

Bluth



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: E&S Computer Systems, Inc.--Request for
Reconsideration

File: B-233608.2

Date: February 22, 1989

DIGEST

1. A subcontractor under an existing contract is not an interested party under General Accounting Office's Bid Protest Regulations for the purposes of maintaining a protest against a new solicitation on the basis that the requirement should have been obtained under the existing contract.
2. Protest alleging that a solicitation's delivery schedule of 15 days was inappropriate is untimely where the requirement was apparent on the face of the solicitation and not protested until after award.

DECISION

E&S Computer Systems, Inc., requests that we reconsider our dismissal of its protest in E&S Computer Sales, Inc., B-233608, Dec. 2, 1988, 88-2 CPD ¶ 556, which was filed in connection with request for proposals (RFP) No. R8-88-18, issued by the Forest Service, Department of Agriculture, for surveying software. E&S contends that our dismissal of its protest contained several errors of fact. We affirm our dismissal.

E&S is a subcontractor to Electronic Data Systems (EDS), which holds the Microcomputer Productivity System (AMPS) contract with the Department of Agriculture. In its initial protest to our Office, E&S contended that the agency should have acquired the surveying software through EDS's existing AMPS contract and should not have conducted a new procurement. E&S alleged that the "Cogo Software" it developed for EDS under the AMPS contract could easily be modified to comply with all of the RFP requirements. According to the protester, after it submitted a proposal under this solicitation, it notified the Forest Service

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that the software was available under an existing contract. The agency suspended the procurement process in order to determine whether the "Cogo Software" did, in fact, comply with the RFP. E&S noted that after finding certain deficiencies with the "Cogo Software" the agency resumed the RFP process and requested E&S to submit a best and final offer (BAFO). After submission of its BAFO, E&S's proposal was rejected because it contained a delivery schedule of 4 weeks from award rather than the 15 days from award as called for by the RFP.

E&S then filed a protest in our Office alleging that the Forest Service improperly conducted a new procurement when it was obligated to purchase the software under an existing contract. In addition, E&S alleged that the agency improperly denied it the opportunity to submit a second BAFO which contained a modified delivery schedule, presumably one which met with the RFP requirements.

We dismissed E&S's protest because it was both untimely and it failed to state a valid basis for protest. E&S's allegation that the Forest Service software requirements should have been obtained under the AMPS contract was an alleged solicitation impropriety, and as such, should have been filed with our Office prior to the July 29, 1988, closing date for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Since it was not filed until after award to another offeror, we dismissed it as untimely.

We also dismissed, for failure to state a valid basis for protest, E&S's contention that the agency should have permitted it to modify the delivery schedule in its BAFO. 4 C.F.R. § 21.3(m). We noted that an agency is under no obligation to reopen discussions and permit an offeror another opportunity to modify its BAFO to comply with terms and conditions which were included in the original RFP. We stated that it is a fundamental rule that an offeror bears the burden of submitting a proposal that fully complies with all the terms and conditions of the RFP, and when it fails to do so, it assumes the risk of being rejected for noncompliance. Since E&S did not offer the "15-day from award" delivery schedule specifically mandated in the RFP, but rather offered a 4-week delivery schedule, it placed itself in a position of noncompliance, and its proposal was therefore properly rejected.

In its request for reconsideration, E&S addresses our dismissal of its protest as untimely by alleging for the first time that not only did the prime contractor on the AMPS contract, EDS, protest to the contracting agency that

the software should be procured under the existing contract, but also, that E&S itself "raised" this issue with the contracting agency on July 26, 3 days before the closing date for initial proposals. E&S further alleges that it was not until the agency notified EDS that it would not halt the procurement process that E&S submitted a proposal. E&S contends, therefore, that since EDS was pursuing its protest with the contracting agency, E&S's protest to the General Accounting Office, filed after award, is timely.

For the reasons stated below, we do not think these contentions establish that E&S's objection to the issuance of this solicitation should have been considered on its merits by our Office. The untimeliness of E&S's initial protest was so manifest from the information presented in it that we dismissed it without discussing the implications of E&S's dual role as an offeror under this solicitation and as a subcontractor to EDS under the latter's existing AMPS contract. Since E&S has alleged that its protest to our Office was, in effect, the continuation of an earlier, agency-level protest filed by its prime contractor, EDS, we think a discussion of these relationships is in order.

In order to maintain a bid protest before our Office, the protester must be an "interested party" as defined in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(2) (Supp. IV 1986), which provides that an interested party for purposes of eligibility to protest must be an actual or prospective bidder or offeror whose direct economic interest would be affected by award of the contract or by failure to award the contract. This statutory definition is implemented in our Bid Protest Regulations at 4 C.F.R. § 21.0(a). Where there is an intermediate party of greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of CICA and our Bid Protest Regulations. Bonar August Systems, B-231366, May 23, 1988, 88-1 CPD ¶ 489.

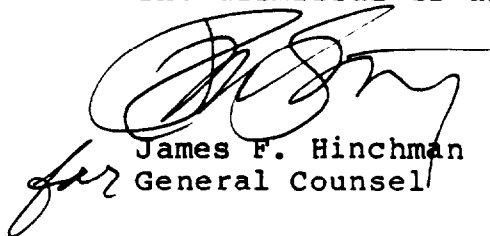
Certainly, E&S was free to submit a proposal in response to this procurement and, as an offeror under it, to protest in its own name any improprieties it perceived in the evaluation of that proposal. As for the issue of whether the very existence of this solicitation was improper because it represented a need which the Forest Service was obligated to satisfy through the AMPS contract, however, EDS, as the prime contractor on the AMPS contract, has a more immediate interest than does E&S in whether the Forest Service obtains software under its existing contract or solicits this software under a new contract. EDS, therefore, and not E&S, would be the proper party to protest this issue.

There is nothing in the record before us to establish that EDS, the proper party to do so, timely filed a written protest with the Forest Service against this solicitation on the basis that the agency was precluded from issuing it by its obligations to EDS under the latter's existing AMPS contract. Even if it had done so, EDS never perfected a timely protest with our Office. Under our Bid Protest Regulations, if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action, 4 C.F.R. § 21.2(a)(3). An example of such an initial adverse action is the agency's opening of initial proposals without taking the corrective action. Consolidated Industrial Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58, dismissal aff'd. for other reasons, B-231669.3, Aug. 2, 1988, 88-2 CPD ¶ 109. EDS, however, has never filed a protest with our Office concerning this procurement even though the agency proceeded to satisfy its requirement through this solicitation rather than through EDS's AMPS contract.

E&S also alleges that since the delivery schedule of 15 days in the RFP is contrary to that in the AMPS contract of 4 to 6 weeks, E&S should have been permitted an opportunity to extend the delivery schedule to meet the AMPS delivery requirements.

To the extent that E&S is protesting that the 15-day delivery schedule in the RFP should have been extended, its protest is untimely. The delivery schedule requirements were apparent on the face of the solicitation and if E&S thought they were inappropriate, it should have protested them prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). If this is but another way of arguing that the software procured under the RFP should have been obtained under the AMPS contract and, therefore, would be subject to a 4-to 6-week delivery schedule, we have already determined that E&S is not an interested party to protest this issue.

The dismissal is affirmed.


James F. Hinchman
General Counsel