

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

50934

FILE: B-183499

DATE: July 22, 1975

97349

MATTER OF: Genisco Technology Corporation

DIGEST:

1. Having received and considered agency report on protest, together with protester's written comment in reply, several grounds of protest initially thought to be timely filed are now considered untimely filed under 4 C.F.R. § 20.2(a) (1974).
2. Critical to conclusion that several grounds of protest concerning lack of discussions after stated date in negotiated procurement are considered untimely filed is protester's admission that it was told, several months prior to date pricing proposals were due in negotiated procurement, that no further pricing discussions would be held after stated date.
3. Since there was conflict between pricing provisions on face of solicitation and because agency advised that no pricing discussions would be held after date set for receipt of pricing proposals, protester was obliged to file protest concerning conflict prior to that date.
4. Various grounds of protest regarding Department of Navy's position announced in December 1974 not to hold pricing discussions after stated date are considered untimely filed in March 1975 under 4 C.F.R. § 20.2(a) (1974). Issue regarding denial of pricing discussions is not considered to be of special significance to procurement practices.
5. Admitting, as protester does, that it was advised that no pricing discussions would be held after March 17, 1975, in negotiated procurement, it appears that any discussions which might have been held with protesting offeror could only have benefited protester since there is no evidence that Department had "discussions" with any other offeror. Consequently, and since alleged cost savings that might have been realized through discussions with protesting

offeror appear speculative, no basis is seen to question award made to other concern even if assumption is made that discussions, albeit of a deficient character, were held with protesting offeror and offeror was erroneously led to believe that further discussions would be held.

6. Since no basis is found for questioning award, protesting offeror's claim for bid preparation expenses is denied.

On March 24, 1975, our Office received a protest from Genisco Technology Corporation (Genisco). Genisco contended that after "further study and inquiry" into solicitation N00039-75-R-0051(S), a negotiated procurement, issued by the Department of the Navy, it was Genisco's view that an ambiguity existed in certain pricing provisions of the solicitation. Because of the ambiguity, Genisco felt that it was prevented from offering its lowest price in response to the solicitation. The company further stated that it attempted, without success, to obtain the Department's approval to submit a revised price offer.

We initially expressed informal concern to counsel for Genisco that the company's protest of a specification ambiguity involving pricing seemed untimely filed. This appeared to be a proper concern since under our Interim Bid Protest Procedures and Standards (4 C.F.R. § 20 (1974)) protests regarding an alleged impropriety, apparent in any type of solicitation, had to be filed before the closing date for receipt of proposals in a negotiated solicitation and because the protest here was not filed before the March 17, 1975, date for receipt of pricing proposals under the subject solicitation.

This initial concern was lessened, in part, by noting that Genisco's March 31 letter raised several questions about the propriety of the negotiation procedures employed which otherwise appeared timely. The end result was that Genisco's protest was allowed to be processed.

Having received and considered the Department's protest report and Genisco's reply comment, it is now our view that several grounds for Genisco's protest must be considered untimely filed.

Critical to the conclusion that several grounds of Genisco's protest are untimely is the company's admission on page 7 of its May 20, 1975, letter that it was informed, by amendment No. 0002, dated December 13, 1974, that no price negotiations would result under "Step II of the procurement" (the phase of the procurement which required the submission of priced proposals by March 17, 1975). This advice, we believe, reasonably informed Genisco and all other offerors that March 17 would be the final closing date for the receipt of price proposals and that no discussions with offerors would be held thereafter. Genisco was therefore obliged, under 4 C.F.R. § 20.2(a) (1974), to file any protest regarding apparent solicitation defects prior to March 17.

It is Genisco's position that the solicitation allows only its interpretation of the pricing provisions in question and that there was, therefore, no apparent ambiguity of which it could complain before the closing date. (These provisions relate to the pricing of "checkout spares" kits for the items being purchased.)

