

DECISION



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

FILE: B-205890

DATE: July 27, 1982

MATTER OF: Armidir, Ltd.

DIGEST:

1. Protester's claim that the contracting agency deliberately tried to prevent the protester from competing is dismissed as untimely since the protester did in fact compete and did not raise this ground of protest until after its proposal had been rejected as technically unacceptable.
2. GAO has no basis to disregard the substantive information in agency's administrative report merely because report was not submitted within GAO guidelines for intermediate case development. Timeliness standards for the filing of protest and request for reconsideration must be more strictly construed in view of seriousness of protests against Government contract awards.
3. Protester's disagreement with contracting agency's technical evaluation provides no basis for GAO to question validity of the evaluation since the protester has failed to show that the agency's determination is unreasonable, arbitrary, or in violation of procurement laws or regulations.
4. Agency was correct in holding that the protester's proposed employee was unacceptable since, although on terminal leave from Navy, the individual still had to be considered an employee of the Federal Government and therefore excluded from consideration under the terms of the solicitation.

5. GAO will not substitute its judgment for that of the contracting agency where the agency rules that the protester's resume for its employee was inadequate and the only evidence that the protester offers in rebuttal is conflicting statements which claim that the resume was suitable for the agency's purposes.
6. Protester's unsubstantiated claim that one of the awardees failed to meet a solicitation requirement for providing information on an alternate employee is without merit where awardee and agency state information was supplied.

Armidir, Ltd. (Armidir), protests the rejection of its proposal by the Naval Electronic Systems Command (Navy) under request for proposals (RFP) No. N00039-82-R-0009.

The RFP solicited mobile technical unit (MOTU) services whereby the contractor provides a skilled individual to become part of a team including Navy civilian and military personnel and would provide on-the-job maintenance and emergency repair and training for specified equipment for fleet personnel. The RFP specified three distinct tasks ("A," "B" and "C"), involving different equipment located at three different sites, with award to be made on a task-by-task basis. Armidir claims that it is the low offeror on all three tasks and, therefore, is entitled to the three awards. However, for various reasons, the Navy found Armidir's technical personnel unacceptable and rejected the Armidir proposal.

We find no basis to question the Navy's decision to reject Armidir's proposal.

Armidir's first ground of protest is that the Navy deliberately tried to keep Armidir from competing under this solicitation by deliberately excluding Armidir from the offerors' mailing list so that Armidir would not receive a copy of the RFP. Armidir states that it was only by chance that it learned of the procurement and was then able to request a copy of the RFP. In Armidir's opinion, the Navy's discriminatory action is the product of a dispute between the two parties over an earlier contract--a dispute currently before the Armed Services Board of Contract Appeals.

The Navy, however, denies that there was any deliberate attempt to prevent Armidir from competing and further argues that this ground for protest is untimely since it was not raised until long after the date for receipt of proposals.

We agree that this ground for protest is untimely. Under our Bid Protest Procedures, protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for the receipt of initial proposals must be filed (received) in our Office prior to that closing date. 4 C.F.R. § 21.2(b)(1) (1982). Since Armidir did in fact get a chance to compete, it is actually protesting that it only had 4 weeks in which to prepare a proposal while the other firms had 7 weeks. However, as noted above, a complaint of this nature--clearly apparent prior to the closing date for the receipt of proposals--must be filed in our Office prior to the closing date. Since Armidir did not raise this matter until after its proposal had been rejected, it is clearly untimely and will not be considered on the merits.

Armidir recognized that this part of its protest might be considered untimely under our Bid Protest Procedures. Nevertheless, it believes that the issue should be considered because the Navy's report in response to the protest also failed to meet GAO's filing requirement. In light of this, Armidir argues that we should either refuse to consider the Navy's report at all and rely solely on the information supplied by Armidir or, if we do decide to consider the report, we should then agree to relax our filing requirements for Armidir as well.

