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DECISION

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

FILE: B-208476 **DATE:** January 31, 1983

MATTER OF: Tracor Jitco Inc.

DIGEST:

1. Protester has diligently pursued protest where request for information under Freedom of Information Act is filed within 10 working days of notice of award. Protest filed within 10 working days of receipt of information on which protest is based is timely. Additional bases of protest not filed within 10 working days of receipt of underlying information are untimely under Bid Protest Procedures, 4 C.F.R. part 21 (1982). Protester may not evade timeliness requirements by reserving right to file untimely contentions.

2. Protest not filed within 10 working days of when protester knew or should have known of basis of protest or, alternatively, not filed within 10 working days of agency's initial adverse action on protest is untimely. Contention, in protester's final submission, that it did not have sufficient information to constitute basis for protest against alleged conflict of interest until time of final submission, conflicts with protester's own earlier raising of issue.

3. Contention that agency conducted cost negotiations with another offeror but not with protester is denied where purpose of negotiation was to advise offeror of deficiency--failure to include escalation of labor costs--in initial proposal and protester had no such deficiency requiring negotiation.

4. Contention that awardee's proposal was unrealistically low, based on findings of audit of initial proposals, is without merit.

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Deficiency--failure to include certain costs--was pointed out in negotiations and corrected in best and final offer. Also, there is no prejudice resulting from awardee's proposal exceeding 100-page limit specified in solicitation where protester's own proposal was more than 100 pages longer than awardee's.

On August 2, 1982, Tracor Jitco Inc. (Tracor) filed a protest against the award of a contract to Enviro-Control, Inc. (Enviro), by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. DLA900-81-R-5921.

We deny the protest in part and dismiss it in part.

In August 1981, the Defense Electronic Supply Center (DESC), a subagency of DLA, issued this RFP for the development and operation of a Department of Defense (DOD) Hazardous Materials Technical Center (HMTC) database on the processing and handling of hazardous materials. The broad objective was to establish a single resource for information on current Federal and private sector work on the technology applicable to the safety, health, transportation and environmental aspects of hazardous and toxic material handling and disposal. The contractor was to be responsible for the collection, review, analysis, technical assessment and summary of available technical and scientific information and data, as well as relevant Federal, State and local laws and regulations. The contractor would also be required to publish handbooks and "state of the art reviews" (SOAR's). The contract is on a cost-plus-fixed-fee basis for an initial year with four 1-year options. Offerors were to base their fixed fee and estimated costs on an anticipated $500,000 per year in direct Government funding with the balance to be derived from service charges to HMTC users and the distribution of publications. DESC advised offerors in a preproposal conference that it would not enforce strictly the 100-page limit, including appendices, etc., that the RFP established for proposals. Best and final offers were submitted on May 10, 1982. Enviro's technical proposal was scored higher than Tracor's (130 points out of 138 versus Tracor's 119.2) and Enviro's total estimated cost plus fixed fee was lower than Tracor's by about $474,000 over the projected 5-year contract life. DESC awarded the contract to Enviro on May 28, 1982.

Tracor states that it learned of the contract award on June 1. On June 15, Tracor filed both a request for a debriefing and a Freedom of Information Act (FOIA) request with DESC seeking the disclosure of materials relating to DESC's evaluation of proposals. On July 20, Tracor received the FOIA materials it had requested. Tracor did not attend the debriefing which DESC had scheduled for that date.

Tracor's protest was filed in our Office on August 2, 1982. In this initial protest, Tracor contended that: (1) the Government's project manager held cost negotiations with Enviro, but did not do so with Tracor; (2) the Government's cost evaluation showed Enviro's proposal to be underestimated by about $577,000 and Enviro's proposal was, therefore, unrealistically low; and (3) Enviro's proposal exceeded the RFP's maximum size limitation of 100 pages. By letter dated August 19, 1982, received in our Office on August 25, Tracor expanded on its initial protest by alleging that: (1) there was a possible conflict of interest between DESC's proposed contracting officer's technical representative (COTR), Major David Warner, and Enviro; (2) the Government may have conducted improper negotiations with Enviro after receipt of best and final offers; and (3) Enviro's failure to include any labor cost escalation in its proposal resulted in DESC's evaluation of Tracor's and Enviro's cost proposals on different bases. In this same letter, Tracor also challenged DESC's evaluation and scoring of the technical proposals based on Tracor's further review of the FOIA materials it received on July 20.Tracor again raised the possibility of a conflict of interest on the part of DESC's COTR in its October 26, 1982, comments on the agency's report; in this letter, Tracor asserts that it had no concrete evidence of Major Warner's status until Tracor received a copy of comments on October 14, 1982, from Enviro's counsel. DLA contends that Tracor's protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1982).

