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DECISION



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

FILE: B-186547

DATE: December 14, 1976

MATTER OF: Singer Company

DIGEST:

1. Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report.
2. Protest that was filed with procuring agency and GAO more than 10 working days from date on which basis of protest was known is untimely filed under section 20.2 of Bid Protest Procedures (4 C.F.R. § 20.2 (1976)). Argument that time limits specified in Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to protests filed before award has been previously considered and rejected.
3. Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in Power Conversion, Inc., B-186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range.

On May 20, 1976, a protest was received from Singer Company protesting against the rejection of its proposals under request for proposals (RFP) No. N61339-76-R-0002 issued by the Naval Training Equipment Center, Orlando, Florida, on July 9, 1975, for "air combat maneuvering simulators."

Background

Singer had previously been notified by the Center of rejection of its proposals under the RFP by message dated March 2, 1976, as follows:

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"* * * The technical evaluation encompassed all elements of your written technical proposals and the demonstrations of critical areas presented under the subject RFP. The technical approach proposed was deemed to be unacceptable in the computer and visual system areas for [the simulators].
* * * Pursuant to ASPR 3-508.4 a debriefing on your proposal will be held at the earliest feasible time subsequent to contract award."

By letter dated March 4, 1976, Singer formally protested the "proposed award of a contract" under the subject RFP to the contracting officer. Singer's letter of protest further insisted that the decision to reject Singer's proposal was not considered to be "in the best interest of the Government." Finally, Singer offered to withdraw its protest if, as a result of a debriefing, the Navy could "justify its position of Singer's technical unacceptability."

By letter dated March 11, 1976, the contracting officer denied Singer's protest. The contracting officer informed Singer that the company had previously been informed as to the reasons why the company's proposal was considered unacceptable according to the mandate in ASPR § 3-508.2(a) (1975 ed.) which provided:

"* * * the contracting officer, upon determination that a proposal is unacceptable, shall provide prompt notice of that fact to the source submitting the proposal.
* * * In addition to stating that the proposal has been determined unacceptable, notice to the offeror shall indicate, in general terms, the basis for such determination * * *."

The contracting officer also affirmed his position that the "general terms" notice previously given Singer as to the reasons why the company's proposal was found unacceptable was all that could be given prior to award and that the immediate debriefing which the company had requested could not be granted under ASPR § 3-508.4 (1975 ed.). The cited regulation provided:

"* * * Debriefing is the process by which purchasing offices provide unsuccessful offerors with the Government's evaluation of the significant factors contained in their proposals, citing determinative deficiencies and weaknesses.
* * * Debriefings shall be provided at the earliest feasible time after contract award."

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By mailgram dated March 16, 1976, Singer submitted a request to the contracting officer for "all records of the technical evaluation by and all personnel of the Naval Training Equipment Center * * * pertaining to [Singer's proposal]."

By letter dated March 30, 1976, the Department informed Singer that the company would be furnished a copy of the evaluation report on the company's proposal. The report, the Department further said, would be excised to remove "those portions applicable to other than [Singer's proposal] as well as numerical scores and weights * * *." The Department also informed Singer that, although a decision on release of "back-up" data was expected to be made by April 13, 1976, the Department's inability to decide the question of the release of the data within the "statutory time limit" constituted a technical denial of the request for release of the data.

On April 9, 1976, the Department hand-delivered to Singer a copy of the evaluation report concerning the company's proposal. On April 22, 1976, the Department formally denied Singer's request for the "back-up data."

On May 5, 1976, Singer lodged a new protest with the contracting officer. Singer's protest requested that the procurement be canceled because of a change in the scope of work under the RFP that Singer thought should be prompted by the Department's issuance of a stop work order under an existing Singer contract.

On May 14, 1976, two representatives of Singer met with the Navy to discuss the "unacceptable" rating assigned to Singer's proposal. The contracting officer reports that it was "obvious [to Singer] that the Navy position in this matter had not changed and did not change" as a result of this meeting.

Is Singer's Protest Timely Filed with GAO?

The contracting officer asserts that Singer's protest is timely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1976)).

