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Williams



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chesapeake and Potomac Telephone Company

File: B-224228, B-224228.2

Date: February 5, 1987

DIGEST

1. A protest filed with the General Accounting Office more than 10 working days after the contracting agency denied the firm's agency-level protest is untimely and will not be considered.
2. GAO will not consider the merits of an untimely protest by invoking the significant issue exception to timeliness rules where the protest does not raise an issue of first impression that would have widespread significance in the procurement community.
3. Where protester raises a new basis of protest in its comments to the agency report and the alleged impropriety was apparent on the face of the request for proposals, the new basis of protest is untimely.

DECISION

The Chesapeake and Potomac Telephone Company (C&P) protests the terms of request for proposals (RFP) No. A-86-8, issued by the Department of the Treasury (Treasury) for the procurement of a digital telecommunications switch (DTS) system. The protester alleges that the RFP contains terms unfairly favoring alternative procurement methods for the DTS system and that these terms will not insure the lowest overall cost to the government. C&P contends that Treasury cannot justify the use of certain cost evaluation criteria.

We dismiss the protest as untimely based on the contracting agency's report. See 4 C.F.R. § 21.3(f) (1986), which provides that when the propriety of a dismissal becomes clear only after information is provided by the contracting agency we will dismiss the protest at that time.

On December 31, 1985, Treasury solicited offers for the acquisition of an integrated voice and data DTS system. The due date for receipt of proposals was September 2, 1986. The

RFP, as amended, advised offerors that the agency would evaluate all proposals by applying a residual value factor to the proposed cost of the equipment installed at cutover.^{1/} The residual value is the system's assumed value at the end of the contract life of 9-1/2 years, based on a 15-year useful life, straight line method of depreciation, which results in a .4667 factor to be applied to the proposed system's cost of each purchase offer.

In its protest to our Office, filed on September 26, 1986, C&P first objects to Treasury's dismissal of its agency-level protest which was filed on September 2. The protester states that "despite the obvious timeliness" of its protest, by letter dated September 17, the contracting officer improperly dismissed C&P's protest as untimely stating that the firm had waived its right to protest for failure to "formally protest" at some earlier date. C&P takes the position that the agency's decision contravenes our Bid Protest Regulations, 4 C.F.R. part 21, and should be rejected.

Next, C&P argues in its agency-level protest and the one filed with our Office that the solicitation is defective because the use of the residual value criterion precludes equitable consideration of the "relative merits of alternative [lease] procurement options" and would not result in an award at the lowest overall cost to the government. Specifically, C&P asserts that the 15-year useful life for this system is "unrealistic" and exceeds the reasonable useful life for equipment presently in use. C&P also questions the use of a straight line versus an accelerated method of depreciation.

As a threshold matter, Treasury asserts that the protest should be dismissed because C&P's September 2 protest to the agency was filed more than 10 days following adverse agency action on a similar protest which Treasury insists C&P filed with it on June 30, 1986. We agree with Treasury that the protest is untimely.

If a protest is filed initially with the agency, the subsequent protest filed here must meet two tests to be timely: (1) it must be filed within 10 days of the protester's learning of the adverse action on the protest filed

^{1/} As the term is used, cutover is that moment in time when the switch that turns on the new system is thrown.

with the agency, and (2) the initial protest itself must have been timely filed. 4 C.F.R. § 21.2(a)(3). Here, neither of the two tests has been met.

The agency reports that during round six of questions and answers, C&P, by letter dated June 30, 1986, raised questions about the residual value factor and the assumptions on which it was based. In that letter C&P asserted that the 15-year useful system life does not reflect "the rate at which technology is expected to change." In this regard, the protester asked "will the Department revise the useful system life to reflect the effect of technology and the Department's historical equipment replacement activity?"

Additionally, C&P stated that the .4667 residual value factor:

". . . seems unrealistic, since the current rate of technological change has resulted in escalated system depreciation and obsolescence. Is the Department assuming that the system's value will depreciate constantly over the proposed useful system life?"

