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DECISION

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

FILE: B-190534 DATE: November 16, 1977

MATTER OF: Technology, Incorporated

DIGEST:

1. Protest after award alleging contract should have been advertised rather than negotiated involves apparent solicitation impropriety and is therefore untimely, and does not raise significant issue within meaning of 4 C.F.R. §20.2(c) (1977). Allegation that award should have been made on basis of initial proposals is also untimely, since basis for protest was known or should have been known when agency requested best and final offers, and protest was not filed within 10 working days after that time.

2. Where initial statement of protest merely speculates that price leak may have occurred during negotiations and that protester may have been prejudiced as result, and no substantive evidence is furnished to support speculations, protest is dismissed.

Technology, Incorporated (TI), through its counsel, protested to our Office on October 26, 1977, concerning the award of a contract for the furnishing of a quantity of hydraulic test stands to ACL-FILCO Corporation under request for proposals (RFP) No. F41608-77-R-0998, issued by the Department of the Air Force. The protest was filed on the tenth working day after TI states it learned of the award.

TI initially contends that the contract should have been formally advertised rather than negotiated because none of the exceptions to the requirement for advertising (ASPR § 3-200 et seq. (1976)) are applicable and because the RFP evaluation factors referred only to price as the criterion for award. This contention is obviously untimely. Under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), improprieties which are apparent in an RFP

as originally issued must be protested prior to the closing date for receipt of initial proposals (here, March 14, 1977); improprieties subsequently incorporated into an RFP must be protested prior to the next closing date following the incorporation (TI states that best and final offers were due on April 18, 1977). Allegations concerning the method of procurement or the evaluation factors involve apparent improprieties within the meaning of this rule. See Hayes International Corporation et al., B-179842, March 22, 1974, 74-1 CPD 141; Honeywell, Inc., B-184245, November 24, 1975, 75-2 CPD 346.

Recognizing that its contention may be found untimely, TI additionally contends that the issue is "significant" because the Air Force intends to negotiate identical or similar procurements in the near future. In this regard, 4 C.F.R.§20.2(c) provides that an untimely protest may be considered if the Comptroller General determines that the protest raises "* * * issues significant to procurement practices or procedures * * *." A significant issue is one involving a procurement principle of widespread interest. 52 Comp. Gen. 20 (1972). The issue of negotiation versus advertising has been considered in many prior decisions of our Office involving a wide variety of factual situations. We see no reason to regard the issue raised here as one of widespread interest.

TI next contends that the award should have been made on the basis of the initial proposals, because it was unlikely that offerors would have significantly reduced their prices below those contained in the initial proposals. This contention is also untimely. Discussions or negotiations means any opportunity for an offeror to revise or modify its proposal. 51 Comp. Gen. 479 (1972). A request for best and final offers, in itself, constitutes discussions or negotiations. Dyneteria, Inc., B-181707, February 7, 1975, 75-1 CPD 86. The conduct of discussions with one or more offerors precludes, of course, the making of an award on the basis of the initial proposals. 48 Comp. Gen. 663 (1969); 50 id. 202 (1970). Accordingly, TI knew or reasonably should have known the basis for its protest in this regard when it received the Air Force's request for best and final offers in April 1977, and the protest should have been filed within 10 working days after that time. 4 C.F.R.§20.2(b)(2).

Further, TI's contention that our timeliness rules are "procedural niceties" which should not "defeat TI's substantive rights"

is without merit. See Cessna Aircraft Company et al., 54 Comp. Gen. 97 (1974), 74-2 CPD 91; Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. An offeror which acquiesces in a particular procurement method or procedure will not later be heard to complain, after award has been made to another, that the method or procedure was improper. Kappa Systems, Inc., B-187395, June 8, 1977, 56 Comp. Gen.675, 77-1 CPD 412; Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294, 1300 (7th Cir., 1975).

The protester raises several other issues. TI speculates that the Air Force may have conducted more extensive negotiations with some offerors than it did with TI. Also, based on the small difference (.36 percent) between ACL-FILCO's best and final price and TI's best and final price, TI surmises that ACL-FILCO may have learned TI's price, i.e., that there may have been an improper price leak during the procurement. The protester states that it would be an unconscionable result if ACL-FILCO in fact learned TI's price and reduced its own price accordingly in the best and final offer.

There is nothing inherently improper in an agency's conducting more extensive negotiations with one offeror than with another. The extent of discussions undertaken with individual offerors--a matter primarily within the discretion of the agency to determine--depends on the need for clarification or correction of particular portions of the individual proposals received. See H.G. Peters & Company, Inc., B-183115, March 22, 1976, 76-1 CPD 190. Moreover, we see no reason why a close differential in the best and final offered prices alone proves that a price leak occurred during the procurement. Our Office has repeatedly denied protests where, as here, bare allegations of a price leak during the negotiations were unsupported by any substantive evidence. See, for example, Engineered Systems, Inc., B-184098, March 2, 1976, 76-1 CPD 144; WESTPAC Products Company, B-186671, November 23, 1976, 76-2 CPD 444.

In this regard, we have indicated that where the allegations in an initial statement of protest are, on their face, legally without merit, the protest will be dismissed without following the usual procedure of obtaining a report from the contracting agency. See What-Mac Contractors, Inc. - Reconsideration, B-187782, January 14, 1977, 77-1 CPD 34. We believe the result should be the same in a case such as this one where the protester is merely speculating that certain improprieties may have occurred during the procurement and that it may have been prejudiced as a result.

The protest is dismissed.

Paul G. Dembling
General Counsel