

P. JORDAN



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tele-Measurements Incorporated

File: B-234624.2

Date: January 22, 1990

DIGEST

1. Protest by original awardee that agency improperly amended the solicitation and required resubmission of proposals is untimely when filed more than 5 months after protester was advised of agency action.
2. Protest by original awardee, challenging agency's release of its technical proposal, is untimely where protester had reason to know of its release more than 7 months prior to filing its protest and any actual ignorance of release is attributable to a failure to diligently pursue the information.

DECISION

Tele-Measurements Incorporated protests the award of a contract to Robert Slye Electronics, Inc., under request for proposals (RFP) No. DAAC09-88-R-0110 issued by the Sacramento Army Depot. We dismiss the protest without obtaining an agency report since it is clear from the record that the protest is without legal merit. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1989).

Tele-Measurements was originally awarded a contract on December 30, 1988, for the engineering, furnishing, and testing of an audio follow video routing switcher system at Fort Ritchie, Maryland. By letters of January 4, and February 1, 1989, Slye filed requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), for Tele-Measurements' technical proposal and evaluation. On or about February 17, the Army contacted Tele-Measurements by telephone to advise it of the FOIA request and to inform it that the Army would release the requested information unless Tele-Measurements could demonstrate that it contained restricted information of a proprietary nature, the release of which would result in financial harm. Tele-Measurements stated that the requested documents did not contain any strictly proprietary information, but it objected to release

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because the documents revealed the "unique technical approach" taken by the company. Tele-Measurements then requested copies of the technical proposals of Slye and the other offeror.

After receiving a copy of the Army's evaluation of Tele-Measurements' proposal, Slye filed a protest with our Office on February 24 alleging that Tele-Measurements' proposal should not have been accepted for award. Tele-Measurements learned of the protest on February 28, but based on statements by the Army, believed that the protest was without merit.

After receiving a redacted copy of Tele-Measurements' technical proposal, Slye supplemented its protest on March 10, alleging that Tele-Measurements failed to meet all the specifications in the RFP. On March 29, Slye withdrew its protest because the Army decided to reopen negotiations based upon amended specifications. A stop work order was issued to Tele-Measurements on March 31.

In a letter dated April 24, Tele-Measurements complained about the Army's failure to respond to its own FOIA request. It noted that when it was "required . . . to release its technical and price submittals, [it] strongly objected due to the innovative technical approach" it had taken. Tele-Measurements also noted that the Army had "stated that this was not sufficient justification for refusal to disclose the information and proceeded to supply that information" to Slye. In a separate April 24 letter, Tele-Measurements requested the basis for and details of Slye's protest. The Army did not furnish any documents in response to Tele-Measurements' requests.

On June 30, 1989, the Army advised all offerors that, in response to a protest with our Office (Slye's) alleging the awardee's noncompliance with stated specifications, had determined that none of the offerors fully complied with the specifications. As a result of the foregoing, they were further informed that the Army intended to suspend the award, issue an amendment to the RFP with revised specifications, and require resubmission of technical proposals. As a condition to participation, all offerors were required to agree to disclosure of initial best and final offer (BAFO) prices. Each was also advised that its "technical approach will not be disclosed."

Tele-Measurements submitted a new technical and pricing proposal on August 7, engaged in technical discussions with the Army, and on December 8, submitted its BAFO. On December 12, it was informed that the Army intended to award

the contract to Slye and that its contract would be terminated for the convenience of the government. Tele-Measurements then retained legal counsel, who obtained a copy of Slye's March 10 supplemental protest. Upon review of this document, Tele-Measurements filed a protest with our Office on December 27, 1989.

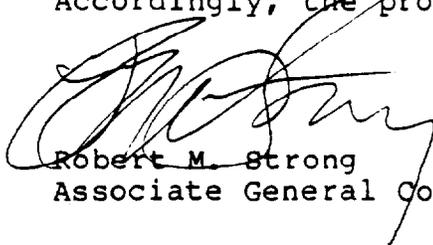
Tele-Measurements' first ground for protest is that the Army never sufficiently explained the basis for its decision to resolicit its requirement. Our Bid Protest Regulations provide that in a negotiated procurement, alleged improprieties in the conduct of that procurement which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested before the next closing date for receipt of proposals. 4 C.F.R. § 21.2(d)(1) (1989). Here, the relevant closing date was on or about August 7, 1989. However, instead of protesting the lack of explanation, protester participated in the reopened procurement. Accordingly, this ground of protest is untimely and will not be considered. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255.

Protester also complains that it was improper for the Army to have divulged its technical proposal to Slye and that it was inequitable to conduct a resolicitation once Tele-Measurements' technical approach had been revealed. Although Tele-Measurements states that it did not in fact know of the disclosure of its technical proposal until after it obtained a copy of Slye's supplemental protest, a protester has the affirmative obligation to diligently pursue the information that forms the basis of its protest. Horizon Trading Co., Inc. et al., B-231177 et al., July 26, 1988, 88-2 CPD ¶ 86.

Here, based on its discussions with the Army in February, Tele-Measurements was convinced in April that its technical proposal had been released to Slye over its objection. Then, in June 1989, the protester learned that the Army was reopening negotiations, based on amended specifications, due to Slye's protest of Tele-Measurements' failure to comply with all specifications. The protester now claims that the Army's advice, that technical approaches would not be released, convinced it that its proposal had not been released. We do not believe that the protester reasonably could rely on the agency's advice. Since the protester had requested a copy of Slye's protest in April, and had not received it by June, it was incumbent upon Tele-Measurements to clarify the matter with the Army or, at the very least, to have obtained a copy of the protest from our Office. Instead, it participated in the reopened procurement until

December 1989, when it lost the competition. Only then did it again seek a copy of Slye's protest from the Army. In our view, the protester's action is inconsistent with its obligation of diligence. Consequently we find these grounds untimely and will not consider them.

Accordingly, the protest is dismissed.



Robert M. Strong
Associate General Counsel