



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Electronic Support Systems, Inc.--  
Request for Reconsideration  
File: B-226961.2  
Date: April 27, 1987

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### DIGEST

Prior dismissal of untimely protest concerning allegedly defective solicitation is affirmed where protest was not filed prior to closing date for receipt of proposals and record indicates that alleged impropriety was apparent to protester prior to that closing date.

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### DECISION

Electronic Support Systems, Inc. (ESSI) requests reconsideration of our March 24, 1987, notice dismissing as untimely its protest concerning the Department of the Navy's request for proposals (RFP) No. N60921-86-R-A382. We affirm our dismissal.

The RFP was issued by the Naval Surface Weapons Center, Dahlgren, Virginia, and sought offers to supply the Navy with pulse analyzers. The closing date for submission of proposals was November 13, 1986. ESSI submitted its proposal prior to that date. On March 19, 1987, the Navy notified ESSI that award had been made to another offeror who had submitted a lower-priced proposal. On March 23, ESSI filed its protest with our Office.

ESSI states that it is the original equipment manufacturer (OEM) for the pulse analyzers, has made more than 400 of them, and maintains the configuration control documentation for this item. In its protest, ESSI alleged that certain critical information which it identified as "Specification Data Defects/Omissions" was omitted from the solicitation package distributed to prospective offerors. Specifically, ESSI alleged that the Navy did not include information concerning the high failure rates recently experienced with certain component parts, and also that the Navy did not require certain acceptance test procedures for the pulse analyzers to ensure their proper performance.

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ESSI stated that, as OEM, it was aware of the data omitted from the solicitation and, therefore, it included in its proposal the anticipated expenses associated with the high failure rates and required testing procedures. It argued that offerors who were unaware of the omitted information likely did not consider these potential costs. Accordingly, ESSI protested that the omitted information placed it on unequal footing with regard to other offerors, and subjected the government to cost escalation under any contract awarded to offerors who had not considered the additional costs.

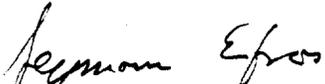
Our dismissal of March 24, 1987, was based on the timeliness provisions of our Bid Protest Regulations which state that protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that closing date. 4 C.F.R. § 21.2(a)(1) (1986). We concluded that ESSI was protesting the omission of information, that is, specification defects in the solicitation, which was apparent to ESSI at the time the solicitation was issued and, under our Regulations, ESSI was required to file its protest prior to November 13, 1986, the closing date for receipt of proposals. Since the protest was not filed until March 23, 1987, it was dismissed.

In its request for reconsideration, ESSI maintains that we incorrectly construed the basis of its protest. ESSI now asserts that its protest challenged the agency's evaluation of proposals pursuant to the RFP, rather than the terms of the RFP itself. It states that it had no reason to suspect the proposals were being given improper consideration until it learned the award had been made to another offeror. Accordingly, ESSI argues that 4 C.F.R. § 21.2(a)(2) is applicable, which requires that "In cases other than those [concerning an impropriety in the solicitation apparent prior to the closing date], protests shall be filed not later than 10 days after the basis of the protest is known or should have been known, whichever is earlier." We conclude that our prior application of 4 C.F.R. § 21.2(a)-(1) was correct.

ESSI's attempt to characterize the basis of its protest as the agency's erroneous evaluation of the proposals is not persuasive. ESSI has not identified anything improper about the agency's evaluation other than its allegation that the solicitation omitted certain information. Since it was aware of the omitted data prior to the closing date for submission of proposals, it was incumbent on ESSI to file its protest prior to that time.

The cases ESSI cites in its submission on reconsideration in support of its view that its protest is timely, see, for example, DeLorenzo Scrap Iron & Metal Co., B-184440, Jan. 2, 1976, 76-1 C.P.D. ¶ 6, are cases where the solicitation defect was not apparent prior to the closing date. Here, however, ESSI clearly was aware prior to the closing date of the solicitation defects of which it complains, and thus these cases are not applicable.

Our prior dismissal is affirmed.

  
Harry R. Van Cleve  
General Counsel