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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Magney Grande Distribution, Inc.

**File:** B-286981

**Date:** March 22, 2001

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Carol Magney Grande and Stephanie M. Grande for the protester.  
Thomas S. Hogan, Jr., Esq., and Deborah McCall, Esq., The Hogan Law Firm, for ITD of Destin, Inc., an intervenor.  
Chris E. Hagberg, Esq., Department of the Navy, for the agency.  
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Protest of agency's award of a contract to the offeror that submitted the significantly lower-priced proposal of two otherwise essentially comparable proposals is denied where record supports the reasonableness of the agency's evaluation and award determination.

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## **DECISION**

Magney Grande Distribution, Inc. protests the award of a contract to ITD of Destin, Inc. under request for proposals (RFP) No. N65540-00-R-0040, issued by the Department of the Navy for transient voltage surge suppressors (TVSS).<sup>1</sup> The protester, a previous sole-source TVSS supplier to the Navy, challenges the agency's evaluation of the ITD proposal and the agency's award to the firm.<sup>2</sup>

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<sup>1</sup> The TVSS units protect sensitive electronic equipment by absorbing excessively high transient voltages. They are to be suitable for use on existing shipboard and land-based Navy electrical supply systems, and are to be placed at interfaces between shipboard electrical power distribution systems and individual connected user equipment and distribution panels. RFP Addendum at §§ 1.0-2.1.

<sup>2</sup> Magney Grande also filed numerous other challenges to the procurement. Our review of those additional challenges, however, shows that they fail to meet our timeliness rules or otherwise warrant no further review by our Office. Accordingly, only a brief discussion of the allegations is included in this decision.

We deny the protest.

The RFP, issued on May 9, 2000, contemplated the award of a fixed-price requirements contract for four types of TVSS units for a 3-year period. The solicitation provided that award would be made to the responsible offeror whose offer was found to be most advantageous to the government, price and other factors considered. The following factors were to be considered in evaluating the proposals: technical, past performance/pertinent experience, and price. The RFP provided that technical and past performance, when combined, were more important than price. The RFP set out certain performance specifications for the TVSS units, and incorporated by reference several military specification standards and electrical code standards. RFP §§ 3.0, 5.1(b). Certain supporting third-party test data--demonstrating the TVSS product's compliance with various performance specifications--was required to be submitted by the successful contractor prior to obtaining a release for manufacture. RFP § 4.1. Post-award first article testing was to be conducted to demonstrate compliance with the RFP's performance specifications. RFP ¶ 52.209-3, § 6.0.

For the evaluation of past performance, offerors were to provide information on recent contracts for "like or similar items" and information demonstrating their experience in the design and manufacture of TVSS. RFP § 5.3.1. The information was to be used for a determination of the firm's responsibility and for evaluation of the firm's past performance/pertinent experience. Id.

Of the 10 proposals received by the extended closing time on June 30, only Magney Grande's and ITD's proposals were found to be technically acceptable. Although the performance testing data was not required until after award, Magney Grande included prior testing data in its proposal, and the proposal was credited for it. Technical Evaluation Memorandum at 2. The ITD proposal, on the other hand, was noted as having an informational weakness for not including all of the data provided by the protester; the evaluators found the weakness to be minor, however, since, under the RFP's terms, the performance demonstration data could be provided after award. Id.; Agency Report at 6. Based upon ITD's technical product specifications, including some test data, and technical manuals, the newly designed ITD TVSS units were found to be fully compliant with the solicitation's technical requirements. Pricing Memorandum at 2.

Both firms' proposals were favorably evaluated for past performance based on information provided by the offerors and gathered by the agency regarding the firms' experience with the TVSS or similar items. Magney Grande's high past performance rating was based on favorable customer/fleet feedback concerning the firm's recent TVSS product performance and customer service. Technical Evaluation Memorandum at 2; Magney Grande TVSS Technical Data Sheets at 2.

ITD's and its manufacturer's (Guardian Manufacturing, Inc.) past performance information was also favorably rated. The agency considered information regarding

the firms' TVSS design, manufacturing, and sales experience with substantially similar products of equal complexity and a number of government and commercial contracts for other TVSS products. Pre-Award Survey Report at 9-10, 15-16, and 22-24. The experience and capability of ITD and Guardian were reviewed and confirmed by the Defense Contract Management Agency (DCMA), which conducted pre-award site surveys at each of those firms' facilities. DCMA determined ITD and Guardian had substantial experience demonstrating the firms' capability to successfully perform the contract. Id.; Agency Report at 32-33.

Upon review of the evaluation record and proposals, and DCMA's unqualified pre-award survey recommendation for award to ITD, which was supported by agency technical evaluation personnel, and the significantly lower price offered by ITD, the contracting officer awarded the contract to ITD. Pricing Memorandum at 2; Agency Report at 34. This protest followed.

