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DECISION



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

FILE: B-197946

DATE: June 17, 1980

MATTER OF: Control Data Corporation

[Protest of Proposal Rejection]
DIGEST:

1. Protest over rejection of proposal filed more than 10 days after debriefing which disclosed basis of protest is untimely since record does not establish intent to file oral protest at time debriefing was held.
2. GAO will not request agency report on timely portion of protest where basis of protest on its face lacks legal merit.
3. Contracting activity is not required to conduct discussions with offeror whose proposal was rejected.

Control Data Corporation protests a decision by Sandia Laboratories (Sandia) to reject Control Data's proposal to furnish Automatic Data Processing Equipment under Request for Quotations AJD/20-0888. Control Data also believes discussions should have been held with it if discussions were held with other firms after its proposal was rejected. The equipment is to be acquired by Sandia Laboratories (a Department of Energy (DOE) prime operating contractor of a Government-owned Contractor-operated (GOCO) facility) "for" DOE and will be installed at Sandia in Livermore, California. DOE objects to our consideration of Control Data's complaint because it views the protest as untimely filed. DOE has therefore restricted its agency report to the question of timeliness and has not filed a report on the merits.

By letter hand-delivered on January 22, 1980, Sandia advised Control Data that its proposal would not be considered because Control Data had failed to comply with

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all mandatory solicitation requirements. That day Control Data requested and received a debriefing, at which time it was advised that its technical proposal was unacceptable because it:

- 1) did not provide single and double error detection capability for all main memory;
- 2) did not include descriptive data showing that SPEED program requirements were met; and
- 3) established that belatedly filed SPEED program data was not run on the system software which Control Data actually proposed.

Control Data asked Sandia to put its reasons in writing, which was done by letter dated January 25, 1980.

Control Data cites our decisions in Systems Analysis and Research Corporation, B-187397, February 4, 1977, 77-1 CPD 90 and in Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312, as supporting its view that the time within which it was required to protest did not begin to run until it received Sandia's January 25 letter, because it was led to believe at the debriefing that there might be some additional grounds for rejecting its proposal. In the cases cited, we concluded that the protesters were justified in waiting until they were debriefed because the information available earlier left uncertain whether they had any basis for protest. The protester in the Systems Analysis and Research Corporation case was not told until its debriefing of the three areas in which the contracting activity considered its proposal to be submarginal, even though the agency viewed each deficiency as acting to reinforce the others. In the Lambda decision we considered the protester's decision to wait to protest until it was debriefed reasonable notwithstanding that it had copies of the awardee's proposal. Lambda could not have known whether the awardee had overcome during discussions the informational deficiencies Lambda later protested and thus could not have known before the debriefing whether a fuller explanation would be forthcoming. Control Data's reliance on these cases is misplaced, in our view, because Control Data was told at its debriefing what Sandia's principal grounds for rejection were, knew its technical

proposal was considered unacceptable (i.e., "nonresponsive") principally if not entirely for the reasons listed above, and thus knew on January 22 what in essence its basis for protest was. Compare Crosby and Overton, Inc., B-193851, July 24, 1979, 79-2 CPD 53; Harneschfeger Corporation, B-192629, October 11, 1978, 78-2 CPD 269.

Consequently, Control Data's protest is not timely unless it protested not later than the close of business on February 5 to meet the initial 10 day filing standard. 4 C.F.R. § 20.2(b)(2). It waited until February 8, 1980, to write Sandia, stating why it believed Sandia's decision was wrong. Indeed, Control Data did not file its protest with our Office until February 29, 1980, after receiving Sandia's letter dated February 14 which affirmed Sandia's rejection of Control Data's proposal and dismissed Control Data's complaints as untimely.

Nevertheless, Control Data maintains that it orally protested Sandia's actions at the debriefing. It points out that an oral protest need not be stated in any specific manner, so long as the words used clearly express the protester's intention to make a protest. Comprehensive Health Services, Inc., B-194318, July 17, 1979, 79-2 CPD 37.

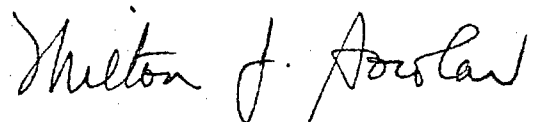
In this respect, DOE employees attending the debriefing state that they did not understand Control Data as intending to file an oral protest at the debriefing, but rather, interpreted what Control Data said as indicating that it expected to protest in the future. Sandia personnel indicate further that Control Data was asked what the grounds of protest would be but received no answer.

Control Data has not established a clearly stated intent to protest during the debriefing and its position that it did so is inconsistent with the affidavits submitted by the parties, including the affidavit of Control Data's Sandia Account Manager. For example, the latter affidavit states that: "At [the debriefing] I stated that Control Data intended to protest Sandia's rejection of our proposal. I requested a complete and detailed written explanation of Sandia's decision and refused to discuss the matter further until that report was received."

In our view, the foregoing statement expresses a future intent to protest, *i.e.*, after the written Sandia statement was received. Moreover, Control Data's February 8 response to Sandia's January 25 letter took no exception to Sandia's view, clearly expressed in its letter, that no protest had been lodged. Not once does Control Data's February 8 letter refer to its oral complaints as a protest. We therefore will not consider the merits of Control Data's protest regarding the initial rejection of its technical proposal.

Alternatively, Control Data states that it has timely protested Sandia's failure to conduct discussions with it while engaging in negotiations with the awardee after Control Data's proposal was rejected. Control Data believes the agency should "respond", *i.e.* file a report on the merits of this portion of the protest. We disagree, because we believe that this contention lacks merit on its face, and we will not require an agency report under this circumstance. See e.g., Industrial Maintenance Services, Inc., B-195216, June 9, 1979, 79-1 CPD 476.

For example, although Sandia characterized Control Data's proposal as "nonresponsive", a term ordinarily applied in advertised procurements, the grounds for Control Data's rejection clearly reflect Sandia's view that Control Data's proposal was unacceptable. In this respect, Sandia's obligation to conduct discussions consistent with the "federal norm" at most extends only to offerors whose proposals are acceptable or capable of being made acceptable and are found to be within the competitive range. See, e.g., Peter J. T. Nelsen, B-194728, October 29, 1979, 79-2 CPD 302. Once its proposal was rejected and the time for its protest expired, Control Data no longer had a legitimate basis for complaint over discussions held with those firms whose proposals were considered to be in the competitive range. This portion of the protest is summarily denied.



Acting Comptroller General
of the United States