



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gardy McGrath International, Inc.--Reconsideration

File: B-231913.2

Date: December 15, 1988

DIGEST

Prior decision dismissing protest as untimely is affirmed where protester does not show that the decision was factually or legally incorrect.

DECISION

Gardy McGrath International, Inc. requests reconsideration of our decision Gardy McGrath International, Inc., B-231913, Sept. 29, 1988, 88-2 CPD ¶ _____, in which we dismissed Gardy's protest against the award of a contract for audiovisual services to Mobile Video under Department of the Navy request for proposals (RFP) No. N00600-87-R-6309. We affirm the decision.

The RFP, issued on November 30, 1987, required offerors to submit a firm-fixed price to supply all labor, equipment, tools, materials, supervision and other items or services needed to provide the requested audiovisual services. While reviewing the final price proposals, the Navy became concerned that due to an ambiguity caused by solicitation amendment No. 6, offerors did not include the costs for all necessary supplies and materials listed in Technical Exhibit 7.4, entitled "Historical Materials/Supplies (Annual Average)." To correct this, the Navy issued amendment No. 9, which required Mobile Video and Gardy, the offerors remaining in the competitive range, to include \$70,000 as a not-to-exceed amount for materials and to submit a second best and final offer (BAFO) by May 27. Subsequently, the Navy awarded the contract to Mobile Video, the low priced, technically acceptable offeror.

On June 29, the Navy denied an agency-level protest filed by Gardy on June 15; on July 7, Gardy submitted its protest to our Office. Gardy alleged that amendment No. 9 was unnecessary and that if Mobile Video did not include all the required costs in its proposal the proposal should have

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been rejected as nonresponsive; that a not-to-exceed amount also should have been included for overtime; and that the award should not have been based on price.

We dismissed the protest as untimely because the allegations involved apparent solicitation improprieties and the protest was not filed prior to the amended closing date for the receipt of BAFOs as required by our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(1) (1988); TM Systems, Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. We noted that the protest was untimely even if Gardy did not have sufficient time to protest before the amended closing date because it was not filed within 10 days after May 27, the amended closing date. See 4 C.F.R. § 21.2(a)(2).

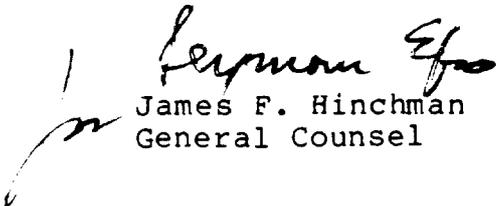
Finally, we pointed out that the Navy was not required to reject Mobile Video's proposal as nonresponsive for failure to include all costs because the concept of responsiveness is not applicable to negotiated procurements; rather, the issue was whether Mobile Video's proposal was technically unacceptable for failing to include all the required costs. We concluded that since the Navy determined that the reason for any omission of costs was an ambiguity in the solicitation, and we could find no reason to question that position, the Navy was not required to reject Mobile Video's offer.

Gardy's request for reconsideration centers on the need for amendment No. 9 and the "responsiveness" of Mobile Video's offer. Gardy asserts that its protest on these grounds was not untimely because Gardy did not know until after the closing date for receipt of BAFOs that Mobile Video was the only offeror in the competitive range and that Mobile Video did not include all the required costs in its bid. We see no basis to reverse our prior decision.

Gardy's challenge to amendment No. 9 is based on its contention that the RFP already was clear as to which costs were to be included in the offerors' proposals. Since the purpose of the amendment was apparent on its face, Gardy was on notice of its basis of protest as soon as the amendment was issued; it could not simply wait until it lost the competition to raise the issue. Further, to the extent Gardy reasserts its challenge to the Navy's decision not to reject Mobile Video's proposal, Gardy has not shown that our prior decision was erroneous. As we explained initially, the Navy acted reasonably by clarifying the solicitation through issuance of amendment No. 9 and allowing both offerors to submit second BAFOs rectifying any omission of costs from their first BAFOs due to the ambiguity of the RFP. Moreover, even assuming, as Gardy argues, that any omission of costs from Mobile Video's first BAFO was not

the result of an ambiguity in the RFP, the Navy was not required to reject its proposal as technically unacceptable; rather, the Navy had the discretion to reopen negotiations and call for a second round of BAFOs. See Federal Acquisition Regulation § 15.611(c); Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524.

Since Gardy has not shown any error of law or fact warranting reversal of our prior decision, see 4 C.F.R. § 21.12(a), it is affirmed.


James F. Hinchman
General Counsel