Magney Grande principally protests the propriety of the agency's source selection, contending that the Navy should have found that the protester's product, despite its higher price, offered the best value to the government.<sup>3</sup> Before addressing those challenges, however, we note that the protester has filed a substantial number of additional challenges regarding this procurement which are untimely or otherwise not for our review. The protester, for instance, contends that the agency violated procurement integrity rules by failing to safeguard its proposal submission. In this regard, Magney Grande states that when its representative came to the agency's facilities, prior to the closing time for the receipt of proposals, to pick up certain first article units the protester had submitted prematurely, the representative noticed that two of the boxes had been opened (for identification purposes, the agency reports), and that one of the opened boxes contained a copy of the firm's proprietary proposal in response to the RFP. Magney Grande argues that the integrity of its proposal was compromised, since it may have been improperly viewed (by the agency or awardee) prior to the closing time for proposal submission.

In addition to our concerns regarding the timeliness of this protest challenge (filed months after the contracting agency confirmed that the proposal information was not disclosed), our review of the record shows that Magney Grande merely speculates that someone may have been able to enter the secured storage area and view its proposal (despite the swipe-card security entrance protections in operation at the location and the agency's asserted confidence that the proposal information was not disclosed). The firm fails to provide any evidence, and we see no basis in the record to conclude, that its information was improperly disclosed.

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<sup>3</sup> The record shows that, on November 1, 2, and 20, Magney Grande filed various protest challenges with the contracting agency. The firm's subsequent protest to our Office, incorporating those earlier protest allegations, was filed before the contracting agency had issued a decision on the agency-level protests.

Magney Grande also protests the agency's affirmative determination of ITD's responsibility, asserting that it has discovered some financial and other information, regarding previous challenges to actions by ITD or its principals, which, the protester believes, demonstrates a lack of integrity by ITD and thus, ineligibility to receive the award. Our Office does not review affirmative determinations of responsibility absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.5(c) (2000). Since the protester does not allege bad faith by the agency or that definitive responsibility requirements were not met by ITD, the matter is not for our review.<sup>4</sup> M-Cubed Information Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 9-10.

Magney Grande's remaining protest contentions mostly relate to the agency's evaluation of ITD's proposal and its selection of ITD for award. The protester generally alleges that ITD and its manufacturer are inexperienced contractors that have not proven themselves as reliable TVSS sources. Magney Grande alleges that, since ITD and Guardian have never manufactured or supplied the proposed TVSS units, ITD cannot meet the RFP's requirements for testing or a technical description of the item offered.<sup>5</sup> Magney Grande also questions the agency's consideration of

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<sup>4</sup> Another protest allegation lodged by Magney Grande is that it did not receive timely notice of the award. The agency report shows that the allegation is factually incorrect in that the protester was notified of the award only 1 day after the contract was signed and executed by the contracting officer. Agency Report at 7. Additionally, to the extent Magney Grande continues to assert that the agency is prohibited from using any of Magney Grande's proprietary technical data in the administration of the ITD contract, that contention, which in any event merely anticipates improper agency action, relates to a matter of contract administration not for our review. 4 C.F.R. § 21.5(a). Magney Grande also argues that if discussions were held with ITD, they should have been held with Magney Grande to tell the protester that its price was much higher than ITD's. The record shows, however, that the challenged communication by the agency to ITD to which Magney Grande refers concerned only minor clarifications requested of ITD, not discussions. Federal Acquisition Regulation § 15.306(a), (b).

<sup>5</sup> Magney Grande additionally contends that the agency has improperly waived for ITD's TVSS units certain long-term testing requirements (including 18-month field-testing) that were imposed on the Magney Grande TVSS units several years ago, prior to Magney Grande's receipt of a sole-source contract from the agency. The long-term testing cited by the protester was not a stated requirement of this competitive procurement. If the protester believed that the RFP should have such tests, instead of or in addition to the first article tests, to be timely, Magney Grande had to have protested the matter prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2 (a)(1); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324 at 7.

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favorable past performance information about prior ITD TVSS contracts under which ITD provided a different TVSS product from that which it offered under the RFP. The protester contends that, since technical merit was more important than price under the RFP, its proven product, despite its higher price, should have been the best value choice for award.

Assessing the merits of competing proposals and deciding which proposal offers the best value are within the discretion of the contracting agency. Our Office therefore will not question an agency's evaluation or award determination where it is reasonably based and consistent with the terms of the solicitation and the underlying procurement statutes and regulations. Global Assocs., Ltd., B-275534, Mar. 3, 1997, 97-1 CPD ¶ 129 at 3. A protester's mere disagreement with the agency does not render the evaluation unreasonable. American Native Med. Transport, L.L.C., B-276873, Aug. 5, 1997, 97-2 CPD ¶ 73 at 3-4. Even where a solicitation provides that technical criteria are more important than price, an agency properly may select a lower-priced, lower technically scored proposal if it reasonably decides that the cost premium involved in selecting the higher-rated proposal is not justified. Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115 at 8; see General Offshore Corp., B-246824, Apr. 1, 1992, 92-1 CPD ¶ 335 at 5. Where source selection officials reasonably regard proposals as being essentially comparable under the technical requirements of solicitation, cost can become the determining factor in making award notwithstanding that the evaluation criteria assigned cost less importance than technical factors. The Parks Co., B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354 at 4.

