



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: System Dynamics International, Inc.--
Reconsideration

File: B-253957.4

Date: April 12, 1994

J.C. White for the protester,
Tania L. Calhoun, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where protester does not show that original decision dismissing protest for lack of a valid basis contains either an error of fact or law which would warrant its reversal, the decision is affirmed.

DECISION

System Dynamics International, Inc. (SDI) requests reconsideration of our decision in System Dynamics Int'l, Inc., B-253957.3, Nov. 8, 1993, 93-2 CPD ¶ 274, in which we dismissed its protest of the Department of the Army's award of a contract under request for proposals (RFP) No. DAAJ09-92-R-0369, for programmatic and technical support services (PATS).

We affirm the dismissal.

The PATS acquisition strategy provided for one solicitation containing a separate statement of work (SOW) for each of three service areas: technical, logistics, and programmatic. The RFP, issued on October 30, 1992, anticipated award of up to nine indefinite quantity contracts. Three awards could be made under each of the SOWs: one to a section 8(a) firm, one to a small business, and one unrestricted award.

The RFP's section L.10.E instructed bidders to "identify clearly" whether they were proposing as a large business, small business, or section 8(a) contractor. In a December 9 letter, the agency, in response to a prospective offeror's

question,¹ instructed each offeror to indicate the SOWs and types of award for which they were proposing. Offerors were required to submit a separate proposal for each SOW, but not necessarily for each type of award. After the evaluation of initial proposals, submitted on December 29, 1992, discussions were conducted and best and final offers (BAFO) were received. After the evaluation was conducted, Westar was awarded the small business portion of the technical requirement on May 26.

On September 13, SDI filed an agency-level protest of the award, arguing, among other things, that Westar had not submitted a proposal for the small business portion of the technical SOW.² The agency dismissed this protest on October 1, and stated that Westar had competed in all three categories--small business, section 8(a), and unrestricted--for the technical SOW. On the cover letter submitted with its proposal, the Army explained, Westar stated that while its proposal was being submitted in response to the section 8(a), technical set-aside, the firm was "willing to make the offer valid for the Small Business and/or Full and Open portions of the effort. . . ." Upon learning of the dismissal of its agency-level protest, SDI filed a protest in our Office on October 12.

As pertains to this request for reconsideration, SDI challenged the agency's finding that Westar submitted a proposal for the small business portion of the technical SOW. SDI explained that on September 24, after it filed the agency-level protest, it received information pursuant to a Freedom of Information Act request which it asserted showed that Westar did not submit a proposal for the small business portion of the technical SOW. This information, apparently

¹This question, reproduced in the letter, was, "If an 8(a) wants to be considered for the 8(a), small business, and full-and-open awards, must they submit separate proposals?"

²SDI's other arguments concerned alleged improprieties surrounding Westar's subcontractor and teaming agreements, as well as an alleged violation of the Certificate of Independent Price Determination. In our decision, we dismissed these arguments as untimely and as inappropriate for consideration under our "significant issue" exception. See Bid Protest Regulations, 4 C.F.R. § 21.2(c) (1993). We also dismissed as untimely SDI's allegation that Westar submitted a late proposal for the small business portion of the technical SOW, as the allegation was raised more than 10 working days after SDI first obtained knowledge of the basis of protest. 4 C.F.R. § 21.2(a)(2). In its request for reconsideration, SDI does not challenge our decision with respect to these issues.

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an abstract of bidders for the procurement, listed Westar as having submitted a section 8(a) proposal for the technical SOW on December 29. It did not indicate that Westar had also submitted a proposal for the small business or unrestricted portions of the technical SOW. SDI argued that the Army ignored this "main issue for protest."

In our decision, we concluded that SDI's allegation was without a valid basis. As discussed above, the RFP required offerors to "identify clearly" whether they were proposing as a large business, small business, or section 8(a) contractor. Accordingly, both Westar's proposal and the cover letter it submitted with that proposal clearly stated that the firm was proposing as a section 8(a) contractor. The December 9 agency letter further explained that offerors could compete for one or more of the three types of awards, so long as they indicated which award or awards they were competing for; offerors were not required to submit a separate proposal for each type of award. As the Army explained in its decision, Westar's cover letter stated that, while it was submitting the proposal as a section 8(a) contractor, it was willing to compete for the small business and unrestricted awards as well. We agreed with the Army that when Westar's cover letter and proposal were read together, it was clear that Westar's statement in the cover letter complied with the agency's instructions and made its proposal available for all three awards.

