

DECISION

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

LIEBERMAN
PL-11

FILE: B-220650; B-220555.2 **DATE:** January 14, 1986

MATTER OF: C.A. Parshall, Inc.

DIGEST:

1. Under GAO Bid Protest Regulations, protests may be dismissed where the protester fails to furnish a copy of the protests to the contracting officer within 1 day after the protests are filed with GAO. Dismissal is not warranted, however, when the contracting officer is orally notified of two protests on the same day they are filed, receives written copies of the protests 2 days later, and the agency files its reports in a timely manner.
2. Protests are not untimely where the notification documents which the agency contends provided the protester with its basis for protests, and which were mailed to the protester more than 10 working days before the protests were filed in GAO, are conceded by the agency to contain inaccurate information, and do not provide the basis for the protests.
3. Protests that awards were improperly made on the basis of low evaluated price constitutes, in effect, an untimely allegation of a solicitation impropriety, where low evaluated price was specified in the solicitations as the basis for award, and the protests are filed with GAO after the closing dates for submission of initial proposals.

034275

4. Protests from an offeror which is not in line for award if the protests are upheld are dismissed because the protester does not have the requisite direct economic interest required to be considered an interested party under GAO Bid Protest Regulations.

C.A. Parshall, Inc. (CAP), protests the rejection of its proposals and the award of contracts to University Research Corp. (URC) and to Deterline Corp., respectively, under requests for proposals (RFP) Nos. DABT60-85-R-0015 (0015), DABT60-85-R-0023 (0023) issued by the Army for the design and development of printed and audio-visual training materials. CAP protests that its proposals were improperly rejected on the basis of high prices, that the awardees' estimated prices are unrealistically low, and that the Army failed to conduct a proper cost realism analysis of either of the awardees' proposals.

We dismiss the protests.

As a threshold matter, the Army asserts that the protests should be dismissed pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1985), because CAP failed to provide the contracting officer with copies of the protests within 1 day of filing with GAO, as is required under the regulation. The protests were filed at GAO on October 9, 1985, and the contracting officer received oral notice of the protests on the same day, but did not receive a copy of the protests until October 11.

The regulation stems from the requirement imposed on the procuring activity by the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(b)(2)(A) (West Supp. 1985), to furnish our Office with a report on a protest within 25 days. While we may dismiss protests for failure to comply with this procedural regulation, 4 C.F.R. § 21.1(f), we do not do so automatically, but rather where the procuring agency has been prejudiced by the protester's noncompliance. We consider such factors as whether the agency otherwise had actual knowledge of the basis of the protest at the time it was filed, and whether the agency is able to file its report in a timely manner. Motorola Inc.--
Reconsideration, B-218888.2, June 24, 1985, 85-1 C.P.D.

¶ 719.

In this instance, the contracting officer was orally advised of the protests on the same day they were filed, and received copies of the protests within 2 days. The agency was able to prepare documented reports on both protests and submit them to our Office substantially in advance of the required 25 days. In addition, the Army first raised the issue of the late filing in its reports submitted to our Office. Under these circumstances, we find that the purpose of the regulation was accomplished and, therefore, we will not dismiss the protests on this basis. Colt Industries, B-218834.2, Sept. 11, 1985, 85-2 C.P.D. ¶ 284.

The Army next asserts that the protests are untimely because CAP received notification that it was no longer being considered for award by letters dated September 18 and 19, but did not file its protests in our Office until October 9, while our regulations, 4 C.F.R. § 21.2(a)(2), require filing within 10 days after the basis for protest is known or should have been known. However, the Army concedes that these notices to CAP were defective in that they suggested that CAP's proposals were rejected as unacceptable, when, in fact, the proposals were found acceptable. Thus, CAP was not provided the basis for its protests on the date it received these notices and did not receive the clarification necessary to know its basis for protest until September 25, 1985, after which it filed within 10 working days.

The RFP's were issued in March 1985 and both contained the following "Basis for Award": "Award will be made to that Offeror who submits an acceptable technical proposal, demonstrates cost realism, and proposes the lowest total evaluated price for satisfactory completion of the requirement." Fourteen proposals were received on May 16, 1985, in response to RFP No. 0015, and five proposals were received on May 10 in response to RFP No. 0023. After technical evaluations, the procuring activity determined that all five proposals under 0023 were within the competitive range, and that 12 of the proposals under 0015 were within the competitive range. In both instances, cost realism analyses of all of the initial proposals resulted in determinations that all offers were either unrealistic as to cost or failed to include certain required cost items.

Because of the cost realism deficiencies, negotiations were reopened with all offerors and new best and final offers were requested. Evaluation of these best and final offers resulted in determinations that all offers remained technically acceptable and were cost realistic. Accordingly, the Army determined to award to URC and Deterline, respectively, the low priced offerors.

To the extent that CAP is simply protesting that award on the basis of low price is improper under the cost-plus-a-fixed-fee contracts, the protests are untimely. Both solicitations explicitly state that award will be made to the technically acceptable, cost realistic offeror which proposes the lowest price. Our regulations provide that protests based on alleged solicitation defects apparent on the face of the solicitation must be filed prior to receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). CAP did not raise any objections to the solicitation evaluation criteria until after the award was made, when it first protested that award on the basis of low price was improper. Accordingly, this aspect of the protest is untimely. Airtronix, Inc., B-217087, Mar. 25, 1985, 85-1 C.P.D. ¶ 345.

With respect to CAP's assertions that URC's and Deterline's proposals are not cost realistic, and that the Army failed to conduct proper cost realism analysis of these proposals, we find that under 4 C.F.R. § 21.1(a), CAP is not an interested party for the purpose of raising this objection. In particular, under 0015, CAP's best and final offer was the highest priced of the nine offerors which submitted best and final offers, all of which were found to be technically acceptable and price realistic. Similarly, under 0023, CAP's offer was the highest of the five best and final offers submitted, all of which were found technically acceptable and price realistic. Our regulations require that a party be "interested" before we will consider its protest. We have held that a protester is not interested where it would not be in line for award if its protest were upheld. Steel Style, Inc., B-219629, Aug. 9, 1985, 85-2 C.P.D. ¶ 156; Advanced Business Systems, B-215717, Dec. 17, 1984, 84-2 C.P.D. ¶ 673. Here, under both solicitations, there are numerous other offerors ahead of CAP in line for award, thus, even if the awardees' costs were found not to be realistic, or the Army were found not have conducted a proper cost realism analysis on either URC or Deterline, CAP

still would not be eligible for award if its protests were sustained. Accordingly, CAP is not an interested party with respect to this issue.

While CAP argues that it may have been misled during negotiations to raise its price while other offerors were told to lower their prices, a review of the negotiations shows that all offerors were unrealistically low and all offerors, under both RFP's, raised their price in the best and final offers. Moreover, if CAP's initial offers are compared to the other offerors' higher best and final offers, CAP is still ranked ninth out of nine under RFP No. 0015 and fourth out of five under RFP No. 0023.

The protester has also requested proposal preparation costs and attorney's fees. However, a claim for such costs which is submitted with a protest that is dismissed without consideration on the merits will not be considered by our Office. Brink Construction Co., B-219413, July 11, 1985, 85-1 C.P.D. ¶ 43.

The protest is dismissed.



Robert M. Strong
Deputy Associate
General Counsel