Despite the protester's speculation that ITD failed to provide in its proposal complete and detailed technical product specifications, drawings, and manuals, as required by the RFP, our review of the proposal and evaluation record confirms that the ITD proposal includes comprehensive technical submissions which were carefully evaluated by the agency and reasonably found to be in full compliance with the RFP's requirements.<sup>6</sup> In fact, there is no indication in the evaluation record of

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To the extent the protester contends that ITD will not be held to the RFP's performance testing requirements, this contention concerns a matter of contract administration not for review by our Office. 4 C.F.R. § 21.5(a). We note, however, that ITD has reported to our Office that, during the course of this protest, its TVSS units satisfactorily passed all of the RFP's first article testing requirements. Letter from The Hogan Law Firm to GAO, Jan. 5, 2001.

<sup>6</sup> Magney Grande is not represented by an attorney admitted to a protective order and therefore did not have access to any protected source selection information in the record. The protester's contentions regarding the awardee's proposal's lack of technical information are speculative, since the protester has not viewed the ITD proposal; Magney Grande and the intervenor received informative, but redacted, copies of all protest submissions. Our Office received and reviewed the full,

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any determination of technical superiority of the protester's proposed TVSS products; rather, both proposals were found to be technically acceptable. While Magney Grande's proposal included additional performance testing data that ITD's did not, the lack of complete performance testing data in ITD's proposal was noted only as a minor informational weakness (i.e., not a failure to meet RFP requirements) since, under the terms of the RFP, the data could be provided after award, prior to the release for manufacture. Agency Report at 6. In short, our review of the evaluators' worksheets and notes supports the agency's view that the proposals, overall, were considered essentially technically comparable.

Similarly, both offerors were highly rated for past performance and experience. ITD's proposal, containing substantial information about other contracts for similar products, was favorably reviewed, and information about ITD's and Guardian's experience and past performance were favorably evaluated as part of a comprehensive pre-award site survey conducted by DCMA, assisted by Navy technical personnel familiar with the current requirements. Numerous similar, equally complex contract requirements were found to have been successfully performed, on schedule, by the firms. Pre-Award Survey Report at 10, 22-24.<sup>7</sup> DCMA concluded that ITD (and Guardian) showed complete capability to successfully perform the contract and recommended that award be made to the firm. Id at 8.

The protester is simply incorrect in its assertions that newly-designed TVSS units and past performance information regarding different TVSS units, as was provided by the ITD proposal, must be evaluated as technically inferior to "proven" TVSS units supported by past performance information about those units, as was provided by Magney Grande's proposal. The RFP did not include any pre-award qualification

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unredacted submissions, including the protected agency report, proposals, evaluator notes, pre-award survey findings and source selection record. Our discussion of the evaluation and proposals, however, in this publicly available decision, is necessarily general and limited.

<sup>7</sup> As did Magney Grande's proposal, ITD's proposal contained letters of praise from past customers for its "great" and "superior" technical and field customer service and support. As Magney Grande speculates, some of the past performance information provided by ITD relates to ITD's experience as a former supplier of the same type of TVSS proposed by Magney Grande here (which unit had been manufactured by the same firm that produces Magney Grande's proposed units). Contrary to Magney Grande's position, however, there is no basis to conclude that the firm improperly submitted this information for review or that this experience could not be considered by the agency in assessing the firm's past performance simply because it relates to a different, but similar, product. On the contrary, the RFP specifically requested past performance information regarding like or similar items (i.e., not only identical items).

standards or otherwise indicate that prior testing of a product was preferred; likewise, the RFP did not require past performance information regarding only the exact product proposed. Rather, first article testing was to be performed after award to demonstrate the technical performance of the proposed units, and past performance information for similar product experience was all that was required to support a determination of sufficient experience and capability. RFP §§ 4.0, 5.3.1., and 5.2.09-3. Our review of the record, including ITD's proposal and pre-award survey information, supports the reasonableness of the agency's evaluation of the firm's proposal.

The record shows that, contrary to Magney Grande's allegations, the source selection authority did not award this contract by considering price alone. As stated above, the contracting officer reviewed the evaluation documents (which, as stated above, did not show any meaningful differences between the proposals' compliance with solicitation requirements in terms of perceived technical superiority), the comprehensive pre-award survey recommendations of DCMA (which were fully supported by agency technical personnel), and the significant disparity in the two offerors' prices. In view of the significant price difference, and the technical closeness of the proposals, where both firms had substantial, relevant experience, the source selection authority's decision to award the contract to ITD is reasonable and supported by the record.

The protest is denied.

Anthony H. Gamboa  
General Counsel