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DECISION



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

FILE: B-203473.2

DATE: December 29, 1981

MATTER OF: Midwest C.O.M. Systems, Inc.

DIGEST:

Protest of agency's cancellation of IFB filed with GAO more than one month after agency issued an amendment canceling the solicitation, is dismissed as untimely because protest was not filed within ten working days of when protester knew or should have known of basis for protest.

Midwest C.O.M. Systems, Inc. protests the cancellation of invitation for bids No. 81-13 by the Federal Communications Commission. We dismiss the protest because it was not timely filed.

We previously decided a protest by another bidder under this solicitation. Microtech Industries, Inc., B-203473(1), October 1, 1981, 81-2 CPD 269. Microtech, the fourth low bidder, questioned the responsibility of the low and second low bidders, East Coast C.O.M., Inc. (an affiliate of Midwest) and Tri-State Micrographics. In addition, Microtech contended that the third low bid by AmeriCOM of Washington, Inc. was materially unbalanced.

We dismissed Microtech's protest as to the responsibility of other bidders and did not resolve the question as to whether the bid of AmeriCOM was materially unbalanced, since that firm was the third low bidder and there was a possibility that an award would be made to one of the first two low bidders. We were concerned, however, by the agency's failure to include in its solicitation a provision informing bidders that option prices would be evaluated and, more importantly, by its failure to comply with Federal Procurement Regulations § 1-1.1506.

That provision, as we pointed out in concluding our decision:

" * * * requires that before option prices can be evaluated a person in the agency above the contracting officer level must determine that there is a known requirement which exceeds the basic quantity but (1) that quantity is a learning or testing requirement or (2) due to the unavailability of funds, the agency cannot exercise the option at the time of award. Even if the FCC did not comply with this provision, we see no prejudice to either the Government or the bidders by an award to either the first or second low bidder since their prices were the same for both the basic and option periods. If, however, the two low bids are rejected, unless the agency can show that the necessary determination has been made or makes such a determination prior to award, the solicitation should be canceled and the requirement readvertised. We are so advising the agency."

A copy of our decision was sent to East Coast C.O.M., since it had participated in the protest as an interested party.

On October 20, 1981, approximately three weeks after our decision, the contracting officer sent a letter to all bidders in which he advised them that the solicitation had been canceled and that a new solicitation would be issued in which the deficiencies we had noted concerning the evaluation of bids would be corrected. Implicit in the cancellation, in view of the recommendation we had made, was that the two lowest bids had been rejected.

One month later, on November 24, 1981, we received a letter from Midwest, in which it objected to the cancellation of solicitation No. 81-13 and the resolicitation, on the basis that East Coast C.O.M. was the low bidder, the firm would meet or exceed all requirements of the solicitation, and the timeliness of its performance had been guaranteed by Midwest. Therefore, Midwest contended, the best interests of the Government would not be served by resoliciting this requirement.

Under our Bid Protest Procedures, Midwest was obligated to file its protest not later than ten days after the basis for protest was known or should have been known, whichever was earlier. 4 C.F.R. § 21.2(b)(2) (1981). This Midwest failed to do, and for that reason its protest is dismissed.

Midwest's affiliate, East Coast C.O.M., was advised by the agency of Microtech's earlier protest, was provided with the agency report to our Office, participated as an interested party during our consideration of the protest, and was sent a copy of our decision when it was issued on October 1. Our decision clearly foreshadowed the possibility that solicitation No. 81-13 would be canceled and the requirement resolicited should the two low bids be rejected. That in fact happened on October 20. If East Coast C.O.M. or Midwest objected to this action by the agency, its protest should have been filed with--that is, received by--our Office within ten working days of East Coast's receipt of the notice of cancellation. Since the protest was not received by us until a month later--November 24--it is clearly untimely.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel