

S. J. Noddy
2-1

DECISION



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

FILE: B-220778

DATE: January 03, 1986

MATTER OF: Micro Research, Inc.

DIGEST:

1. A protest filed more than 10 working days after the protester knew or should have known of the basis for protest is untimely and will not be considered.
2. Protest against known requirement to be imposed in a benchmark test is untimely when not filed with the agency until after the date of the benchmark. Subsequent protest to GAO is also untimely since it was not initially timely protested to the agency.
3. Protest that agency did not give 5 working days notice of time and place for benchmark test, as required by solicitation, is denied where agency asserts initial test was scheduled by mutual consent, and protester was given opportunity for additional test on 6th working day after initial notice.

Micro Research, Inc. (Micro), protests the rejection of its proposal as technically unacceptable under solicitation No. FGA-XU319-N-8-13-85, issued by the General Services Administration (GSA) for terminals, printers, multiple interface units and modems. GSA found the printer offered by Micro was technically unacceptable because it did not successfully complete any of the three live test demonstrations (LTD's--otherwise known as benchmarks) successfully. Micro protests that GSA did not, as required by the solicitation, give 5 working days written notice of the time and place for the LTD, and that GSA required the LTD be conducted with a GSA furnished five part paper form not required by the solicitation.

We dismiss the protest in part and deny it in part.

GSA contacted Micro by telephone on September 19 to arrange for an LTD of all equipment offered by Micro. The LTD was scheduled and held on September 24. Micro's printer

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would not print the same characters displayed on the terminal, and the printer demonstration was halted. GSA showed Micro the GSA five part paper to be used in the LTD, and, at Micro's request, gave Micro samples so it could make adjustments to its printer for the LTD the following day. On September 25, the printer correctly printed data from the terminal, and Micro made print samples using five part paper provided by GSA. GSA reviewed the samples on September 26, found the print quality unacceptable, and scheduled a followup demonstration for September 27. Micro made print samples using its own five part paper and GSA's. The print sample in letter quality mode using GSA paper was marginally acceptable to GSA, which then requested a test using single part paper, letter quality mode. Samples from the latter test were unacceptable. When GSA's five part paper was inserted into the printer, the printer was unable to print at all. GSA notified Micro on September 30 that its printer was unacceptable.

Micro protests that it was not given written notice of the time and place for the LTD, as required by the solicitation provision which stated "The Government shall notify the offeror, in writing, as to the time and place for this demonstration." Micro's contention is untimely. Our Bid Protest Regulations require that a protest concerning other than an apparent solicitation impropriety must be filed within 10 working days after the basis for protest was known or should have been known. 4 C.F.R. § 21.2(a)(2) 1985. Here, GSA arranged the date for the initial LTD with Micro by telephone, and the LTD's were conducted from September 24 through September 27. Although Micro was certainly aware by September 27 that GSA was not giving written notice of the time and place for the LTD, Micro first protested the lack of written notice to our Office on October 15. The issue therefore was not timely filed and is dismissed. Griffin Galbraith, B-218933, Sept. 19, 1985, 64 Comp. Gen. ____, 85-2 C.P.D. ¶ 307.

Micro also protests that it was not given 5 working days notice of the LTD as required by the solicitation. The relevant portion of the solicitation states that:

The Government shall require the offeror to be prepared to give an LTD within 5 days (business days) after notification by the Government that the Government requires the demonstration."

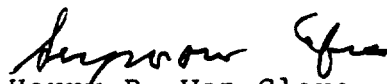
Micro initially protested that it was notified by phone on September 24 to submit to a test on September 26. According to GSA, Micro was contacted by GSA on September 19 to

arrange for an LTD, which was scheduled by mutual consent for September 24. GSA argues that the solicitation did not require it to notify Micro 5 days in advance of the LTD, but rather required Micro to be prepared to conduct an LTD within 5 business days after notification by the government. In its comments on the agency report, Micro does not dispute that GSA contacted it on September 19 to arrange for an LTD, but does contend that it only agreed to September 24 LTD under protest and threat of disqualification.

We fail to see, however, how Micro was prejudiced by GSA's failure to notify it 5 working days in advance of the initial LTD, since Micro was given an opportunity for an LTD on September 27, 6 working days after its September 19 notification by GSA of the need for an LTD. Since prejudice is an essential part of a protest, this aspect of Micro's protest is without merit. Cf. KET, Inc.--Request for Reconsideration, B-190983, Jan. 12, 1981, 81-1 C.P.D. ¶ 17.

Micro's contention that GSA required the LTD to be conducted with a five part paper form not required by the solicitation is also untimely. Our Bid Protest Regulations require that protests based on alleged improprieties in a negotiated procurement which do not exist in the initial solicitation, but which are subsequently incorporated therein must be protested not later than the next closing date for the receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1985). When the alleged improprieties concern the ground rules or requirements for benchmarking, the "next closing date" is the date set for the benchmarking. Federal Data Corporation, B-208237, Apr. 19, 1983, 83-1 C.P.D. ¶ 422. Here GSA notified Micro on September 24 that GSA five part paper would be used for LTD purposes. Subsequently, LTD's were held on September 25 and 27, yet Micro did not protest to GSA about the use of GSA paper for benchmark purposes until September 30, after the LTD's. Consequently, its protest to GSA on this ground was untimely. Where, as here, a protest is filed first with the contracting agency, a subsequent protest to our Office will be considered only if the initial protest was timely. 4 C.F.R. § 21.2(a)(3). Since Micro's initial protest on this ground was not timely filed with GSA, this portion of its protest subsequently filed with this Office also is untimely and will not be considered. Ross Bicycles, Inc., B-217179, B-217547, June 26, 1985, 85-1 C.P.D. ¶ 722.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel