



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ITT Gilfillan
File: B-225781
Date: May 8, 1987

DIGEST

1. Protest that the Navy's procurement of the SPY-1 Radar system, including all subsystems and integration and testing, as a total package unnecessarily restricts competition is untimely where the protester waited more than 4 months after the initial adverse agency action on the protester's agency-level protest--receipt of proposals without taking requested corrective action--before filing the protest in the General Accounting Office.
2. Protest that "total package" procurement for the SPY-1 Radar system, including all subsystems and integration and testing, unnecessarily restricts competition does not raise "significant issues" so as to warrant exception to timeliness rules set forth in General Accounting Office (GAO) Bid Protest Regulations, since GAO previously has considered similar issues a number of times.
3. Where protest is dismissed as untimely, related claims for proposal preparation expenses and costs of pursuing bid protest will not be considered.

DECISION

ITT Gilfillan protests the proposed award of a contract by the Department of the Navy to Unisys Corporation (formerly Sperry Corporation) pursuant to request for proposals (RFP) No. N00024-87-R-5101(Q). ITT protests that this RFP unnecessarily restricts competition because it requires the contractor to supply all major subsystems of the SPY-1 Radar system and to provide integration and testing of those subsystems. The protester contends that the subsystems are clearly divisible requirements which should be procured separately. ITT also protests the Navy's cancellation of an earlier procurement (RFP No. ASSAP-401) for the SPY-1 Transmitter--a major subsystem of the SPY-1 Radar system--and incorporation of that requirement into the present RFP for the entire SPY-1 Radar system.

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ITT requests that our Office direct the Navy to cancel RFP No. N00024-87-R-5101(Q) and reinstate the earlier SPY-1 Transmitter solicitation. ITT also requests reimbursement of the proposal preparation expenses it incurred in connection with the SPY-1 Transmitter procurement, as well as the costs of filing and pursuing this protest.

We dismiss the protest as untimely, and we also dismiss the claims for costs.

The SPY-1 Transmitter RFP was issued on December 2, 1985. ITT submitted an initial proposal, was determined to be within the competitive range, and submitted its best and final offer on June 16, 1986. However, during this period, the Navy developed a new procurement strategy and decided to procure all SPY-1 Radar system components, as well as integration and testing of those components, from a single contractor pursuant to a revised solicitation. Accordingly, ITT was notified by letter of July 2, 1986, that the SPY-1 Transmitter RFP was canceled.

On July 15, 1986, the Navy published an announcement in the Commerce Business Daily describing its new procurement strategy and inviting all interested firms to attend a preproposal conference on August 5. At the preproposal conference, the Navy explained to potential offerors, including ITT, that its new procurement strategy would involve a "leader/follower arrangement." Under this arrangement, RCA Corporation (which previously had been the recipient of all prime contracts on a sole-source basis) would form Team A with its subcontractors, and the Navy would issue the present RFP to obtain a leader for Team B (comprised of the Team B leader and its subcontractors). Team A would provide technology transfer and training to Team B, which would ultimately become a competitive second source for the full system. The Team B leader would be responsible for production and integration of all subsystems of the SPY-1 Radar system. In addition, each attendee at the preproposal conference was given a draft RFP and an "Industry Briefing" booklet which described the new procurement strategy.

By letter dated August 14, 1986, ITT expressed to the Navy its concern that the incorporation of all SPY-1 Radar subsystems into one solicitation, coupled with the time constraints and teaming restrictions set forth in the draft RFP, would unduly restrict competition and eliminate ITT from the procurement. ITT also requested that the Navy revert to its previous strategy of conducting separate procurements for each individual subsystem of the SPY-1

Radar system. In particular, ITT requested that the Navy reinstate the canceled SPY-1 Transmitter RFP.

In spite of ITT's expressed concerns, the Navy continued with the Team B leader selection process. Solicitation No. N00024-87-R-5101(Q) was issued on September 10, 1986, with a closing date for submission of initial proposals set as October 20. ITT was provided a copy of this RFP on September 10. By letter of October 16, ITT formally protested to the Navy on the basis that, because of the time constraints and the teaming limitations in the RFP, it had been unable to find an available company with which to form a team and, thus, it was unfairly "excluded from the competition." ITT did not submit a proposal under the Team B solicitation by the October 20 closing date. The Navy formally denied ITT's protest by letter dated February 13, 1987. On March 2, ITT filed its protest in our Office, raising the same issues it had raised in its protest to the Navy.

