



Comptroller General
of the United States

10052510

Washington, D.C. 20548

Decision

Matter of: ADC Ltd.

File: B-255457

Date: October 25, 1993

Arthur D. Cordova, Jr. for the protester.
Behn Miller, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of awardee's proposal is dismissed as untimely where filed more than 10 working days after protester knew, or should have known, its basis for protest.
2. Protest that awardee is not performing in accordance with contract requirements is dismissed since it involves a matter of contract administration.

DECISION

ADC Ltd. protests the award of a contract to ATM Service Company under request for proposals (RFP) No. DE-RP04-93AL75636, issued by the Department of Energy (DOE) for administrative and clerical support services for the Personnel Security Operations Division and Management Support Division at the DOE Albuquerque Field Office.¹ In its protest, ADC contends that the agency's technical evaluation of the awardee's proposal was flawed, and alleges that the awardee is not performing in accordance with the terms of the contract as awarded. ADC also protests the contracting officer's refusal to terminate the awardee's contract.

We dismiss the protest.

¹The solicitation was issued as a total set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), which authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance of such contracts by letting subcontracts to socially and economically disadvantaged businesses.

On August 26, 1993, DOE notified ADC--who was the incumbent contractor for these services--that ATM had received contract award, in part due to the source evaluation board's (SEB) determination that ATM's proposal was technically superior to the ADC proposal. On August 28, ADC filed an agency-level protest challenging the SEB's evaluation of ATM's capabilities and contending that ATM "was not qualified" to perform the contract. In response to its agency-level protest, ADC reports that the contracting officer "assured [ADC] that [ATM's] performance of this contract would be closely monitored and that a 'cure notice' would be issued if necessary," from this communication, ADC apparently concluded that in the event ATM's contract performance was delinquent, the agency would terminate ATM's contract and make award to ADC. Consequently, ADC withdrew its agency-level protest on August 30.

On September 1, DOE hired ADC to "assist DOE in managing the Office" and provide "training" during ATM's start-up of contract performance. According to the protester, DOE required ADC's assistance since the ATM staff was unqualified and incapable of performing the required services. Since that time, ADC contends, ATM's performance of the contract has been so sub-standard that ADC and DOE personnel have been required to perform most of the contract work.

As a result of ATM's alleged performance delinquencies, ADC met with the DOE contracting officer on October 4; during this meeting, ADC reports, the contracting officer stated that notwithstanding ATM's alleged inadequate contract performance, "no 'cure notice' . . . was planned, and . . . DOE was going to do whatever it takes to make this contract work." On October 18, ADC filed this protest with our Office.

With respect to ADC's challenge to the agency's evaluation and contract award to ATM, its protest is untimely. Our Bid Protest Regulations contain strict rules requiring the timely submission of protests. Under these rules, a protest based on other than apparent solicitation improprieties must be filed within 10 working days after the protester knows or should know the protest basis. See 4 C.F.R. § 21.2(a)(3) (1993); Native Resource Dev., Inc., B-246597.2; B-246597.3, July 13, 1992, 92-2 CPD ¶ 15.

ADC argues that its protest is timely because the contracting officer misled the firm into withdrawing its protest with the promise that the agency would award the contract to the protester if ATM's performance became unacceptable. ADC contends that since it did not discover until October 4 that the agency did not intend to issue a "cure notice," its current protest is timely. We disagree.

The contracting officer's representation regarding the possible cure notice issuance did not toll the time for filing ATM's award challenge since, by ADC's version of events, the contracting officer at no point conceded that the agency's evaluation or selection decision was flawed. Rather, the contracting officer merely advised the protester of a remedy available to the agency which could be exercised in response to a contractor's delinquent performance; in no way did this representation answer or address the merits of ADC's award challenge. In fact, we think it clear that by advising ADC of this possible remedy--rather than responding to the merits of ADC's challenge--the contracting officer clearly communicated that DOE did not agree with ADC's protest conclusions; at a minimum, the contracting officer's communication clearly conveyed the agency's plans to continue with the ATM award, notwithstanding ADC's challenge.

As such, to the extent ADC seeks to overturn the award or solicit a determination from this Office that the agency's technical evaluation was flawed, it should have filed these protest grounds within 10 working days of the August 30 discussion. Since it delayed filing any further award challenge until October 18, its protest to this Office is untimely and will not be considered on the merits. See Tero Tek Int'l, Inc., B-242743.3, Oct. 3, 1991, 91-2 CPD ¶ 288.

ADC's challenges to ATM's alleged delinquent contract performance and DOE's refusal to terminate the ATM contract involve matters of contract administration beyond the scope of our bid protest function. Under the Competition in Contracting Act of 1984, our Office considers challenges to the award or proposed award of contracts, 31 U.S.C. § 3552 (1988). Consequently, we generally do not review matters of contract administration, as they are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Court of Federal Claims, 4 C.F.R. § 21.3(m)(1). The few exceptions to this rule include situations where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement, CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364; where the protest alleges that the exercise of a contractor's option is contrary to applicable regulations, Bristol Elecs., Inc., B-193591, June 7, 1979, 79-1 CPD ¶ 403; or where an agency's basis for contract termination is that the contract was improperly awarded, ASR Mgmt. & Technical Servs., B-244862.3, B-247422, Apr. 23, 1992, 92-1 CPD 383. These exceptions have no application to the issues raised in ADC's protest--whether ATM is performing in accordance with the required contract, or the propriety of the agency's refusal to terminate ATM's contract. Consequently, we dismiss these grounds of

protest. See Aviation Sys. and Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD 155 (protest that awardee is not performing in accordance with contract requirements is dismissed as matter of contract administration); Barrett and Blandford Assocs., Inc., B-250926, Feb. 2, 1993, 93-1 CPD ¶ 95 (General Accounting Office will not consider the propriety of contracting agency's decision to terminate a contract for default).

The protest is dismissed.

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