

6980

J. Tucker 021

DECISION



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

FILE: B-190793

DATE: July 12, 1978

MATTER OF: Magnasync/Moviola Corporation

DIGEST:

1. Record does not support allegation that protester, advised by contracting officer that SBA had determined protester to be other than small business and that offer could not presently be considered from it, was denied opportunity to submit proposal where contracting officer furnished copy of RFP and protester submitted incomplete proposal.
2. Protest, filed after closing date for receipt of proposals, that specifications were written around one firm's product and, therefore, were restrictive is untimely under 4 C.F.R. § 20.2 (b)(1) (1977).
3. Where offeror protests small business set-aside to contracting officer as being not justified and protester does not protest to GAO within 10 working days of adverse agency action (denial of protest), protest is untimely under 4 C.F.R. § 20.2(a) (1977).
4. Argument that small business set-aside procurement did not result in adequate competition is premature since negotiations have been suspended pending outcome of protest on other issues and contracting officer will not make determination of price reasonableness under ASPR § 1-706.3(a) until conclusion of negotiations.

Magnasync/Moviola Corporation (Magnasync) has protested certain actions by the Department of the Air Force which it contends prevented it from submitting an offer under request for proposals (RFP) F04606-77-R-0999 issued by the Sacramento Air Logistics Center, McClellan Air Force Base, California.

The RFP, issued on September 26, 1977, was a 100-percent small business set-aside. On the date the RFP was issued, the contracting officer was advised by the Los Angeles District Office of the Small Business Administration (SBA) that it had determined Magnasync to be other than a small business. Based on this information, the contracting officer removed Magnasync from the source list for the procurement and advised Magnasync that based on the SBA determination, the Government could not presently consider an offer from Magnasync. At the same time this advice was given, Magnasync requested a copy of the solicitation, which it was supplied along with two subsequent amendments.

On November 4, 1977, Magnasync submitted a partial proposal under the RFP but did not include prices for the items offered. The closing date for receipt of proposals was November 9, 1977.

On November 7, 1977, the SBA Size Appeals Board ruled that, as the determination of Magnasync's size status had not been made in connection with a particular procurement but was furnished upon another procuring activity for reporting purposes, the determination was merely advisory and did not preclude Magnasync from self-certifying itself as a small business. The contracting officer received notice of this decision on November 11, 1977, 2 days after the closing date, and Magnasync received its copy of the SBA ruling on November 14, 1977.

Magnasync argues that improper actions by the contracting officer denied it an opportunity to compete in the procurement and requests that the solicitation be canceled and that Magnasync be allowed to compete on the resolicitation.

Based upon our review of the record, we cannot say that the actions of the contracting officer were

improper or directly prohibited Magnasync from submitting a proposal.

It appears a potential competitor raised a question regarding Magnasync's size status with the contracting officer, who then contacted the Los Angeles SBA office and was advised of the outstanding determination. We find nothing improper or contrary to the procurement regulations in the contracting officer's advising Magnasync of this information. Whether Magnasync chose to expend the resources and time to submit a complete proposal was, we believe, a business judgment on its part and the record does not support Magnasync's allegation that the contracting officer prevented the submission of a proposal. Accordingly, while the timing of events here was unfortunate, we find no reason to require the cancellation of the instant RFP. Further, while Magnasync has raised the question of the authority of the contracting officer to remove Magnasync from the source list to receive a copy of the RFP, as Magnasync was furnished a copy and did submit a proposal, albeit incomplete, we find this question to be academic.

Magnasync also argues that the specifications contained in the RFP were restrictive and written around one company's product. We find this basis of protest to be untimely under our Bid Protest Procedures (4 C.F.R. part 20 (1977)). Section 20.2(b)(1) requires protests based on alleged improprieties which are apparent prior to the closing date for receipt of proposals be filed prior to the closing date. As the specifications were contained in the RFP and Magnasync's protest was not filed until after the closing date for receipt of proposals, it is untimely and not for consideration.

Magnasync further contends that the decision to set aside the procurement for small businesses was not justified. We note Magnasync protested this decision to the contracting officer on October 12, 1977,

and by letter of October 27, 1977, received by Magnasync on October 31, 1977, the protest was denied. As Magnasync did not protest this adverse agency action to our Office until more than 10 working days had elapsed, this basis of protest is untimely under 4 C.F.R. § 20.2(a) (1977).

Finally, Magnasync argues that the solicitation should be canceled because of lack of adequate competition. However, the negotiations have been suspended pending the outcome of the protest. The contracting officer will not make his determination as to whether a reasonable price was obtained and, thus, whether there was adequate competition until negotiations are complete. See section 1-706.3(a) of the Armed Services Procurement Regulation (1976 ed.). Therefore, we find this basis of protest to be prematurely raised.

Accordingly, the protest is denied.

R. F. Kistner
Deputy Comptroller General
of the United States