

DECISION

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

Axel
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B-218359.2

FILE:

DATE: May 6, 1985

Syva Company--Reconsideration

MATTER OF:

DIGEST:

A protest which is filed with GAO prior to an amended RFP's closing date, alleging a specification defect, is timely even though the original RFP contained a provision similar to that protested in the amendment, since the amended RFP is for a subsequent year's needs and is therefore tantamount to a new procurement. Prior decision holding that the protest is untimely is reversed and protest will be considered on its merits.

Syva Company (Syva) requests reconsideration of our decision, Syva Co., B-218359, Mar. 28, 1985, 85-1 C.P.D. ¶ _____, which dismissed Syva's protest against Defense Logistics Agency, Defense Personnel Support Center (DLA), request for proposals (RFP) No. DLA120-84-R-0774 as untimely filed under section 21.2(a) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1985). On reconsideration, we find the protest timely and, accordingly, reverse our prior finding.

The RFP, as initially issued on March 24, 1984, called for a 1-year requirements contract to provide whatever drug test kits are required by 14 using activities (medical centers, hospitals and laboratories). The year was to run from date of award of the contract. The RFP was on a brand name or equal basis for a drug test system employing a radioimmunoassay test method (R-method). In April 1984, Syva submitted an "or equal" offer in response to the RFP. In June, Syva's offer was rejected for failure to meet the R-method characteristic. Syva protested the rejection of its offer to DLA on June 27, 1984. The record shows that Syva sells a drug test system based on the enzyme immunoassay test method (E-method). Syva contended to DLA that both test methods are functionally equivalent.

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Thereafter, on February 26, 1985, DLA denied Syva's protest. On February 28, 1985, DLA issued amendment 4 to the RFP changing the specification from brand name or equal to brand name or equal R-method. The amendment also extended the closing date for proposals to March 25, 1985, and modified the delivery schedule to begin on July 23, 1985, and run 1 year.

Syva thereupon protested to our Office, prior to the amended closing date, contending the RFP, as amended, was unduly restrictive of competition because it prohibited consideration of the E-method as an acceptable equal to the R-method.

Subsequent to Syva's protest to DLA and prior to denial of that protest and amendment of the RFP, DLA awarded a contract to the manufacturer of the brand name product for its ongoing requirements.

After receiving an interim report from DLA, contending that Syva's protest was untimely since it was filed after receipt of initial proposals and protested the R-method requirement, which was apparent on the face of the RFP as initially issued, we dismissed the protest as untimely. We did so because of our agreement with DLA's position in accordance with section 21.3(f) of our Bid Protest Regulations, which, in part, provide:

" . . . When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, it will dismiss the protest at that time." 4 C.F.R. § 21.3(f) (1985).

In its request for reconsideration, Syva contends that amendment 4 should be considered a de facto new procurement. Syva notes that whereas the initial RFP contemplated award in 1984 for the estimated requirements for 1 year, the amended delivery schedule is to begin in July 1985. Specifically, Syva argues that: (1) the parallel procurement, during the pendency of Syva's protest, has met DLA's needs; and (2) amendment 4 concerns fiscal year 1985 requirements instead of the fiscal year 1984 requirements set out in the initial RFP. Syva argues that amendment 4 therefore is tantamount to a new procurement and the timeliness of Syva's protest of amendment 4 should be judged on

the basis of the new closing date for amendment 4 and not the initial RFP closing date.

We agree with Syva's argument. DLA is actually procuring its 1985/86 needs under an RFP that was originally issued to procure DLA's 1984/85 needs. We recognize that award under the original RFP was delayed because of Syva's protest. Be that as it may, DLA has fulfilled its 1984/85 needs. Therefore, we are of the view that the protest is directed against DLA's 1985/86 needs as set forth in amendment 4. Since the closing date for amendment 4 is March 25, 1985, and Syva's protest was filed on March 19, 1985, we find Syva timely.

Syva's request for reconsideration is sustained and our prior decision is reversed to the extent that it held Syva's protest of amendment 4's specifications to be untimely. We will request a report from DLA and consider the protest on its merits.

Harry R. Van Cleve
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General Counsel