It is apparent that ITT knew its bases for protest at the latest by August 14 when it expressed its concern to the Navy that the Team A/Team B procurement strategy for procuring all SPY-1 Radar components effectively eliminated ITT from the competition and would result in a de facto sole-source award to Unisys. Since ITT protested these alleged improprieties to the Navy by letter of October 16, prior to the October 20 closing date, ITT's protest to the Navy was timely under our Bid Protest Regulations, which require a protest based upon alleged improprieties in a solicitation to be filed with our Office or the contracting agency no later than the closing date for receipt of initial proposals. 4 C.F.R. §§ 21.2(a)(1) and 21.2(a)(3) (1986). However, as discussed below, we find that ITT's subsequent protest to our Office was untimely filed.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), a protest to our Office must be filed within 10 working days after notice of initial adverse agency action on a protest filed initially with the contracting agency. Where a protest has been filed with the contracting agency, and the contracting agency proceeds to receive proposals without taking the corrective action requested in the agency-level protest, closing constitutes initial adverse agency action on the protest. See Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357; 4 C.F.R. § 21.0(e). Since ITT's protest was filed in our Office on March 2, 1987, more than 4 months after the October 20, 1986, closing date, it is clearly untimely. See Systems Associates, Inc., 64 Comp. Gen. 485 (1985), 85-1 C.P.D. ¶ 465.

ITT argues that the passing of the closing date without taking the corrective action requested in ITT's agency-level protest did not constitute adverse agency action on its protest. ITT states that its representative had several conversations with the contracting officer's superior shortly after the closing date which led it to conclude that its agency-level protest was still under active consideration, that the procurement was being delayed due to ITT's agency-level protest, and that no adverse action had been taken on the protest. ITT has provided an affidavit from its representative indicating his recollection of these conversations.

The Navy strongly disagrees with ITT's assertions of what was said by the contracting officer's superior during these post-closing date conversations. The Navy has provided a declaration from this official that he made it "unmistakably clear to [the ITT representative] that we were proceeding with the evaluation of Team B offerors." This Navy official also asserts that he never told ITT that the Navy had taken no adverse agency action, but rather, after consultation with a Navy attorney, he told the ITT representative that ". . . I could not decide for him what constitutes adverse action." The contracting officer's supervisor did tell ITT's representative that the Navy would inform ITT before an award of the Team B contract was made.

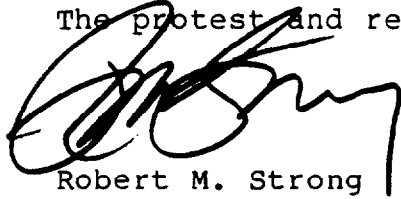
It is not possible for our Office to tell exactly what was said in the several conversations which took place between the ITT representative and the Navy official after the closing date for receipt of proposals. However, there is no documentary evidence to support the protester's claim that this Navy official misled the protester's representative by telling him that no adverse agency action had taken place. In any event, a protester is on constructive notice of our Bid Protest Regulations, and our timeliness requirements may not be waived by the actions of an official of the contracting agency. See Data Processing Services, B-225443.2, Dec. 18, 1986, 86-2 C.P.D. ¶ 683. Accordingly, the protester's interpretation of the telephone conversations is not sufficient to waive our timeliness rules.

ITT requests that we consider its allegations, even if we find they are untimely, under the "significant issue" exception to our Regulations, 4 C.F.R. § 21.2(c). That exception to our timeliness rules is invoked sparingly, so that our timeliness rules do not become meaningless. Bell Atlanticom Systems, Inc., B-222601.2, June 30, 1986, 86-2 C.P.D. ¶ 19. We limit such consideration to issues of widespread interest to the procurement community and those dealing with legal issues that have not been previously decided. Id.

The central issue running through the ITT protest concerns whether the Navy could properly combine the purchase of the three major subsystems which make up the SPY-1 Radar system into one procurement for the entire radar system. We have previously decided many protests which challenged an agency determination to procure by means of an overall package approach rather than by separate procurements for divisible portions of the total requirement. See, for example, Batch-Air, Inc., B-204574, Dec. 29, 1981, 81-2 C.P.D. ¶ 509, and cases cited; see also MASSTOR Systems Corp., B-211240, Dec. 27, 1983, 84-1 C.P.D. ¶ 23. Thus, while this procurement is no doubt significant to the Navy as well as the protester and other potential offerors, we do not find the issues presented to be significant within the meaning of our Regulations. Accordingly, we will not consider ITT's protest on its merits.

The protester's claims for proposal preparation and bid protest costs are also dismissed, because our Office will not consider claims for such costs when submitted in connection with a protest which is not considered on the merits. See Arkla, Inc., B-225519.3, Apr. 3, 1987, 87-1 C.P.D. ¶ ____; R.H.G. Systems, Inc., B-224176, Oct. 2, 1986, 86-2 C.P.D. ¶ 380.

The protest and related claims are dismissed.



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