

Vickers
Proc. G. I

DECISION



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

18958

FILE: B-201466

DATE: August 3, 1981

MATTER OF: Microtech Industries, Inc.

DIGEST:

Protest, contending that solicitation should have been formally advertised rather than negotiated and that only price should have been considered in award selection, filed after request for best and final offers, at latest, is untimely under 4 C.F.R. § 21.2(b)(1) (1981) as alleged improprieties were apparent from solicitation.

Microtech Industries, Inc. (Microtech), has protested the award of a subcontract to Engineered Systems, Inc. (ESI), by Union Carbide Corporation (UC) under UC's prime operating contract for Oak Ridge, Tennessee, with the Department of Energy.

The contract, for microfilm service and sales, was pursuant to solicitation No. V8619-49 issued on June 27, 1980, by UC, and award was made on December 5, 1980, to ESI.

Microtech contends that the solicitation, a negotiated request for proposals (RFP), was for all practical purposes an invitation for bids (IFB). Further, award was not made to the low offeror, Microtech, which would have resulted from an IFB based on price only competition. Also, the substitution of UC for DOE as the contracting authority permitted the circumvention of normal procurement procedures and regulations.

DOE contends that the protest was untimely filed under our Bid Protest Procedures (4 C.F.R. part 21 (1981)) and should be dismissed. DOE argues that Microtech should have known from the contents of the solicitation that the procurement was negotiated, that

[Protest Alleging That Award Was Not Made To Low Offeror]

017719

115945

price alone was not the determining award factor, and that UC, not DOE, was conducting the procurement. Therefore, DOE alleges the protest should have been filed before the closing date for receipt of proposals under 4 C.F.R. § 21.2(b)(1) which requires protests be filed prior to the closing date if the basis of protest is apparent from the face of the solicitation.

We note from the record that it is undisputed that Microtech questioned UC at the preproposal conference as to the reason this procurement was negotiated rather than formally advertised and was told that the reason would eventually become clear to Microtech as the procurement proceeded. Further, during negotiations, Microtech raised the same objection and received the same answer. Following receipt of the notice of award, Microtech protested to our Office on December 8, 1980.

We find the protest to be untimely filed under 4 C.F.R. § 21.2(b)(1) (1981). The solicitation made it clear that the procurement was to be negotiated and that UC, not DOE, was conducting the procurement. Also, the RFP, by setting out the six evaluation criteria in descending order of importance, showed that price was not the only factor that would be considered in selecting the successful offeror, but that technical approach, experience, equipment, etc., would also be evaluated. Therefore, the bases of Microtech's protest were apparent from the solicitation.

While Microtech argues that it was lulled into a false sense of security by the responses of the contracting officials to its inquiries, Microtech continued to participate in the procurement. Even assuming that Microtech acted reasonably in not protesting as a result of the answer given at the preproposal conference, after negotiations were completed and Microtech was requested to submit its best and final offer, it should have been clear to Microtech that any answers or events concerning its objection should have become evident. Therefore, assuming Microtech was lulled into not filing earlier by UC responses, at the latest the protest should have been filed prior to the closing

date for receipt of best and final offers. See 4 C.F.R. § 21.2(b)(1) (1981). Accepting Microtech's argument that its inquiries to the agency were protests, Microtech's protest to our Office would be untimely since it was not filed within 10 working days of initial adverse agency action, the receipt of best and final offers. See 4 C.F.R. § 21.2(a) (1981).

Accordingly, the protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

HRD-82-63

STATE FORM 105
REV. 1-1-74

DEPARTMENT OF GENERAL ACCOUNTING OFFICE

APPROVAL FOR RELEASE AND DISTRIBUTION OF REPORT
(SIGNED BY OFFICIAL OTHER THAN THE COMPTROLLER GENERAL OR DIVISION DIRECTOR)

TITLE OF REPORT AND ASSIGNMENT CODE

Use of Program Income by Evaluation, Dissemination,
Assessment Centers Supported by OBEMLA (Code 104520)

INSTRUCTIONS

Instructions for preparing this form are contained in Chapter 20 of the Report Manual.

NAME OF OFFICIAL TO SIGN REPORT

Morton E. Henig

TITLE

Senior Associate Director

DATE ISSUED

INITIAL EXTERNAL DISTRIBUTION

NO. OF COPIES	RECIPIENT	NO. OF COPIES	RECIPIENT
12	Robert Nagle, Office of the Inspector General, Department of Education	1	Senate Committee on Labor and Human Services
2	House Committee on Appropriations	4	Director, Office of Management and Budget
2	House Committee on Education and Labor		
1	Senate Subcommittee on Labor, Health, Education and Welfare		
1	Education Committee on Appropriations		

INITIAL INTERNAL DISTRIBUTION

NO. OF COPIES	RECIPIENT	NO. OF COPIES	RECIPIENT
1	DIRECTOR, OFFICE OF POLICY	1	Regional Manager, Seattle
1	Cognizant Division Director Mr. Ahart		
5	Chief, Distribution Section, OAPS		
1	Cognizant Division Deputy Director Mr. Densmore		
1	Cognizant Division Associate Director Mr. Henig		
2	Cognizant Division Group Director Mr. Jojokian		

REMARKS

Budget Functions

0501

ORGANIZATIONS

DE

ISSUE AREAS

3300/3306

021719

APPROVAL FOR RELEASE OF REPORT AND TRANSMITTAL LETTERS

SIGNATURE

TITLE

DATE