

M. Curcio



Comptroller General
of the United States

520214

Washington, D.C. 20548

Decision

Matter of: Engineering Design Group, Inc.
File: B-256598
Date: April 15, 1994

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.
Joel R. Feidelman, Esq., James J. McCullough, Esq., and Deneen J. Melander, Esq., for Science Applications International Corporation, an interested party.
Paul Brundage, Esq., National Aeronautics and Space Administration, for the agency.
Mary G. Curcio, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly requested a second round of best and final offers (BAFO) and created an impermissible auction is dismissed as untimely when not filed within 10 working days after the protester received the solicitation amendment requesting the BAFOs.

DECISION

Engineering Design Group, Inc. (EDG) protests that the National Aeronautics and Space Administration (NASA) decision to request a second round of best and final offers (BAFO) under request for proposals (RFP) No. RFP2-35115(BEJ) violates federal and NASA procurement regulations and creates an impermissible auction.

We dismiss the protest.

The RFP was issued on February 8, 1993, for a Facility Automation Control System for the modernization of the Unitary Plan Wind Tunnel at Ames Research Center. After proposals were received and evaluated, EDG was selected for award. However, before the award was made Science Applications International Corporation (SAIC) and another offeror protested to the General Services Board of Contract Appeals (GSBCA) arguing, among other things, that NASA improperly conducted the procurement because it did not obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA). The GSBCA recommended that NASA obtain a DPA and proceed with the procurement in accordance with statute and regulation.

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Following the GSBICA decision, NASA requested and received a DPA from GSA. By letter of February 2, 1994, NASA advised EDG that it had received the DPA for the procurement and that it would be giving all offerors in the competitive range an opportunity to revise their proposals and submit a second BAFO. On February 11, by facsimile transmission, NASA sent to each offeror in the competitive range amendments 7 and 8, which, among other things, changed the government estimate from approximately \$10 million to \$15 to \$18 million, requested second BAFOs, and made other administrative changes to the RFP. On March 1, EDG submitted its protest to our Office arguing that NASA's decision to request second BAFOs violated federal and NASA procurement regulations and created an impermissible auction.

Under our Bid Protest Regulations, a protest that is based upon an apparent impropriety that is incorporated into a solicitation after it is issued must be filed prior to the next closing date set for the receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1993). Protests that are not based upon solicitation improprieties must be filed no later than 10 working days after the protester knew or should have known the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). EDG argues that its protest is based on regulatory improprieties that were incorporated into the solicitation by amendments 7 and 8. Specifically, EDG argues that its allegation that the request for second BAFOs violated federal procurement regulations is based on the fact that amendments 7 and 8 do not provide any justification to request a second BAFO, its allegation that the request violated NASA regulations is based on the NASA regulations cited in amendment 7 as authorization for the request, and its argument that NASA conducted an impermissible auction is based on the revised government estimate in amendment 7. EDG therefore asserts that the timeliness of its protest should be judged by the rule concerning solicitation improprieties that are incorporated in a solicitation after it is issued.

We disagree. In our view, EDG is not protesting an impropriety apparent from the solicitation or the amendments, but rather NASA's action in requesting a second BAFO. That is, EDG does not assert that there is something wrong with the solicitation such as defective specifications that resulted from NASA issuing amendments 7 and 8. Rather, EDG is arguing that NASA violated procurement regulations by requesting a second BAFO because NASA did not have sufficient justification to do so. Similarly, while amendment 7 changed the government estimate, EDG is not protesting the change in the estimate itself. Rather, EDG is protesting that because of the change in the estimate, and because during the course of the procurement, offerors

had been advised of their standing in relation to the government estimate, NASA's request for a second round of BAFOs created an auction. Thus, EDG's protest is based on the issuance of the amendments permitting the other offerors to submit revised BAFOs changing their prices and EDG was required to raise these issues within 10 working days after it learned the bases of protest. See Jay-Em Corp.--Recon., B-226386.2, Apr. 13, 1987, 87-1 CPD ¶ 403. By its own acknowledgment, EDG knew no later than February 11, when it received amendments 7 and 8, that it did not believe that NASA had sufficient justification under federal or NASA procurement regulations to request second BAFOs and that it believed NASA was conducting an improper auction. As stated, EDG protested on March 1. Since EDG did not protest by February 28, 10 working days after it knew its grounds for protest, the protest is untimely and will not be considered.

The protest is dismissed.



John Van Schaik
Acting Assistant General Counsel