



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E. H. Pechan & Associates, Inc.

File: B-225648

Date: February 17, 1987

DIGEST

1. Protest, based on information provided to protester at debriefing, filed with General Accounting Office more than 10 working days after debriefing is untimely.
2. In negotiated procurements there is no requirement that award be made on the basis of the lowest cost.
3. Protest against solicitation requirements, apparent prior to the submission of initial proposals, is untimely when it is not filed until after award has been made.
4. Allegation that agency improperly disclosed proposed prices to awardee is without merit where protester provides no probative evidence and the record indicates that allegation is based on "rumors."

DECISION

E. H. Pechan & Associates, Inc. (Pechan), protests the award of a contract to Decision Analysis Corporation (DAC) under request for proposals (RFP) No. DE-RP01-86EI19801, issued by the Department of Energy (DOE). The solicitation, a total small business set-aside, sought proposals for modeling and forecasting support services to the Energy Information Administration.

We dismiss the protest without requiring the submission of an agency report, pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1986), because on its face the protest is untimely.

On August 12, 1986, DOE notified Pechan that its offer had been rejected as technically unacceptable. At Pechan's request, DOE conducted an oral debriefing on August 27 concerning the areas in its proposal which were found to be weak or deficient. Representatives from DOE's technical and contracts staff were present at the debriefing during which

"a number of weaknesses in [the firm's] technical submission were identified." According to the protester, subsequent oral conversations with the contracting officer revealed that "some of the weaknesses identified during the debriefing were not significant" in the agency's decision to eliminate the firm from further consideration. Pechan states that, on October 24, it wrote the contracting officer requesting that she specifically identify "those weaknesses which were significant to DOE's decision" regarding the firm's proposal. Pechan alleges that it has not received any response to its October 24 request despite "follow-up" phone calls to the contracting officer. By letter dated January 9, 1987, Pechan was notified of the award to DAC.

In its protest filed with our Office on January 13 Pechan identifies its bases for protest as:

- "(1) DOE has not responded to our written request for specific information on why we were eliminated from competition.
- "(2) DOE awarded the contract to another firm at a cost substantially higher than ours."

On January 27 Pechan expanded its bases of protest beyond that articulated in its initial protest alleging that the additional grounds for protest were based on "new" information it received on January 21. The protester specifically identifies areas which, in its view, led to the firm's elimination and resulted in an improper award to DAC. Pechan contends that:

- "(a) There exists serious doubt as to whether DAC is a responsible Contractor within the intent of the FAR [Federal Acquisition Regulation].
- "(b) DOE did not comply with the spirit, if not the legal requirements, of the FAR with respect to the use of the small business set-aside provisions.
- "(c) DOE failed to negotiate in good faith by failing to inform Pechan of the technical weaknesses in its proposal during the evaluation and negotiation phase.
- "(d) DOE introduced additional evaluation criteria (e.g., lack of recent management experience) not expressed in the RFP.

"(e) DOE used a sample problem that clearly favored an incumbent contractor.

"(f) DOE again followed the concept that costs can be safely ignored.

"(g) There apparently were leaks of confidential data by DOE insiders to favored contractors."

Pechan's allegation that DAC is a nonresponsible offeror is based on its belief that DAC is "totally incapable of handling an \$8.5 million dollar contract and that it is irresponsible of DOE to award such a large contract to a "neophyte firm." Before awarding the contract, the contracting officer necessarily determined that DAC was responsible. See 48 C.F.R. § 9.103 (1985). We do not review protests concerning affirmative determinations of responsibility absent a showing that the contracting agency personnel acted fraudulently or in bad faith or that definitive responsibility criteria contained in the solicitation were not met. 4 C.F.R. § 21.3(f)(5) (1986); Adamson Containers, Ltd., B-219791.2, Aug. 4, 1986, 86-2 C.P.D. ¶ 140 at 3. Neither is alleged here.

As to the allegations asserted in paragraphs (b)-(e), the record indicates that these protest grounds are based entirely on information which Pechan obtained at the debriefing and not from information allegedly received on January 21. Thus, Pechan was aware of these bases of protest on August 27, the date of its debriefing. However, the first time Pechan raised these issues was on January 27 in its supplement of its protest to our Office.

Our Bid Protest Regulations provide that a protest, the basis of which is not apparent on the face of the solicitation, must be filed within 10 working days after the protester knew or should have known the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, Pechan clearly knew its basis of protest regarding the evaluation of its proposal from the debriefing on August 27 but did not protest these issues until January 27. For example, Pechan admits in its January 27 letter that during the debriefing:

"(1) several new "weaknesses" regarding our technical proposal were raised that had not been mentioned in the best and final questions, (2) the evaluation criteria discussed in the debriefing had apparently been modified and elaborated upon in comparison to the criteria mentioned in the Request for Proposal (RFP) in a way which appeared to

adversely affect the scoring for our firm, and (3) some of the management and administrative "weaknesses" ascribed by DOE to our firm were clearly and demonstrably untrue."

Thus, Pechan's protest concerning DOE's technical evaluation of its offer is untimely.

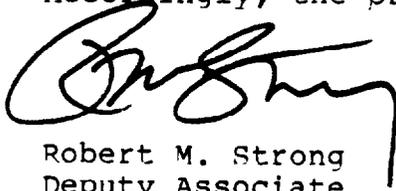
In its initial protest of January 13, Pechan alleged that the award was improper because the contract price was "substantially higher" than Pechan's. The protester, however, submitted no evidence in its initial protest, tending to show how award to a higher priced offeror was improper. There is no requirement in a negotiated procurement that award be made on the basis of lowest cost or price to the government unless the solicitation so provides. See Joseph L. De Clerk and Associates, Inc., B-221723, Feb. 10, 1986, 86-1 C.P.D. ¶ 146. Here, Pechan states that under the terms of the RFP, technical considerations were more important than cost. Therefore, Pechan's contention that the award to DAC at a higher cost was somehow improper is dismissed.

We consider Pechan's protest argument of January 27 concerning the relative importance of cost in this solicitation to be a new ground of protest. Since the solicitation clearly stated the evaluation factors and their relative weights, Pechan's protest that the evaluation of proposals was improper because DOE should have placed greater emphasis on cost constitutes an allegation of a solicitation impropriety that was apparent before the closing date for receipt of initial proposals. Our Regulations require that a protest based upon alleged improprieties in a solicitation must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Since Pechan's protest of the evaluation scheme was raised after the closing date, it is untimely. See Travenol Laboratories, Inc., B-220823, Oct. 23, 1985, 85-2 C.P.D. ¶ 453.

Finally, Pechan alleges that there are "rumors" that agency personnel improperly divulged proposal prices to DAC. Pechan asserts, therefore, that as a result of this alleged improper disclosure, "it appears likely" that DAC significantly reduced its costs between its first and second best and final offers. However, the protester has presented no probative evidence that DOE disclosed prices to DAC; thus, its argument in this regard is merely speculative. Our Office will not attribute improper action to agency officials from inference or supposition, since the protester has the burden of proving

its case. See Joseph L. De Clerk and Associates, Inc.,
B-221723, supra.

Accordingly, the protest is dismissed.

A handwritten signature in black ink, appearing to read "R. Strong", written in a cursive style.

Robert M. Strong
Deputy Associate
General Counsel