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

Decision

Matter of: American Communications Company

File: B-248303

Date: July 30, 1992

Robert M. Cambridge, Esq., for the protester.
Roger B. Sabin, Esq., and Eileen P. Manley, Esq., Defense Information Systems Agency, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that award was improperly made without discussions is untimely where the protester did not file its protest within 10 working days of being advised of the agency's decision to award without discussions.

DECISION

American Communications Company (ACC) protests the award of a contract to Halifax Corporation under request for proposals (RFP) No. DCA100-92-R-0008, issued by the Defense Information Systems Agency (DISA) as a total small business set-aside. ACC initially contended that DISA improperly made award without discussions, and that award on the basis of price was inconsistent with the evaluation criteria.

We dismiss the protest.

The RFP incorporated by reference Federal Acquisition Regulation (FAR) § 52.215-16, "Contract Award (APR 1985)," which advised offerors that the agency may award a contract on the basis of initial proposals without discussions and also warned offerors that initial proposals should contain the offeror's best technical and price terms. Eight proposals were received by the January 31, 1992, closing date. Based on the evaluation of proposals, Halifax was recommended for award without discussions.

On March 24, the contracting officer sent a letter by facsimile to each unsuccessful offeror to notify them of the name and location of the apparent successful offeror. This notice was sent pursuant to FAR § 15.1001(b)(2) (FAC 90-7), which requires the contracting officer to notify unsuccessful offerors in small business set-aside

acquisitions of the intended awardee so that a timely protest of the intended awardee's small business size status may be filed. The letter specifically stated that the agency would not consider any subsequent revisions of proposals.

After ACC's receipt of the award notification on March 24, several telephone conversations took place between ACC and the contracting officer in which ACC informed the contracting officer that award without discussions appeared to be inconsistent with the provisions applicable to the RFP. ACC contended that discussions were mandatory.

On March 31, award was made to Halifax. ACC filed a protest with this Office on April 9, within 10 days of its receipt of the March 31 award notification.

By letter dated April 13, DISA requested that our Office dismiss as untimely ACC's basis of protest concerning the failure to conduct discussions. On April 27, we notified the parties that we considered ACC's protest on the issue to be untimely because ACC did not protest within 10 working days after the basis of protest was known or should have been known, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1992). The basis for our view was that ACC learned of its grounds of protest on March 24, when ACC received written notification from the contracting officer that Halifax was the selected awardee and that the agency would not consider any subsequent revision of unsuccessful proposals but did not protest until April 9, more than 10 working days later.

ACC contends that the March 24 notification did not provide it with a basis of protest because it merely stated the agency's intent to make award. ACC argues that it was entitled to wait for notification of an actual award before it had grounds for protest. We disagree. ACC was clearly on notice from the March 24 letter that no discussions were contemplated prior to award. Thus, it was, or should have been, aware that award would be made without discussions on March 24, and the 10-day period for protesting on that basis began on that date.

ACC alternately contends that its telephone complaints to the contracting officer shortly after receipt of the March 24 notification should be considered a timely protest filed with the contracting agency. However, FAR § 33.101 (FAC 90-3) does not provide for oral protests to the agency. Thus, even assuming we could construe ACC's conversations with agency personnel as a protest, the oral complaint to the contracting agency did not constitute a protest such that a subsequent protest to our Office would be timely.

See K-II Constr., Inc., 65 Comp. Gen. 422 (1986), 86-1 CPD ¶ 270. Accordingly, under the FAR and our Bid Protest Regulations, the protester was here obligated to file its protest in writing with the agency or with our Office no later than April 7, 10 working days after it knew of its basis of protest. 4 C.F.R. §§ 21.1(b), 21.2(a)(2) and (3).

ACC also contends that we should consider its protest under the significant issue exception to our timeliness requirements. See 4 C.F.R. § 21.2(b). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Lucas Place, Ltd.--Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the best interest of the procurement system. Golden N. Van Lines, Inc., 69 Comp. Gen. 610 (1990), 90-2 CPD ¶ 44. In order to prevent the timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to untimely protests that raise issues of widespread interest to the procurement community that have not been considered on the merits in a previous decision. Dyncorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

ACC's protest does not meet this standard. We have decided several cases involving the issue raised here. See, e.g., BDM Int'l Inc., B-246136.2, Apr. 22, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 377; Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227. Thus, we decline to invoke the significant issue exception.

As for the protester's second issue, we consider it to have been abandoned since ACC in its comments to the agency report did not address in any way the agency's documented position that the evaluation and award was in accordance with the solicitation requirement. See Hampton Rds. Leasing, Inc., 71 Comp. Gen. 90 (1991), 91-2 CPD ¶ 490.

The protest is dismissed.


Ronald Berger
Associate General Counsel