

DECISION

Smith

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

27665

FILE: B-213811

DATE: March 13, 1984

MATTER OF: Tempest Technologies, Inc.

DIGEST:

1. Alleged improprieties not existing in the initial solicitation but subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals to be timely under 4 C.F.R. § 21.2(b)(1).
2. Protest alleging defects apparent on the face of a solicitation which is filed with a proposal does not constitute a timely protest to the contracting agency.

Tempest Technologies, Inc. protests the rejection of its basic and alternate proposals and award of a contract by the National Security Agency, Maryland Procurement Office, to Mesa Technology Corporation under request for proposals (RFP) No. MDA904-83-R-0349. Tempest contends that the agency's award under the solicitation, as amended, was for all practical purposes a sole-source award because the specifications and delivery requirements of the solicitation were restrictive and limited competition to only one firm. We dismiss the protest as untimely.

The solicitation, issued on July 15, 1983, sought proposals for 70 computer printers with an interface device described as Model QSI 7320. The solicitation contained a desired delivery schedule (ranging from 60 to 150 days), but also invited offerors to propose a more economical alternate delivery schedule, that is, a delivery schedule that would permit a lower priced offer.

Mesa proposed to strictly meet the desired delivery schedule set forth in the solicitation but conditioned the award on an "all or none" basis. Tempest proposed to deliver all items "210 days ARO." (According to Tempest, its proposed delivery terms were dictated by Mesa, the

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manufacturer of the specified interface device, which quoted Tempest delivery terms of 180 days.) Tempest also submitted an alternate technical proposal offering printers with a different interface device, described as Model RS 232.

On September 30, 1983, while proposals were still being evaluated, the contracting officer was informed that a critical requirement had developed for delivery of a minimum of 26 printers by December 30, and that any slippage would seriously affect the mission of the agency. By letter dated October 6, the contracting officer rejected Tempest's alternate proposal as technically unacceptable because the equipment offered in the alternate was not compatible with the agency's "existing system management software and printer software drivers." The letter also requested best and final offers by October 14 for the specified printer based upon a firm delivery schedule, requiring delivery of 26 printers by December 30. Mesa was similarly notified of the change in the solicitation's delivery terms.

On October 13, Tempest sent the contracting officer the following letter which, according to Tempest, constituted its best and final offer:

"In response to your letter of notification dated 6 October 1983, [Tempest] regrets to inform you that, based on the delivery schedule quoted to us, copy attached, by [Mesa], our supplier for the QSI interface, we are not in a position to improve our quoted delivery date. It appears that, by rejection of our alternate proposal and the establishment of a required delivery date of 30 December 1983 for equipment utilizing the Mesa QSI interface, the Government has eliminated all bidders except Mesa.

"By this letter, [Tempest] formally requests, at your earliest convenience, a debriefing to establish why our alternate proposal was unacceptable.

"[We] would like to thank you for your consideration of [Tempest] for this procurement. Please consider us for future requirements which do not require the Mesa QSI interface. In the event [we] can be of further service, please do not hesitate in calling."

Tempest's letter was opened, along with Mesa's best and final offer, on October 14. Subsequently, on November 16, the contracting officer formally rejected Tempest's proposal as unacceptable since the proposal failed to "meet [the agency's] critical delivery schedule." This protest followed on November 28.

Although Tempest protests rejection of its proposals, it is clear that its objections run essentially to the specification and delivery provisions of the RFP. As such, we find the protest to be untimely filed.

First, with respect to the delivery requirement, the contracting officer, by requesting best and final offers based upon an accelerated delivery schedule, clearly amended the initial delivery provisions of the solicitation. Under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), protests based upon alleged improprieties in an RFP which are apparent prior to the closing date must be filed prior to the closing date. Further, any alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date for receipt of proposals following the incorporation. Francis O. Stebbins & Robert A. Dunaway, B-209460, March 1, 1983, 83-1 CPD 212. Therefore, Tempest's protest concerning the delivery schedule should have been filed, at the latest, prior to the closing date for receipt of best and final offers. See Microtech Industries, Inc., B-201466, August 3, 1981, 81-2 CPD 83.

It is not at all clear that Tempest's letter of October 13 was intended to be a protest to the agency. Even if we consider it as such, however, it would be untimely since a protest which is filed with a bid or included in a proposal and therefore not opened until after the deadline for receipt of offers cannot be considered timely. Glatzer Industries Corp.--Reconsideration, B-209440.2, March 1, 1983, 83-1 CPD 211.

Second, concerning the rejection of Tempest's alternate proposal, the solicitation called for a printer with the Model QSI 7320 interface device as a mandatory requirement. Tempest's alternate proposal, in effect, took exception to this requirement and, as indicated above, Tempest's concern essentially is directed to the mandatory nature of the interface provision. Under such circumstances, we believe Tempest should have objected prior to the closing date for receipt of initial proposals. Because

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it did not do so, its protest on this issue is untimely.
See Hewlett-Packard Company, B-183288, August 13, 1975,
75-2 CPD 105.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel