

DECISION

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

FILE: B-184639

DATE: December 12, 1975

MATTER OF: Maxwell Laboratories, Inc.

DIGEST:

1. Allegation that change subsequent to submission of proposals of SIC code for a total Small Business set-aside violated ASPR is now academic since the solicitation was subsequently canceled.
2. Allegations that change in SIC code was "arbitrary and capricious" are not sustained since contracting officer was acting within his authority when he found that original SIC code was incorrect. Consequently, protesters request for proposal preparation costs incurred must be denied.
3. Protest against resolicitation was untimely since not made prior to closing date for receipt of initial proposals under new solicitation.

On April 4, 1975, the Department of the Air Force issued request for proposals (RFP) No. F29601-75-R-0115, for a VPD-II Pulser Development program. The solicitation was a total small business set-aside with a Standard Industrial Classification Code 8911, which has a small business qualification size standard of 500 employees or less.

The Government received responses to the original solicitation (0115) from two firms: Maxwell Laboratories, Inc. (Maxwell), and Physics International Company (Physics). When the Government, on June 26, 1975, notified Maxwell of its intent to award the contract to Physics, Maxwell submitted a small business size protest to the Small Business Administration (SBA), alleging that Physics was not qualified for this set-aside procurement since that company had more than 500 employees. The SBA held that Physics did not qualify for a small business set-aside with a Standard Industrial Classification (SIC) code of 500 employees, but would be qualified for an SIC code of 1,000 employees.

On July 29, 1975, the Air Force notified Maxwell that it was deleting the SIC Code 8911 and substituting in lieu thereof Code 3621, which has a small business qualification size standard of 1,000 employees or less. The reason given by the contracting officer for this change was that the definition of a small business set forth in the solicitation was wrong since it contained the size standard applicable to a service industry whereas it should have contained the standard applicable to a manufacturing industry.

Also on July 29, 1975, Maxwell submitted a protest to our Office, contending that the change of the SIC code subsequent to the submission of proposals was inconsistent with Armed Services Procurement Regulation (ASPR) and was arbitrary, capricious and discriminatory to Maxwell Laboratories.

On August 25, 1975, the Air Force canceled the original solicitation, F29601-75-R-0115, and issued a new solicitation, F29601-76-R-0021, which contained the revised SIC Code 3621, allowing firms with a maximum of 1,000 employees to submit a proposal. Proposals in response to this solicitation were due on September 10, 1975. Maxwell, after the due date for proposals had passed, notified the agency that it was both resubmitting its prior proposal and protesting the resolicitation. Maxwell also protested to our Office the resolicitation in a letter received by our Office on September 11, 1975.

The first protest by Maxwell, submitted on July 29, 1975, requested two forms of relief. First, it requested that award for the procurement be made to Maxwell Laboratories, Inc., since it was the only remaining qualified offeror. Maxwell contended that the change in SIC code by the Air Force was ineffective since ASPR § 1-703(c)(2) and (3) (1974 ed.) preclude a contracting officer from changing the SIC code used in any given procurement once he has selected it. This argument became academic when the original request for proposals was canceled. Cf. Pacific Architects and Engineers, Inc., B-179633, February 12, 1975, 75-1 CPD 87. Maxwell also argued that if a contracting officer were allowed to change the SIC code subsequent to the submission of offers, an offeror would be precluded from challenging the qualifications of other offerors for that code due to ASPR § 1-703(c)(2), which requires that an appeal from a product or service classification determination be taken 10 days before the bid opening date or the deadline for submitting proposals. This argument likewise became

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academic when the original solicitation was canceled, and will not be considered further.

The second form of relief requested by Maxwell in its protest under RFP 0115 was recompense for costs incurred by it in submitting its proposals. Proposal preparation costs are not recoverable by an offeror unless he can show that the actions of the procurement agency toward the claimant were in bad faith, arbitrary or capricious. See Keco Industries, Inc. v. United States, 428 F.2d 1233 (1970); Frequency Electronics, Inc., B-178164, July 5, 1974, 74-2 CPD 8; B-173099, May 25, 1972. Thus Maxwell must base its request for proposal costs on its contention that the contracting officer acted in an arbitrary, capricious or discriminatory manner when he revised the SIC classification code subsequent to the receipt of offers received in response to the first solicitation.

In this case, the contracting officer determined that the definition of small business used in RFP 0115 was incorrect and improperly restricted full and free competition, and thus cancellation of the solicitation was in the best interest of the Government. While a contracting officer may not cancel a solicitation merely to increase competition, nor may he change the size standards fixed by the SBA, B-167282, March 10, 1970, he may consider a mistake in the choice of the proper SIC code to be grounds for canceling the solicitation in which the erroneous code appears. Evergreen Helicopters, Inc., B-183482, June 24, 1975, 75-1 CPD 382; B-167282, March 10, 1970; B-153300, March 18, 1964. We therefore conclude that the failure of the contracting officer to proceed to award the contract to Maxwell was not "arbitrary or capricious." Accordingly, Maxwell's request that it be recompensed for costs incurred by it in submitting its proposal must be denied.

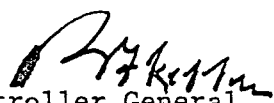
The second protest by Maxwell, submitted to our Office on September 11, 1975, challenges the issuance of Air Force of the resolicitation, RFP No. F29601-76-R-0021, containing a different SIC code from that used in the original solicitation. Maxwell alleges that the resolicitation was a "subterfuge" to get around the prior SBA ruling regarding the qualifications of Physics for the set-aside under the original SIC code.

In order for a protest to receive consideration on its merits by GAO, the protest must be filed in a timely manner according to section 20.2(b)(1) of our Bid Protest Procedures, (40 Fed. Reg. 17979 (1975)) which states that:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

The term "filed" as used in § 20.2(b)(1) means "receipt in the contracting agency or in the General Accounting Office as the case may be." See § 20.2(3).

The closing date for the receipt of initial proposals for the resolicitation, 0021, was 1530 Mountain Time on September 10, 1975. Maxwell submitted a protest to the Air Force at 1532 Mountain Time on September 10, 1975. A letter of protest for Maxwell was also received by GAO on September 11, 1975. Since Maxwell's protest was received by neither the contracting agency nor GAO until after the closing date for receipt of initial proposals, the protest was untimely. Consequently, we will not consider the merits of the protest under the resolicitation, 0021.


Deputy Comptroller General
of the United States