It is the apparent position of the contracting officer that Singer possessed the basis of its May 19 protest to our Office by early March 1976 (the date Singer received the Navy's message concerning the unacceptable rating assigned the company's proposal) or,

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alternatively, no later than April 9, 1976 (the date on which Singer was given a copy of an edited version of the Navy's evaluation report on the company's proposal). The contracting officer further points out that even if April 9 is the date on which it could be said that Singer first had notice of grounds of protest against the unacceptable rating through receipt of the Navy's evaluation report, Singer waited until May 19 to file its protest with GAO. Since the time interval (27 working days) between April 9 and May 19 exceeds 10 working days, the contracting officer argues that Singer's protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures which requires that protests not based upon solicitation defects be filed within 10 working days from the date the basis of protest is known or should have been known.

Singer insists that it was not in possession of facts sufficient to give rise to a "basis of protest" concerning the rejection of its initial proposal until April 26--the date on which "Singer received the Navy's denial of its request for important back-up data." And Singer further argues that its May 5 "efforts to arrange a meeting as soon as possible between the Commanding Officer of NREC and the President of Singer-SPD" were made within 10 working days of April 26. Finally, Singer concludes that its May 14, 1976, meeting with the Navy was the "first opportunity that Singer was afforded to present an informed protest [concerning the rejection of its proposal]."

Because of this analysis, Singer argues that its May 19 protest to GAO was timely since it was made within 10 working days of the date Singer's May 14 protest was denied by the Department.

Analysis

Singer must be considered to have been sufficiently informed of the reasons for rejection of its proposal no later than April 9, 1976--the date on which it received the excised six-page evaluation report on its proposal. The degree of detail contained in the six-page report clearly shows why the Department considered Singer's proposal to be unacceptable.

Singer argues, however, that it was entitled to wait for the Navy's decision (received by Singer on April 26) on the question of the release of the "back-up" material before it should be held

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to have known the basis for protest against the rejection of its proposal. To buttress its argument, Singer cites Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312, in which we held that a protester could reasonably withhold filing a protest to our Office until it had a debriefing conference with the procuring agency to find out the specific reasons why award was made to another offeror.

Here, however, Singer did possess the specific reasons as to why its proposal was rejected--inferentially including any possible reasons as to how the Navy may have erroneously applied the RFP evaluation criteria in evaluating Singer's proposal (an additional basis for protest)--when it received the evaluation report on April 9, 1976. Moreover, unlike the Lambda case, nothing in the nature of a formal debriefing could have been afforded Singer given the preaward status of the procurement in April 1976 and the stipulation in ASPR § 3-508.4, supra, that debriefings are to be provided after award.

The requested "back-up" material was clearly identified by the Navy's March 30 letter as being only "preliminary, individual evaluation." Thus, the requested material should have reasonably been recognized by Singer as relating to initial evaluation only and not the final, specific reasons (contained in the evaluation report) as to why its proposal was rejected. Conversely, we think that Singer should have realized that the requested data merely contained, at best, only individual judgments already evidenced in the entirety of the evaluation report and not any unknown reasons as to why its proposal was rejected. Consequently, we do not agree that Singer was entitled to wait for a decision on the release of the back-up material before being held to have actual or constructive notice of the basis for protest against the rejection of its proposal. Cf. Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. (In the cited case, the protester was given the specific reasons for the rejection of its proposal prior to award by means of a three-sentence statement (contrast this with the six-page evaluation report given to Singer on April 9) as to the reasons why its proposal was rejected. This statement was considered sufficient to enable the protester to submit a protest against the rejection of its proposal.)

Since Singer admits that it did not file a protest with the Navy until May 3, 1976 (or 18 working days after the company's receipt of the Navy's evaluation report on April 9, 1976), Singer's protest must be considered untimely filed with the Navy under section 20.2 of our Bid Protest Procedures which provides:

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"(a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of * * * adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, [emphasis supplied] * * *

"(b)(2) In cases other than [protests involving solicitation defects] bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Alternatively, Singer argues that the time limits specified in our Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to preaward protests (award under the subject RFP was made to another offeror in September of this year--or more than 3 months after Singer filed its protest with our Office) since "effective remedial action" is still possible when award has not yet been made.

A similar argument was recently considered and rejected in Power Conversion, Inc., supra, which also involved a preaward protest against the rejection of a proposal when we said:

"PCI also contends that neither the Air Force nor any other party has been prejudiced by PCI's failure to submit a protest within 10 days of receipt of the May 13 letter because no award has yet been made and the procurement cannot reasonably be regarded as urgent. PCI also notes that the Air Force has not alleged that it was prejudiced in any way by this delay. Consequently, PCI asserts that we should exercise the discretion it alleges we possess under our Bid Protest Procedures, and consider PCI's protest on the merits. PCI also states that we should consider the protest because of the acknowledgment letter we sent to PCI and since we did not tell PCI that there was any problem regarding the timeliness of its protest until 3 weeks after filing.

