



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: MIDDCO, Inc.--Request for Reconsideration
File: B-235587.2
Date: October 31, 1989

DIGEST

Protest that sole-source award was not justified is untimely, where protest was filed with contracting agency more than 10 working days after protester was told by project engineer who was contracting activity's technical representative that contracting agency intended to make a sole-source award to another firm.

DECISION

MIDDCO, Inc., requests reconsideration of our decision MIDDCO, Inc., B-235587, Sept. 6, 1989, 89-2 CPD ¶ __, dismissing MIDDCO's protest against the United States Army Missile Command's (MICOM) award of a contract for technical support services to Logicon, Inc., on a sole-source basis. The contract is for performing nuclear surety/safety support activities for the Army's Follow-on To Lance (FOTL) Project Office. We affirm our prior decision.

In its original protest, MIDDCO argued that a sole-source award to Logicon was not justified because MIDDCO was also qualified. MIDDCO also argued that there were several deficiencies in the statement of work contained in the contract with Logicon. We dismissed the protest against the sole-source nature of the contract, because the protest was untimely. We did not consider whether the statement of work in Logicon's contract was deficient, because MIDDCO was not considered eligible for award by the Army and because MIDDCO did not allege that it would have been considered eligible for award but for the deficiencies contained in the statement of work.

At the outset, we wish to address MIDDCO's apparent misconception concerning our bid protest function. In its request for reconsideration, MIDDCO complains that the General Accounting Office investigation was not sufficiently

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thorough. However, our Office does not conduct investigations as part of our bid protest function. See Todd Logistics, Inc., B-203808, Aug. 19, 1982, 82-2 CPD ¶ 157. Our decisions are based primarily upon the evidence presented by the protester, the contracting agency's report responding to the protester's assertions, and the documentation submitted by the parties in developing the protest record. Thus, our prior decision on MIDDCO's protest was based upon the entire protest record, which clearly showed that the protest was untimely, and, therefore, we did not consider MIDDCO's protest on its merits.

Basically, MIDDCO contends that our earlier finding that the protest was untimely is erroneous. We held that MIDDCO's protest against the sole-source award was untimely, because MIDDCO did not file its protest with either our Office or the contracting agency until 1 month after MIDDCO was aware of its basis for protest. Our Bid Protest Regulations require that a protest be filed not later than 10 working days after the protester knew or should have known its basis for protest. 4 C.F.R. § 21.2(a)(2) (1989). We determined that MIDDCO should have been aware of its basis of protest as early as March 29, 1989, when MIDDCO contacted a contracting activity official who told MIDDCO that MICOM had decided to pursue a sole-source award with Logicon.

MIDDCO points out that the individual who told MIDDCO's representative about the sole-source award was not in the contracting activity, but rather was an employee of the FOTL program office. MIDDCO somehow concludes that, as the Army representative was not in the contracting office and his duties were not related to procurement, MIDDCO was not required to file its protest within 10 working days after the Army representative informed MIDDCO that a sole-source award would be made. We do not agree.

The record shows that the Army representative who first informed MIDDCO of the impending sole-source award to Logicon was a MICOM employee who was employed as the FOTL Project Office engineer. The engineer was responsible for the nuclear surety/safety requirement that is the subject of the protested contract, and, in that capacity, this Army employee served as the technical representative of the purchasing activity, wrote the statement of work for the FOTL technical support services contract, and requested a market survey from the United States Army Nuclear and Chemical Agency (USANCA) to ascertain what firms were capable of performing the services. Thus, while the FOTL Project Office engineer was not an employee of the contracting activity, the engineer was intimately acquainted

with the FOTL Project Office's technical support services requirement. Furthermore, MIDDCO's original protest letter shows that MIDDCO contacted the Project Office engineer concerning the FOTL Project Office's support services needs on a least four occasions before the engineer told MIDDCO that the Army was going to make a sole-source award to Logicon. Consequently, it is clear that MIDDCO recognized that the Project Office engineer knew the most current status of the procurement and relied upon the engineer for information related to the requirement.

The fact that the Project Office engineer was neither the contracting officer nor employed directly in the contracting activity does not alter our previous finding that MIDDCO's protest was untimely. We considered and rejected a similar argument made by a protester in Storage Technology Corp., B-194549, May 9, 1980, 80-1 CPD ¶ 333, wherein the protester argued that statements made by agency personnel other than the contracting officer were not effective notice of award and were sufficient at most to raise a suspicion that did not amount to the specific knowledge requisite to filing a protest. We held that the protester was charged with knowledge of the basis for its protest where agency personnel conveyed to the protester the agency's intent to follow a course of action adverse to the protester's interests, even though the agency personnel who informed the protester of the agency's impending action were not employed in a procurement capacity. We also held that, even though the agency employee told the protester that the agency "intended" to award to another firm, that was sufficient to put the protester on notice of its basis for protest for timeliness purposes, and the protester could not defer filing its protest until after the agency had actually taken the proposed action.

Accordingly, when the engineer told MIDDCO on March 29 that "his office had decided to pursue a sole source contract with Logicon"^{1/} in spite of the interest MIDDCO had expressed in performing the technical support services work, MIDDCO was on notice of its basis for protest and had 10 working days to file a protest. 4 C.F.R. § 21.2(a)(2). Instead, MIDDCO did not file its initial protest with the Army until 1 month later, and we correctly determined the protest to be untimely.

^{1/} We have taken this quotation directly from MIDDCO's original protest letter.

The remainder of MIDDCO's arguments are directed at whether the Army was justified in making a sole-source award to Logicon. In view of the fact that we are upholding our previous finding that this issue was filed in an untimely manner, we need not address the merits of the protester's arguments in detail. However, we do want to point out that the record appears to support the Army's decision that MIDDCO was not qualified to perform all of the required work.

For example, the record contains a letter MIDDCO sent to MICOM concerning the support services requirement in which MIDDCO stated:

"MIDDCO is qualified to perform a major portion of the work and, depending on the scope of the SOW [statement of work], may be qualified for other tasks as well."

Apparently, after discussing the work requirement with MICOM personnel, MIDDCO tried to convince MICOM that the firm was capable of performing some, but not all, of the work.

In addition, MIDDCO does not dispute USANCA's market survey report to the FOTL Project Office to the effect that only TRW and Logicon were known to be qualified to perform a software nuclear safety analysis. Instead, MIDDCO argues that it should not have been precluded from competing for the technical support services contract "simply because it does not have the resources to perform the software nuclear safety analysis."^{2/}

The Army points out that software and hardware nuclear safety analysis capability is necessary for a contractor to perform several of the tasks set forth in the contract's statement of work, and that MIDDCO's lack of experience in these areas of expertise was the reason for excluding MIDDCO from consideration. Moreover, the Army points out that the present support services contractor will be required to provide input into a subsequent request for proposals (RFP) for the full-scale development contract which will include performing a nuclear surety/safety analysis. The Army believes that only a firm that has extensive nuclear software/hardware analysis experience can provide the

^{2/} This is a direct quotation from MIDDCO's letter requesting reconsideration of our denial of its protest.

required input necessary to set forth accurately and thoroughly the nuclear surety/safety requirements of the full-scale development RFP.

In sum, MIDDCO has not shown that the Army's justification for a sole-source award was unreasonable.

for Raymond Egan
James F. Hinchman
General Counsel