

DECISION

RESPON 28967
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-212964

DATE: July 31, 1984

MATTER OF: Intermem Corporation

DIGEST:

1. Protest of a delivery order under an indefinite quantity sole-source contract is not a matter of contract administration where protester initially protested award of contract on a sole-source basis, agency agreed to permit competition on portion of contract beyond minimum order requirements, and protester withdrew initial protest based on that agreement. Protest of delivery order is merely a refiling of initial protest based on new agency action inconsistent with agreement.
2. Protest of sole-source solicitation filed after the closing date of the solicitation is timely where protester had no way of knowing of content of solicitation or closing date, requested copy of solicitation as soon as it was aware of solicitation, received solicitation after closing date, and filed protest within 10 working days of receipt of solicitation.
3. Protest that divisible component of sole-sourced package should be broken out for competition is sustained where agency provides no basis for requiring total package procurement and, in fact, agrees that component should be procured competitively.

Intermem Corporation (Intermem) protests the sole-source award of a contract to the Control Data Corporation (CDC) by the Department of the Air Force (Air Force), under solicitation No. F19630-83-D0002.

We sustain the protest.

08/01/84

In response to an unsolicited proposal from CDC, on March 16, 1983, the Air Force issued a sole-source solicitation to CDC. The week of March 21, 1983, Intermem was orally advised that the Air Force was going to negotiate a sole-source contract with CDC. Intermem asked for, and was provided, a copy of the solicitation. The closing date for receipt of CDC's proposal was April 1, 1983. However, Intermem received its copy of the solicitation on April 8, 1983.

On April 14, 1983, Intermem protested the sole-source solicitation to the Air Force. Intermem argued that its extended semiconductor memory (ESM) was compatible with CDC's computer system and, therefore, that the Air Force should break out the ESM and compete it. In response to the protest, the contracting officer stated in writing that vendors would not be precluded from competing for portions of the requirement, such as the ESM, that were beyond the minimum ordering obligation under the contract. The letter stated further that while offers would receive due consideration, there was no assurance that the government would execute a new contract, rather than issuing an order under the existing contract. Based on this statement, Intermem withdrew its protest, but reserved its rights to pursue the protest if the Air Force failed to properly evaluate future offers. On May 31, 1983, the Air Force awarded CDC an indefinite quantity contract with minimum ordering quantities.

On July 19, 1983, Intermem learned that the Air Force had issued a delivery order for equipment for Edwards Air Force Base which included the ESM. Intermem had not been contacted. Intermem reinstated its protest with the Air Force on July 22, pointing to the assurances which led it to withdraw its initial protest. The Air Force denied the protest, essentially stating that it was properly administering a legally awarded sole-source contract. Intermem then filed this protest.

The Air Force argues that Intermem's protest should be dismissed as either untimely or involving a matter of contract administration. The Air Force argues that if Intermem is protesting the award of the sole-source contract, the protest is untimely because it is a protest of an apparent solicitation impropriety, which must be filed prior to the

closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(b)(1) (1984). April 1, 1983, was the closing date, and Intermem's protest was not filed until April 14. Alternatively, the Air Force argues that if Intermem is protesting the execution of the order under the contract, that is a matter of contract administration which GAO does not consider.

The Air Force also states that while it believes that the protest should be dismissed, it also believes that Intermem should be permitted to compete for future requirements. Consequently, the Air Force will competitively purchase ESM requirements where feasible including any remaining under this contract.

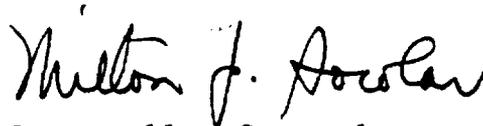
It is clear that Intermem initially protested, and is now protesting, the award of the sole-source contract without breaking out the ESM for competition. The issue arises in the context of contract administration only because the initial protest was withdrawn in response to written Air Force assurances that competition would be considered for future ESM requirements under the sole-source contract.

We find Intermem's initial protest to the Air Force to have been timely filed. While our Bid Protest Procedures do require protests of alleged patent solicitation improprieties to be filed prior to the closing date for receipt of proposals, we found such a protest timely where the protester did not know the closing date or the contents of the solicitation, diligently requested a copy of the solicitation, received it after the closing date and filed its protest within 10 working days of receipt of the solicitation. International Business Investments, Inc., B-212349, Feb. 22, 1984, 84-1 C.P.D. ¶ 213. Here, Intermem apparently knew the week of March 21, 1983, that the Air Force was contemplating a sole-source procurement, but there is no evidence in the record indicating that Intermem knew the content of the solicitation or the closing date. Intermem requested a copy of the solicitation in a timely manner, but did not receive it until after the closing date. Intermem's protest was filed within 10 working days of that date. Intermem renewed its protest within the required 10 working days of the action that it perceived to be in violation of

the Air Force assurances that led to the withdrawal of its initial protest, and it filed at GAO within 10 working days of the denial of that protest. We therefore conclude that the protest is timely.

Concerning the merits of the case, we have held that an agency may procure, as part of a sole-source package, a divisible component for which there might be competition, if the agency has a reasonable basis for so doing. Inter-science Systems, Inc.; Amperif Corporation, B-201943 et al., Aug. 31, 1982, 82-2 C.P.D. ¶ 187. Here, the Air Force has not presented any basis at all for not breaking out the ESM for competition. On the contrary, the Air Force implicitly agreed that there is no such basis when it stated that it believes that Intermem should be permitted to compete for the requirement in future instances and will be permitted to do so.

Therefore, we sustain the protest and concur in the Air Force's decision to compete future ESM requirements since remedial action under the protested purchase order is not now possible.

for 
Comptroller General
of the United States