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DECISION

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

FILE: B-188738 DATE: December 21, 1977

MATTER OF: Brandon Applied Systems, Inc.

DIGEST:

1. Contrary to usual view that protests against proposed contract modifications are not for review since within realm of contract administration, protest which alleges that proposed modification is beyond scope of contract is reviewable by GAO, if otherwise for consideration.

2. It is concluded that protester was specifically informed on February 18, 1977, of Navy's intent to modify contract in ways which were later made subject of March 31 protest notwithstanding that, as of February 18, Navy contracting office had not received internal Navy document describing modification and that some details of intended modification--unrelated to basic grounds of protest--were later changed.

3. Although protester hedges admission that it was aware--as of March 30--that "grounds of protest would exist" if Navy modified contract as it intended, fact that protester actually filed protest on March 31 goes against protester's argument that companies need not file "defensive protests." In any event, information conveyed by Navy on March 30 was no more than that which had been conveyed in February 18 conference about intended modification.

4. Basic concepts evident from review of cases holding protesters need not file "defensive protests" are: (1) protesters need not file protests if interests are not being threatened under then-relevant factual scheme; and (2) unless agency conveys its intended action (or finally refuses to convey its intent) on position adverse to protester's interest, protester cannot be charged with knowledge of basis of protest.

5. If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest

is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 constituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met.

6. Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed.

On March 31, 1977, a protest was received from Brandon Applied Systems, Inc., against the refusal of the Department of the Navy to state that "actual conversion of programs [would not be done] on a cost-reimbursable (hourly-rates) basis" under a proposed modification of Computer Sciences Corporation (CSC) contract No. N66032-76-D-0012. Brandon also protested against the proposed modification of the contract to include "additional work" in the contract on the theory that the modification would result in an improper sole-source contract. Specifically, Brandon said:

> "* * * [O]n March 17, 1977, * * * the ADPESO [Navy Automatic Data Processing Selection Office] Contracting Officer who issued the contract [informed Brandon that he] ha[d] received a written request, originated by the Naval Data Automation Command (NAVDAC), to take certain actions with regard to Contract No. N66032-76-D-0012. Although Brandon's request for a copy of the written request was denied, it is understood to call for the following action: (a) Early termination of the contract; (b) Termination of line item 6 in Section E, consisting of conversion of programs at fixed-prices per unit; (c) Award of additional work on a cost-reimbursable (hourly-rates) basis."

Brandon further explained that it was an unsuccessful offeror for the original work involved in the contract (awarded on June 15, 1976) which was described in RFP No. N66032-76-D-0010. The contract--awarded for computer software conversion and related services at Navy data processing centers--provided, according to Brandon, that conversion was to be on a "fixed-price" per unit basis, while related services, such as requirements analysis and planning, were to be on a cost-reimbursable basis. Contrary to the express limits of the contract, Brandon explained (as detailed more fully in a subsequent letter) that in "various meetings in February and March, 1977, [it was] advised orally by Navy that Navy was considering eliminating the fixed-price portions [relating to actual conversion (translation) of programs] of [the contract] and increasing the cost-reimbursable (hourly-rates) portions of the contract." Brandon also said:

> "* * * At a meeting on March 8, 1977, representatives of Brandon and Navy discussed the issue of whether [actual] conversion should be fixed-price. By letter dated March 25, 1977, Navy ADPESO advised Brandon that such an approach would be considered (though not assured) for the Navy's conversion to be performed by contractors [on future contracts] * * *. At a meeting on March 30, 1977, with the Contracting Officer and his legal counsel, Brandon representatives were advised that (1) NAVDAC had made a written request of ADPESO, by letter dated February 18, 1977, that [the contract] be subject to the procurement action indicated above; (2) No actual conversion had been performed thus far under the contract; (3) The Contracting Officer would not give Brandon a copy of the NAVDAC letter, in response to Brandon's oral request at the March 30, 1977, meeting; (4) Although the NAVDAC letter had been received in ADPESO previously, it was delayed in reaching the Contracting Officer's hands; (5) There was no assurance that actual conversion (fixed price under the contract) would be excluded from the contemplated additional hourly-rates work; (6) For reasons which the Contracting Officer could not reveal, Navy would not agree to incorporate means to preclude the performance of actual conversion on an hourly-rates basis.

