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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Merck & Co., Inc.

File: B-248655

Date: May 19, 1992

Horace D. Nalle, Jr., Esq., for the protester,
Catherine M. Evans, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency improperly failed to make award to protester based on its initial proposal, allowing the awardee to undercut protester's price in its best and final offer (BAFO), is untimely where solicitation language placed protester on notice that agency would conduct discussions and request BAFOs, and protester did not object to provision before the time set for receipt of initial proposals.
2. Protest that time allowed--1 day--for submission of best and final offers (BAFO) was insufficient is untimely where not filed either before BAFOs were due or within 10 working days after protester learned of BAFO request.
3. Protest challenging agency's decision to award pharmaceutical contract to awardee notwithstanding Food and Drug Administration's recommendation against contract awards to that firm because of alleged mislabeling is dismissed as it concerns the contracting officer's affirmative determination of the awardee's responsibility.

DECISION

Merck & Co., Inc. protests the award of a contract to Stuart Pharmaceuticals under request for proposals (RFP) No. DLA120-91-R-1599, issued by the Defense Personnel Supply Center (DPSC) for lisinopril, a prescription drug used to treat high blood pressure. Merck, the incumbent contractor, complains that the agency improperly delayed the procurement process, allowing Stuart eventually to offer the lowest price, instead of making award to Merck based on its initial proposal. In addition, Merck complains that the agency did not allow enough time for preparation of best and final offers (BAFO), and that it improperly made award to Stuart notwithstanding an adverse recommendation from the Food and Drug Administration (FDA).

We dismiss the protest.

The RFP, issued on June 13, 1991, established a closing date of July 18; both Merck and Stuart (the only firms selling lisinopril in the United States) submitted proposals. On October 7, the agency amended the solicitation to provide for an indefinite quantity-type contract, and requested revised proposals by October 16 (the date Merck's contract was due to expire). On October 10, the agency asked Merck to agree to extend its contract until November 18; Merck agreed. On January 13, 1992, the agency again amended the solicitation to delete requirements for palletization and 24 hour prior notice of shipment, and requested revised proposals by February 19.

On February 26, the agency amended the solicitation to require submission of an alternate offer for "direct vendor delivery," utilizing the agency's electronic ordering system, and to request the submission of BAFOs by the following day. After unsuccessfully asking for more time, Merck submitted its BAFO by the deadline. On March 9, Merck learned of the award to Stuart; Merck also learned that Stuart's offered prices were exactly 50 cents lower than Merck's for each of three required dosage forms. Merck then filed an agency-level protest of the award on March 19, which was denied on April 24; the firm subsequently filed this protest.

Merck first alleges that the agency's delay in completing the procurement allowed Stuart to learn of Merck's price and to undercut. In this regard, Merck notes that the Department of Veterans Affairs (VA) had issued a sealed bid solicitation for lisinopril with a bid opening date of July 18, 1991, the same date initial proposals were due under the RFP here. Merck asserts that DPSC should have made award to it based on its initial proposal instead of requesting revised proposals and BAFOs, since the request for revised proposals allowed Stuart to undercut Merck's price after the price became available at VA's public bid opening.

Merck fails to state a valid basis for protest. First, the RFP informed offerors that the agency intended to hold discussions with offerors in the competitive range before making award. If Merck had any objection to the RFP's terms in this regard, it was required to protest those terms by the time set for receipt of initial proposals on July 18. 4 C.F.R. § 21.2(a)(1) (1992). In any case, Merck was not eligible for award based on its initial proposal because the proposal took exception to two RFP requirements. As for the alleged improper delay in completing the procurement, while an agency is required to award a contract with reasonable promptness, Merck has not offered any evidence that would

tend to establish that the agency unreasonably delayed the procurement; rather, the delays appear to have been necessitated by changes in the agency's requirements. An agency's delay in meeting procurement milestones is a procedural matter which does not affect the propriety of an award. Federal Sales Serv., Inc., B-237978, Feb. 28, 1990, 90-1 CPD ¶ 249.

Merck also objects to the length of time DPSC allowed for BAFO submission. Generally, to be timely under our Bid Protest Regulations, a protest of a solicitation impropriety incorporated by amendment must be filed prior to the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). In some cases where the amendment was not received until 1 day before proposals were due, we have held that the protester did not have a reasonable opportunity to file its protest before the due date, and have instead applied the rule at 4 C.F.R. § 21.2(a)(2), which states that protests of other than solicitation improprieties must be filed within 10 days after the protester knew or should have known the basis for protest. See, e.g., The Big Picture Co., B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166. Merck, however, did not file its agency-level protest on this ground until March 19, after the February 27 BAFO due date and more than 10 working days after the February 26 BAFO request. Its subsequent protest to our Office therefore is untimely. 4 C.F.R. § 21.3(a)(3).

Merck asserts that we should consider its untimely arguments under the significant issue exception to our timeliness requirements, 4 C.F.R. § 21.2(c). Under this exception, we may consider a given protest notwithstanding its untimeliness when, in our judgment, the circumstances are such that our consideration of the protest would be in the interest of the procurement system. DynCorp, 70 Comp. Gen. 39 (1990), 90-2 CPD ¶ 310. In order to prevent our timeliness requirements from becoming meaningless, however, we strictly construe and seldom use the exception, limiting it to protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. Id. The question of whether an agency provided sufficient time for offerors to prepare proposals or respond to an amendment does not present a significant issue. Tony Western--Recon., B-241169; B-241169.3, May 21, 1991, 91-1 CPD ¶ 489; Diversified Computer Consultants, B-225714.2, June 19, 1987, 87-1 CPD ¶ 613. We therefore will not consider Merck's untimely argument.

Finally, Merck challenges the agency's decision to make award to Stuart contrary to the FDA's recommendation. The FDA has issued Stuart a "warning letter" stating that it believed Stuart's promotional literature made misleading

but the benefits of its brand of lisinopril and
ould recommend to federal agencies against awarding
to the firm. In its letter denying Merck's
el protest, the contracting officer stated that
tuart responsible based on the firm's performance
ality record, and input from the FDA. We will not
n affirmative responsibility determinations absent
that the determination was made fraudulently or in
or that definitive responsibility criteria in the
on were not met. 4 C.F.R. § 21.3(m)(5); ALM,
5679.3, May 8, 1987, 27-1 CPD ¶ 493. Neither
applies here.

is dismissed.



: Ashen
g Assistant General Counsel