B-199577

DECISION

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

FILE: B-199577 DATE: February 9, 1981

MATTER OF: Optimum Systems, Inc.

DIGEST:

Protest to GAO is untimely when not filed within 10 working days of initial adverse action on protest to agency or, alternatively, when apparent impropriety is not protested prior to date set for receipt of next round of offers. Related contentions, resulting from untimely protest, will not be considered on merits.

Optimum Systems, Inc., protests the award by ACTION of a contract to Boeing Computer Services Company for data processing time-sharing services. Optimum Systems first protested to ACTION on June 3 and then filed its protest with our Office on July 14, 1980. Optimum Systems contends that ACTION's evaluation of its proposal was improper. We find the protest to be untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), and will not consider it on the merits.

On December 14, 1979, ACTION issued a request for proposals for a firm-fixed-price contract for time-shared data processing services for an initial contract year plus 4 option years. The solicitation described ACTION's required system in terms of mandatory and desirable features. The presence of all of the mandatory features was evaluated on a pass-fail basis; ACTION evaluated the desirable features "which the offeror has on the system proposed" on a cost-additive basis, with a specific dollar amount added to the proposed price for each desirable feature not present on the system. The controversy here concerns the meaning of the phrase "* * * on the system proposed."

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Although Optimum Systems proposed to furnish all of the desirable features identified in the solicitation at or after award of the contract, ACTION applied substantial cost additives to Optimum Systems' proposal because its existing system did not have all of the desirable features. Optimum Systems contends that ACTION's evaluation of its existing, rather than proposed, system was improper. ACTION argues that "on the system proposed" means currently on the system and that its evaluation was therefore proper. Both ACTION and Boeing contend that Optimum Systems' protest is untimely.

The record is unclear concerning the source of Optimum Systems' apparent concern about ACTION's evaluation of the desirable features. Whatever the origin, however, it led to an exchange of letters between Optimum Systems and ACTION from April 22 to 25 from which Optimum Systems should have recognized that it differed with ACTION in its interpretation of the evaluation criteria.

In this connection, Optimum Systems wrote to ACTION on April 22 seeking verification of its understanding that for each desirable software package which an offeror unequivocally committed itself to furnish with its proposed system, there would be no cost additive, even though the offeror intended to charge ACTION for the use of the software. ACTION's response, dated April 23, states:

> "Your understanding is incorrect. Enclosure 3, page 74 states 'For each item listed which the offeror has on the system (underscoring added) proposed, a value of zero (0) dollars will be recorded for that item.' The RFP further states the amounts to be added to each offerors [sic] price in event such desireable [sic] features are not already on the system. As you indicated in your letter, the addition of absent items would result in an additional cost to ACTION and it is equitable to reflect these costs in the evaluation."

On the following day, April 24, Optimum Systems expressed its opposition to ACTION's position in a letter which stated, in part:

> "* * * we must respectfully point out that in clarifying your position you have documented one patent defect in the evaluation criteria. * * *"

Optimum Systems followed this with a discussion of the effect of ACTION's interpretation, and its conclusion that:

> "This massive evaluation differential is determined purely on the basis of whether or not the DBMS desireable [sic] software is currently on the system. This seems both untenable and capricious * * *."

On April 25, ACTION responded to Optimum Systems' complaint by stating:

> "We believe the underscoring in our letter of 23 April 1980, is correct and therefore no mistake took place in the placement of the underscoring. However, in considering the three examples set forth in your letter, only an offeror that has all 5 DBMS software packages on the system and proposes to provide all of the DBMS software packages on a surcharge basis to ACTION would not be assessed a penalty.
>
> "In reviewing the second example, set forth in your letter, relative to the provision of the sixteen 6250 BPI Tape Drives, no penalty will be assessed if available at time of award."

(The second example in Optimum Systems' letter involved an offeror which had committed itself to furnish all 16 tape drives sought by ACTION, but which had only 12 drives currently on its system.)

This exchange of correspondence should have, at the least, made Optimum Systems aware that a problem existed. ACTION's letter of April 23 clearly espoused a position contrary to Optimum Systems' interpretation of the solicitation. Optimum Systems clearly understood ACTION's position because Optimum Systems specifically objected to ACTION's interpretation in its letter of April 24. ACTION's reply to this letter on April 25 was at best contradictory and fell far short of the corrective action Optimum Systems was seeking.

Optimum Systems' protest to our Office is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1980). If we view Optimum Systems' letter of April 24 as a protest to ACTION against ACTION's interpretation of the solicitation, then we must also view ACTION's receipt of best and final proposals on April 28 without taking corrective measures to remedy Optimum Systems' objections as an initial adverse agency action from which Optimum Systems should have protested to our Office within 10 working days. 4 C.F.R. § 20.2(a) (1980); United States Steel Corporation, USS Chemicals Division; et al., B-184105, August 19, 1975, 75-2 CPD 116. Alternatively, if we consider Optimum Systems' letter of April 24 not to be a protest, then the present matter is untimely because Optimum Systems failed to protest the apparent impropriety prior to the date set for receipt of the next round of offers. 4 C.F.R. § 20.2(b)(1) (1980). Optimum Systems' protest is untimely under either interpretation.

Optimum Systems' related contention that it had a commitment for and could have had installed on the date of award an additional four (desired) tape drives, for which ACTION added $200,000 to its proposed costs, is another manifestation of the controversy dismissed above and will not be considered on the merits.

The protest is dismissed.

Milton J. Socolar
General Counsel