 1-year options, for a variety of inspection, repair, training, and

testing services to be performed aboard 35 Military Sealift Command vessels. Award was to be made to the responsible offeror whose proposal represented the “best value” to the government based on the agency’s consideration of three major evaluation factors (in descending order of importance): technical, price, and past performance. RFP at 52-53.

Under the technical factor, the RFP identified (in descending order of importance) four “technical factors”: (1) ability to perform the statement of work (which included two subfactors, 1.1 management control and 1.2 quality control); (2) understanding the statement of work; (3) experience; and (4) problem areas.

As it relates to the protest, under the technical factor regarding ability to perform the statement of work, the RFP required offerors to provide manufacturer “certifications/qualifications of being an OEM ‘original equipment manufacturer’ for the equipment being maintained aboard vessels.” RFP attach. J-2. Offerors were further required to provide “contractors['] special pricing” agreements with manufacturers and to identify “the available labor resources to accomplish scope of work and capability of performing multiple large tasks, upgrades and inspections simultaneously on vessels all over the country. (Ability to accomplish large tasks on up to ‘five’ vessels concurrently).” Id.

Four offerors submitted timely proposals by the RFP’s June 18, 2003 closing date, including proposals from the protester and Beach Panel. In its initial evaluation of proposals, the Navy rated IMP as “satisfactory” overall under the technical evaluation factors, while identifying numerous weaknesses with IMP’s proposal, and rated its past performance as “good.” Beach Panel received overall ratings of “excellent” for both the technical and past performance factors.

Specifically, as it relates to the protest, with regard to the evaluation of IMP’s proposal under the technical factor regarding ability to perform the statement of work, the Navy noted that IMP’s evidence of OEM certification was limited to two companies through a third-party electrical supplier. This perceived “lack of OEM depth” created risk for the government, according to the Navy.¹ AR, Tab 7, Technical Evaluation Report, Aug. 6, 2003, at 9. Under this same technical factor, the Navy found fault with IMP’s evidence of contractor special pricing agreements, noting IMP’s failure to include specific pricing and product information and IMP’s limited supply structure, which, in the Navy’s view, exposed the government to greater risk. The Navy also raised concerns about IMP’s size and its ability to accomplish five concurrent tasks as required by the solicitation. In this regard the Navy was concerned with IMP’s reliance on memoranda of understanding to provide its pool of labor. According to the Navy, this approach “lacks continuity of experience, which

¹ In contrast, Beach Panel indicated in its proposal that it was a certified OEM with 20 major electrical component suppliers. Beach Panel Proposal at 3.

can reduce productivity when dealing with complicated electronic and control systems.” AR, Tab 7, Technical Evaluation Report, Aug. 6, 2004, at 9.

After the initial evaluation, the Navy held discussions with the offerors. During its discussions with the protester, the Navy asked IMP, among other things, to identify any additional OEM certification letters it maintained and how IMP would meet the solicitation requirements given its size and with the use of its identified subcontractors. AR, Tab 10, IMP Items for Negotiations, Sept. 13, 2004, at 2.

After the conclusion of discussions and the submission of revised proposals--only IMP and Beach Panel submitted revised proposals--the Navy evaluated the offerors' revised proposals and again rated IMP as satisfactory overall under the technical factors and Beach Panel as excellent. With regard to the evaluation of IMP, the Navy remained concerned about IMP's OEM certifications. In response to the Navy's discussion question regarding the OEM certification issue, IMP had submitted an additional letter from a third-party electrical supplier as further evidence of its OEM certification. The Navy, however, contacted each of the electrical suppliers identified by IMP and learned that, while IMP maintained a business relationship with the suppliers, IMP did not in fact maintain any OEM certifications. The Navy concluded that the letters provided by IMP were misleading and that IMP had failed to satisfy the OEM certification requirement. More specifically, the Navy concluded that IMP's lack of OEM certification was a limitation on the company's technical resources. AR, Tab 13, Revised Technical Evaluation Report.

The Navy also reiterated its concerns regarding IMP's contractor special pricing information, as well as IMP's size and ability to perform the requirements. With regard to the contractor special pricing issue, the Navy again concluded that IMP failed to provide specifics or pricing information and that IMP's information was limited to a single electrical distributor local to IMP geographically. Regarding IMP's size and ability to perform the requirements, IMP had revised its proposal in response to the Navy's discussions questions regarding this issue, to indicate that it had grown to 19 employees and that it would directly hire or subcontract for additional labor as necessary. The Navy, however, remained concerned that IMP may have problems accomplishing five tasks concurrently, as required by the solicitation. In this regard, the Navy noted that IMP's organization was small, specifically noting that an organization of 19 employees is "insufficient" based on the level of effort required to maintain the Navy's then-existing contract. In addition, the Navy concluded that IMP's plan to obtain additional labor as necessary lacked continuity, which could reduce productivity in dealing with complicated electronic and control systems. AR, Tab 13, Revised Technical Evaluation Report.

