

DECISION

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

50970

FILE: B-183288

DATE: August 13, 1975

MATTER OF: Hewlett-Packard Company

97496

DIGEST:

Decision is affirmed that protest filed after Army's rejection of nonconforming alternate offers--seeking amendment of RFP provision contained in solicitation as originally issued--is untimely, because GAO bid protest procedures required protest to be filed before closing date for receipt of initial proposals. Assuming protest could have been filed after rejection of alternate offers, it is untimely because of failure to file within required time after protester knew or should have known basis of protest. Also, allegation that protester did not then have information it believed necessary to refute Army's position is not pertinent to timeliness issue.

Hewlett-Packard Company (H-P) has requested reconsideration of our decision which found that its protest under request for proposals No. DAAH01-74-R-0877, issued by the United States Army Missile Command, Redstone Arsenal, Alabama, was not timely filed. (Hewlett-Packard Company, B-183288, June 23, 1975, 54 Comp. Gen. _____).

The pertinent facts are extensively set forth in our earlier decision and need not be repeated here. Briefly, the H-P protest (filed May 23, 1975) was ruled untimely because it was not filed prior to the closing date for receipt of initial proposals (December 6, 1974). The holding of our decision is summarized in its digest, which reads:

"Where offeror submitted initial basic proposal conforming to RFP and initial alternate proposals taking exception to RFP requirement, protest filed after rejection of alternate proposals--seeking amendment of RFP to eliminate stated requirement--is untimely, because protests against apparent improprieties in RFP must be filed prior to closing date for receipt of initial proposals."

H-P letters to our Office dated June 27, 1975, and July 7, 1975, make several points in requesting reconsideration. A summary of these points and our Office's conclusions follows:

1. H-P states that it never received written notification at any time from the Army that its alternate offers of one work station per system were considered nonresponsive.

We believe H-P's message to the Army dated February 12, 1975, which is quoted in our earlier decision, is the best indication of H-P's understanding of the matter at that time. This message indicates H-P understood that its (initial) alternate proposals were considered nonresponsive by the Army and that H-P was, therefore, requesting that the RFP be amended. As our decision noted, this message did not protest against the rejection of the alternate offers, but instead appeared to contend that a competitive environment required the amendment of the RFP so as to eliminate the two-station requirement. As our earlier decision held, any attempt of this kind to change the competitive premises upon which the protester's basic conforming proposal was submitted was, in our view, untimely. We do not see anything in H-P's present allegation which would demonstrate that our conclusion was incorrect.

2. H-P states that its best and final offer proposed one work station per system based on the assumption that the specification was being modified by the Army as H-P had requested. H-P states that its best and final offer has never been held nonresponsive by the Army. H-P indicates that upon receiving the Army Metrology and Calibration Center (AMCC) study in May 1975 and learning of the basis of the two-station specification, it then protested in a timely manner.

We note from the foregoing statement that H-P apparently submitted only one best and final offer, and that this offer adopted the one-station approach contained in H-P's initial alternate proposals. That is, H-P evidently did not submit any best and final offer conforming to the two-station requirement.

We have held that where an initial alternate proposal is submitted taking exception to certain specifications, and a protest is later filed based on the agency's rejection of that proposal, the protest may be timely insofar as it objects to specifications as to which the RFP provided that waivers could be requested. However, portions of the protest relating to specifications which were not subject to waiver are

untimely, since a protest on these bases should have been filed prior to the closing date for receipt of initial proposals. See TelePrompter Corporation, B-181274, November 27, 1974.

In the present case, we do not find any indication that the RFP invited requests for waivers from the specifications. Therefore, a protest filed at any time after the initial closing date which is premised upon the Army's rejection of the alternate proposals' departure from the two-station requirement must be considered untimely. In this light, the question of whether or when the Army notified H-P that its best and final offer was unacceptable is immaterial.

Alternatively, we note that even if H-P's February 12, 1975, message to the Army requesting amendment of the RFP could be interpreted as a timely protest against the rejection of H-P's initial alternate proposals, the Army's February 14, 1975, letter denying the request was initial adverse agency action. Under these circumstances, any protest to our Office should have been filed not later than 5 working days after H-P's receipt of the Army's February 14, 1975, letter. See 4 C.F.R. § 20.2(a) (1974 ed.).

In addition, assuming that H-P could properly request amendment of the RFP preparatory to filing a protest against rejection of its alternate offers, we believe that H-P knew or should have known the basis for protest by March 28, 1975, the closing date for receipt of best and final offers. In this regard, H-P's assumption that the Army would amend the specification as requested in its February 12, 1975, message was unwarranted. We note that the Army's February 14, 1975, letter unequivocally rejected the request to amend the RFP. The record does not indicate any further correspondence from the Army to H-P between February 14, 1975, and the submission of H-P's best and final offer. Under these circumstances, the Army's inaction in declining to accede to H-P's request for amendment by the closing date for receipt of best and final offers notified H-P of the basis for its protest, and a protest should have been filed not later than 5 working days later, i.e., April 4, 1975. See, in this regard, Southern Packaging and Storage Co., Inc., B-181249, June 7, 1974, and Sperry Rand Corporation (Univac Division) et al., 54 Comp. Gen. 408 (1974).

3. H-P states that its request that the RFP be amended was not based upon "actual data" in its possession.

H-P indicates that when it first learned (in February 1975) that the Army's requirements were defined by the AMCC study, it demanded a copy of the study. Since, however, it did not obtain a copy of the study until May 1975, it was not in a position to logically refute the Army's position until that time.

We do not believe the pertinent question is whether H-P believed it had enough information to refute the Army's position prior to May 1975. For the purposes of any protest attempting to amend the RFP so as to alter the competitive basis upon which H-P's basic proposal was submitted, the question is whether the alleged impropriety in the RFP was or should have been apparent to H-P prior to the closing date for receipt of initial proposals. Our earlier decision held that the alleged impropriety was apparent at that time. As indicated supra, we believe the same time limitation applies with respect to a protest against rejection of alternate offers whose provisions vary from non-waivable RFP requirements, and even assuming that the protester could properly object to the rejection of its alternate offers, at the very latest H-P knew or should have known the basis of protest by March 28, 1975.

Based on the foregoing, we are unpersuaded that H-P's protest is timely or that H-P has demonstrated any errors of fact or law in our earlier decision. Accordingly, our decision of June 23, 1975, is affirmed.


Deputy Comptroller General
of the United States