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"None of the foregoing arguments forms a basis for consideration of PCI's protest on the merits. See Lea's Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314; Cessna Aircraft Company; Beech Aircraft Corporation, 54 Comp. Gen. 17 (1974), 74-2 CPD 91; Art Metals - U.S.A., Inc., [B-18441], August 29, 1975, 75-2 CPD 132]."

Finally, Singer argues that even if we find its protest to have been untimely filed we should nonetheless consider the protest under the "significant issue" exception to our filing limitations. Singer urges that the issue of the rejection of its proposal must be considered "significant" because it resulted in the elimination of one of the two offerors competing for the contract in question.

The "significant issue" exception to our filing limitations generally refers to the presence of questions of widespread interest and not necessarily to the sums of money involved. Eocom, Inc., B-183345, March 25, 1976, 76-1 CPD 196. Generally, however, we do not regard a protest concerning the elimination of one offeror from the competitive range in a particular procurement to involve any "significant issues." Power Conversion, Inc., *supra*. Singer argues, however, that a significant issue is always involved when a protest, as here, is directed against a procuring agency's decision to conduct discussions with only one offeror. In support of this argument Singer cites RCA Alaska Communications, Inc., B-178442, June 20, 1974, 74-1 CPD 336, where we held that the question of the General Services Administration's "obligation to obtain competition in procuring public utility services" was a significant issue. The cited case involved the question of the degree to which GSA has to obtain competition for all of its public utility services contracts. Clearly, therefore, the issue was considered significant because it specifically affected a broad range of procurements by the agency. By contrast, Singer's protest essentially involves the question whether one company was properly excluded from negotiations in one procurement.

Singer also cites Willamette-Western Corporation; Pacific Towboat & Salvage Company, 54 Comp. Gen. 375 (1974), 74-2 CPD 259, where we found that the question of the propriety of an agency's release of a draft copy of a solicitation to only one of several prospective offerors was a significant issue. The allegation of irregular practices in the Willamette-Western case, if found to be accurate, would have clearly indicated partiality to the offeror in question to the prejudice of competition, contrary to the concept implicit in negotiated procurements and the statutory requirement for maximum competition. Although this issue did not specifically affect

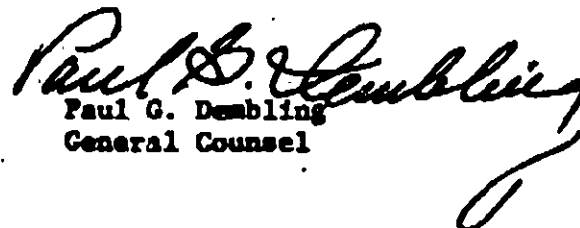
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a class of procurements as in the RCA Alaska Communication, Inc., decision, the question of specific partiality toward one offeror was nevertheless considered significant because of the flagrant circumstances alleged and shown. By contrast, Singer's protest here simply takes issue with the Navy's technical judgment.

Finally, Singer cites our decision in response to the protest of Aircraft Armaments, Inc. (AAI)—45 Comp. Gen. 417 (1966)—which also involved a Navy procurement where, as here: (1) only two concerns submitted proposals; and (2) one offeror (AAI) was eliminated from negotiations and consideration for award. We criticized AAI's exclusion from negotiations since we could find nothing in the record which indicated that the company's proposal should have been excluded. Singer argues that our approach of actively reviewing the AAI protest should require our considering the merits of Singer's similar protest here. The AAI protest, however, was received and considered several years before the issuance of our Bid Protest Procedures. Consequently, the decision cannot be read as authorizing the consideration of an otherwise untimely protest of the type lodged by Singer.

Because of our analysis, we conclude that the principle enunciated in Power Conversion, Inc., *supra* (namely: generally, we do not regard a protest concerning the elimination of one offeror from the competitive range in a particular procurement as involving any "significant issues"), applies to the present protest.

Therefore, Singer's protest will not be considered on the merits.


Paul G. Dembling
General Counsel