

6021

J. Vachon  
Page 2

**DECISION**



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

**FILE: B-190942**

**DATE: April 13, 1978**

**MATTER OF: Technical Services Corporation**

**DIGEST:**

1. Protest filed untimely with procuring agency more than 10 days after basis of protest was known, and then filed within 10 working days with GAO after denial by contracting officer, is not for consideration on merits under 4 C.F.R. § 20.2(a) which requires that initial protest to agency be on timely basis. Further, protest does not present significant issue under 4 C.F.R. § 20.2(c).
2. Procuring activity has adequately justified sole-source award where time is of essence and procurement from other than current source would entail unacceptable performance and schedule risks.

Technical Services Corporation (TSC) has protested several procurement actions by the United States Army Tank-Automotive Materiel Readiness Command (TARCOM) relating to the acquisition of engineering services.

The background of the matter is that on January 4, 1977, TARCOM issued request for proposals (RFP) No. DAAE07-77-R-3174 for two items of engineering services. Contract line item 0001 covered engineering services for development or revision of standardization documents to establish requirements for military vehicles, parts, and other components in terms of design details. Item 0002 was for engineering services for development and preparation of specifications for major item commercial vehicles in terms of performance specifications.

Three firms submitted proposals on January 24, 1977, and revised proposals following negotiations

B-190942

were submitted on February 23, 1977. Following final technical and cost evaluations, Gonzalez Design Engineering Company (Gonzalez) was the low eligible offeror with a proposed cost of \$510,853. TSC's proposed cost was \$631,533. On March 14, 1977, the date a favorable preaward survey was received on Gonzalez, funds for item 0001 were withdrawn. Therefore, the contracting officer amended the RFP, deleting item 0001, and proceeded to conduct negotiations with the three offerors solely on item 0002. Following a review of the new best and final offers, Gonzalez was again selected as the successful offeror with a cost proposal of \$137,323. TSC's proposed cost was \$142,502. Award was made to Gonzalez on April 14, 1977, of contract No. DAAE07-77-C-3022.

On August 19, 1977, additional funds became available which permitted the procurement of deleted item 0001. Because of the delay in procuring the item, the requirement was now urgent, according to the contracting officer, and the available funds would expire on September 30, 1977. Therefore, the contracting officer determined that it would be in the Government's best interest to reinstate Gonzalez's prior proposal for item 0001 on a sole-source basis and negotiations were conducted with Gonzalez on this basis. Following negotiations, modification No. P00001, incorporating item 0001, was issued to the existing Gonzalez contract on September 14, 1977, and synopsisized in the Commerce Business Daily on October 17, 1977. TSC requested a copy of the modification on October 18, 1977, and was furnished a copy by letter of October 27, 1977, from TARCOM.

TSC protested the award of the modification to the contracting officer by letter of November 28, 1977, contending the item should have been competitively procured, which protest was denied by letter of December 6, 1977. TSC protested to our Office on December 20, 1977.

We find this protest to be untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1977)).

B-190942

Section 20.2(a) provides that where a protest has been initially filed with the agency on a timely basis, any protest to our Office will be considered if filed within 10 days of notification of initial adverse agency action. Section 20.2(b)(2) states that protests must be filed within 10 working days after the basis of the protest is known. Here, TSC knew of the basis of its protest upon receipt of TARCOT's letter of October 27, 1977, but did not protest to the agency until November 28, 1977. Accordingly, the protest was untimely filed with the agency and will not be considered by our Office. Southwest Aircraft Services, Inc., B-188483, April 1, 1977, 77-1 CPD 227.

Further, TSC argues that, notwithstanding the untimeliness of the protest, our Office should consider the matter on the merits as it involves a "significant issue" under section 20.2(c) of our Bid Protest Procedures. We do not find that the protest meets our Office's test of an issue which is of widespread interest to the procurement community or significant to the procurement process. The "significant issue" exception is to be exercised sparingly so that the timeliness standards do not become meaningless. R.A. Miller Industries, Inc. (Reconsideration), B-187183, January 14, 1977, 77-1 CPD 32. The decision as to what constitutes a significant issue is made on a case-by-case basis and, therefore, the fact that our Office has considered an untimely protest on a sole-source procurement in Willamette-Western Corporation et al., 54 Comp. Gen. 375 (1974), 74-2 CPD 259, is not controlling here.

TSC has also protested another procurement action by TARCOT involving a sole-source decision which was timely filed and will be considered.

In the December 29, 1977, issue of the Commerce Business Daily, TARCOT advised that it had issued request for quotations (RFQ) No. DAAE07-77-Q-5037 to Gonzalez to increase the level of effort under the

B-190942

above-noted item 0001 by 8,784 hours, as an add-on to the Gonzalez contract. This RFQ was subsequently canceled and a sole-source RFP No. DAAE07-78-R-5042 was issued in its place for the same increase in the level of effort. This increase in the level of effort was necessary because Gonzalez had exhausted the number of hours of effort contained in modification P00001.

TARCOM has advised our Office that the urgency of procurement required the use of the sole-source RFP to Gonzalez. The specifications being generated must be completed no later than June 30, 1978, for use in the fiscal year 1978 commercial vehicle truck program. TARCOM states that, because of the time required for a new contractor to set up operations and the learning curve inefficiency incident to performing the work in conformance with military requirements, it would take 4 to 6 months for the specifications to be delivered. This time period plus the time required to evaluate competitive technical proposals would present an unacceptable risk to the Government's urgent needs.

As a general rule, a noncompetitive award is justified where time is of the essence and procurement from other than the current source would entail unacceptable performance and schedule risks. Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPD 137. In view thereof, and since the Army had a reasonable basis for the sole-source award to Gonzalez under RFP -5042, the procurement action was appropriate.

TSC concedes that, standing alone, there was nothing improper with the above award but believes that this RFP award must be viewed in light of what it contends was the alleged illegal modification of the prior contract, which placed Gonzalez in the position of being the only contractor that could meet the Government's delivery schedule.

To do as TSC requests would be a circumvention of our timeliness procedures and allow TSC to have a decision on the merits of a protest which we have found to be untimely filed. Even if we were to find

B-190942

that the modification was questionable, which we do not do here, it is not practicable to ignore the performance under the contract and attempt to reconstruct the circumstances and facts as they existed at the date of the award to Gonzalez. Informatics, Inc. - Reconsideration, 56 Comp. Gen. 663 (1977), 77-1 CPD 383.

For the foregoing reasons, the protest is denied.



Deputy Comptroller General  
of the United States