Our Bid Protest Procedures state that we shall request an agency to submit a report on a bid protest as expeditiously as possible--generally, within 25 working days. 4 C.F.R. § 21.3(c) (1982). We note that more than 4 months elapsed between our request to the Navy for a report and our receipt of that report. Nevertheless, we have held that the late receipt of an agency report does not provide a basis for disregarding the substantive information contained in the report or for sustaining the protest on an inadequate record. Cummings Marine System, Inc., B-197506, August 21, 1980, 80-2 CPD 136. Moreover, we have recognized that, due to

the seriousness of protests against award of Government contracts, timeliness standards for both the filing of protests and requests for reconsideration must be more strictly construed than filing requirements during intermediate case development. See, for example, U.S. Financial Services, Inc.--Reconsideration, B-195945.6, B-198276.3, November 3, 1981, 31-2 CPD 376. Therefore, we find no basis for relaxing our filing requirements as Armidir suggests.

Task "A": Armidir Employee Determined to be Technically Unacceptable

Task "A," "MOTU Thirteen," specified Subic Bay in the Republic of the Philippines as the location for the services and listed the equipment with which the members of the MOTU would be working. Armidir proposed an individual for task "A" who had obtained his experience at a naval shipyard where, as a civilian employee, he had worked as an electronics technician and as an electronics foreman. The Navy rejected Armidir's proposed individual as technically unacceptable. This rejection was based on four grounds:

- (1) experience gained at a naval shipyard was not acceptable;
- (2) lack of military (Navy) experience in the enlisted grades of E-6 through E-9;
- (3) lack of prior experience with a MOTU; and
- (4) lack of any experience with "Related Equipment"--equipment similar to the equipment listed under task "A."

Armidir argues that the Navy's evaluation was biased and defective. In Armidir's opinion, the experience gained at a naval shipyard is more than adequate for purposes of a MOTU and questions whether the members of the Navy's Technical Evaluation Board (TEB) had the background to recognize this. Armidir also argues that the requirement for military experience in the enlisted grades of E-6 through E-9 is unduly restrictive but, regardless of this fact, the civilian experience its employee has is actually superior to the required military experience. Likewise,

Armidir criticizes the requirement of prior MOTU experience, arguing that this was not a requirement in past procurements and, along with the military experience requirement, effectively bars anyone except former Navy enlisted personnel from consideration. As to the requirement for experience with related equipment, Armidir argues that it is improper and unfair for the Navy to use such a vague evaluation factor to disqualify its employee. Finally, in a more general sense, Armidir questions the overall qualifications of the TEB members and indicates that they were biased against Armidir.

The Navy maintains that Armidir's various contentions are without merit. The Navy first argues that, if Armidir believed that the RFP's evaluation factors were defective, under GAO's Bid Protest Procedures, Armidir was required to protest these matters prior to the closing date for the receipt of proposals. Since Armidir failed to do this, the Navy concludes that any complaints Armidir has now concerning alleged improprieties in the solicitation must be ruled untimely.

As to the TEB's technical evaluation, the Navy argues that all the proposals, including Armidir's, were evaluated in accordance with the RFP's stated evaluation criteria. More specifically, the Navy points out that Armidir's proposed task "A" employee was deficient in four specific areas and was rejected for having this combination of weakness, not for any single deficiency. According to the Navy, a single deficiency could have been overcome by strength in other areas; but, with four major deficiencies, the TEB had no other choice but to reject Armidir's employee as technically unacceptable.

In response to Armidir's other complaints regarding the evaluation under task "A," the Navy denies that there is any evidence that the members of the TEB or any other Navy personnel discriminated against Armidir. In addition, the Navy sees nothing wrong with the evaluation criteria for the present MOTU procurement being more stringent than the criteria used under the prior MOTU procurements in which Armidir participated. The Navy argues that its needs have changed over the course of time, requiring a higher quality of services, as reflected in the present solicitation.

We agree with the Navy that insofar as Armidir is arguing that the solicitation's evaluation criteria are defective, such a protest is untimely. As noted above, any protest based upon alleged improprieties in a solicitation which are apparent prior to the closing date for the receipt of initial proposals must be filed in our Office prior to that closing date. 4 C.F.R. § 21.2(b)(1) (1982). The evaluation criteria which Armidir finds defective are set out in the RFP's section "V," "Evaluation Factors for Award," and Armidir was, or should have been, aware of them some 4 weeks prior to the closing date for the receipt of initial proposals. Consequently, Armidir's protest on this ground is again clearly untimely and not for consideration on the merits.

