The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ames-Avon Industries--Reconsideration

File: B-227839.4

Date: August 11, 1987

DIGEST

Original decision dismissing as untimely protest challenging contracting agency's decision to exclude protester from procurement because it failed to meet agency's technical requirements is affirmed where protester fails to show that protest, which was filed approximately 6 months after protester knew or should have known it would be excluded from the competition, was timely or raised a significant issue warranting waiver of the timeliness rules.

DECISION

Ames-Avon Industries requests reconsideration of our decision, Ames-Avon Industries, B-227839.3, July 20, 1987, 87-2 CPD ¶ _____, dismissing its protest regarding the Army's decision to exclude Ames-Avon from competing for award of a contract to produce chemical/biological masks under request for proposals (RFP) No. DAAA15-87-R-0035. We affirm the dismissal.

The RFP at issue in the protest is for the production phase of a program begun by the Army in 1982 to develop a new design for the chemical/biological masks used by soldiers. In the initial phases of the program, the Army awarded contracts to three United States firms to design and produce a prototype mask, followed by the award of contracts to two of the three firms for production test items and development of a technical data package for the new design. At the same time, the Army was evaluating another version of the mask manufactured by a British company, Avon Industrial Polymers; the protester, Ames-Avon, is a United States licensee of Avon.

In December 1986, the Army determined that Avon would not be allowed to participate in the procurement for production of the masks because its version of the mask failed during testing to meet the technical requirements for the new mask. The Army first advised Ames-Avon of its decision on January 6, 1987.

On January 12, the Army published a notice in the Commerce Business Daily (CBD) that the competition for production of the masks would be limited to the two United States firms which had participated in the second phase of the development program; as a result, Avon and Mine Safety Appliances (MSA), the third American firm which had participated in the early phases of the program, would not be allowed to participate in the production procurement. The Army then issued two justifications for restricting the competition. The first, dated January 15, 1987, relied on 10 U.S.C. § 2304(c)(1) (Supp. III 1985), as amended by the 1987 National Defense Authorization Act, Pub. L. No. 99-661, but was issued before the effective date of the amendment; the second justification, dated February 4, was based on the determination by the Secretary of the Army under 10 U.S.C. § 2304(c)(7) that it was necessary in the public interest to use other than competitive procedures.

In its protest, Ames-Avon argued that the Army's decision to exclude it from the competition was improper. We dismissed the protest because (1) the propriety of the Army's justification under 10 U.S.C. § 2304(c)(7) to restrict the competition had been raised and decided in a lawsuit brought by the other potential offeror, MSA, in the U.S. District Court for the Eastern District of Virginia; and (2) Ames-Avon's challenge to the Army's determination regarding the technical deficiencies of its mask was untimely and did not raise a significant issue warranting waiver of our timeliness rules.

In its request for reconsideration, Ames-Avon argues that the court's decision in the lawsuit brought by MSA does not bar further review by our Office because Ames-Avon raises a different issue than was raised by MSA. Ames-Avon also argues that its challenge to the Army's decision to exclude it from the competition is timely, and, even if untimely, presents a significant issue warranting waiver of the timeliness rules. We disagree.

The fundamental issue raised by Ames-Avon is the propriety of the Army's decision to exclude it from the competition based on the results of the Army's technical evaluation of the Avon mask; Ames-Avon contends that the deficiencies the Army found are relatively minor and did not justify its

exclusion from the competition. In support of its position, Ames-Avon notes that some officials in the Army's evaluation chain considered that the deficiencies could have been cured and Ames-Avon included in the competition. Ames-Avon has not disputed either in the initial protest or the request for reconsideration that it first was told of its exclusion from the competition and the reasons for the Army's decision in early January, approximately 6 months before the protest was filed. Thus, as discussed in detail in our original decision, the protest is clearly untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987).

In arguing that the protest should be considered even if it is untimely because it raises a significant issue, Ames-Avon in its reconsideration request attempts to recast its argument to focus on the propriety of the Army's reliance on 10 U.S.C. § 2304(c)(7), instead of its disagreement with the Army's underlying assessment of the technical evaluation of the Avon mask. In fact, the issue concerning 10 U.S.C. § 2304(c)(7), which Ames-Avon raises--whether it was proper to exclude Ames-Avon from the competition under 10 U.S.C. § 2304(c)(7) based on, in Ames-Avon's view, the Army's erroneous determination regarding the technical deficiencies of the Avon mask--arises only if Ames-Avon prevails on its fundamental challenge to the Army's assessment of its technical evaluation results. Since that issue clearly is untimely and for the reasons cited in the prior decision not by itself a significant issue, it is not for consideration on the merits. Hence, Ames-Avon's challenge to the Army's justification under 10 U.S.C. § 2304(c)(7) to the extent that it excluded Ames-Avon from the competition is not reached. In addition, Ames-Avon is not an interested party to challenge the Army's justification under 10 U.S.C. § 2304(c)(7) on any other grounds not related to its own exclusion from the competition. See Cable Antenna Systems--Reconsideration, B-220752.2, Mar. 28, 1986, 86-1 CPD ¶ 298.

In our original decision dismissing the protest, we also found that the propriety of the Army's justification under 10 U.S.C. § 2304(c)(7) had been raised and decided by the court in the lawsuit brought by MSA, the other potential offeror. Since we find that that issue is not for our consideration for the reasons cited above, we need not address Ames-Avon's contention that the court's decision

does not bar further consideration of its protest by our Office.

Our decision is affirmed.

for Harry R. Van Cleve
General Counsel