> "Accordingly, it was not until the March 30, 1977, meeting that Brandon was made aware that Navy might take a procurement action having the effect of having a contractor perform actual conversion on an hourly-rates basis. This awareness gave Brandon additional concern relative to Navy's March 25, 1977, letter regarding the use of other than fixed-price procurement for future actual conversion needs."

## NAVY POSITION ON RELEVANT FACTS

The Navy informs us that because "many problems" had arisen with the administration of the CSC contract "it was initially decided to renegotiate" CSC's contract to: (a) eliminate the "line-by-line program translation" feature; (b) "double the labor hour categories;" and (c) terminate CSC's contract by September 30, 1977. Navy later decided that its initial decision was "not workable in a practical sense" because the planned termination date would prevent the contractor from completing certain needed tasks. As a result the Navy has informed us that it has decided to: (1) limit the current contract to two sites--San Diego and Norfolk; (2) let the contract run to its current termination date (June 27, 1978); (3) remove the line-by-line feature; and (4) initiate a new procurement for the workload at the remaining sites.

Navy further says that a Brandon representative met with the contracting officer and counsel on February 18, 1977, for the purpose of "discussing a rumor regarding a possible modification to the contract." The Navy continues:

> "* * * At that time the Contracting Officer advised Mr. O'Connell [of Brandon] he was intending to modify the Computer Sciences Corporation contract * * * to reflect the deletion of items 6A and 6B in the contract and increase the labor-hour portion of the contract * * * by approximately one-hundred percent. Mr. O'Connell indicated that the Navy was incorrect in its approach and that the requirement should be handled on the line-by-line conversion of the contract, namely items 6A and 6B.

"On 1 March 1977 Mr. O'Connell again visited the Contracting Officer and Counsel and the same area was reviewed, and the Contracting Officer again advised Mr. O'Connell of the Navy's intention to modify the existing contract. During the period of 18 February through 1 March 1977, Mr. O'Connell repeatedly called the Contracting Officer on the same subject.

"On 30 March 1977 Mr. O'Connell had another meeting with the Contracting Officer and Navy Counsel together with Mr. Doyle, counsel for the company. The discussion was the same as the 18 February and the 1 March meetings. It is pertinent to point out that in the 30 March 1977 meeting the Contracting Officer advised the company representatives that he personally did not have correspondence from COMNAVDAC requesting the modification. This point is correct only because the formal request for modification had not reached the Contracting Officer although it had been received within ADPESO. * * * A copy was given to company Counsel on 2 April 1977 pursuant to a Freedom of Information Request. * * *

"Independently of discussion with this office, Mr. O'Connell and the president of Brandon visited Mr. G. D. Penisten, Assistant Secretary of the Navy for Financial Management, to again reaffirm the company's posture that the labor hour approach of the Navy was incorrect. Mr. Penisten arranged for a meeting with Captain L. Maice, USN, Data Processing Service Center Project Manager for the Naval Data Automation Command. This meeting was held on 8 March 1977 and the company submitted [a letter] to Captain Maice confirming the discussions. Captain Maice replied [by letter of March 25, 1977] indicating that although the meeting was held, the substance of the company's letter was incorrect."

THRESHOLD QUESTION

A threshold question is initially for consideration. Protests against proposed modifications of contracts involve contract administration which is primarily within the authority of the

contracting agency and is not ordinarily for resolution under our bid protest function. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. Where, however, as here, the protest alleges that the proposed modification constitutes, in effect, a "cardinal change" beyond the scope of the contract and that the proposed modification should be the subject of a new procurement, we will review the protest, if otherwise for consideration. 50 Comp. Gen. 540 (1971); see also Symbolic Displays, Incorporated, supra.

TIMELINESS ISSUE

Turning to the "timeliness" issue raised by Navy, it is the Department's view that Brandon had knowledge of the basis of its present protest as of February 18, 1977--the date of the first Brandon Navy conference. Consequently, under this view, Brandon's failure to file a formal protest with our Office until 41 days after February 18 should render its protest untimely. See 4 C.F.R. § 20.2(b)(2) (1977). Alternatively, the Navy argues that, if Brandon's February 18 oral objections to the contemplated modification were considered to be a protest, the Navy's February 18 contemporaneous oral rejection of that protest must be considered initial adverse agency action from which, under 4 C.F.R. § 20.2(a) (1977), Brandon had 10 working days to file a protest with our Office. Since the March 31 protest was filed more than 10 working days after the February 18 oral denial, the protest is also untimely under this view.

