



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Afftrex, Ltd.
File: B-231033
Date: August 12, 1988

DIGEST

1. The General Accounting Office will consider a protest by a potential subcontractor where prime contractor is managing and operating a government-owned facility.
2. Protest alleging that prime contractor conspired to preclude protester from the procurement is denied since protester has not shown by virtually irrefutable proof that prime contractor had a specific and malicious intent to injure the protester.
3. Decision by prime contractor to amend rather than cancel original solicitation is reasonable where protester fails to show that the nature and scope of the changes warrant cancellation and reissuance of the solicitation.
4. Where the record indicates that protester's knowledge of its bases of protest was acquired 8 working days prior to its protest to the General Accounting Office the protest is timely since it was filed within 10 working days after the bases of the protest was known.

DECISION

Afftrex Ltd. protests the award of any subcontract by General Electric Company, (GE) under request for proposals (RFP) No. 10003B-CR for the decontamination of various sites at the Knolls Atomic Power Laboratory (KAPL). GE is the prime contractor under Department of Energy (DOE) contract No. DE-AC12-76SN0052 for the management and operation of KAPL, a government-owned facility.

Afftrex alleges that GE's personnel conspired to exclude the firm from competing for the procurement, and improperly refused to provide it with another copy of the solicitation prior to the closing date for receipt of best and final offers (BAFOs). In addition, the protester alleges that the requirements of the solicitation were so extensively amended

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after receipt of initial proposals that cancellation and resolicitation was warranted. Consequently, Afftrex maintains that the requirement for full and open competition was not fulfilled.

We deny the protest.

The solicitation was issued on February 8, 1988, and required initial proposals to be submitted by February 23. The scope of work contained in the technical specifications described the required services as the removal, decontamination and unconditional release of radioactive waste from various areas at KAPL. The solicitation stated that time was of the essence and that all work must be completed by July 31, 1989. The RFP further advised offerors that a Notice to Proceed (NTP)--which was required before the start of on-site work--would be issued only after certain requirements were completed and approved by GE. Award would be made to that firm whose proposal was considered to be in the best interest of GE.

Afftrex was among the nine firms to which the solicitation was issued. Four firms responded with proposals by the closing date. Afftrex responded on February 22 with a "no-bid" stating that it did not have "the resources at this time to adequately support this project should it be the successful bidder." Along with that "no-bid," the protester returned the complete proposal package to GE, and requested that the firm be maintained on GE's bidder's list for similar work in the future. The RFP was amended two times subsequent to the receipt of initial proposals. Specifically, on March 8, GE revised the performance period such that all work would be completed within 65 weeks after issuance of the NTP and changed the dates various work sites would be available to the successful subcontractor. BAFOs were requested by March 15. The RFP was again amended on March 28 to reflect, among other things, the deletion of all work in the "D3/D4" site. A second BAFO was requested by April 5. The amendments in question were not sent to Afftrex.

On April 1, Afftrex was informed by GE that two decontamination subcontracts then held by Afftrex were terminated for convenience of the government, effective immediately. At that time, the protester, through its president, requested another copy of the RFP and its amendments because the firm would now have resources available to perform the work and was now interested in participating in the procurement. On April 4, the protester, through its counsel, renewed its

request for another copy of the solicitation, stating that "Afftrex [was] prepared to submit a bid within the current timeframe." On April 13, Afftrex filed this protest with our Office.

JURISDICTION AND STANDARD OF REVIEW

At the outset, we note that our Office does not review the award of subcontracts by government prime contractors except when the award is made "by or for" the government. See 4 C.F.R. § 21.3(f)(10) (1988); Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44. When we do review subcontract award protests, we do so to determine whether the procurement was consistent with, and achieved the policy objectives of, the "federal norm," i.e., the fundamental principles of federal procurement as set forth in the statutes and regulations governing direct federal procurements. Union Natural Gas Co., supra. Here, the parties do not dispute that GE is acting "for" the government. Id.