As to Armidir's criticism of how its proposal was evaluated, we note that our review of the evaluation of technical proposals is limited to ascertaining whether the determination of the technical merit of a proposal is unreasonable, arbitrary, or a violation of procurement laws and regulations; we do not independently evaluate proposals and make our own determination as to their acceptability. General Technology Applications Incorporated, B-204635, March 22, 1982, 82-1 CPD 266. Moreover, we have also held that it is the responsibility of each offeror to establish that what it proposes will meet the Government's needs. Duroyd Manufacturing Company, Inc., B-195762, November 16, 1979, 79-2 CPD 359. As the Navy has indicated, the determination of the Government's needs and the best methods of accommodating those needs is primarily the responsibility of the contracting agencies, and our Office will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis. East Bay Auto Supply, Inc., B-195325, October 23, 1979, 79-2 CPD 281.

Here, Armidir has declared both the Navy's minimum needs determination and the Navy's technical evaluation to be unreasonable. However, Armidir reaches these conclusions on little more than its disagreement with the Navy's exercise of its administrative discretion. In Armidir's opinion, the Navy should have recognized that Armidir's employee satisfied the agency's stated needs, despite the fact that those needs were exaggerated.

We have held that mere disagreement with an agency's discretionary decision is not grounds to disturb it, James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. It is well recognized that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Moreover, we have held that the protester has failed to meet the burden where the only available evidence is the conflicting statements of the protester and the contracting agency. Del Rio Flying Services, Inc., B-197448, August 6, 1980, 80-2 CPD 92. Therefore, Armidir has not presented our Office with any basis to question either the Navy's minimum needs determination or its technical evaluation.

Armidir has argued that the members of the TEB and other unspecified Navy personnel were biased against Armidir and that its poor technical evaluation is a reflection of this bias. The Navy, however, denies this accusation and maintains that Armidir's task "A" proposal was evaluated in strict accordance with the evaluation criteria and on an equal basis with all other proposals. Since these conflicting statements are the only evidence available, we conclude that Armidir has failed to meet its burden of proof on this issue. Del Rio Flying Services, Inc., supra.

As to Armidir's disagreement with what it considers the more stringent requirements of this MOTU procurement in comparison with earlier MOTU procurements, we note that it is not unusual for an agency's needs to change with the passage of time or for the agency to decide that it can only satisfy those revised needs through an altered procurement approach. See, for example, EMI Medical, Inc; Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96. Therefore, this portion of Armidir's protest is also without merit.

Task "B": Government Employee on Terminal Leave Ruled Unacceptable

Task "B," "MOTU Twelve," specified Mayport, Florida, as the location for the services and, as under task "A," listed the particular equipment involved in the project. The Navy found the employee Armidir proposed for this task unacceptable because, at the time the proposal was

submitted, the individual was a Government employee who shortly thereafter was scheduled to go on terminal leave prior to his release from active military service. According to the Navy, a person on terminal leave is still a Government employee and, under section "C," paragraph (e), of the RFP, Government employees may not be offered for any position under the solicitation.

Armidir argues that a Government employee on terminal leave should be permitted to participate in a MOTU procurement. In Armidir's opinion, such a person is no longer an employee of the Government as that term was used by the RFP. On the other hand, Armidir points out that the individual in question would have been out of the Navy by the time the contract was actually awarded. Therefore, Armidir argues that, for practical reasons, the Navy should have considered Armidir for the award of task "B."

Both the agency and the protester note that the issue of the status of an individual on terminal leave is currently before the Armed Services Board of Contract Appeals in a case involving a prior MOTU contract between the Navy and Armidir. In light of this, the Navy argues that Armidir was well aware of its interpretation and should have taken this into account when preparing its proposal.

Armidir, however, has submitted to our Office a letter it received from the Naval Military Personnel Command which states that:

"The Department of the Navy has no objection to the employment of Navy personnel in a terminal leave status. No restrictions are imposed on individuals in that status regarding civilian employment."

