



Comptroller General
of the United States

Washington, D.C. 20548

G. Pietrovito

Decision

Matter of: Analytica, Inc.

File: B-243692

Date: July 31, 1991

Loren R. Needles for the protester.
Richard J. Webber, Esq., and Dean L. Grayson, Esq., Arent,
Fox, Kintner, Plotkin & Kahn, for Falcon Microsystems, Inc.,
an interested party.
Craig E. Hodge, Esq., and Robert E. Vollmar II, Esq.,
Department of the Army, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest of an alleged price disclosure by the procuring agency in a negotiated procurement need not be filed within 10 working days of the date the protester learned of the alleged disclosure where the agency promised corrective action; however, when the protester knew from the issuance of the solicitation that the agency was not performing the promised corrective action, the protester was required to protest within 10 working days of receipt of the solicitation, thus its post-award protest, which was not filed within 10 working days of the protester's receipt of the solicitation, is untimely under the General Accounting Office Bid Protest Regulations.

2. Untimely protest alleging the disclosure of the protester's price by the procuring agency will not be considered under the significant issue exception to the General Accounting Office (GAO) timeliness requirements where the issue raised in the protest has been considered on the merits by GAO in prior decisions.

DECISION

Analytica, Inc. protests the award of a contract to Falcon Microsystems, Inc. under request for proposals (RFP) No. DAAE07-91-R-Q219, issued by the United States Army Tank-Automotive Command for consulting and training services in support of the agency's new electronic publishing system.

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Analytica contends that the agency improperly disclosed its price to Falcon during the procurement.

We dismiss the protest as untimely.

On February 14, 1991, the agency requested pricing and market information from Analytica and Falcon regarding the performance of consulting and training services in support of an electronic publishing system.^{1/} Analytica indicated its availability to perform the requested services at a price of \$29,585, and Falcon indicated its price would be \$39,000 to perform the work. Falcon intended to use Analytica as its subcontractor and Analytica submitted a subcontract price quote of \$25,000 to Falcon.

On March 21, the agency issued the RFP for the training and consulting services to only Analytica and Falcon.^{2/} Analytica received the RFP on March 27. The RFP requested only price proposals and informed offerors that award would be made to the lowest priced, technically acceptable offeror.^{3/} Offers were received from Analytica (\$30,400) and Falcon (\$28,000)^{4/} by the April 8 closing date, and award was made to Falcon on April 10. This protest followed on April 17.

Analytica protests that on or about March 7, prior to the issuance of the RFP, the Army disclosed Analytica's price to Falcon.^{5/} Specifically, Analytica argues that an Army contracting specialist disclosed Analytica's market survey

1/ Prior to the issuance of the RFP, Falcon was performing training services in support of the electronic publishing system under contract No. DAAE07-90-C-Q217, with Analytica as Falcon's subcontractor.

2/ The agency did not synopsize the RFP requirement.

3/ The RFP did not request technical proposals or provide for a comparative technical evaluation.

4/ Falcon proposed to use a different subcontractor.

5/ Analytica also protested that Falcon is not qualified to perform the contract work. The agency in its report responded to this allegation, and the protester in its comments "concede[d] that the contracting officer is in the best position to assess whether any particular bidder satisfies the minimum qualifications to perform the work," and did not address the agency's response. We consider this issue to have been abandoned. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

price to Falcon.^{6/} Analytica states that prior to the issuance of the RFP it orally complained of this price disclosure to the Army, which, according to Analytica, stated that although the disclosure was regrettable,^{7/} Analytica would not be prejudiced because the award under the RFP would not be based solely on price but on the qualifications of the firms.^{8/} Analytica also states, and the interested party does not rebut, that Falcon informed Analytica prior to the issuance of the RFP that Falcon would not compete for the award. The Army denies that it disclosed Analytica's precise price to Falcon, although it admits that it disclosed to Falcon its relative price standing.

The Army argues that Analytica was required to protest within 10 working days of learning of the alleged price disclosure and that its post-award protest is untimely. We do not agree that Analytica was required to protest within 10 working days of the date it learned of the alleged disclosure. In response to Analytica's concern about the disclosure of its price, the agency advised Analytica that award would not be based only upon price and therefore Analytica would not be prejudiced by the alleged disclosure. In light of the agency's statements, Analytica was not required to file a defensive protest but could await the agency's promised corrective action. See, e.g., Brandon Applied Sys., Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD ¶ 486.

Contrary to the agency's assurances to Analytica, the RFP provided that award would be made to the technically acceptable offeror with the lowest price. Accordingly, Analytica knew when it received the RFP that the agency was not performing the promised corrective action. Under the circumstances, Analytica was required to protest within 10 working days of March 27, the date it received the RFP. See 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.2(a)-(2)). Instead, Analytica submitted a proposal and

^{6/} Analytica supports its allegations with a detailed affidavit.

^{7/} The Army argues that this disclosure did not occur during the procurement since the RFP had not yet been issued. We do not agree with the agency's apparent belief that its market/price survey and subsequent issuance of an RFP to act on the price information were not part of the same procurement.

^{8/} Analytica's oral complaint to the Army does not constitute an agency-level protest; the Federal Acquisition Regulation (FAR) requires protest objections to be written. See FAR § 33.101; K-II Constr., Inc., 65 Comp. Gen. 422 (1986), 86-1 CPD ¶ 270.

waited until it lost the award before protesting.^{9/} Since Analytica's April 17 protest was not filed within 10 working days of receipt of the RFP, its protest is untimely.^{10/}

Analytica contends that we should consider its protest under the significant issue exception to our timeliness requirements. See 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.2(b)). Specifically, the protester contends that its price disclosure allegation represents a possible violation of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (Supp. 1989), and that we have not yet considered a case involving a price disclosure under the OFPP Act.

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Lucas Place, Ltd.--Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the best interest of the procurement system. Golden North Van Lines, Inc., 69 Comp. Gen. 610 (1990), 90-2 CPD ¶ 44. In order to prevent the timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to untimely protests that raise issues of widespread interest to the procurement community and that have not been considered on the merits in a previous decision. DynCorp, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. ___, 90-2 CPD ¶ 310.

Analytica's protest of an alleged price disclosure does not meet this standard. We have decided numerous cases discussing improper price disclosures. See, e.g., The Franklin Inst., B-182560, Sept. 26, 1975, 75-2 CPD ¶ 194; ITT Telecom Prods. Corp., B-221325; B-221326, Mar. 21, 1986, 86-1 CPD ¶ 283. The

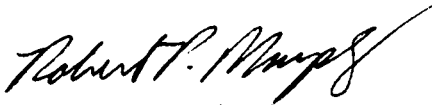
^{9/} The fact that Analytica may have believed that Falcon may not compete for award does not excuse Analytica's failure to timely protest the alleged price disclosure since the RFP requested competitive offers. See, e.g., Diogenes Corp.--Recon., B-229828.2, Feb. 8, 1988, 88-1 CPD ¶ 125.

^{10/} Even were we to consider the RFP statement--that price would be the award determination factor--to be a solicitation impropriety, because the agency had earlier informed Analytica that award would not be based solely on price, Analytica's protest after the closing date for receipt of proposals is untimely. See 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.2(a)(1)).

disclosure of an offeror's or bidder's price is improper, irrespective of the requirements of the OFPP Act, and therefore we do not think that the fact that the OFPP Act also prohibits such a disclosure renders this matter a significant issue.

The protest is dismissed.

While we will not waive our timeliness requirements to decide Analytica's untimely protest, the record indicates that an improper price disclosure may have occurred. For that reason, we have notified the Secretary of the Army so that the agency may address the matter as it finds appropriate. See DynCorp, B-240980.2, supra.


for James F. Hinchman
General Counsel