

DECISION

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

FILE: B-215242

DATE: December 17, 1984

MATTER OF: RMS Technology, Inc.

DIGEST:

1. Protest in two-step advertised procurement alleging that the procuring agency's designation of the original equipment manufacturer as the subcontractor for providing updated engineering drawings gave that firm an unfair competitive advantage and resulted in a conflict of interest is untimely where the Step I solicitation clearly spelled out that requirement and the protester submitted its Step I proposal on that basis, since the alleged deficiency was apparent on the face of the solicitation and the protest was not filed until after Step I proposals were received.
2. Protest that the original equipment manufacturer used its position as the designated subcontractor for providing updated engineering drawings to obtain an unfair competitive advantage by charging the protester substantially more than it bid directly for performing that same portion of the work is denied since the protester has not proven that improper action by the government resulted in an unfair competitive advantage.

RMS Technology, Inc. protests award to GTE Government Systems Corporation under invitation for bids No. F42600-84-B-0149 issued by the Ogden Air Logistics Center, Hill Air Force Base, Utah for upgrading missile procedure trainers. We dismiss as untimely RMS's contention that the solicitation requirement gave the manufacturer of the equipment an unfair competitive advantage, and we deny RMS's contention that the bid prices show that competition was actually prejudiced in this case.

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The Air Force sought technical proposals to upgrade by modification a simulated communication system used in certain missile procedure trainers under the first step of a two-step formally advertised procurement. Two firms, RMS and GTE, submitted acceptable technical proposals by the closing date for the first step, September 8, 1983. After some delay caused by funding uncertainties, the Air Force solicited second step bid prices and on May 4, 1984, the bid opening date, bids were received from RMS and GTE. GTE's bid price of \$3,162,312 was low and RMS's bid price of \$3,607,912 was second low. RMS filed its protest with this Office within 10 days after bid opening and the Air Force has withheld award pending resolution of the protest.

RMS contends that because any firm other than GTE was required by the Air Force to subcontract with GTE for baseline engineering drawings, technical manuals and other specified services, GTE had an unfair competitive advantage which precluded full and free competition. RMS also argues that by designating GTE as the required source for these services, the Air Force created an organizational conflict of interest, since GTE was both a government-specified subcontractor and a direct competitor for the overall job.

The Air Force responds that this aspect of RMS's protest is untimely because paragraph 7.1.2 of the statement of work, which was included with the first step solicitation issued July 10, 1983, advised bidders that:

"(i)n the event that the contractor does not control the trainer baseline, the contractor shall contract with the prime manufacturer, GTE Products Corp., to update the trainer baseline."

As noted, the requirement that other firms subcontract with GTE for certain services was expressly set forth in the Step I solicitation, which was issued some 10 months prior to when RMS filed its protest. Further, there was no prohibition in the solicitation barring GTE from competing as the prime contractor even though the solicitation normally contains notice where the agency believes such prohibition to be appropriate. See, e.g., Gould, Inc., Advanced Technology Group, B-181448, Oct. 15, 1974, 74-2 CPD ¶ 205. We further assume that in its Step I proposal RMS adequately addressed its proposed subcontracting arrangement with GTE or its proposal would

not have been found acceptable. In summary, it appears that the solicitation apprised RMS of the fact that GTE was both a potential competitor and a mandatory subcontractor and that RMS submitted its Step I proposal with full knowledge of whatever competitive advantage or inherent conflict this circumstance created. However, our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require that protests based on solicitation improprieties must be filed prior to bid opening to be timely. Everett Dykes Grassing Company; Peach State Sanitation Co., Inc., B-210233.4, et al., Feb. 13, 1984, 84-1 CPD ¶ 176. Consequently, RMS's protest against the solicitation provision which made its potential competitor a mandatory subcontractor should have been filed prior to the submission of Step I proposals. Since it was not, this aspect of the protest is untimely.

We further note that RMS's documentation of its subcontract negotiations with GTE during the interval between Step I and Step II indicates that both firms were careful to maintain their positions as a prime contractor. For example, both firms agreed not to reveal to the other each firm's estimate of the level of effort required under the subcontracted work, an incomprehensible limitation when negotiating a subcontract unless one assumes that the mandatory subcontractor is also competing for the prime contract. This conclusion is supported by the contracting officer's uncontradicted assertion that RMS knew for several months prior to protesting that it was competing with GTE in this procurement. Consequently, even if RMS had not been required to protest the Step I solicitation provisions that permitted GTE to compete even though it was a mandatory subcontractor, RMS was clearly required to protest within 10 days of learning of GTE's actual participation in the competition if RMS believed such participation was adverse to RMS's interests. 4 C.F.R. § 21.2(a) (1984).

RMS also contends that not only did the solicitation put GTE in an unfairly advantageous position but that GTE did in fact take advantage of its position, as reflected in its prices for line items 3 and 4, requiring the delivery of technical and engineering data, respectively. According to RMS, GTE quoted to it a price of \$808,854 for performing that portion of the work which the Air Force designated for subcontracting to GTE under items 3 and 4, even though as a competitor for the prime contract GTE bid only \$240,832 for performing all of the work required under these two items. RMS argues that this

price disparity shows that GTE charged RMS appreciably more than it charged the government for the same work, and that as a result RMS's bid price was higher than GTE's.

The bid prices in question are as follows:

<u>Line item</u>	<u>GTE price</u>	<u>RMS price</u>
1 (prototype)	\$1,729,425	\$ 922,029
2 (production units)	1,155,328	766,312
3 (technical data)	191,930	850,086
4 (engineering data)	48,902	998,704
5 (spare parts)	32,872	64,693
11 (vendor data)	3,855	6,088
	<u>\$3,162,312</u>	<u>\$3,607,912</u>

GTE responds that under its method of cost allocation, the work that it quoted to RMS was not apportioned entirely to line items 3 and 4, which concern the preparation and delivery of the actual data. Rather, GTE argues, only 22 percent of the cost quoted to RMS should be apportioned to those two items; the remainder should be apportioned to line items 1 and 2, since the bulk of the engineering design work and preparation of data are necessary and incident to the design of the prototype and the actual production work. GTE points out that its method of allocation is consistent with the instructions on Form DD 1423 included in the solicitation, which direct that the estimated price for data should include only "those costs which will be incurred as a direct result of the requirement to supply the data, over and above those costs which would be otherwise incurred in performance of the contract if no data were required."

The Air Force advises that because Step II of the solicitation was an invitation for bids, it has no information on the cost elements each bidder used to price individual line items, but that it is entirely possible that RMS and GTE constructed their prices differently for each line item.

As the protester, RMS bears the burden of proving its case when alleging that the government permitted other firms to gain an unfair competitive advantage in the procurement process. See Jensen-Kelly Corporation, B-208685, B-208960, Jan. 10, 1983, 83-1 CPD ¶ 21. Here, the conflicting arguments as to which line items should include the costs of the services GTE was required to

furnish do not satisfy this burden. We conclude, therefore, that there is not sufficient evidence to show that GTE gained a competitive advantage as a result of any improper action by the government.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States