C&P concluded by stating:

"We believe that it would be more realistic to assume that the system's value will decrease rapidly in the first few years (e.g., like a new car) and that the resulting value after 8 years would be minimal, rather than nearly 50 percent as stated. If the projected useful life of the system is 15 years, should not the procurement and the life-cycle costing be based on 15 years? Using a 15-year evaluated life cycle would ensure that the Department procures the best possible system at the 'lowest overall cost to the government.'"

By letter of July 15, the contracting officer advised C&P that after consideration of all aspects of its objections to this solicitation requirement, "the Department's position on residual value as stated in this RFP remains unchanged."

In our view, C&P's letter of June 30 to the contracting officer constituted an agency-level protest. Under our decisions, a letter does not have to state explicitly that it is intended as a protest for it to be so considered. As a minimum, the intent to protest must be conveyed by an expression of dissatisfaction and a request for corrective action. Finalco, Inc., B-220651, Jan. 2, 1986, 86-1 C.P.D. ¶ 4 at 4.

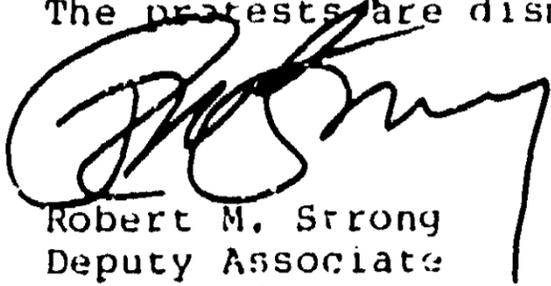
We read C&P's letter, although characterized as a "request for clarifications," as an expression of dissatisfaction with the residual value criterion and as an attempt to influence the agency to take corrective action. Under these circumstances, we find the letter was an agency-level protest and C&P was therefore required to file any subsequent protest to this office within 10 days after the protester had formal notification of initial adverse agency action. 4 C.F.R. § 21.2(a)(3); see also Blinderman Construction Co., Inc., B-222523, June 16, 1986, 86-1 C.P.D. ¶ 554 at 3. Here, initial adverse agency action occurred on July 15, and while C&P repeated its protest to Treasury on September 2, C&P did not protest to our Office until September 26, thus, its protest to our Office is untimely and will not be considered. Id.

In a later submission filed with our Office on November 28 (B-224228.2), C&P raises a new basis of protest--the applicability of the residual value factor to its various proposals--and urges for the first time that we should consider its protest pursuant to the exception in our timeliness rules for a protest that raises a significant issue. See 4 C.F.R. § 21.2(c). However, this exception is strictly construed and used sparingly to prevent the rules from being rendered meaningless and is limited to issues of widespread importance to the procurement community that we have not considered on the merits in previous decisions. Shaw Aero Development, Inc.--Request for Reconsideration, B-221980.2, May 28, 1986, 86-1 C.P.D. ¶ 495 at 3. We do not find C&P's protests significant within the meaning of our regulations, as it neither presents a unique issue of first impression nor involves a question that, if resolved, would benefit parties other than the protester. Id.

We have previously considered the issue of residual value as an evaluation factor in the context of procurements for typewriters and have held that residual value comprises a cost element that logically cannot be ignored despite the difficulty in determining the precise residual value of each typewriter model. See Swintec Corp., et al., B-216106 et al., Jan. 17, 1985, 85-1 C.P.D. ¶ 48 at 6. Additionally, in the acquisition of telephone equipment, maintenance and related services, we have indicated that the reasonableness of the residual value evaluation factor is a matter of administrative discretion that is not subject to question unless the determination is clearly unreasonable or resulted from fraud or bad faith (not alleged herein). See General Telephone Company of California, B-190142, Feb. 22, 1978, 78-1 C.P.D. ¶ 148, aff'd on reconsideration, 78-2 C.P.D. ¶ 395.

Finally, we point out that each new protest issue must independently satisfy the timeliness requirements of our regulations, which do not contemplate piecemeal presentation or development of protest issues. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 C.P.D. ¶ 21 at 14. Our regulations require that a protest based on alleged improprieties in an RFP that are apparent before the closing date for receipt of initial proposals be filed by that date. 4 C.F.R. § 21.2(a)(1). Here, C&P's protest ground was not raised prior to the date for receipt of proposals.

The protests are dismissed.



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