TIMELINESS

GE maintains that the protest is untimely because it is apparent from Afftrex's protest submission that the firm knew prior to April 1 of the alleged conspiracy to exclude it from the procurement but did not protest until April 13, more than 10 days after it knew the basis for its protest, in contravention of our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2). Similarly, to the extent Afftrex contends that the amendments at issue were improper because they significantly changed the solicitation requirements, GE asserts that this protest ground concerns a solicitation impropriety that should have been raised prior to the next closing date for receipt of BAFOs, i.e., prior to April 5. In addition, GE states that Afftrex, "working on KAPL's site," probably acquired knowledge of the two amendments to the RFP by March 28, and was therefore required to file this basis of protest within 10 days of March 28, after the basis of protest was or should have been known.

In response, Afftrex alleges that it did not know or have any reason to "suspect" any misconduct by GE until an April 1 meeting. At that meeting, Afftrex states, it was informed of the termination of its then existing subcontracts, the request for BAFOs and the solicitation amendments at issue in this protest. Since this basis of protest was filed 8 working days after the alleged conspiracy was suspected, Afftrex asserts this protest ground is timely and should be considered.

Afftrex also alleges that notwithstanding GE's characterization to the contrary, its protest that the solicitation was twice improperly amended subsequent to the receipt of initial proposals does not constitute a challenge based upon alleged improprieties in the solicitation. The protester claims that the proper timeliness standard to be applied to this basis for protest is section 21.2(a)(2) of our Regulations, which requires that a protest of other than an apparent solicitation impropriety be filed within 10 working days after the basis for protest is known or should have been known. Since its actual or constructive knowledge of this basis for protest did not occur until April 1, Afftrex argues the protest filed in our Office on April 13 was timely.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. See Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. We think Afftrex has provided sufficient evidence that it did not know or have reason to suspect prior to April 1 that there was an alleged conspiracy to exclude the firm or had knowledge of the amendments to the solicitation. We also think it illogical to assume that Afftrex knew or should have known of the amendments in question by March 28 simply by virtue of its presence at the KAPL site. Nor do we find any support for GE's assertion that Afftrex knew prior to April 1 of GE's alleged deliberate intent to exclude the firm. Therefore, we consider the protest to be timely.

INTERESTED PARTY

GE contends that the protest should be dismissed because Afftrex is no longer an "interested party" under our Regulations to protest GE's decision to amend rather than cancel the RFP. According to GE, Afftrex "voluntarily" removed itself from the procurement and, as a consequence thereof, it should not now be permitted to challenge the amendments to the RFP.

To be considered by our Office, a protest must be filed by an interested party, which is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by a failure to award a contract. 31 U.S.C. § 3551(1) (Supp. IV 1986); 4 C.F.R. § 21.0(A). In determining whether a party has a sufficient interest to have its protest considered, we examine the extent to which a direct relationship exists between the question raised and the party's asserted interest. REL, B-228155, Jan. 13, 1988, 88-1 CPD ¶ 25. In

this case, Afftrex contends that it chose not to participate in the procurement as originally defined by the RFP because of its then existing commitments under two subcontracts at KAPL. However, when these two subcontracts were terminated and its resources became available, the protester alleges that it sought to participate in the procurement, as amended, but was denied an opportunity to do so. Where, as here, a protester asserts a reasonably demonstrated interest in competing for a contract, we generally consider such a protester to have a sufficient interest to warrant consideration of its protest. Id. We therefore consider Afftrex to be an interested party to maintain this protest.

MERITS

Afftrex first protests that GE deliberately conspired to exclude it from participation in this procurement and claims that certain actions by GE were motivated by retaliation in violation of the full and open competition requirements of the Competition in Contracting Act of 1984 (CICA). Afftrex finds persuasive, in this regard, the fact that GE's personnel were informed of the reasons for its "no-bid" but failed to disclose the proposed terminations which would have allowed Afftrex to reconsider its decision not to compete. According to Afftrex, during several conversations between GE personnel and its president, Afftrex explained that its decision not to submit an offer was premised on the fact that its resources were "expended" on then existing subcontracts at KAPL on whose continued existence Afftrex relied when it decided to submit a "no-bid." Had it been informed of the proposed terminations, Afftrex alleges, it would have submitted a proposal since its resources would then be available to meet the requirements of any new subcontract.

According to the protester, it believes that GE had formulated and set in motion the process to terminate its two subcontracts prior to February 22 and that approval to terminate these subcontracts had been received from DOE as early as March 11. The protester further alleges that GE did not intend to notify Afftrex of the terminations until after the closing date for receipt of second BAFOs, which was April 5, but did so on April 1 when "challenged" by Afftrex that it had heard rumors of the pending terminations.

Afftrex also cites a series of events going back to 1980 between itself and GE through which the protester seeks to establish a pattern of animosity toward Afftrex and its personnel. To substantiate its position, Afftrex has submitted a series of newspaper articles and affidavits from its

president and a retired GE employee concerning an on-going dispute surrounding the removal and disposal of radioactive waste from the KAPL site. The protester argues that as a result of negative media publicity on this issue, GE considered Afftrex a "whistle-blower" and began efforts to eliminate the firm as a contractor.

Afftrex further maintains that a deliberate effort on the part of GE to exclude it from this procurement is indicated by the fact that GE "stalled" in providing a response to its April 1 request for another copy of the RFP until April 14, 7 working days after the closing date for receipt of BAFOs. The protester concludes that these circumstances are indicative of a pattern designed to exclude Afftrex from this and other procurements at KAPL.

In its report on the protest, GE maintains that it made a conscious effort to promote full and open competition, as a result of which it received four offers which met the technical requirements of the RFP and offered reasonable prices. GE categorically denies that the company or any of its personnel participated in a conspiracy to exclude Afftrex from participating in this procurement. GE also denies that Afftrex informed any of its personnel (1) of the reasons, as advanced in its protest letter, for not submitting a proposal; (2) that the firm wanted to be kept informed of any changes to the RFP; (3) that Afftrex would participate in the procurement if either the solicitation or the firm's work load changed; or (4) that Afftrex would have submitted an offer had it been notified of the pending terminations.

As previously noted, GE points out that Afftrex was one of the nine prospective offerors initially solicited but the firm "voluntarily" excluded itself from the competition when it submitted a "no-bid" and returned the entire solicitation package. GE asserts that it had no duty to "independently" determine the reasons for the protester's "no-bid" nor had any reason to know that Afftrex was "resource constrained" because of its then existing subcontracts at KAPL.

GE further maintains that it had no duty to inform Afftrex of a "possible" termination nor would it have been appropriate to do so until the proposed terminations were approved by DOE. In this regard, GE states that by letters dated March 21 and 23 respectively, it identified various concerns pertaining to its contracting approach for the Facilities Deactivation Program at KAPL and recommended corrective action. One of the various concerns enunciated

by GE was its current use of "fixed-price openers"^{1/} in its subcontracts which, according to GE, did not provide effective safeguards to control costs. Therefore, GE reports that it recommended and sought approval for the modification of any current solicitation to remove the fixed-price openers provision and all work associated therewith, and to terminate for convenience any existing subcontracts which contained this provision. On March 28, DOE gave oral approval to GE to amend the subject solicitation by deleting all work that would require the use of fixed-price openers and approved the proposed termination of Afftrex's then existing subcontracts on April 1.

On that same day, GE reports it notified Afftrex of the terminations which were effective immediately and informed the firm of its obligation to minimize all costs and liabilities associated with the terminated subcontracts. Furthermore, GE states that the reason for its prompt notification of the terminations is based on the fact that GE was on notice that as of April 4 Afftrex would start incurring increased expenses relating to the terminated subcontracts. Thus, GE asserts, it had no intention of delaying notification of the terminations since any delay would increase the termination costs that the government would have to absorb.

Regarding the contention that GE intentionally delayed responding to the protester's request for another copy of the solicitation, GE notes that this request was made only 1 day before second BAFOs were due and subsequent to the conclusion of negotiations. Under these circumstances, GE concluded that since Afftrex had been given an earlier opportunity to participate and adequate competition had been obtained it was not in the best interests of the government or GE to afford Afftrex another opportunity to compete at this late stage in the procurement process.

