

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

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FILE: B-211847**DATE:** March 20, 1984**MATTER OF:** The Washington Management Group, Inc.**DIGEST:**

1. General Services Administration's failure to promptly modify extant Federal Supply Schedule contract to provide for inclusion of items awarded under contested purchase order is not significant where GSA ultimately corrected failure.
2. Protest that competitor's products are not equal to the brand names specified is timely under Bid Protest Procedures when filed within 10 working days after notification of procuring agency's initial adverse agency action on protest; nevertheless, GAO cannot question acceptance of lower priced Federal Supply Schedule items, especially in view of Army's unrefuted position that, in response to protest, competitor clarified quotation to show that offered products would be identical to specified products.
3. GAO will not review protest challenging offeror's intended compliance with representation in its Buy American certification that domestic source end products will be supplied.
4. Protest issue raised after protester's receipt of agency report on original timely protest is dismissed as untimely. Later-raised issue must independently satisfy timeliness rules of our Bid Protest Procedures. Later-raised issue concerns the proper application of protester's discounts and should have been known to protester not later than May 6, 1983, when it knew that procuring agency had authorized awardee to complete delivery. Since the issue was raised approximately 3 months after the initial

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protest was filed, it is untimely. Moreover, issue concerning propriety of request for quotations procurement approach should have been raised before quotations were due.

5. Lack of actual knowledge of Bid Protest Procedures does not excuse late filing of protest.

The Washington Management Group, Inc., on behalf of Wright Line, Inc. (Wright), protests the Army's award of purchase order No. DABT59-83-F-1122 to Western Media Products, Inc., c/o Datastor (Datastor), under authority of Western Media's Federal Supply Schedule (FSS) contract No. GS-00S-38094 with the General Services Administration (GSA).

For the reasons stated below, we deny the protest in part and dismiss the protest in part.

On March 24, 1983, the procurement office at Fort Lee, Virginia, issued a request for quotations (RFQ) for 48 furniture items, described by Wright part numbers, or equal, with further narrative descriptions. Wright states that the descriptions correspond to specified items in its FSS contract No. GS-00S-38121. On April 4, 1983, the Army received quotations from Wright and Datastor. Ultimately, the Army found that Datastor had submitted the lowest priced, acceptable quotation and awarded the purchase order to the company.

Wright contends that: (1) the awarded items were not on Western Media's FSS contract at the time they were quoted and, therefore, suggests that the items should not have been accepted; (2) the Datastor items were not equal to the Wright products in several respects based on Datastor's initial quotation; (3) Datastor has apparently misrepresented the foreign content of its products such that the Buy American Act differential should be retroactively applied to Datastor's price quotation; (4) Datastor was not in fact the lowest quoter based on Wright's analysis of Datastor's quotation and, in any event, the estimated cost of the order was high enough so that Fort Lee should have submitted the requisition to GSA for GSA's own purchase; (5) the RFQ was

improperly issued, and (6) Wright was not properly informed of its right to protest and the procedure for filing a protest.

Untimely Issues

We consider issues (4) and (5), above, to be untimely filed under our Bid Protest Procedures.

Issue (4) - Price Evaluation

In commenting on the Army's report on its initial protest, Wright raises for the first time its argument that Datastor was not the low bidder. Wright states that the Army improperly evaluated its offered discounts and that, as a result, Wright did not receive an award for several of the items. Since this issue differs from those raised in the initial protest, it must independently satisfy our Bid Protest Procedures regarding timeliness. See Southwestern Bell Telephone Company; Northern Telecom, Inc., B-200523.3, B-200523.4, B-200523.5, March 5, 1982, 82-1 CPD 203.

In our view, this basis of protest is untimely since it was not raised within 10 working days after the basis was known or should have been known. See 4 C.F.R. § 21.2(b)(2) (1983). Wright examined Datastor's price quote on April 18, 1983, and Wright knew then that a "purchase order would be issued to Datastor." If Wright believed that its prices were lower than Datastor's after applying discounts, it should have raised this argument--along with the argument that GSA should have conducted the purchase given the dollar value of the order--far earlier than it did--August 19, 1983. Even if we assume that it should not be charged with knowledge of this basis of protest until May 6, when Wright learned that the Army had advised Datastor to complete delivery, this issue must still be considered untimely and will not be considered on the merits.

Issue (5) - Propriety of RFQ

Wright contends that the RFQ format was inappropriate for this purchase. But this issue should have been raised before the closing date for the RFQ in order to be considered timely under our Bid Protest Procedures. See 4 C.F.R. § 20.2(b)(1) (1983). Consequently, we will not consider this issue.

Timely Issues

Issue (1) - FSS Coverage

Wright contends that the products offered by Datastor were not on the GSA schedule at the time they were offered and, therefore, implies that they should not have been accepted. The record shows that Datastor's FSS contract was modified by GSA's contracting officer on June 20, 1983, but with an effective date of September 30, 1982. The GSA contracting officer has informally advised our Office that Datastor sent a letter to GSA on September 17, 1982, requesting that additional model numbers be added to its contract. The contracting officer notes Western Media's position that the new products were approved for inclusion on the FSS schedule on September 22, 1982, and states that GSA through oversight failed to issue a modification at the time the items had been approved. In view of these facts, the modification, when issued in June 1983, carried an effective date of September 30, 1982. While we agree with Wright that an award for items not on the FSS would have been improper, we find no basis to question the award to Datastor on this basis since the items delivered were in fact on the FSS, as subsequently amended, and they had been approved for inclusion on the schedule at the time the order was placed. Under these circumstances, GSA's failure to timely modify Western Media's contract was not significant.

Issue (2) - Product Equality

The contracting officer argues that Wright's protest that the products represented by the model numbers listed by Datastor were not equal to the Wright products is untimely under our Bid Protest Procedures. The contracting officer states that Wright knew the basis for its protest when it examined Datastor's quotation on April 18, 1983, and sent a letter on April 19 to the procuring agency questioning Datastor's offer. The contracting officer therefore contends that Wright was required to file its protest within 10 days of April 19 and that its May 18 protest is untimely. We disagree. We note that Wright's April 19 letter raised specific objections (in the nature of a protest) with the Army about this issue. Wright did not receive notice that the Army advised Datastor "to follow thru with this delivery order" until May 6, 1983, and this notice was "initial

adverse agency action" on Wright's protest as referred to in 4 C.F.R. § 21.2(a) (1983). Until this time, Wright had no reason to know what the agency had decided about this protest issue. Therefore, its protest filed here on May 18, 1983, was timely since it was filed within 10 days after notification of initial adverse agency action.

The Army disagrees with Wright's contention that Datastor's items do not meet the specifications. In its report on the protest, the Army states that the descriptions supplied by Datastor in response to Wright's April 19 letter show that the items are identical to the descriptions set forth in the RFQ. The Army states that this comparison establishes that the government's requirements have been met.

In response to the Army's report, Wright does not now argue that the clarifications furnished by Datastor fail to show the identity of the product characteristics involved. Since the Army determined that the products offered by Datastor were identical to the specified products and they were cheaper than the items offered by Wright, the contracting officer was required to order the items from Datastor even assuming that the items being ordered were not identical to those of Wright. Defense Acquisition Regulation (DAR) § 5-106(a) (1976 ed.) requires, in effect, that, where more than one FSS source is available for a requirement, the requirement be ordered from that vendor whose schedule offers the lowest prices unless doing otherwise can be justified on bases such as delivery time or administrative expense. The Army's RFQ did not include any other bases for quotation evaluation.

Moreover, whether the specification requirements are met during performance of the contract is a matter of contract administration which we will not consider. Tenavision, Inc., B-208857, September 21, 1982, 82-2 CPD 256. Therefore, we cannot question the Army's acceptance of Datastor's lower priced products.

Issue (3) - Datastor's Buy American Act Certification

In its quote, Datastor states that "(a) approximately NONE percent of the proposed contract price represents foreign content of effort"; yet, Wright contends some of the items came from West Germany. Wright therefore states that

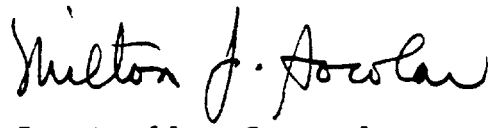
an additional six percent (the Buy American Act differential) should have been added to Datastor's offer for evaluation purposes.

Where a bidder excludes no end products from the Buy American certificate in its bid and does not indicate that it is offering anything other than domestic source end products, the acceptance of the bid, if otherwise acceptable, will result in an obligation on the part of the bidder to furnish domestic source end products; compliance with that obligation is a matter of contract administration for the contracting agency. Thus, we will not consider the matter. Rockwood Systems Corporation, B-206872, April 7, 1982, 82-1 CPD 326.

Issue (6) - Right to Protest

Wright also complains that it was not properly informed of its right to protest and the procedure for filing a protest. In this regard, we have stated that since our Bid Protest Procedures are published in the Federal Register, protesters are charged with constructive notice of their contents. Mike Vanebo, B-211816, June 20, 1983, 83-2 CPD 4.

In the circumstances, the protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States