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DECISION

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

[Protest of NASA Contract Award]

FILE: B-201143

DATE: April 9, 1981

MATTER OF: Pioneer Contract Services, Inc.

DIGEST:

1. Protest allegation that procuring agency was biased is untimely because it was filed more than 10 days after protester was informed of agency's denial of similar protest.
2. Negotiated contract need not necessarily be awarded to offeror proposing lowest cost unless solicitation so provides; moreover, in cost-reimbursement contracts evaluated costs rather than proposed costs provide sounder basis for determining most advantageous proposal. Solicitation did not require that award be made to lowest cost offeror; also, record shows that, while protester had lower proposed cost, awardee had lower evaluated cost. Consequently, and since protester has not otherwise shown that award was erroneous, award cannot be questioned.

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Pioneer Contract Services, Inc. (Pioneer), protests the award of a cost-reimbursement contract to Klate Holt Company (Klate Holt) by the National Aeronautics and Space Administration (NASA) under request for proposals (RFP) No. 1-16-5836.0367. The RFP was for logistical and administrative support services at NASA's Langley Research Center.

Pioneer raises the following grounds of protest:

- (1) NASA's failure to select Pioneer for award was the consequence of persistent bias and prejudice against Pioneer because the company provided pension benefits to its employees through an employee stock ownership plan (ESOP). Such bias, according to Pioneer, adversely affected its competitive standing and exerted

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an unwarranted influence upon the evaluation of proposals. Pioneer also notes that it raised a similar issue in a protest against an award of a recent contract by NASA's Marshall Space Flight Center. We found that this similar issue lacked merit in Pioneer Contract Services, Inc., B-197245, February 19, 1981, 81-1 CPD _____.

(2) There was no rational basis for the selection of Klate Holt's proposal because the total contract price as awarded by NASA is substantially greater than the cost proposed by Pioneer.

NASA argues that the protest is untimely. NASA states that on August 8, 1980, the contracting officer notified Pioneer that Klate Holt had been selected for final negotiations and that on August 11, 1980, Pioneer filed a protest with NASA. The basis of the protest to NASA was that the agency's failure to select Pioneer was the consequence of a "persistent bias and prejudice against Pioneer" because of the company's ESOP. Following repeated attempts to obtain details on Pioneer's allegation of bias, NASA states that the contracting officer notified Pioneer by telegram on October 3, 1980, that its protest was denied because the requested details had not been submitted despite reasonable time being given for their submission. And NASA points out that Pioneer's protest was filed with our Office on November 6, 1980, or more than 10 days after NASA denied Pioneer's protest.

Section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), requires that if a protest is initially filed with the contracting agency in a timely manner, in order for any subsequent protest to our Office to be timely, it must be filed within 10 days of formal notification (or actual or constructive knowledge) of initial adverse agency action on the protest. Since NASA notified Pioneer of the denial of the company's protest by telegram on October 3, 1980, it is apparent that Pioneer's protest to our Office on the issue of bias was not filed within 10 days of the initial adverse agency action. Consequently, we will not consider this issue.

NASA also considers the issue involving the selection of Klate Holt, notwithstanding Pioneer's lower proposed cost, to be untimely. NASA asserts that the contracting officer's October 3, 1980, telegram to Pioneer also decided this issue. In particular, NASA points to the contracting officer's statement in the telegram that, "I can find no evidence of bias or prejudice against Pioneer in the evaluation and selection process." According to NASA, the contracting officer could not have made such a statement without reviewing the record and any review, as a matter of course, would have involved a consideration of the reasonableness of NASA's source evaluation board's findings--including cost considerations. Furthermore, NASA argues that as a general principle, award need not necessarily be made to the offeror proposing the lowest cost in a negotiated procurement. Consequently, NASA takes the position that any argument attacking the cost basis for selection should also have been filed within 10 days of the contracting officer's denial.

We disagree. Pioneer informs us that it received a letter dated October 27, 1980, from NASA's Langley Research Center which reflected that the total contract cost of the award to Klate Holt was substantially greater than the cost proposed by Pioneer. Further, Pioneer emphasizes that this fact was never made known to it prior to its receipt of NASA's October 27, 1980, letter. We note that NASA does not dispute Pioneer's statements as to when the company first learned the price of the Klate Holt award. Moreover, the record shows that NASA did not give Pioneer a debriefing regarding the procurement until October 23, 1980. Therefore, we consider the protest concerning this cost issue to have been timely filed with out Office.

Nevertheless, Pioneer, the party having the burden of substantiating its allegations, has simply not shown why the award at a higher proposed cost was erroneous, especially given the general principle that an award of a negotiated contract need not necessarily be made to the offeror proposing the lowest cost unless the RFP dictates otherwise. See generally, 50 Comp. Gen. 110 (1970). Here, the RFP stated only that cost "may be important" and that the selection would be made in a manner "most advantageous to the Government, all

factors considered." Therefore, it is clear that under this wording NASA was not required to award to the offeror submitting the lowest cost proposal. Moreover, we have consistently stated that in cost-reimbursement procurements evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal since the Government is required, within certain limits, to pay the contractor's actual, allowable and allocable costs. 52 Comp. Gen. 870, 874 (1973). Here, NASA determined that the probable cost of doing business with Klute Holt would be lower than the probable cost of doing business with Pioneer. In view of this consideration and the above analysis, we find no basis to question the award.

Pioneer's protest is denied in part and dismissed in part.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States