

Schatz
KHH/O



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sea Corp
File: B-244380
Date: July 12, 1991

Michael G. Fisk for the protester.
William R. Sheehan, Esq., Department of the Navy, for the agency.
Sylvia Schatz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency's inadvertent disclosure to awardee of deficiencies in protester's proposal gave awardee unfair competitive advantage is untimely where filed within 10 working days after the basis of protest was known.
2. Protest alleging that provisions of the Service Contract Act should have been included in the request for proposals is untimely where it was clear from the face of the solicitation that it did not contain Service Contract Act provisions and protest was not filed prior to the closing date for receipt of initial proposals.

DECISION

Sea Corp protests the award of a contract to American Systems Corporation (ASC) under request for proposals (RFP) No. N00140-90-R-0960, issued by the Department of the Navy for engineering and technical services.

We dismiss the protest.

The RFP, issued on February 14, 1990, with a closing date of April 13, contemplated award of a cost-plus-fixed-fee contract. The Navy received offers from Sea Corp and ASC. After evaluation of initial offers, discussions were held on November 26. On the same day, the Navy telefaxed best and final offer (BAFO) requests to the offerors that also described the technical deficiencies in their proposals. During transmission, the agency noticed that Sea Corp's letter was inadvertently being faxed to ASC. After the first two pages had been sent in error, the transmission was terminated and the contracting officer was notified. The contracting officer reviewed the material that was telefaxed in error. On

November 27, the contracting officer sent Sea Corp a letter in which he explained the inadvertent disclosure, but also advised that the disclosure was not considered prejudicial to Sea Corp (due to the limited information in the two telefaxed pages); and that the RFP therefore would not be canceled. On December 3, Sea Corp requested during a telephone conversation with the Navy that the first two pages of ASC's deficiency letter be sent to Sea Corp to compensate for the disclosure of Sea Corp's letter, but the contracting officer declined the request. BAFOs were received from both offerors on April 26, 1991. Award was made to ASC on May 31, and Sea Corp filed this protest with our Office on June 7.

Sea Corp contends that the Navy's inadvertent disclosure to ASC of the first two pages of its BAFO deficiency letter, which it claims contained proprietary information about Sea Corp's proposal, gave ASC an unfair competitive advantage, because the awardee was in a position to use the information in preparing its BAFO, and thus to improve its technical rating and lower its cost in its BAFO. Sea Corp concludes that award to ASC under these circumstances was improper.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1991), protests must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. See Technical Support Servs., Inc., B-235406, May 12, 1989, 89-1 CPD ¶ 456. The record clearly shows that Sea Corp knew no later than December 3, following its telephone discussion with the agency, that the inadvertent disclosure of information in its BAFO letter had taken place. Instead of protesting at that juncture, however, Sea Corp chose to continue participating in the procurement, submitting its BAFO even after the Navy declined Sea Corp's specific request for release of information from ASC's BAFO letter. Since Sea Corp knew the basis of its protest on December 3, the firm was required to protest by December 17, 10 working days later. Sea Corp did not protest the inadvertent disclosure until months later, on June 7, 1991, after learning that it had not received the award. Sea Corp's protest therefore is untimely and will not be considered.^{1/}

Sea Corp also argues that the contracting officer improperly failed to include provisions of the Service Contract Act of

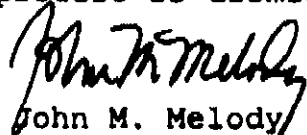
^{1/} Sea Corp states that it did not protest until after award because it believed that a preaward protest would harm its standing with the agency in any subsequent resolicitation. While this was a business judgment Sea Corp was free to make, it does not provide a basis for waiving our timeliness requirements.

1965 (SCA), 41 U.S.C. § 351 et seq. (1988) in the RFP; the SCA requires service contractors to pay their employees minimum wages and fringe benefits. The protester argues that because ASC does not comply with SCA requirements, any award to that firm would be improper.

This argument also is untimely. Under our Regulations, alleged solicitation deficiencies must be protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Thus, if the protester believed the absence of SCA provisions constituted a solicitation defect, it was required to protest on this basis prior to the April 13 closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1); Management Eng'gs, Inc.; KLD Assocs., Inc., B-233085; B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156.

Sea Corp states it did not protest prior to the April 13 closing date due to its mistaken belief that the Navy would amend the solicitation to include the SCA provisions shortly before award. The protester's allegedly mistaken belief that the agency would add the SCA provisions before award does not excuse its failure to protest the absence of these provisions prior to the closing date, again, as required under our Regulations.

The protest is dismissed.



John M. Melody
Assistant General Counsel