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DECISION



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

FILE: B-198563

DATE: October 8, 1980

MATTER OF: Kahle Engineering Company

DIGEST:

1. Protests against subcontracts awarded in 1977, 1978, and 1979 by agency's prime management contractor are untimely.
2. Protest filed with GAO more than 10 days after closing date for receipt of initial proposals against alleged apparent solicitation improprieties in procurement by agency's prime management contractor is untimely under 4 C.F.R. § 20.2(b)(1).
3. In absence of any indication that agency's prime management contractor has policy prohibiting oral protest, GAO is applying Federal Procurement Regulations standard that an oral protest is permissible provided it is stated so that intent to protest is clear. Intent to protest is not evidenced by mere expression of displeasure over actions taken by contracting activity. In any event, if protester's actions constitute protest, prime management contractor's receipt of proposals without modifying solicitation was initial adverse agency action and protest to GAO more than 10 days after receipt is untimely.
4. GAO's significant issue exception allowing consideration of untimely protests is inapplicable where protest issue regarding improper use of proprietary data affects only instant procurement, and issue has been dealt with by GAO in previous decisions.

Kahle Engineering Company (Kahle) protests the award of a subcontract under negotiated solicitation No. Y-167343 issued by Westinghouse Hanford Company (WHC). The procurement by WHC was for the design of a prototype 16-position nuclear reactor vacuum valve pin loading machine.

Against ↑ ↑

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The protested solicitation was issued pursuant to WHC's prime contract with the Department of Energy (DOE) for the operation of the agency's Hanford Engineering Development Laboratory. This Office does not ordinarily review the award of subcontracts by Government prime contractors, except in limited circumstances. See Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-2 CPD 166. One exception to our general policy is those awards made "for" DOE by prime management contractors who operate and manage DOE facilities. See Sono-Tek Corporation, B-192061, October 20, 1978, 78-2 CPD 290. Since Hanford Engineering Development Laboratory is operated "for" DOE, the protest falls within our subcontract award review policy. It is, however, untimely.

Kahle contends that WHC misappropriated Kahle's design concept for a Nuclear Fuel Pin Loading Station prepared by Kahle and submitted under a proprietary data restriction to WHC in November 1976. In this regard, Kahle alleges that WHC publicly disclosed Kahle's proprietary design concept in 1977, 1978, and 1979 procurements. Kahle further alleges that WHC committed a continuing violation in using Kahle's proprietary data by disclosing the data in the current procurement.

To the extent that Kahle takes exception to subcontracts previously awarded by WHC, protests against those awards at this time are clearly untimely filed and not for consideration on the merits under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1980). See Cacciamani Bros., B-194434, July 20, 1979, 79-2 CPD 45.

As to solicitation No. Y-167343, DOE states that the data which Kahle claims is proprietary was included in the solicitation. Therefore, we believe that the protest is against alleged solicitation improprieties that were apparent prior to the closing date for receipt of initial proposals. See ACR Electronics, Inc., B-193210, March 12, 1979, 79-1 CPD 171. WHC's closing date for receipt of initial proposals was March 20, 1980. However, Kahle did not file its protest with this Office until after WHC's award of the subcontract. Since protests against alleged apparent improprieties in a solicitation must be filed prior to the closing date for receipt of proposals in order to be timely

filed, under section 20.2(b)(1) of our Bid Protest Procedures, Kahle's protest is untimely and will not be considered on the merits.

Kahle believes that its protest is timely because it is not alleging a "mere" defect in the solicitation; its protest is against alleged bad faith by WHC in the selection process because of WHC's alleged misappropriation of privileged technical data. Consequently, Kahle was not obligated to protest until not later than 10 days after the basis for its protest was known, or the WHC award to another offeror, citing 4 C.F.R. § 20.2(b)(2) (1980).

We have rejected similar contentions in the past by stating that to adopt such an argument would completely undermine the necessary requirement that patent solicitation improprieties be protested prior to the bid opening or in the case of negotiated procurements the closing date for receipt of initial proposals. See CSA Reporting Corporation, 59 Comp. Gen. _____ (1980), 80-1 CPD 225; JDL General Contractors & Associates - Request for Reconsideration, B-183415, June 6, 1975, 75-1 CPD 344. This position is especially applicable here where WHC had incorporated in several previous solicitations the same or similar data which Kahle now alleges is proprietary.

Kahle also claims that immediately after solicitation No. Y-167343 was issued, its Vice President orally protested the use of the proprietary data to the Senior Engineer at WHC. An oral protest is permissible under Federal Procurement Regulations § 1-2.407-8(a) (1964 ed. amend. 139) provided the oral protest is stated in such a fashion that the intent to protest is clear. Comprehensive Health Services, Inc., B-194318, July 17, 1979, 79-2 CPD 37. Because we find nothing in the record to indicate that WHC's own procurement policies and procedures prohibit an oral protest, we are applying the above-stated standard to Kahle's conduct here. Consequently, if Kahle lodged a protest initially with WHC, any subsequent protest with this Office within 10 days of actual or constructive knowledge of initial adverse action by WHC would be considered by us as long as the protest was otherwise timely filed. 4 C.F.R. § 20.2(a) (1980).

We do not think that the statements made by the Vice President of Kahle to WHC's Senior Engineer evidence an intent to protest the inclusion of alleged proprietary data. The facts show that Kahle's Vice President called WHC's Senior Engineer a few times prior to the March 20, 1980, closing date for receipt of initial proposals. During the conversations, Kahle's Vice President "complained" about the fact that the solicitation was competitive and asked why WHC could not "sole source" the contract. WHC's Senior Engineer denies that Kahle's Vice President ever claimed that any technical data being used by WHC was proprietary. The Senior Engineer also advised the Vice President to contact WHC's contracting personnel because he lacked authority to "sole source" the contract.

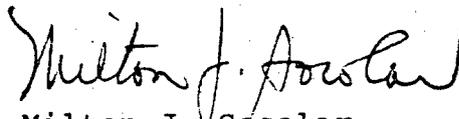
In the circumstances, we do not find that a protest was lodged with WHC. First, an intent to protest is not, in our opinion, evidenced by a mere expression of displeasure over certain action taken by the contracting activity. See Comprehensive Health Services, Inc., supra. Second, no matter how Kahle's complaints are characterized, no contracting officials were contacted. In any event, assuming the actions constituted a protest, the WHC receipt of proposals without modifying the solicitations was initial adverse agency action, and Kahle's protest here--more than 10 days after that receipt--is untimely filed. See General Leasing Corporation--Reconsideration, B-193527, March 9, 1979, 79-1 CPD 170 and cases cited therein.

Finally, Kahle asserts that we should consider the protest on the merits because the issue raised by Kahle has widespread interest. According to Kahle, the intentional misappropriation of privileged technical information by a Government procurement process under the guise of encouraging competition among prospective offerors is of crucial interest to all involved in procuring with the Government.

We will consider an untimely protest under the "significant issue" exception set forth in our Bid Protest Procedures. See 4 C.F.R. § 20.2(c). The exception is limited to an issue which is of interest to the entire procurement community and is exercised sparingly so that our timeliness standards do not become meaningless. R. A. Miller Industries, Inc.

(Reconsideration), B-187183, January 14, 1977, 77-1 CPD 32. Further, we have stated that a significant issue is one which affects more than the individual procurement. See Catalytic, Incorporated, B-187444, November 23, 1976, 76-2 CPD 445. Moreover, where the merits of a protest involve issues which have been considered in previous decisions, such issues are not "significant" within the meaning of section 20.2(c). Technical Services Corporated, et al., B-190945, B-190970, B-190992, August 25, 1978, 78-2 CPD 145. We believe that Kahle's allegation of misappropriation of proprietary data by WHC concerns only the protested procurement. In addition, the issue raised by Kahle has been dealt with frequently by this Office. See for example, Holosonics, Inc., B-192414, October 17, 1978, 78-2 CPD 282. Consequently, consideration of this allegation under the significant issue exception is unwarranted.

The protest is dismissed.



Milton J. Socolar
General Counsel