

117149
DECISION



20378
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

PL-2
Kratzer

FILE: B-205697

DATE: December 24, 1981

MATTER OF: Microwave Power Devices, Inc.

DIGEST:

1. Contention that agency impermissibly disclosed to competitor confidential information contained in a previous unsolicited proposal, where filed more than 10 working days after protester became aware of basis for protest, is untimely and will not be considered on merits.
2. Contention that agency violated Defense Acquisition Regulation by refusing to permit protester to modify cost proposal is without merit since protester sought to do so well after date for receipt of best and final offers.

Microwave Power Devices, Inc. (MPD) protests the award of a contract to Eaton Corporation under request for proposals (RFP) F41608-81-R-3407 issued by the Department of the Air Force for the installation of a power meter calibration system at Kelly Air Force Base, Texas. MPD contends that the Air Force impermissibly provided Eaton with confidential design information contained in an unsolicited proposal submitted by MPD. The protester also contends that the Air Force violated the Defense Acquisition Regulation (DAR) by refusing to allow MPD to revise its cost proposal. Since we find the former contention to have been untimely filed and the latter to be without merit, we dismiss the protest in part and summarily deny the protest in part.

In 1979, MPD submitted an unsolicited proposal for the installation of a calibration system at Kelly. With the alleged encouragement of the Air Force, MPD amended the unsolicited proposal and developed a system which was eventually approved for use by the Air Force. On January 21, 1981, the Air Force issued an RFP which designated the MPD system's model number, but did not otherwise describe the requirement. In February, MPD submitted a proposal in response to the RFP.

MPD asserts that between January and July 1981, it received information which led it to believe that Eaton had been given a copy of MPD's unsolicited proposal. On June 25, 1981, the Air Force amended the RFP adding the model number of a system manufactured by Eaton to the description of the required item and requested best and final offers by July 27, 1981.

MPD alleges that because the original RFP contained no description of the requirement, Eaton could have designed an approved system only if it had obtained MPD's previous unsolicited proposal. MPD also states that it received information from July to October 1981 which confirms this allegation. MPD contends that the Air Force violated an express agreement to keep the unsolicited proposal confidential.

Under our Bid Protest Procedures, this contention is untimely. These procedures require the filing of a protest not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2 (1981). Because MPD's contention that the Air Force breached a confidentiality is based primarily on the inclusion of Eaton's system in the June 25 amendment to the RFP, we find that MPD knew or should have known the basis of its protest at the time it received the amendment. Therefore, MPD should have filed a protest within 10 working days thereof. Since MPD did not file a protest until December 3, 1981, this contention was untimely filed and will not be considered on its merits.

MPD states that in the course of securing an extension of MPD's offer acceptance period to November 20, 1981, the Air Force assured MPD that it could alter its price at any time until November 20. Soon after this assurance was given, the protester asserts, the Air Force informed MPD that it would not be allowed to modify its price. MPD claims that it was considering a price modification until it received this information. On November 20, MPD learned that the Air Force had awarded a contract to Eaton at a price only slightly lower than its own.

MPD contends that the refusal to allow a price modification violates DAR §§ 7-2002.2 and 7-2002.4 (1976 ed.). Section 7-2002.2, however, applies only to advertised procurements. Section 7-2002.4 provides that a modification resulting from a request for best

and final offers may not be considered if it is received after the time and date specified in the request unless certain conditions, not extant here, are present. The only request for best and final offers indicated by the protester specified July 27, 1981, as the date for receipt of best and final offers. Notwithstanding any representation to the contrary which may have been made by a contracting official, MPD could not have been permitted to alter its price after July 27 absent a second request for best and final offers. Thus, we find MPD's contention that it was impermissibly denied the opportunity to alter its price to be without merit.

The protest is dismissed in part and summarily denied in part.

Harry R. Van Cleve.
For the Comptroller General
of the United States