



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Malzahn Company

File: B-225813

Date: June 5, 1987

DIGEST

1. Protest based upon several alleged solicitation defects that were apparent prior to the closing date for receipt of initial proposals is untimely when filed prior to the closing date for receipt of initial proposals.
2. The General Accounting Office (GAO) generally will not consider a protest that alleges the protester is entitled to a sole-source award because the objective of GAO's bid patent function is to insure full and open competition.
3. Untimely protest will not be considered under the significant issue exception to the General Accounting Office's (GAO) timeliness rules, where the issues raised are ones that the GAO has routinely considered in the past.

DECISION

Malzahn Company protests the award of a contract to National Technical Systems Engineering (NTS) under request for proposals (RFP) No. F04704-87-R-0006, issued by the Department of the Air Force, Ballistic Missile Office, Norton Air Force Base, California, for a demonstration project known as the Cofferdam Concept Test Program. The objective of this program is to evaluate the construction feasibility and survivability enhancement potential of a double-walled reinforced concrete cofferdam for the protection of existing intercontinental ballistic missile silos. The protester contends that the site chosen for the demonstration project is inappropriate, that there is an insufficient performance time allowed, that it was improper to allow alternate means of construction, that it was entitled to a sole-source award, and that the award could result in the infringement of its patent.

We dismiss the protest.

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The origin of this program can be traced to an unsolicited proposal submitted by Malzahn to the House of Representatives Committee on Appropriations which resulted in a \$15 million appropriation for the evaluation of the concept of a double-walled cofferdam constructed of reinforced slipform concrete in 1985. See H.R. Rep. No. 382, 99th Cong., 1st Sess. at 333 (1985). A competitive RFP was issued on October 17, 1986. The successful contractor is required to construct, test, and evaluate a double-walled cofferdam constructed of reinforced concrete; analyze any increase in survivability of existing silos based on instrumented test results; assess the feasibility of using slipform construction methods; and aid in determining the cost effectiveness of this method as compared with other options for protecting silos.

Four proposals were received on December 3, 1986. All four offerors were technically evaluated and found to be within the competitive range; discussions followed. Best and final offers were received on February 11, 1987. After being notified of the intended award to NTS, Malzahn filed this protest with our Office (after award to NTS had been made), following the denial by the Air Force of Malzahn's agency-level protest.

Most of Malzahn's allegations relate to matters evident from the solicitation. Generally, under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date in order to be timely. See 4 C.F.R. § 21.2(a)(1) (1986); American Bank Note Co., B-212505.2, Oct. 25, 1983, 83-2 CPD ¶ 495.

First, Malzahn asserts that the site chosen by the Air Force for the construction of the project was ill-advised and "assure[s] failure of [the Cofferdam] concept," since the shale formation and clay present at the site are not suitable for an appropriate project demonstration. The solicitation specifically designated Rogers Hollow, Fort Knox, Kentucky, as the site for the project. The protester visited the site prior to proposal submission, was made aware of its geology, and did not express dissatisfaction with the site until after it learned of the proposed award to another offeror. This alleged impropriety was apparent from the solicitation, and since Malzahn's protest concerning this matter was not filed prior to the closing date for receipt of initial proposals, it is untimely and will not be considered.

The protester also asserts that the compressed time allowed for performance of the work is unreasonably short. The RFP

specifically established a completion date of approximately 14 months. At no time during the source selection process did the protester take exception to the period for performance. This too was not protested prior to the closing date for the receipt of initial proposals and is untimely.

Malzahn further alleges that the Air Force improperly permitted offerors to employ alternate, unstable methods of emplacement of double-walled cofferdams (such as "open excavation") which are other than the concept contained in the unsolicited Malzahn proposal presented to Congress. Data and experience obtained by these other methods would be meaningless in determining the efficacy of the cofferdam concept, according to Malzahn. Thus, Malzahn believes that only its own construction method, as contained in its unsolicited proposal, should have been permitted by the Air Force in this procurement.

The RFP specifically permitted offerors to propose their own construction methods and to offer alternate construction methods for emplacement of the cofferdam. Offerors were required to justify their proposed baseline construction methods and to discuss the risks associated with alternate methods as compared with an offeror's baseline. Thus, it was apparent from the face of the solicitation that the RFP contemplated proposals for different construction methods in the emplacement of the double-walled cofferdams. Malzahn should have protested this matter upon receipt of the solicitation if it believed the agency's engineering judgment on this issue was flawed, since the alleged impropriety was apparent on the face of the solicitation. This protest ground is consequently also untimely and will not be considered on the merits.

The protester also contends that the requirement should have been awarded to Malzahn on a sole-source basis since its unsolicited proposal was the basis for the procurement.

Since the RFP's competitive nature was apparent prior to the closing date, this ground of protest is also untimely. In any event, since the objective of our bid protest function is to insure full and open competition for government contracts, our Office generally will not review a protest that has the explicit or implicit purpose of reducing competition. In other words, a protester's presumable interest as the beneficiary of a more restrictive specification is not protectable under our bid protest function. California Mobile Communications, B-224398, Aug. 29, 1986, 86-2 CPD ¶ 244. This is so even where the protester claims that its proprietary position makes it the only firm qualified to do the work. Marker-Modell Associates, B-215049, May 25, 1984, 84-1 CPD ¶ 576.

In its comments on the agency report, Malzahn alleges for the first time that the Air Force improperly did not assess the cost of a license or potential litigation costs against NTS although Malzahn alleges that it holds a patent which NTS may infringe. Alternatively, according to Malzahn, if NTS does not infringe the patent, the NTS effort will not be in compliance with the Congressional intent to test Malzahn's cofferdam concept.

Concerning the Air Force's failure to assess the cost of a license or potential litigation costs against other offerors, we simply note that the RFP's evaluation scheme admittedly did not provide for such an assessment. Further, Malzahn knew or should have known that the RFP did not provide for assessment of such costs against other offerors since this omission was apparent on the face of the RFP. If Malzahn believed that the RFP was defective in this regard, it should have protested prior to the closing date for receipt of initial proposals. With regard to Malzahn's allegation that NTSS may infringe its patent, this serves no basis for objection to award since patent infringement allegations are not encompassed within our bid protest function. Presto Lock, Inc., B-218766, Aug. 16, 1985, 85-2 CPD ¶ 183.

Finally, Malzahn argues that we should consider the protest even if it is untimely because it presents a significant issue. Specifically, Malzahn argues that the Air Force is either awarding a contract to NTS with the knowledge that NTS must appropriate Malzahn's patent or the agency is not following Congressional direction to test Malzahn's cofferdam concept. Our Regulations allow for consideration of the merits of an untimely protest where the issue raised is significant to the procurement system. 4 C.F.R. § 21.2(c).

Generally, we apply the "significant issue" exception to our timeliness requirements sparingly, and only when the subject matter is of widespread interest to the procurement community and has not previously been considered by our Office. OAO Corp., B-211803, July 17, 1984, 84-2 CPD ¶ 54. Malzahn's protest grounds concerning, in essence, the agency's technical requirements, performance schedule, scope of competition, cost evaluation, and alleged patent infringement, are either not unique because they have been considered in the past or are matters we will not consider in bid protests. Moreover, despite the unique circumstances presented by Malzahn's unsolicited proposal to Congress and the ensuing legislation, we reiterate that there is nothing to suggest that Congress intended that only Malzahn receive the award or that only its patent was to be utilized in the

demonstration. We therefore do not find the issues raised to warrant consideration by our Office after the completion of the procurement cycle with the full participation and knowledge of the protester.

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Deputy Associate
General Counsel