

DECISION

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

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FILE: B-207898.3

DATE: April 1, 1983

MATTER OF: Ensign Aircraft Company

DIGEST:

1. Protest filed after award and debriefing contending that the protester's proposal was improperly found to be outside of the competitive range, and that an opportunity to correct its deficiencies should have been afforded, is dismissed as untimely since the record indicates the protester was aware of the alleged improprieties months before the protest was filed.
2. Protest contending the agency based the evaluation on criteria not stated in the solicitation is dismissed as untimely since it was not filed within 10 working days after the protester was aware of such alleged improprieties.
3. Protest contending that awardee's design is deficient is dismissed as untimely since the record shows the alleged deficiency was known to the protester more than 10 working days before the protest was submitted.
4. GAO will not consider an untimely protest under either the good cause or significant issue exception to the timeliness requirements of GAO's Bid Protest Procedures where there has been no showing of a compelling reason beyond the protester's control which prevented the timely filing of protest, and the protest presents no issues which have not been previously considered.

Ensign Aircraft Company protests the rejection of its proposal submitted in response to request for proposals (RFP) No. F33657-81-R-0395 issued by the Department of the Air Force to build the Next Generation Trainer (NGT). Ensign's proposal was determined to be outside of the

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competitive range. We dismiss the protest as untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1982).

Facts

By letter of March 31, 1982, the Air Force informed Ensign that its proposal was determined to be outside of the competitive range because its failure to comply with the solicitation requirements, including technical, logistics and cost elements, indicated it did not have a reasonable chance of being selected for award. Ensign did not protest when it received the March 31 letter; instead, it submitted additional data and asked the Air Force which elements of its technical proposal could be improved to meet the "competitive range qualifications." In other letters, Ensign stated that while its proposal may not have been as comprehensive as those of its competitors, those competitors had the benefit of Government-funded studies during the previous year and more than 6 months to prepare their proposals. Ensign admitted in these letters that the logistics and support provisions of its proposal may have been inadequate and asked for an opportunity to make a presentation to the Air Force on the matters.

The Air Force responded that once an offeror's proposal had been found to be outside of the competitive range, no further negotiations would be held with that offeror, and therefore no further actions would be taken with respect to the additional data submitted by Ensign. The response also pointed out that a debriefing could be provided after the contract award.

In additional letters, Ensign continued its efforts to convince the Air Force to place its proposal in the competitive range and, with a letter of May 28, it submitted a revised proposal. The Air Force replied that it considered its determination to be still valid, and there was no basis for placing Ensign's proposal in the competitive range or for offering Ensign any encouragement that future submittals would alter this determination. The contract was awarded to another company July 12, and Ensign received a debriefing on August 11. The protest to our Office was filed on August 25.

Protest

Ensign contends that the debriefing did not establish that its proposal contained deficiencies which could not have been corrected through discussions. In this respect, Ensign's protest concedes it responded to only 30 percent of the Air Force deficiency reports and contractor clarification inquiries, which were part of the negotiations process, by the deadlines established by the Air Force, but it contends these deadlines were unreasonable. Ensign also protests the unfairness of competing with companies that previously had been funded by the Air Force. Ensign further contends that at the debriefing on August 11 it obtained information with respect to a second basis for its protest: that factors were used in evaluating the awardee's offer, to the awardee's benefit, which were not specified in the solicitation.

Discussion

(a) Ensign's Proposal

To the extent that Ensign's protest is based on the contention that the Air Force allowed inadequate time for responding to deficiency reports and inquiries for clarifications, the unfairness of competing with companies that had been previously funded by the Air force, and the Air Force's failure to conduct negotiations after omitting Ensign's proposal from the competitive range, it is untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1982) and those issues will not be considered on their merits. Section 21.2(b)(1) of these Procedures provides that in negotiated procurements, alleged improprieties not contained in the initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date after the incorporation. Thus, Ensign's contention that the Air Force allowed inadequate response time should have been filed as a protest before the due date for the responses. While it is not clear from the record exactly when Ensign knew that it would be competing with previously funded companies, it is clear that Ensign knew of its competition at least by the time it submitted its revised proposal on May 28, 1982 and

did not protest on this ground until August 25. This issue therefore is untimely under section 21.2(b)(2) of the Procedures, which requires that a protest based on grounds other than alleged improprieties in the solicitation be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. Ensign's protest with respect to the lack of negotiations is also untimely under this section because it knew or should have known that negotiations would be conducted when it received notification that its proposal was not within the competitive range. See Qualex Technology Incorporated, B-205731, December 28, 1981, 81-2 CPD 505.

