

DECISION

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

FILE: B-219661.2 **DATE:** February 14, 1986
MATTER OF: N.F. Electronic Instruments

DIGEST:

Protest is dismissed where protester is not an "interested party" as defined in the Competition in Contracting Act and GAO's Bid Protest Regulations. Protest was submitted by the supplier of the items to be procured and not by the firm which submitted the bid.

By protest filed October 24, 1985, N.F. Electronic Instruments (N.F.) has requested the reinstatement of the protest which it and Moxon Electronics, Inc., filed on August 7, 1985, wherein it protested the Navy's proposed award of a contract to Solartron Instruments (Solartron) under solicitation No. N00244-85-R-0231, a two-step formally advertised procurement of 98 frequency analyzers. In the August 7, 1985, protest Moxon and N.F. protested the Navy's determination that the frequency analyzer offered by Solartron under the step one request for technical proposals was technically acceptable and requested that award be made to the only other bidder "Moxon/N.F." or that the solicitation be canceled and that a new solicitation be issued. The basis for the August 7 protest was that the analyzer offered by Solartron failed to meet the solicitation's minimum requirements with regard to five technical specifications.

The protest by N.F. is dismissed.

On March 26 the Naval Supply Center, San Diego, California, issued the above-cited solicitation for a two-step formally advertised procurement of 98 frequency response analyzers. Under a two-step formally advertised procurement step one entails the request for and the submission and evaluation of technical proposals, with discussions as necessary, but without pricing to determine the acceptability of the items offered. Step two is conducted as a formally advertised procurement, limited to those offerors whose step-one proposals are determined

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to be acceptable. Only two firms responded to the solicitation--Solartron and Moxon, the distributor for N.F. On May 28, 1985, the Navy determined that both firms offered technically acceptable proposals under the first step and on July 10, 1985, notice of the acceptability of both proposals was published in the Commerce Business Daily (CBD). On July 18, bid opening was held under step two of the solicitation with Solartron having submitted the low bid in the amount of \$1,130,600 compared with Moxon's bid of \$1,551,622.

The agency advises that upon reviewing the matters raised in the August 7 protest the contracting officer determined that Solartron's proposal did not meet two of the requirements set forth in the solicitation's specifications, but that in both instances the agency's minimum needs were overstated. Accordingly, on August 19 the contracting officer canceled the solicitation. Upon being advised by the agency that the solicitation would be canceled, on August 27 Moxon and N.F. withdrew the protest which they had filed. However, Solartron protested the cancellation action and on October 24 the contracting officer revoked her prior cancellation action and reinstated the solicitation based on her determination that the analyzers offered by Solartron met the agency's actual minimum needs and that Moxon would not be prejudiced by such action.

As a result of the agency's reinstatement of the solicitation N.F. filed the October 24 protest in which it seeks to reinstate the August 7 protest.

The agency asserts that N.F. may not reinstate the August 7 protest on the basis that N.F. is not an interested party for the purpose of filing a protest with this Office. In addition, the agency alleges that N.F.'s August 7 protest was untimely.

Standing

The agency points out that the proposal submitted by Moxon which offered the analyzer manufactured by N.F. identified the offeror as Moxon and that such offer was signed by one of Moxon's employees. The agency also advises that it was Moxon which was found to be technically acceptable at the conclusion of step one of the procurement. The

agency states that only an interested party defined as an actual or prospective bidder or offeror, may file a protest and that at most N.F. is "merely" a supplier or subcontractor to Moxon for some or all of the equipment which Moxon planned to furnish under the contract. N.F., on the other hand, asserts that it is an "interested party" to file a protest. N.F. asserts that Moxon was merely acting as its agent in this procurement and points out that in the cover letter accompanying Moxon's proposal offering the N.F. S-5720B frequency response analyzer Moxon advised that it was responding to the solicitation "on behalf of N.F. Electronic Instruments." N.F. also notes that in that same cover letter Moxon advised the agency that N.F. would provide long term support for the procurement. N.F. also points out that in its bid Moxon indicated that it would use the facilities of N.F. in the performance of the contract and that payment under the contract would be to "N.F. Electronic Instruments."

Our consideration of bid protests filed on or after January 15, 1985, is pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985). In pertinent part CICA defines an interested party as:

" . . . an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of [a] contract or by the failure to award [a] contract." 31 U.S.C.A. § 3551(2) (West Supp. 1985).

This definition is incorporated in section 21.0 of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

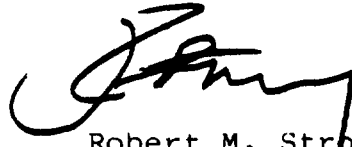
In support of its contention that it is an interested party for the purpose of filing a protest N.F. cites several decisions of this Office which held, in view of the particular circumstances present, that a protester which was neither an actual nor a potential bidder under the solicitation was an interested party with standing to file a bid protest. In these decisions the test as to whether a protester met the "interested party" requirement was based on the protester's status in relation to the procurement, the nature of the issues raised, and how these circumstances show the existence of a direct or substantial economic interest on the part of the protester. For example, see NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 C.P.D. ¶ 649. Those decisions cited by the protester, however,

concerned protests filed prior to the effective date of CICA and accordingly were decided in the absence of the statutory requirement that a protester be either an actual or prospective bidder.

As stated by the agency, the bid under the solicitation was submitted by Moxon and signed by an employee of Moxon. Under the circumstances, we must view Moxon as the bidder under the solicitation rather than N.F. See True Temper Corp., B-212492, Oct. 31, 1983, 83-2 C.P.D. ¶ 517. In True Temper we held that the supplier of items under a solicitation could not legally supplant as a bidder the entity which apparently submitted a bid on its behalf. Id. at 2.

Under the circumstances, since N.F. was merely a supplier and not a bidder under the solicitation in question, we conclude that it is not an interested party for purposes of filing a protest to request the reinstatement of the August 7 protest filed jointly by itself and the actual bidder Moxon. See U.S. Polycon Corp., B-219298, Sept. 18, 1985, 85-2 C.P.D. ¶ 298. Accordingly, we need not address the issue of the timeliness of the protest filed by N.F.

The protest is dismissed.



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