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Proc I

DECISION



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

FILE: B-194984, B-195424

DATE: December 7, 1979

MATTER OF: Optimum Systems, Inc. C1094

[Protest Alleging Improprieties in RFP]
DIGEST:

1. Where protest based upon apparent improprieties in RFP is filed with contracting agency prior to closing date for receipt of initial proposals and agency goes ahead with scheduled receipt of proposals, protest filed with GAO within 10 working days thereafter is timely.
2. Protester asserts that RFP's, which specify certain ADPE will be Government Furnished Equipment, are in derogation of rights it acquired in same ADPE under prior contract. Basic issue of rights in ADPE is not for consideration, as it is subject of current disputes proceeding, and there is no showing that RFP provisions have unduly restricted competition. Protests are accordingly dismissed.

2 Optimum Systems, Inc. (OSI), has protested concerning requests for proposals (RFP's) Nos. 78-R-01-6454 and DE-RP01-79E110047, issued by the Department of Energy (DOE). 5/2

3 OSI was awarded a contract by the Federal Energy Administration, a predecessor of DOE, in 1974. OSI contends that the specific terms of the contract as well as the facts and circumstances surrounding the 1974 award show that the Government elected not to acquire title to ADPE obtained by the contractor during the performance of that contract. The protester further argues that under the terms of the 1974 contract as modified and powers of attorney issued to it during contract performance, it obtained certain contractual and proprietary rights, including purchase option credits, in such ADPE. 75

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Disagreement between OSI and the Government over these issues first surfaced more than 2 years ago. In 1977, DOE issued a modification to the contract designating certain ADPE obtained under the contract by OSI as Government Furnished Equipment (GFE). Subsequently, when DOE issued the two RFP's in question here in March and June 1979, OSI protested. The protests are essentially that the RFP's, by providing that the ADPE involved in the 1974 contract will be GFE under the contracts to be awarded in these procurements, are defective because they are in derogation of OSI's rights in the ADPE. In addition, by letter to the contracting officer dated August 31, 1979, OSI filed a claim pursuant to the Contract Disputes Act of 1978, Public Law 95-563, November 1, 1978, 41 U.S.C. § 601, et seq. (1976), for several million dollars damages. The gravamen of the claim, like the protests, is DOE's allegedly wrongful conversion of the ADPE to GFE and denial of OSI's rights to purchase option credits.

IBM, an interested party, contends the protests are untimely because they were filed more than 10 working days after public release of the RFP's. In this regard, under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), protests based upon apparent improprieties in an RFP as initially issued must be filed prior to the closing date for receipt of initial proposals. Under section 20.2(a), if a protest is filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of "initial adverse agency action."

The present protests are based upon apparent solicitation improprieties, i.e., the RFP provisions designating certain ADPE as GFE. Although OSI protested to DOE prior to the closing dates for receipt of initial proposals under both RFP's, DOE nonetheless went ahead with receipt of proposals (initial adverse agency action), and OSI protested to our Office within 10 working days thereafter. OSI's protests are therefore timely.

DOE maintains that OSI's contentions have no substantive merit. In addition, the agency argues that OSI is in the wrong forum. DOE contends that the amalgamation of issues concerning ownership of the equipment, rights to purchase option credits and ability to offer the ADPE as GFE involves matters of contract administration, and that the proper forum for resolution of these issues is DOE, through OSI's exercise of its rights under the "Disputes" clause of the contract.

We agree. Since S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), we have declined to consider claims which involve matters of contract administration and which have been presented to a contracting officer pursuant to the "Disputes" clause procedure. Cf. Bradley Mechanical Contracting, Inc., 53 Comp. Gen. 829 (1974), 74-1 CPD 229; E.P. Reid, Inc., B-183172, March 7, 1975, 75-1 CPD 141. Similarly, we have declined to consider protests essentially based on contractual provisions which are collaterally the subject of "Disputes" clause proceedings. See, e.g., Union Carbide Corporation, B-188692, B-191319, B-191491, May 18, 1978, 78-1 CPD 380. Therefore, since the issues raised by OSI concerning ownership of the ADPE and purchase option credits are currently the subject of a disputes proceeding, they are not for our consideration.

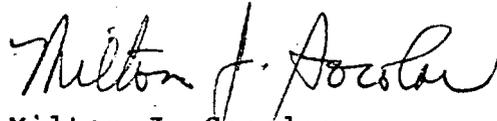
In this regard, it is quite clear from OSI's lengthy submissions that its basic complaint is not that it has been wrongfully denied awards under the RFP's, or an equal opportunity to compete for awards, or that the Government is being deprived of the benefits of maximum competition. Rather, OSI's complaint involves the administration of its 1974 contract. To the extent that it can be expressed in a protest context, it amounts to a demand that OSI's claims under a prior contract be favorably resolved as a condition of OSI's uncomplaining participation in the current procurements. The pertinent inquiry, however, is not whether any individual offeror is dissatisfied with the terms and conditions established by the Government in an RFP, but whether such terms

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and conditions unduly restrict the competition as a whole. See, e.g., CompuServe, B-188990, September 9, 1977, 77-2 CPD 182. We see no basis to find an undue restriction on competition here. OSI itself states that it has submitted a proposal under RFP -6454, and we note that multiple proposals were submitted under both RFP's.

The protests are dismissed.



Milton J. Socolar
General Counsel