Brandon's view on the "untimeliness" issue is that Brandon did not have a basis of protest as of February 18 because the Navy merely told Brandon that it was "contemplating"* taking the proposed action but had not finally decided to do so let alone actually executed the modification. The allegedly "tentative" nature of the Navy position was further underscored in Brandon's view by the facts that as of February 18, 1977, the contracting officer had not received an internal Navy

*That Navy merely stated it was "contemplating" the action is allegedly confirmed by contemporaneous notes taken by Brandon's representative in attendance at the February 18 conference. Additionally, Brandon alleges that the contracting officer orally admitted (at a July 29 CAO protest conference) that the action was only "contemplated" prior to late March 1977.

document requesting that the modification action be taken and that the initial Navy position regarding the proposed modification was later changed (insofar as Navy permitted the outstanding contract to run until its stated expiration date and decided to initiate a new procurement for some work otherwise covered by the contract). Because of these views Brandon insists that to have required it to file a protest within 10 working days of the February 18 conference would have placed it in the position of having to file a "defensive protest," that is, a protest filed before a protester learns of the outcome of efforts to determine if grounds of protest exist. Brandon further says that our decisions have rejected the concept of "defensive protests."

ANALYSIS

The first issue for decision is what information was conveyed to Brandon at the February 18 and March 1 conferences. The Navy insists that it told Brandon that it was intending to modify the outstanding contract to eliminate the "line-by-line program translation" feature (which Brandon considers as consisting of, or including, "actual conversion") and to increase the "labor-hour portion" (which Brandon views as "cost reimbursable" in nature) of the contract. Brandon's view--at least with respect to the February 18 conference--was that the Navy said that it was only "contemplating" the modification.

There is an obvious conflict between the Navy's view of the February 18 conference and Brandon's view. The allegedly contemporaneous written notes which Brandon cites as confirming its view of the conference have not been submitted to our Office, nor do we think that they are determinative of the outcome even if submitted. First of all, we have no way of determining whether in fact they were "contemporaneous"; secondly, we do not agree that allegedly contemporaneous notes should carry any greater weight than the actual recollections of the agency employees who participated in the conference. Under these circumstances, we must agree with the Navy's view that Brandon was specifically informed of Navy's intent to modify the contract in ways which were later made the subject of the March 31 protest to our Office.* Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

*Although Brandon insists that its protest was not against the modification as such--for example, Brandon says it would not have protested if Navy employees had performed "actual conversion" under the changed scheme--it is clear that at the February 18 conference the company's representative understood that the Navy was not planning to use its own employees for "actual conversion" work. If the representative had understood that Navy employees were to be used, the representative would not have objected that the Navy approach to "actual conversion" was incorrect.

Brandon's assertions that it should not be held to have had knowledge of a basis of protest as of February 18 hinge on the facts that the contracting officer had not received (as of February 18) the internal Navy document describing the intended modification and that some details of the intended modification were later changed. These facts do not alter our agreement with Navy's view that Brandon was informed of the bases of the March 31 protest as of February 18. The receipt of the internal Navy document merely gave technical approval to the substance of the intended modification later protested by Brandon.* The fact that some of the details of the intended modification were later changed is also not significant. These details did not go to the protested elimination of the "line-by-line program translation" feature and the transfer of "conversion" work from a fixed-price category to an alleged cost-reimbursement category.

Thus, it is our view that Brandon was specifically informed of the basis of its March 31 protest as of February 18. The only remaining question is whether the "intended" nature of the protested action should otherwise have permitted Brandon to defer the filing of its protest until the "intended" character of the modification had been reduced to an actual modification.

First of all, it is important to note that Brandon does not argue that it was permitted to wait for the actual modification of the contract before being charged with having notice of the basis of protest. Brandon admits that it was aware that "grounds of protest would exist" no later than March 30, 1977, when it was

*As to the alleged statement of the contracting officer at the GAO bid protest conference that the protested action was only contemplated until the Navy document was received, the GAO representative at the conference has no recollection of the alleged statement. Even if the statement was made, it is the implicit position of the Navy that the statement was in error in view of the contracting officer's contrary views in the written record.

told by the "contracting officer and his legal counsel" that there could be no assurance the Navy would exclude "actual conversion" work under the modified contract. This information, in our view, contained nothing more than what was already known by Brandon on February 18 under Brandon's interpretation of the existing contract. In that conference, it is clear that Brandon felt that the deletion of fixed-price, "program translation" work and increase in "labor-hour" work could only mean that "conversion" work would be done on an allegedly improper cost-reimbursement basis by non-Navy employees as to which manifested concern the Navy rebuffed Brandon. Although Brandon hedges its analysis by stating that it was only aware of the possible bases of protest as of March 30, the fact that Brandon actually filed a protest rebuts its argument that it felt it only was aware of possible bases of protest as of that date. As stated by Brandon: "Navy's position [on the untimeliness issue] would be to place the burden upon offerors to file defensive protests, a practice specifically disapproved of by GAO." If Brandon was of the view that it was not obliged to file a defensive protest involving only possible grounds of protest there would have been no reason--under Brandon's view of the facts--for the company to have filed a protest with our Office on March 31.

The cases cited by Brandon for the proposition that "defensive" protests need not be filed involve situations where:

(1) The protester--the apparent low bidder eligible for award until our decision moved its bid from low to second low--challenged the responsiveness of the second low bid within 10 days from receipt of our decision rather than 10 days from bid opening. Action Manufacturing Company,--Reconsideration MBAssociates, B-186195, November 17, 1976, 76-2 CPD 424;

(2) The protester--the second low bidder--challenged the propriety of a restrictive legend in the low bid within 10 days from the date the procuring agency gave up its attempts to have the legend removed rather than 10 days from the date of bid opening when the legend was of public notice in the low bid. Carco Electronics, B-186747, March 9, 1977, 77-1 CPD 172;

(3) The protester had no notice of the initial agency decision to make a sole-source award until sometime after initial discussions with the contracting agency; further, the protester reasonably interpreted the initial discussions as indicating that an award decision had not been made. Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329;

(4) The protester did not file a protest about an unacceptable part of its technical proposal until 10 days from the date the agency refused to confirm or deny unacceptability rather than from the date the agency told the protester the problem of unacceptability was being considered. Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348.

Two basic concepts are evident from a review of these cases--all of which found the filed protests to be timely. First, protesters are not viewed as having knowledge of a basis of protest if their interests are not being directly threatened under a then-relevant factual scheme. For example, until the protester in Action Manufacturing Company, supra, was displaced from its status as low bidder it could not be held to be obligated to raise questions about the adequacy of the second low bid. Secondly, unless the agency conveys to the protester its intent (or finally refuses to convey its intent) on a position adverse to the protester's interest the protester cannot be charged with knowledge of a basis of protest. (See, in this connection, Domar Industries, 56 Comp. Gen. 924 (1977), 77-2 CPD 150, where we held timely a protest about the propriety of a proposed contract modification waiving the specifications when there had been a similar waiver by the agency under another contract and the agency had not decided whether to modify the contract under protest.)

In the present case, we believe the Navy clearly conveyed its decided intent to act in a manner contrary to the protester's perceived interests at the February 18 conference. Thus, as of February 18, Brandon must be held to have been charged with the basis of protest. If Brandon's February 18 objections, subsequent telephone calls, conferences and the like are not to be considered the filing of a protest with the Navy then it is clear that Brandon's March 31 protest is untimely filed under GAO's Bid Protest Procedures since it was filed more than 10 days after the basis of protest was known about nonsolicitation irregularities. On the other hand, if Brandon's February 18 (or March 1) objections are considered to be a protest then it is clear that the Navy's simultaneous oral rejection of those protests on February 18 or March 1 constituted initial adverse agency action from which Brandon had 10 days within which to file a protest with our Office. See National Flooring Company, B-188019, February 24, 1977, 77-1 CPD 138. Under either of these dates, the March 31 protest

is untimely. Although Brandon apparently considered the contracting officer's initial adverse action to be ill-founded or inadequately explained, leading Brandon to seek reconsideration or clarification at a higher agency level, it was nevertheless obligatory that the protest be filed within 10 days after initial adverse agency action. Rowe Industries, B-185520, January 8, 1976, 76-1 CPD 13. Since the protest was not so filed it is untimely.

Since Brandon's related objection to the intended Navy contract modification--that Navy has failed to obtain a proper delegation of procurement authority for the modification--was not raised within 10 working days from February 18 or March 1, it is also untimely and will not be considered.

Protest dismissed.

Deputy Comptroller General
of the United States