We find Afftrex's allegations of conspiracy and retaliation in the conduct of this procurement amount to a claim of bad faith on the part of GE's personnel. In this regard, we have stated that where a protester alleges that procurement officials acted intentionally to preclude the protester from competing for the award, the protester must submit virtually

^{1/} "Fixed-price openers" is described as a contracting method whereby a subcontractor is reimbursed, on a fixed unit price basis, for any excess work over and above the scope of the contract.

irrefutable proof that the officials had a specific and malicious intent to harm the protester, since contracting officials otherwise are presumed to act in good faith. See Micronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185.

We believe the facts establish that Afftrex made a business decision not to participate in the procurement and as a consequence thereof it was eliminated from the procurement. Even though Afftrex asserts that it later provided various GE personnel with an explanation for its decision, which GE denies, it has not explained why these later articulated reasons were not included in its "no-bid" letter of February 22. Thus, we agree with GE that it had no duty to look behind the "no-bid" submission, since on its face it represented a business decision that was voluntarily made.

While the record does not indicate when GE initially became concerned with the use of fixed-price openers in its subcontracts or when it began to consider terminating all existing subcontracts that contained this provision, the record does establish that by March 21 GE had identified and set in motion the process whereby this contracting method would be discontinued.^{2/} We think Afftrex could not reasonably believe that GE was required to inform it of the proposed terminations prior to DOE approval. While Afftrex disputes GE's assertion that it intended to promptly notify the firm once DOE approved the proposed terminations, it does not offer any evidence to refute GE's argument that it knew that any delay in notification would result in increased termination costs. On the basis of this record, we cannot conclude that GE intended to delay notification of the terminations until after April 5 so as to preclude Afftrex from any further participation in the procurement.

After examining this record in its entirety, we conclude that the arguments presented by Afftrex, even if true, do not evidence a specific and malicious intent on the part of GE to injure the protester. We think it is significant, and incongruous with Afftrex's position, that along with eight other firms Afftrex was not only maintained on GE's qualified bidders list for these services but was in fact solicited for this procurement. In view of the actions on the part of GE to obtain maximum competition which included soliciting Afftrex, the record cannot be said to establish that GE conspired to exclude Afftrex from the competition.

^{2/} As previously discussed, this resulted in the termination of Afftrex's then existing subcontracts for convenience of the government. We note, however, that Afftrex does not challenge the propriety of these terminations.

Moreover, as a result of GE's efforts, adequate competition was achieved and reasonable prices were offered. Under these circumstances, we will not infer on the basis of the information before us that GE engaged in improper procurement practices.

As for the alleged failure to provide Afftrex with another copy of the RFP as amended, it is the protester's view that as a small business it was entitled to receive a copy of the solicitation "upon demand" since the Small Business Act requires that upon its request any small business concern shall be provided a copy of a solicitation. See 15 U.S.C. § 637(b) (1982). While we agree that Afftrex, as a small business concern, was entitled to receive a copy of the instant solicitation, the protester apparently overlooks the fact that initially it did receive a copy of the solicitation but chose not to submit an offer. Nor does the protester explain why it believes it is entitled under this provision to receive more than one copy of the solicitation. Under the circumstances, we fail to see how GE violated this mandate nor do we have reason to question GE's denial of Afftrex's request made near the conclusion of the procurement for another copy of the RFP.

Afftrex next maintains that the two amendments dated March 8 and 28, respectively, were improper since they significantly reduced the scope and nature of the work and "drastically" changed the time for completion of the required services. Afftrex expresses the view that these changes were so substantial that GE should have canceled the original solicitation and resolicited all firms, including Afftrex.

GE reports, however, that the net effect of the amendments in question were insubstantial and did not require cancellation of the original solicitation. Specifically, GE states that the March 8 amendment changed the starting date for the project from May 15 to September 1 and added a "nominal" period of 2 weeks to the work schedule. GE explains that the project start date was changed because of unrelated security matters which needed to be resolved and insists that these changes did not modify the scope, or change the nature of, the project.

As to the March 28 amendment, GE contends that all work associated with the decontamination and removal of waste in the D-3 building yard area was deleted because it involved the type of work that required use of fixed-price openers which, as discussed elsewhere in this decision, was identified as an area that GE had to review and improve its methods and controls for this type of work.