We recognize that the thrust of Ensign's contentions with respect to deficiencies in its proposal is not that they do not exist, but that the Air Force, at the debriefing, "did not substantiate that the proposal contained uncorrectable deficiencies, and did not substantiate that Ensign was afforded a reasonable opportunity to correct proposal deficiencies." It is obvious from Ensign's correspondence with the Air Force subsequent to the rejection of its proposal, however, that Ensign did not receive new information in this regard during the debriefing. Ensign was well informed as to those portions of its proposal that the Air Force found to be deficient, and why, months before the debriefing. The letter of March 31, 1982 from the Air Force generally identified those areas of Ensign's proposal that the Air Force found did not comply with the requirements of the solicitation, including "Technical, Logistics and Cost Elements." Moreover, in a letter to the Air Force dated May 4, 1982, Ensign acknowledged the fact that its proposal was not as comprehensive as that of the other competitors, and Ensign was aware that it had made timely responses to only 30 percent of the Air Force's requests for information by the established deadlines. It also acknowledged in a letter dated May 5 that the Air Force thought its proposal was inadequate with respect to logistics and support and it proposed that it be permitted to make "an appropriate Logistics/Support presentation to the Air Force Source Selection Board."

Although Ensign believed its proposal was improperly excluded from the competitive range, and knew the reasons for the Air Force's view, it did not protest. Instead, it

undertook a campaign to overturn the rejection of its proposal and chose to wait for the debriefing, to which it was not entitled until after award, Defense Acquisition Regulation (DAR) § 3-508 (1976 ed.), essentially for a reiteration of the Air Force's evaluation of its offer. Had Ensign elected to protest within the timeliness requirements of our Bid Protest Procedures, we would have requested that the Air Force furnish a documented explanation of its reasons for rejecting the proposal and the issues could have been resolved. See SES, Inc., B-205961, March 4, 1982, 82-1 CPD 201. In this regard, DAR 2-407.8(b) requires that award be withheld pending our decision unless a determination approved at an appropriate level above the contracting officer has been made that a prompt award is necessary or otherwise advantageous to the Government.

The protest based on the above issues is untimely.

(b) The Awardee's Proposal

Ensign states that the basis for its contention that the awardee's proposal was evaluated on factors not set out in the RFP is an article in the Aviation Week issue of July 12, 1982. This article quoted an Air Force officer as stating that the awardee submitted a 62 percent scale model and had a production workload schedule that would permit accommodation of the NGT, which is scheduled for production in 1985. Ensign contends these factors are inconsistent with the stated evaluation factors in the RFP, but the firm did not protest until August 25. The protest on this issue, therefore, is untimely because it was not filed within 10 working days after the time it arose. 4 C.F.R. § 21.2(b)(2).

After filing the August 25 protest, Ensign furnished a letter, dated September 24, referring to "other equally important grounds for protest which were established after subject debriefing." We have been unable to determine just which grounds it is referring to, but assume it is a list of deficiencies in the awardee's design. The record indicates, however, that these alleged deficiencies were well known to Ensign before the debriefing as evidenced by Ensign's updated proposal of May 5 containing a section

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entitled "COMPETING NGT DESIGN COMPARISONS" in which Ensign listed the same deficiencies and displayed three drawings of the awardee's design. Ensign did not protest until well after the 10 working day period allowed for protests had expired, and it is therefore untimely as to this matter.

(c) Good Cause and Significant Issue Exceptions

Ensign points out that section 21.2(c) of our Bid Protest Procedures permits our consideration of untimely protests for good cause shown or where a protest raises issues significant to procurement practices or procedures.

The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the timely filing of the protest. McCaleb Associates, Inc., B-197209, September 2, 1980, 80-2 CPD 163. Ensign's protest does not fall into this category because the record reflects no compelling reason beyond Ensign's control for not filing a timely protest.

To invoke the significant issue exception, the protest must present an issue significant to procurement practice or procedure because of its widespread interest to the procurement community. Sequoia Pacific Corporation, B-199583, January 7, 1981, 81-1 CPD 13. In order to prevent our timeliness requirements from becoming meaningless, this exception is strictly construed and seldom used. Kennametal, Inc., B-207307, July 28, 1982, 82-2 CPD 91. Previously-considered issues are therefore not regarded as significant within the meaning of this exception. Berz Ambulance Service, Inc., B-187349, June 8, 1977, 77-1 CPD 411. All of the issues which Ensign considers significant have been considered previously by our Office in numerous cases, and there is nothing to indicate that our consideration of them here would benefit anyone other than Ensign.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel