



Comptroller General
of the United States

Washington, D.C. 20548

Decision

1125164

Matter of: Biomedical Research Incorporated--
Reconsideration

File: B-249522.2

Date: April 16, 1993

Robert L. Middleton, Esq., Brian A. Mizoguchi, Esq., and Buel White, Esq., for the protester. John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision dismissing a protest issue as untimely is denied where the protest issue was untimely raised and no basis exists for considering the protest issue under the significant issue exception.

DECISION

Biomedical Research Incorporated (BRI) requests reconsideration of our decision in Biomedical Research Inc., B-249522, Nov. 25, 1992, 92-2 CPD ¶ 381, in which we denied BRI's protest of the award of a contract to Medical Equipment and Maintenance Company (MEMCO) under request for proposals (RFP) No. 263-91-P(39)-0387 (-0387), issued by the Department of Health and Human Services (HHS), for biological repository services¹ for the National Institute of Allergy and Infectious Diseases and the National Institute of Neurological Disorders and Stroke.

We deny the request for reconsideration.

The agency issued RFP-0387, as a small business set-aside, on December 31, 1991. Offers were received from BRI and MEMCO by the solicitation's closing date of February 7, 1992. The proposals were evaluated, discussions were conducted, and best and final offers were requested and received. The agency determined that the technical quality of the proposals was essentially equal, and made award to

¹Biological repository services essentially entail the storage of biological specimens in cold storage.

MEMCO based on its lower price. The agency notified BRI that award had been made to MEMCO on July 15, and shortly thereafter, in response to BRI's inquiry, informed the protester that ERC BioServices Corporation would be performing the contract with MEMCO as MEMCO's subcontractor.²

BRI filed a protest with our Office on July 23, 1992, contending that MEMCO gained an unfair competitive advantage under RFP-0387 because, during a simultaneous procurement for similar repository services, the agency disclosed to MEMCO through MEMCO's proposed subcontractor--ERC--technical and cost information proprietary to BRI. The protester explained that on December 16, 1991, it submitted a proposal in response to RFP. No. NIHD-PRP-92-02 (-02), issued by the National Institute of Child Health and Human Development, HHS, for similar repository services, and that a Vice President of ERC, Dr. Susan A. Stern, had served on a team of reviewers tasked with evaluating BRI's technical proposal.³

A hearing was held in connection with this protest at which testimony was elicited concerning the nature of Dr. Stern's position at ERC, and whether Dr. Stern had disclosed to ERC or MEMCO personnel any information proprietary to BRI to which Dr. Stern had access in her capacity as a reviewer for HHS in connection with RFP-02. Based on our review of the record, including the testimony elicited at the hearing, we concluded that there was no improper disclosure of BRI's proprietary information to either ERC or MEMCO personnel, nor was there any evidence that the information was not properly safeguarded. Therefore, there was no basis to conclude that MEMCO gained an unfair competitive advantage that would justify its exclusion from the competition.

In its protest, BRI also argued that HHS' release of BRI's technical proposal submitted in response to RFP-02 to Dr. Stern for evaluation purposes constituted a violation of the Office of Federal Procurement and Policy (OFPP) Act, 41 U.S.C. § 423(a) (1988 and Supp. III 1991), as implemented by FAR § 3.104-3, and that the agency violated FAR § 9.505-4 in failing to obtain ERC's agreement with BRI to protect BRI's proprietary information and refrain from unauthorized use or disclosure of such information.

²ERC is now known as Ogden BioServices Corporation.

³The HHS Acquisition Regulation, 48 C.F.R. § 315.608-71(f) (1991), consistent with Federal Acquisition Regulation (FAR) § 15.413-2(f), authorizes the use of non-government personnel as evaluators where the required expertise is not available in the government.

We found untimely BRI's argument that HHS' release of BRI's technical proposal submitted in response to RFP-02 to Dr. Stern for evaluation purposes constituted a violation of the OFPP Act and FAR §§ 3.104-3 and 9.505-4. BRI had been informed by the agency on February 10, 1992, that Dr. Stern would be performing as a reviewer for HHS with regard to RFP-02 and that Dr. Stern had been provided with a copy of BRI's technical proposal. While BRI had verbally objected to Dr. Stern's participation because ERC is a direct competitor of BRI, BRI elected not to pursue the matter. Because our Bid Protest Regulations require that protests not based on alleged improprieties in a solicitation be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier, we dismissed as untimely BRI's protest on these bases, filed more than 5 months after BRI knew of Dr. Stern's specific involvement in RFP-02. 4 C.F.R. § 21.2(a)(2) (1993).

In order to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Mere disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

In its request for reconsideration, BRI does not dispute our conclusion that an improper disclosure of BRI's proprietary information to either ERC or MEMCO personnel did not occur. BRI argues, however, that we erred in dismissing as untimely its argument concerning the propriety of HHS' release of BRI's technical proposal submitted in response to RFP-02 to Dr. Stern for evaluation purposes.

BRI first asserts that our dismissal of this argument as untimely is inconsistent with our request that the parties address the merits of the argument in the parties' post-hearing comments. However, the request that the parties address in their post-hearing comments the propriety of HHS' release of BRI's technical proposal submitted in response to RFP-02 to Dr. Stern for evaluation purposes did not operate to suspend our timeliness requirements, nor did it preclude us from properly dismissing this protest issue upon concluding that dismissal was the appropriate resolution. Logue Boston Ltd. Partnership--Recon., B-246796.2, July 2, 1992, 92-2 CPD ¶ 1.

BRI next contends that we erred in dismissing this argument as untimely because BRI was not aware that ERC was in essence competing against BRI for award under RFP-0387 until after award had been made and that this was the event that triggered its protest. The agency informed BRI on February 10, 1992, that Dr. Stern would be performing as a

reviewer for HHS with regard to RFP-02, and that Dr. Stern had been provided with BRI's technical proposal. As mentioned previously, while BRI verbally objected to Dr. Stern's participation because ERC is a direct competitor of BRI, BRI elected not to pursue the matter further, and in fact did not subsequently object to Dr. Stern's February 19 on-site visit of BRI's facility until its protest to our Office 5 months later. These facts are not disputed by BRI. Where a protester is in possession of all facts on which it bases a protest argument (i.e., that Dr. Stern had been given access to BRI's proposal on RFP-02), it is required to protest to either the agency or our Office within 10 working days. Under such circumstances a protester may not await further developments before filing a protest. See Computer Hut Int'l, Inc.--Recon., B-248408.2, May 20, 1992, 92-1 CPD ¶ 459.

BRI finally requests that we consider its argument concerning the propriety of HHS' release of BRI's technical proposal to Dr. Stern for evaluation purposes under the significant issue exception to our timeliness rules. See 4 C.F.R. § 21.2(c). 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. Cleveland Telecomm. Corp.--Recon., B-247964.4, Nov. 12, 1992, 92-2 CPD ¶ 340. In order to prevent our timeliness rules from becoming meaningless, we strictly construe and seldom use the significant issue exception, limiting it to those protests that raise issues of widespread interest to the procurement community which have not been considered on the merits in a previous decision. Mead Data Cent., 70 Comp. Gen. 371 (1991), 91-1 CPD ¶ 330; DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. BRI's complaint here is particular to this procurement, and thus does not present an issue of such widespread interest or importance to the procurement community as to justify invoking the exception. Cleveland Telecomm. Corp.--Recon., supra; Cardion, Inc.--Recon., B-249069.2, Nov. 9, 1992, 92-2 CPD ¶ 329.

The request for reconsideration is denied.


James F. Hinchman
General Counsel