Armidir also argues, although without any proof, that the Navy admits in its brief to the Board that Government employment ceases with the commencement of terminal leave. Based on these two facts, Armidir concludes that the Navy had no basis to find its proposed employee technically unacceptable solely because he was in the terminal leave status at the time the procurement was being conducted.

We do not agree. Our Office in the past has held that employees in a terminal leave status are carried on the rolls as employees and must legally be regarded as such for all intents and purposes until they are actually separated. 38 Comp. Gen. 594 (1959). Therefore, we believe that the Navy had a proper basis for concluding that Armidir's proposed employee must be considered a Government employee for purposes of this procurement and that section "C," paragraph (e), prohibited such an individual from being considered for the position. We further note that the RFP contemplated performance to begin on October 1, 1981, or as soon thereafter as the contracts could be awarded. Therefore, we do not believe that the Navy was required to speculate, as Armidir maintains, that the awards could not be made until after January 1, 1982, so that for practical purposes Armidir's proposed employee could have been considered eligible for the position.

As to the apparent inconsistency between the position of the contracting agency and the Naval Military Personnel Command on the issue of terminal leave, we find that this is an internal matter for resolution within the executive department. We also find no merit to Armidir's unsupported claim that the brief which the Navy presented to the Board accepts the Armidir position on terminal leave. The Navy's administrative report, in effect, denies that the agency accepts such a position. Therefore, in view of these conflicting statements, Armidir has failed to affirmatively prove its case. Del Rio Flying Services, Inc., supra.

Task "C": Inadequacy of Resume Submitted
for Armidir's Proposed Employee

Task "C," "MOTU Ten," specified Charleston, South Carolina, as the location for the services and again listed the project's equipment. The Navy rejected Armidir's proposed employee for this task on the grounds that the employee's resume was inadequate--that is, it did not include the timeframe and locations showing when and where the employee gained his experience as required by the solicitation's section "L," paragraph 18.

In rebuttal, Armidir argues that the resume only lacked the timeframe for the employee's experience and that this was only a minor defect. In addition, Armidir argues that the TEB should have understood that the

employee was well suited for the position since he was "MOTU Qualification One and Two"--a qualification designation used by the various MOTU sites, but not an official Navy evaluation criterion.

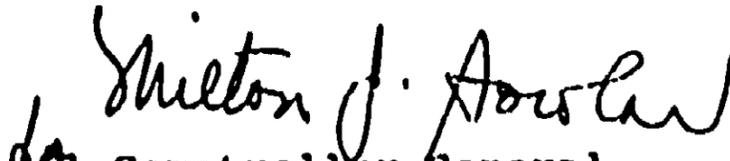
Once again, we are presented with conflicting statements from the contracting agency and the protester as the only evidence available on an issue and, as indicated above, such evidence does not satisfy Armidir's burden of proof. Del Rio Flying Services, Inc., supra. Moreover, in making this argument, Armidir again accuses the TEB of being biased. But, as before, we see no substance to Armidir's complaints. Mere allegations of bias are not sufficient for our Office to question the makeup of the TEB or its findings. Industrial Writing Institute, Inc., B-193243, May 10, 1979, 79-1 CPD 328.

Other Issues

Armidir claims that 21st Century Communications of Tidewater, Inc., the successful offeror under task "A," failed to satisfy the RFP requirement that, if the offeror plans to use an employee currently assigned to a MOTU under another contract, information must also be provided regarding the technical capabilities of the person who will fill the vacancy created. 21st Century states that the required information was provided and the Navy concurs that the information was timely submitted. Therefore, this ground of protest is denied.

Finally, Armidir charges that the Navy did not follow proper procedures in creating the TEB or in the other stages of the procurement. The Navy claims proper procedures were followed throughout. Therefore, in view of these conflicting statements, we again conclude that Armidir has failed to meet its burden of proof. Armidir wants us to investigate the Navy's procurement procedures, but we have held that our Office will not conduct an investigation to establish whether a protester's speculative statements are valid. Alan Scott Industries, B-197036, March 21, 1980, 80-1 CPD 212.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States