Genisco submits that the provisions required offerors to determine a unit price for the spares kit on the assumption that all "interface cards" for the basic item would be included in the kit. To buttress this argument, Genisco cites the following provision of the RFP:

"Installation and Checkout Spares to be provided with the CMTU unit, if specified, and priced under Column J of the various tables shall consist of the following:

"1. One (1) unique line replaceable item including but not limited to all printed circuit assemblies and all other replaceable electronic or electro-mechanical assemblies."

On the other hand, the Department insists that other provisions of the RFP clearly advised offerors to determine a unit price for the spares kit on the assumption that only one interface card need be included in the kit. Thus, the Department recites the following RFP provisions:

"[Section J - paragraph (17)a]

"Delivery Orders * * * shall contain * * * INPUT/
OUTPUT Interface Type * * *

* * * * *

"[ELEX-R-183]

"Ordering Data. Procurement documents should specify * * * Computer interface type * * *"

From these provisions, the Department argues that offerors should have reasonably known that delivered items would only require one interface card (since the above provisions refer to type rather than types) and that there would, therefore, only be need for a spares kit containing one interface card (of the type initially ordered). Since there would be need for only one interface card in the spares kit, offerors, in the Department's view, should only have reasonably included a price for one interface card in their lump-sum price for the kit.

From the foregoing, we believe it is apparent that there is a conflict on the face of the solicitation. Therefore, it was incumbent on Genisco to protest the conflict prior to the March 17 closing date. Its failure to do so renders this aspect of its protest untimely.

The other grounds of protest relate to the Department's advice that no price negotiations would be conducted after submission of the March 17 proposals. Thus, Genisco argues that: (1) the Department arbitrarily refused to take advantage of its general authority to conduct pricing discussions after March 17 (Genisco's argument that the Department erroneously considered its pricing proposal to be "in order on its face" and that the Department should therefore have held discussions with Genisco because of an alleged pricing discrepancy is considered to be a restatement of argument (1)); (2) the Department could not dispense with all pricing discussions even though it so desired; and (3) the Department should have permitted offerors the opportunity to submit a best and final pricing proposal after March 17.

The basis for protest on these arguments was known by Genisco after it received the Department's answer in December 1974 that no price negotiations were to be held. The March 1975 protest raising these grounds is therefore considered untimely. See 4 C.F.R. § 20.2(a) (1974).

Alternatively, Genisco argues that argument 2 is for consideration because it is of special significance to procurement practices. We do not agree.

Genisco also argues that the Department abandoned its position not to conduct discussions with offerors and, in fact, held discussions (albeit of an allegedly deficient character) with Genisco after March 17, 1975. Consequently, Genisco argues that it was led to believe negotiations would continue after March 17 to its detriment.

Admitting (as Genisco does) that the Department previously advised that no pricing discussions would be held after March 17, 1975 (a procedure which we must accept for the purpose of the protest given the untimeliness of Genisco's protest), it seems to us that any discussions that might have nonetheless been held could only have benefited Genisco, since there is no evidence that the Department had "discussions" with any other offeror. Consequently, we see no basis for questioning the award subsequently made by the Department during the pendency of the protest to Qantex Division of North Atlantic Industries, Inc., even if we assume discussions were held with Genisco and the concern was erroneously led to believe further discussions would be so held.

Had the Department so negotiated with Genisco in an attempt to pursue the pricing advantages allegedly present in Genisco's revised offer, it would have been required to negotiate with all other competitive-range offerors. Not only would this approach have further contravened the December 1974 advice that no pricing discussions would be held with offerors, but it would have required additional administrative cost and effort to pursue what might be a purely speculative cost savings. (The Department insists that any actual dollar savings that might arise from Genisco's revised offer could only be determined after all orders were placed under the resulting contract.)

Consequently, we will not consider the protest further.

Since we find no basis for questioning the award, Genisco's alternative claim for bid preparation expenses is denied.

Deputy Comptroller General
of the United States

R. F. Kellin