



Comptroller General
of the United States

Washington, D.C. 20548

144740

Decision

Matter of: Berkshire Computer Products

File: B-244355

Date: August 20, 1991

Edward J. Walsh for the protester.
Charles J. McManus, Esq., Maryann L. Grodin, Esq., and Barbara Amster, Esq., Department of the Navy, for the agency.
Sylvia Schatz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DTGEST

1. Where Commerce Business Daily (CBD) notice announcing specifications and agency's intent to place an order without competition against a firm's nonmandatory schedule contract gives other potential alternative sources 15 days to submit expressions of interest showing their capability to respond to the agency's requirements, protest challenging specifications when they appear in subsequently issued solicitation is untimely, as it was filed well beyond the closing date for written expressions of interest and 10 working days after publication of the CBD notice.

2. General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO's Bid Protest Regulations, where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

DECISION

Berkshire Computer Products protests as unduly restrictive certain specifications in request for proposals (RFP) No. N66001-91-R-5067, issued by the Department of the Navy for 9 Micro Technology, Inc. (MTI) removable, hard-disk-drive subsystems (Model-276R) and 20 add-on 550MB canister-mounted disk drives (Model DAI-76P).

We dismiss the protest.

On March 1, 1991, the Navy announced in the Commerce Business Daily (CBD) its intent to place an order without competition against MTI's nonmandatory General Services Administration schedule contract for the equipment. The announcement stated,

however, that potential alternate sources would be considered if they supplied technical and pricing information within 15 days showing their ability to meet the requirements. The synopsis listed all the technical specifications for the equipment, including the requirement that drives be compatible with existing MTI subsystems and canister-mounted disk drives, and that disk drives have the capability to format directly from the front disk drive control panel to avoid the need for external formatters.

Berkshire responded by letter of March 29, proposing to supply the same MTI equipment that the agency intended to order against MTI's schedule contract, for a lower price. Consequently, on May 16, the Navy issued an RFP with a June 6 closing date for receipt of initial proposals; the solicitation specifications were identical to those announced in the CBD notice. On May 24, after receiving the solicitation, Berkshire filed an agency-level protest claiming that two specifications in the RFP--requiring (1) that drives be compatible with existing MTI subsystems and canister-mounted disk drives; and (2) that disk drives have the capability to format directly from the front disk drive control panel--were unduly restrictive of competition. In a subsequent telephone call to Berkshire's representative, the cognizant contract negotiator questioned him about the firm's letter of March 29, in which the firm claimed that it could supply the specified MTI equipment at a stated price. The representative responded that after the letter was sent, the firm sold the equipment it intended to provide pursuant to the CBD notice, and that if it reordered a new shipment from MTI, the price to the government would be three times higher than the firm proposed in its March 29 letter. Consequently, the representative suggested that the agency procure alternative products, which "would provide a better solution to what the customer is requiring," and that the Navy replace some of the existing MTI equipment with other equipment in order to make Berkshire's suggested alternative products compatible.

On June 5, the Navy denied Berkshire's protest. The firm then filed this protest with our Office on June 6, the date set for receipt of proposals; only MTI submitted a proposal. In its protest, Berkshire raises the same issues contained in its agency-level protest. Berkshire essentially concludes that the two specifications it claims are unduly restrictive of competition result in a de facto sole-source award to MTI because no other potential offerors can supply equipment that is identical or equal to MTI's equipment. Berkshire requests that the agency issue an amendment deleting the two specifications it believes are unduly restrictive of competition from the RFP and extend the closing date for receipt of proposals.

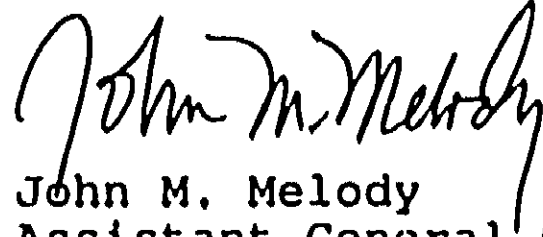
Where a firm initially files a protest with the contracting agency, we will consider a subsequent protest to our Office following the agency's adverse action only if the initial protest was timely filed, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.2(a)(3)). The publication of a proposed sole-source procurement in the CBD constitutes constructive notice to potential offerors of a solicitation and its contents. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490. Our cases have differed in the time frame applied for filing a protest challenging the sole-source nature of the procurement where, as here, the CBD notice gives offerors the opportunity to identify their interest and capability to respond to the requirement within a specified number of days. Id. In some cases, we have required a potential offeror to file a protest by the closing date for written expressions of interest to the CBD notice. See Pro-Tem, B-231087, Apr. 29, 1988, 88-1 CPD ¶ 427. In other cases, we have required a potential offeror to file a protest 10 working days after the publication of the CBD notice. See S.T. Research Corp., B-232751, Oct. 11, 1988, 88-2 CPD ¶ 432.

As indicated above, the March 18 CBD notice contained the specifications to which Berkshire objects. Berkshire did not protest the specifications at that time but, rather, provided the Navy with evidence that it could supply the MTI equipment meeting all the specifications in the announcement at a lower price than the manufacturer. On this basis, the agency abandoned its planned noncompetitive award to MTI and issued a competitive solicitation. Since Berkshire's initial protest (to the agency) was not filed until May 24, well beyond 10 days after publication of the March 18 synopsis of intent and the 15-day period for expressions of interest, the firm's protest is untimely under any of the theories communicated in our previous cases, and we therefore will not consider it.

Berkshire argues that, even if its protest is untimely, we should consider it under the exception to our timeliness rules in our Regulations for issues that are significant to the procurement community. See 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.2(b)). There is no basis for applying the exception here. In order to prevent the timeliness requirements from becoming meaningless, we strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Keco Indus., Inc., B-238301, supra. While we recognize the importance of the matter to the protester, in our view, the issue of whether the specifications in question are unduly restrictive is not of sufficient interest to the procurement community as a whole

to warrant invoking the exception. Moreover, we have considered protests of alleged restrictive specifications in numerous prior decisions. See, e.g., Massa Prods. Corp., B-236892, June 9, 1990, 90-1 CPD ¶ 38.

The protest is dismissed.

A handwritten signature in cursive script, reading "John M. Melody".

John M. Melody
Assistant General Counsel