



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Symbiont, Inc.

File: B-240043

Date: August 1, 1990

David Davenport, Esq., Davenport & Associates, for the protester.
Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency. Mona K. Mitnick, Esq., for the Small Business Administration. Sabina K. Cooper, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is untimely when filed more than 10 working days following publication of agency's intention to open the procurement from which protester was disqualified to all 8(a) companies under the 8(a) competitive procedures, and more than 10 working days following direct notification to the protester by the agency of its intentions.

2. Significant issue exception to the General Accounting Office's timeliness requirements will be invoked only where the protest involves a matter which has not been considered on the merits in previous decisions and which is of wide-spread interest to the procurement community.

DECISION

Symbiont, Inc. protests the disqualification of its proposal under request for proposals (RFP) No. DABT60-89-R-0047, issued by the U.S. Army Training and Doctrine Command, Fort Eustis, Virginia, for engineering and analytical support services for the Directorate for Army Rangers and Targets, Combat Training Centers. Symbiont also protests the decision by the Army to change the method of procurement to a limited competition among small disadvantaged business concerns. Symbiont alleges that the Army acted in bad faith in disqualifying its proposal and deciding to issue the competitive solicitation.

We dismiss the protest.

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Initially, Symbiont was selected for award of a Small Business Administration (SBA) Section 8(a) program sub-contract on February 10, 1989. Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. However, after three rounds of negotiations with Symbiont and Symbiont's submission of three technical proposals, the Army found Symbiont technically unacceptable and requested that SBA withdraw the Symbiont nomination, remove the procurement from the normal 8(a) process, and change the method of procurement to the competitive 8(a) program.^{1/} With the concurrence of the SBA, the Army published notice of the issuance of the solicitation as a competitive 8(a) procurement on February 15, 1990, in the Commerce Business Daily (CBD).

On March 7, the Deputy Assistant Secretary of the Army for Procurement informed Symbiont by letter that the Army had concluded, following a February 8 meeting in response to a January 5 letter from Symbiont, and after a thorough review, that all appropriate regulations and procedures had been followed, and that the contracting officer's determination was proper. The Army official stated that "the requirement is now being considered for procurement under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), on the basis of competition restricted to eligible 8(a) program participants." By letter of June 1, the Assistant Secretary of the Army for Research, Development and Acquisition, in response to an April 30 telephone conversation with Symbiont, reiterated the Army's position that appropriate procedures were utilized and that authorization had been granted to proceed with the acquisition using competitive 8(a) procedures. The Army official emphasized that Symbiont would have the opportunity to submit a proposal in response to the solicitation and suggested that Symbiont avail itself of several assistance programs. Symbiont then protested its disqualification and the notice of reissuance of the solicitation to our Office on June 14. The RFP was issued as a competitive 8(a) solicitation on June 15.

^{1/} Effective October 1, 1989, contracts such as the one at issue, for over \$3,000,000, are to be awarded based on a competition among eligible 8(a) program participants if there is a reasonable expectation of receiving offers from two eligible firms and award can be made at a fair market price. See 13 C.F.R. § 124.311 (1990).

Our Bid Protest Regulations provide that, in cases not involving alleged improprieties in a solicitation, a protest must be filed within 10 working days after actual or constructive knowledge of the basis of the protest. 4 C.F.R. § 21.2(a)(2) (1990). Here, Symbiont had notice of the Army's intention to open the procurement at issue to all eligible 8(a) companies when the Army published the February 15, 1990, CBD notice. Since publication in the CBD constitutes constructive notice to all interested parties, Metrox, Inc., B-235618, Aug. 21, 1989, 89-2 CPD ¶ 161, Symbiont should have filed its protest in our Office within 10 working days of the date of the publication of the CBD notice rather than waiting 4 months to do so.

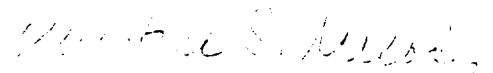
Moreover, the Army notified Symbiont directly of its intention to compete the acquisition through the competitive 8(a) program by letter of March 7 from the Deputy Assistant Secretary of the Army, explicitly informing the firm that, because it had not demonstrated the requisite ability to complete the contract, the procurement was being competed, but that Symbiont was free to participate in the competitive procurement. Even if Symbiont's January 5 letter, referenced in the Army's March 7 letter, is considered a protest to the Army concerning its action with respect to Symbiont's offer, our Regulations provide that a protest originally filed with a contracting agency is untimely if it is not filed with our Office within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3). The Army's letter of March 7 served to inform Symbiont of the Army's determination that Symbiont did not possess the requisite capability to perform the requirements of the solicitation, and to confirm the Army's intention to consider offers from all 8(a) firms for the procurement. Accordingly, at most Symbiont had 10 working days from receipt of the March 7 letter to protest the rejection of its offer from the regular 8(a) process. Since Symbiont did not file its protest in our Office until June 14, the protest is untimely.

Symbiont argues that the timeliness of its protest should not be determined with reference to the CBD notice or the March 7 letter from the Army, because the Army subsequently suspended the issuance of the solicitation in response to a conversation with Symbiont, while an internal investigation and an investigation by the Army's Inspector General were conducted, and also withheld information about the solicitation from other offerors. Our review of the record indicates that the Army had concluded its internal investigation and informed Symbiont of that fact. Neither the Inspector General's investigation nor the delay in the

Army's issuance of the solicitation, which the record indicates occurred for reasons not connected with the protester, vitiated Symbiont's duty to file its protest in our Office following the Army's publication of its intention to compete the requirement, or at the latest, following Symbiont's receipt of the Army's letter confirming its decision to disqualify Symbiont and compete the procurement. The fact that Symbiont continued to pursue the matter with the Army after its offer was disqualified and the Army's intention to compete the procurement was announced, rather than file a protest with our Office, does not toll our timeliness requirements. Novitas, Inc.--Second Request for Recon., B-238178.3, May 17, 1990, 90-1 CPD ¶ 483.

Symbiont further argues that its protest should be considered under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.12(b). Under that exception we will consider an untimely protest only if it raises an issue of first impression and of widespread interest to the procurement community. Novitas, Inc.--Second Request for Recon., B-238178.3, supra. Symbiont's protest, that its offer was improperly disqualified from the regular 8(a) process, does not present an issue of such widespread interest or importance to the procurement community as to justify invoking the exception. Moreover, Symbiont will be able to again present an offer in response to the competitive 8(a) solicitation.

The protest is dismissed.


Christine S. Melody
Assistant General Counsel