After evaluating the revised proposals and conducting a price/technical tradeoff, the Navy decided to make award to Beach Panel. While IMP's total evaluated price (\$5,170,700) was lower than Beach Panel's price (\$5,990,000), the Navy concluded that Beach Panel's higher-rated proposal was worth the higher price. AR, Tab 14, Source Selection Decision.

Upon learning of the Navy's decision, IMP filed a protest with the Navy, which was denied, and then filed the subject protest with our Office.

As an initial matter, the Navy argues that IMP's protest should be dismissed as untimely because IMP, by its own admission, received the Navy's decision denying its agency-level protest on Saturday, March 12, yet did not file its protest with our Office until March 24, more than 10 days after receipt of the agency-level protest decision. The protester responds that it is not open for business on weekends, and that although a vice-president for IMP received the envelope containing the protest decision on March 12 and then called another principle of the company to inform him that a letter had arrived from the Navy, the envelope was not opened until Monday, March 14.

Our Bid Protest Regulations provide that where, as here, a protester timely files an agency-level protest, any subsequent protest to our Office must be filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (2005). In an analogous case, Supreme Edgelight Devices, Inc., B-295574, Mar. 4, 2005, 2005 CPD ¶ 58, a protester's office clerk received mail containing the agency's decision in response to the protester's agency-level protest on a Saturday (not a business day) but the mail was not opened until Monday, the next business day. We concluded that the agency-level protest decision should be considered as received by the protester on Monday, not Saturday, as argued by the agency, for the purpose of determining whether a subsequent protest to our Office was timely.

The agency argues that our decision in Supreme Edgelight is distinguishable because in that case, the agency's decision was only received by an office clerk and here, a vice-president for IMP received the mail containing the decision and went to the added effort of calling another principle of IMP to inform him of the letter's arrival. According to the agency, our Office should charge IMP with constructive notice of the agency-level protest decision based on the Saturday receipt. Since IMP was awaiting a decision from the agency with regard to its protest and two principles for IMP were aware of the letter from the Navy on Saturday, in the agency's view, IMP had a duty to open the mail containing the agency's decision, relying on our decisions holding that protesters have a duty to diligently pursue all information that may give rise to a protest issue. See, e.g., Global Eng'g and Constr., LLC, B-290288.3, B-290288.4, Apr. 3, 2003, 2003 CPD ¶ 180 at 7 n.7.

We do not agree with the Navy that the circumstances of this case warrant application of a rule different from the one articulated in Supreme Edgelight. The time period for filing a protest with our Office commences with a protester's actual or constructive knowledge of initial adverse agency action. As in Supreme Edgelight, there plainly was no actual knowledge in this case. Moreover, as we found in Supreme Edgelight, the receipt of an agency-level protest decision on a non-business day, where the notice is not actually read, does not constitute

constructive knowledge. While the Navy correctly points out that protesters have a duty to diligently pursue their bases for protest, we have never held, as the Navy would have us do here, that such a duty extends to conducting business outside of ordinary business hours (for example, a weekend). In addition, contrary to the Navy's argument, the position of the individual who receives the envelope containing the decision but leaves it unopened (whether a clerk, a principle of the company, or anyone else) has no bearing on whether a protester has received constructive notice of initial adverse agency action.²

Thus, we find that receipt of the agency's unopened envelope containing the decision on Saturday did not constitute constructive knowledge of initial adverse agency action, given that Saturday was not an ordinary business day for the protester. Rather, we conclude that IMP first learned of the agency's protest decision on Monday, March 14, the next business day. Accordingly, IMP's protest, which was filed within 10 calendar days of that date, is timely.

In its protest, IMP principally challenges the agency's evaluation of its proposal.³ Specifically, IMP contends that the Navy afforded too much weight to the submission of OEM certification and contractor special pricing agreements. In IMP's view, OEM certifications "do not in fact offer any insight into an OEM's technical capability," and contractor special pricing agreements are "not a guarantee of best pricing."⁴

² In contrast, actual knowledge of adverse agency action, even when received on a non-business day, commences the time for filing a protest with our Office. See Atkinson Dredging Co., B-218030.2, July 3, 1985, 85-2 CPD ¶ 22.