In its request for reconsideration, SDI contends that the abstract of bidders listing Westar as submitting only a section 8(a) proposal, and another document, which it asserts is the agency's list of issues to discuss with Westar, entitled, "Westar 8(a) Technical," support its protest "on its face." We disagree.

Cover letters submitted with offers have long been considered as part of the offers and must be considered in determining what offerors are proposing to furnish under the contemplated contract. See AEG Aktiengesellschaft, 65 Comp. Gen. 418 (1986), 86-1 CPD ¶ 267; Sabre Communications Corp.--Recon., B-233439.2, June 30, 1989, 89-2 CPD ¶ 14. An offeror's cover letter separately drafted for submission in a particular procurement may alter the obligations the offeror would otherwise assume under the terms of the solicitation. Only by evaluating a cover letter, or other extraneous documents, submitted with an offer can a contracting officer assure himself of making award on the basis of a compliant offer which satisfies the agency's requirements. See Techniarts Eng'g; Department of the Navy--Recon., B-238520.3; B-238520.4, June 27, 1991, 91-1 CPD ¶ 608.

As discussed above, Westar's initial proposal and its cover letter complied with the RFP's instructions. Westar "clearly identified" that it was proposing as a section 8(a) contractor in accordance with section L.10.E, and additionally indicated that it was making the offer valid for the small business and/or full and open awards, in accordance with the agency's December 9 instructions. While it is not clear why the abstract of bidders does not list Westar as submitting a proposal for the small business and full and open awards, as well as the section 8(a) award, or why the list of issues to discuss refers to Westar as solely an 8(a) offeror, we cannot conclude that these documents have any bearing on the determination whether Westar properly put itself into consideration for all three awards. Proposals must be evaluated based on the information furnished with them. See Rolm Southern California, B-216955, Mar. 14, 1985, 85-1 CPD ¶ 327.¹

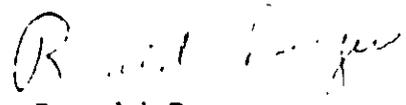
SDI finally argues that we should not have dismissed its protest without requesting and receiving an agency report. This argument is without merit.

Bid protests are serious matters which require effective and equitable procedural standards assuring a fair opportunity to have objections considered consistent with the goal of not unduly disrupting the protest process. Diemaster Tool, Inc.--Recon., 70 Comp. Gen. 339 (1991), 91-1 CPD ¶ 304. To that end, our Bid Protest Regulations require that protests include a detailed statement of the legal and factual grounds of protest, 4 C.F.R. § 21.1(c)(4), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(e). This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. See Imaging Equip. Servs., Inc., B-247201, Jan. 10, 1992, 92-1 CPD ¶ 50. In this regard, our Regulations clearly state that we may summarily dismiss a protest without requiring the agency to submit a report when on its face a protest does not state a valid basis of protest, is untimely, or

¹In support of its argument, SDI also submits the cover letter to Westar's BAFO, which does not mention the small business award, as well as the covers from several volumes of Westar's initial proposal and BAFO, which contain a diagram indicating that the proposal was submitted for the section 8(a) technical award. However, these documents do not contain any retraction of the statement made in Westar's initial proposal cover letter, and are not inconsistent with that statement or with the agency's instruction that offerors were not required to submit separate proposals for each type of award.

is otherwise not for consideration by our Office. See 31 U.S.C. § 3554(a)(3) (1988); 4 C.F.R. § 21.3(m); Alascom, Inc.--Second Recon., B-250407.4, May 26, 1993, 93-1 CPD ¶ 411. Here, our review of the protest documents showed that most of the issues presented by SDI were untimely, and that the issue raised again in this request for reconsideration did not have a valid basis. As a result, our dismissal of the protest without obtaining an agency report was proper.

The dismissal is affirmed.



Ronald Berger
Associate General Counsel