



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: G. McMillan & Co., Inc.

File: B-239805

Date: September 14, 1990

Wesley W. Harris for the protester.
Maryann L. Grodin, Esq., Department of the Navy, for the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against cancellation of solicitation filed more than 5 months after solicitation was canceled is untimely.
2. Protester is not entitled to reimbursement for costs incurred in anticipation of being awarded a government contract which it did not receive.
3. An agency's delay in awarding a contract is merely a procedural matter which alone does not provide a basis of protest because it does not affect the validity of the procurement.

DECISION

G. McMillan Co., Inc. protests "the methods employed" by the Navy in failing to award it a contract and canceling request for proposals (RFP) No. N00164-89-R-0196 (RFP 0196) for sniper rifles and by the agency's unreasonable delay in making an award under a subsequent RFP, No. N00164-90-R-0415 (RFP 0415), also for sniper rifles. In addition, the protester claims the costs that it incurred in preparing for an award under RFP 0196.

We dismiss the protest and claim.

On August 21, 1989, the Navy issued RFP No. 0196 on a sole-source basis to McMillan for 30 M-86 sniper rifles. The Navy had determined that the sole-source was justified

049502/142261

because of an urgent need for the rifles. The M-86 rifle is a McMillan manufactured 7.62 caliber sniper rifle for which the Navy has an established logistics, maintenance and training support system. On August 30, H-S Precision, Inc. protested the proposed award to this Office objecting to its sole source nature (B-236760). On December 4, the Navy canceled RFP No. 0196 and H-S withdrew its protest.

Subsequently, the Navy prepared new specifications and issued RFP No. 0415 on January 18, 1990 for 165 7.62 sniper rifles, using full and open competitive procedures without specifying McMillan's model M-86 rifle. The Navy reports that on the March 14 closing date it received a number of offers and at the time the protest was filed, it had not yet made award.

McMillan maintains that in January 1988, an employee of the Navy informed it that the agency was going to purchase 220 McMillan Model M-86 7.62 sniper rifles. Also, according to McMillan, this same employee and another Navy employee responsible for administration of rifle contracts repeatedly assured McMillan that it would be awarded a sole-source contract for the rifles since the Navy already had a number of McMillan rifles in use. McMillan says that it was told in "mid-year 1989" that the contract would be awarded shortly and that it should be ready to deliver 30 rifles in 30 days. McMillan says that because of the long lead time for parts, it began ordering or manufacturing the parts necessary for the rifles.

According to McMillan, it was expecting a solicitation for 220 rifles when the Navy issued RFP No. 0196 for only 30 rifles on August 21, 1989. Further, McMillan says it still was ready to produce the 30 rifles for a contract that was to be awarded on September 1. McMillan maintains that it was unfair to cancel RFP No. 0196. In this regard, McMillan states that based on the assurances of Navy employees the firm had purchased or manufactured the parts necessary to deliver 30 rifles by October 1. According to McMillan, it spent or committed \$131,510 on behalf of the Navy and the Navy should reimburse it that amount.

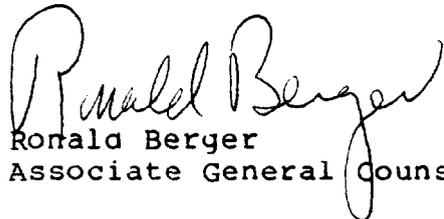
To the extent that McMillan is objecting to the cancellation of the RFP, the protest is untimely. Under our Bid Protest Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1990). The Navy canceled RFP No. 0196 on December 4, 1989 and McMillan did not object until it filed its letter with us on May 24, 1990. Under the circumstances, McMillan's contentions regarding the cancellation of the sole source

solicitation are untimely. In any event, we do not consider protests that award should be made on a sole source basis to the protester. See JL Assocs., Inc., B-234106, Mar. 22, 1989, 89-1 CPD ¶ 295.

With respect to McMillan's claim that it should be reimbursed its costs, the protester does not assert that, based on the oral advice of Navy employees, a contract actually came into existence.^{1/} Rather, McMillan argues that it incurred expenses in anticipation of being awarded a contract and requests that it be reimbursed for those expenses. Under these circumstances, there is no basis for recovery since McMillan's expenditures were the result of a business judgment exercised prior to the award of a contract and the government received no benefit as a result.^{2/} Leisure Inv. Co., B-233904.2, Apr. 4, 1989, 89-1 CPD ¶ 353.

McMillan also argues that the Navy has unreasonably delayed awarding a contract under RFP No. 0415, resulting in further harm to it. A delay in meeting a procurement milestone, such as an award date, is a procedural deficiency which does not alone provide a basis for protest because it has no effect on the validity of the procurement. American Fuel Cell and Coated Fabrics Co., B-234395, Feb. 21, 1989, 89-1 CPD ¶ 183, aff'd, American Fuel Cell and Coated Fabrics Co.--Recon., B-234395.2, Mar. 21, 1989, 89-1 CPD ¶ 290.

The protest and claim are dismissed.


Ronald Berger
Associate General Counsel

^{1/} Since the law and regulations require written notice of award, we think it unlikely that the protester could establish that a contract resulted from the alleged oral advice. James M. Smith, Inc., B-233877, Apr. 19, 1989, 89-1 CPD ¶ 390.

^{2/} The Navy has expressed concern about the alleged unauthorized statements attributed to its employees and it has informed us that the matter has been forwarded to its Competition Advocate General and Inspector General.