³ IMP also argued that one of the technical evaluators was improperly biased in favor of Beach Panel because he was "a close personal friend" of Beach Panel's owner. The Navy specifically refuted this assertion in its report on the protest and the protester did not rebut the agency's position in its comments. We therefore consider this issue abandoned. See Delco Indus. Textile Corp., B-292324, Aug. 8, 2003, 2003 CPD ¶ 141 at 3 n.2. In addition, IMP raised several arguments in its agency-level protest. For example, IMP maintained that the Navy improperly evaluated its proposal with respect to the quality control requirements. IMP, however, did not expressly raise these arguments in its protest with our Office, and we therefore do not consider them.

⁴ To the extent IMP suggests that the Navy should not have given any consideration to OEM certifications, or contractor special pricing agreements, as part of the technical evaluation, this suggestion is contrary to the express terms of the RFP, which provided for the consideration of these items under the technical evaluation factors. Moreover, any challenge to the solicitation's inclusion of these factors in the evaluation criteria is untimely since it relates to the propriety of the terms of the RFP, which, under our timeliness rules, must be raised prior to time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

Protester's Comments at 3. In addition, IMP challenges the agency's conclusion that its staffing was inadequate as well as the agency's determination that its teaming arrangements presented greater risk. According to IMP, the solicitation did not require a minimum level of staffing, it had demonstrated its ability to successfully perform other large-scale projects, and the agency effectively required staffing levels in excess of the solicitation's requirements.

Fundamentally, the challenges raised by IMP in its protest offer little more than mere disagreement with the Navy's assessments of the weaknesses in its proposal.⁵ However, in reviewing challenges to an agency's evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals. We will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria, and with procurement statutes and regulations. M-Cubed Info. Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 5. As a consequence, a protestor's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Command Mgmt. Servs., Inc., B-292893.2, June 30, 2004, 2004 CPD ¶ 168 at 3.

While IMP believes that OEM certifications and contractor special pricing agreements with manufacturers are of minimal value in evaluating an offeror's ability to perform the requirements of the solicitation and that the Navy should not have given any significant weight to these certifications or agreements, the RFP expressly required offerors to provide these certifications and agreements, and in the agency's view, IMP's submissions were insufficient. In the Navy's judgment IMP's lack of certifications and its single special pricing agreement presented greater risk of unsuccessful performance. Other than IMP's own assessments regarding the limited value of OEM certification and special pricing agreements, there is nothing in the record to suggest that the agency's judgments were unreasonable or inconsistent with the terms of the solicitation.

Similarly, IMP's assertions regarding the Navy's evaluation of its work force do not demonstrate that the agency's judgments were unreasonable or inconsistent with the terms of the solicitation. The Navy specifically considered IMP's work force plan in the context of IMP's ability to perform five concurrent tasks as specified in the RFP, and found that IMP's proposal presented risks in this regard. Again, while IMP maintains that its work force is sufficient to meet the requirements of the

⁵ It should be noted that in challenging the agency's evaluation, IMP suggests that the issues it protests were the paramount reasons that caused the agency to select Beach Panel's higher-priced proposal. The record, however, reflects that the Navy evaluated IMP's proposal as containing numerous other weaknesses, all of which contributed to IMP's overall technical rating of "satisfactory" and were considered as part of the tradeoff decision.

solicitation, this disagreement does not provide a basis for finding the agency's assessments unreasonable.

Moreover, there was nothing inherently unreasonable about the agency's concerns with IMP's use of subcontracting arrangements to address additional work force needs, as IMP suggests. According to IMP, such arrangements are standard practice and therefore the agency should not have viewed IMP's use of a teaming arrangement in a negative light. The agency, however, in the context of questioning IMP's size and ability to perform the solicitation requirements, was concerned that IMP's use of subcontractors on an as-needed basis had the potential for a lack of continuity and reduced productivity. While IMP may disagree with this assessment, there is nothing to suggest that it was unreasonable. In addition, IMP's reliance on the fact that the RFP did not preclude a contractor's use of teaming arrangements or subcontractors is misplaced. The mere fact that an RFP does not expressly disallow a particular approach does not mean that the agency is precluded from considering the advantages or disadvantages in that approach.

As a final matter, IMP argues that the Navy's decision to make award to Beach Panel was colored by the agency's general bias in favor of Beach Panel. In support of this contention IMP points to what IMP characterizes as the Navy's history of "questionable contracting practices" in favor of Beach Panel dating back to 1996, including various contract awards. Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. Supreme Edgelight Devices, Inc., *supra*, at 4. IMP's assertions regarding the agency's prior contracting history with Beach Panel are conclusory in nature and fail to demonstrate bias by the agency.

The protest is denied.

Anthony H. Gamboa
General Counsel