In its comments on the agency report, Afftrex continues to disagree with GE's conclusion that the changes to the RFP were insubstantial. For example, the protester disputes GE's findings that the March 8 amendment only added 2 weeks to the work schedule. It argues that the RFP as originally issued contained a firm completion date of July 31, 1989, and contemplated that from the date of award through July 31, 1989, the successful subcontractor would not only complete all requirements necessary to obtain a NTP but complete all on-site work by that date. However, Afftrex contends that the March 8 amendment provides the awardee with an unspecified time in which to obtain the NTP--which the protester states could take from 3 to 9 months--before the 65 weeks for completion of all on-site work begins to run. Thus, the protester views this change as substituting the firm completion date of July 31, 1989, to an uncertain or "floating" completion date.

When the government's needs or basis for award changes after proposals have been received, the government may not proceed with award unless it either amends the solicitation to advise offerors of the change and provides offerors with an opportunity to submit revised proposals or cancel the solicitation altogether. See Federal Acquisition Regulation (FAR) §§ 15.606(a),(b)(4); Union Natural Gas Co.--Reconsideration, B-224607.2, April 9, 1987, 87-1 CPD ¶ 390. As we have often stated, the magnitude of the change necessary to make an original solicitation reflect the government's current requirements governs the propriety of the decision to cancel and reissue a solicitation. Union Natural Gas Co., B-224607.2, supra.; ASG Partnership, B-227872, Sept. 30, 1987, 87-2 CPD ¶ 321, citing Burroughs Corp., Inc., B-207660.3, May 16, 1983, 83-1 CPD ¶ 508.

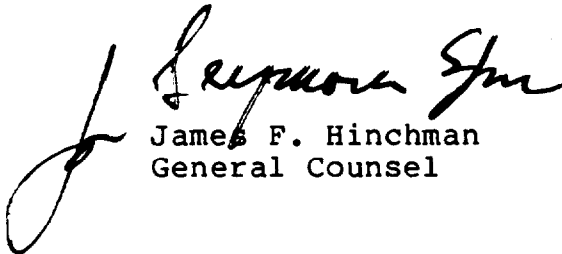
Insofar as Afftrex contends that the amendments were so substantial that GE should have canceled the RFP and issued a new one, we have examined the amendments in question and are not persuaded by Afftrex's argument. Under the solicitation, as amended on March 8, the availability dates for various work sites were changed and, as the protester states, the completion date for all work on the project was changed from July 31, 1989, to 65 weeks after the NTP is issued. Obviously, this amendment reflects GE's view that time was no longer of the essence and that its need for this work could otherwise be met.

As we understand the protester's argument, in this regard, had it known that the firm completion date would have been changed, it would have submitted an offer because Afftrex's personnel would be available during this "floating" performance period. However, as we stated in Burroughs Corp.,

supra, we will not judge the magnitude of the changes contained in an amendment on the basis of an individual prospective offeror's perception of their effect on its own ability to meet the needs of the RFP. Here, apart from the fact that Afftrex considers this change in the time for performance to be significant to its ability to compete for the award, the protester has failed to show that GE's decision to amend, rather than cancel the RFP, was unreasonable.

Finally, as to the March 28 amendment which deleted the D3/D4 yard areas and the fixed-price openers, Afftrex maintains that GE's decision to eliminate this work from the RFP by amendment was unreasonably inconsistent with its decision to eliminate this same type work and fixed-price openers from Afftrex's two subcontracts by termination for convenience. On this basis, Afftrex essentially argues that GE was required to effect the deletion of this type work through cancellation and resolicitation. We disagree. Once again Afftrex wants us to evaluate the reasonableness of GE's decision to amend on the basis of how the use of an amendment adversely affected the firm. For the reasons previously stated, we conclude that Afftrex has not established that the amendments were so substantial that cancellation and resolicitation was warranted.

Accordingly, the protest is denied, as are the claims for attorneys' fees and the costs of filing and pursuing the protest.



James F. Hinchman
General Counsel