We find that Tracor's protest is, in large degree, untimely. With certain exceptions not applicable here, our Bid Protest Procedures require that protests be filed within 10 working days of the date on which the protester knew or should have known of the basis for its protest, 4 C.F.R. § 21.2(b)(2) (1982), or, where the protest was first timely filed with the procuring agency, within 10 working days of

the agency's initial adverse action on the protest. 4 C.F.R. § 21.2(a) (1982). The purpose of these requirements is to afford protesters and interested parties a fair opportunity to present their cases while minimizing the disruption of the Government's procurements. See Pennsylvania Blue Shield, B-203338, March 23, 1982, 82-1 CPD 272; Bird-Johnson Company--Request for Reconsideration, B-199445.3, October 14, 1980, 80-2 CPD 275. In this connection, we will consider a protest based on information obtained under the FOIA to be timely so long as the protest is filed within 10 working days of the protester's receipt of the information and the protester diligently pursued the release of the information under the FOIA. See Work System Design, Inc.--Reconsideration, B-200917.2, September 29, 1981, 81-2 CPD 261; cf. National Systems Management Corporation, B-198811, October 10, 1980, 80-2 CPD 268; National Council of Senior Citizens, Inc., B-196723, February 1, 1980, 80-1 CPD 87. Where, however, a protest incorporates multiple bases, we have held that each individual basis of protest must independently satisfy the timeliness standards established in our procedures and that new and independent contentions which do not satisfy these criteria will not be considered except to the extent they might provide additional support for earlier timely raised objections. Southwestern Bell Telephone Company; Northern Telecom, Inc., B-200523.3, B-200523.4, B-200523.5, March 5, 1982, 82-1 CPD 203; Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412, aff'd, July 11, 1978, 78-2 CPD 28. A protester's use of language reserving a right to raise new bases at a later time will not exempt the protester from these requirements. Pennsylvania Blue Shield, supra.

Tracor filed its FOIA request with DESC within 10 working days of when Tracor learned of the award of the contract to Enviro and filed its initial protest with our Office within 10 working days after Tracor received the FOIA information on which its protest is founded. In these circumstances, we do not find that Tracor was either dilatory in pursuing its FOIA request or delinquent in filing its initial protest once the information was received. Consequently, we find the contentions raised in Tracor's initial protest to be timely and will consider these questions on the merits. The balance of Tracor's protest is untimely, however, because Tracor did not protest these additional matters, with one exception discussed below,

within 10 working days of Tracor's receipt of the FOIA materials on which they are based. These contentions are dismissed.

The single exception, to which we referred above, is Tracor's contention that there may have been a potential conflict of interest involving the COTR in this procurement. In this connection, Tracor states that it learned on June 3 that Major David Warner, identified in the RFP as the COTR, may have become an employee of Enviro. Tracor attempted to confirm its suspicions by placing a telephone call to Enviro and asking to speak to David Warner who, Tracor reports, responded to the call. On June 8, Tracor advised a DESC official of these events. This official advised Tracor later on the same day that Major Warner was not an employee of Enviro and, also, that DESC had terminated Major Warner's participation in the HMTC procurement in February 1982 in anticipation of his retirement. There is no evidence that Tracor pursued this matter any further until Tracor's suggestion of a possible conflict of interest in its letter of August 19.

We find two plausible explanations for this chain of events--and one not so plausible. First, Tracor had a basis for protest on June 3, but merely expressed its concerns to DESC on June 8 without actually protesting the possibility of a conflict until Tracor filed its letter of August 19--substantially more than 10 working days after Tracor learned of the basis for this allegation. 4 C.F.R. § 21.2(b)(2). Second, we might view Tracor's communication with DESC of June 8 as a protest of a possible conflict of interest--in which case the DESC official's response on the same day would have been DESC's initial adverse action--and, again, Tracor failed to protest to us within 10 working days of this event. 4 C.F.R. § 21.2(a). Third, we might consider, as Tracor suggests in its comments of October 26, 1982, that Tracor did not have sufficient information until October to constitute a basis for protest; we attach little credence to this latter possibility, however, because it conflicts with Tracor's letter of August 19, which first raised the conflict of interest question with our Office. Since this contention is untimely under either of the likely alternatives, we will not consider it on the merits. In any event, we also find no evidence that Major Warner either participated in the procurement after February 1982 or played any role in the final selection of the contractor.

Turning to the contentions raised in Tracor's protest of August 2, we find no merit in Tracor's assertion that DESC held cost negotiations with Enviro, but not with Tracor. An audit of Enviro's initial cost proposal revealed that Enviro had failed to include anything for labor cost escalation, which led the auditors to report to DESC that Enviro's proposal may have been understated by as much as $577,000. DESC advised Enviro of this deficiency during negotiations and Enviro included an escalation factor in its best and final offer. The very purpose of negotiations is to point out such deficiencies and, if DESC advised Enviro of a deficiency in its cost proposal, but gave no similar communication to Tracor, we take it to mean only that Tracor had no such deficiency in its proposal. We find no impropriety here.

Tracor's second principal contention, that Enviro's proposal was unrealistically low because it omitted $577,000 in labor escalation costs, is premised on the auditors' review of Enviro's proposal to which we referred above. This review, however, covered Enviro's initial proposal and the deficiency was corrected in Enviro's best and final offer. Consequently, we see no merit in this contention.

With regard to Tracor's assertion that Enviro's proposal exceeded the 100-page limit, including appendices, etc., established in the RFP, DESC advised that Enviro's proposal was, in fact, about 104 pages long with a further 83 pages of appendices, for a total of 187 pages. DESC reports, however, that Tracor's own proposal was 94 pages in length with more than 200 pages of appendices, or about 100 pages longer than Enviro's proposal. In these circumstances, we find no prejudice to Tracor.

Milton J. Socolar

for Comptroller General
of the United States