

146664
Benejam



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

Decision

Matter of: The Jonathan Corporation
File: B-247053.7
Date: May 15, 1992

Donald P. Young, Esq., Saul, Ewing, Remick & Saul, for the protester
Rhonda L. Russ, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of cancellation of solicitation filed more than 10 working days after protester learned of the cancellation is untimely.
2. Request for reinstatement of protest challenging award of a contract because agency did not take proposed corrective action (partially terminating contract for convenience and reopening discussions with protester) which formed the basis for dismissal of protest as academic, is untimely, where protester knew basis for dismissal, but filed request for reinstatement of protest more than 10 working days after protester learned that the agency canceled the solicitation, and therefore, was not taking proposed corrective action.

DECISION

The Jonathan Corporation protests the cancellation of request for proposals (RFP) No. N00024-91-R-8535, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for the phased maintenance of LSD/LPD class vessels homeported in Norfolk, Virginia. The protester also requests that we reinstate Jonathan's earlier protest against the award of a contract under the solicitation which we dismissed as academic.

We dismiss the protest as untimely because it was filed more than 10 days after the protester knew, or should have known, of the basis for its protest.

BACKGROUND

The RFP, issued on March 20, 1991, contemplated the award of a cost-plus-award-fee contract for nine phased maintenance availabilities to be performed on three ships over a 5-year period. Of the seven firms solicited, five offerors, including Jonathan, submitted offers by the June 4 extended closing date for receipt of initial proposals. The agency held discussions and received best and final offers (BAFO) from all five. In a December 10 letter, the agency announced that the contract had been awarded to Metro Machine Corporation for a total proposed cost of \$32,271,346.

On December 19, Moon Engineering Co., Inc. (MECO), the incumbent, protested the award to our Office, essentially arguing that NAVSEA had improperly evaluated technical and cost proposals; had failed to conduct meaningful discussions with MECO; and had created an improper auction.¹ Following its debriefing, Jonathan also protested the award to our Office on virtually identical grounds on January 3, 1992.

In a January 15 letter, the agency informed our Office that it had discovered an error in the procurement and requested that we dismiss MECO's and Jonathan's protests based upon the following proposed corrective action: (1) terminate for convenience the contract awarded to Metro, with the exception of one availability on the USS Austin; (2) amend the RFP to reflect the reduction from nine to eight in the number of availabilities required; (3) reveal the proposed costs and fees all offerors submitted in response to BAFOs on the original nine availabilities; and (4) conduct another round of discussions with all offerors and request new BAFOs for the remaining eight availabilities. MECO subsequently withdrew its protest based upon NAVSEA's proposed corrective action. We dismissed Jonathan's protest on January 22.

On February 10, NAVSEA issued amendment No. 0017 canceling the RFP. On February 27, Jonathan filed the instant protest in our Office challenging the cancellation and requesting that we reinstate its earlier January 3 protest challenging the original award to Metro.

¹In accordance with Federal Acquisition Regulation § 33.104(b), the head of the procuring activity determined that urgent and compelling circumstances significantly affecting the interests of the United States did not permit suspending performance of the contract pending our decision on the protest, and directed Metro to continue performance of the first availability on the USS Austin.

NAVSEA requests that we dismiss Jonathan's protest of the cancellation as untimely filed. The agency states that it telefaxed a copy of amendment No. 0017 to Jonathan on February 10, and sent a copy of the amendment via overnight mail which Jonathan received on February 11. The agency thus argues that since Jonathan filed its protest more than 10 working days after it received notice of the cancellation, its protest is untimely filed and should not be considered. See 4 C.F.R. § 21.2(a)(2) (1992).

While Jonathan does not deny having received amendment No. 0017 on February 10, the protester argues that we should nevertheless consider its protest of the cancellation because, according to Jonathan, the amendment did not provide adequate notice since it was not signed by the contracting officer. The protester further argues that even if its challenge to the cancellation is untimely, Jonathan should not be precluded from "reinstating" its earlier protest against the award to Metro of the availability on the USS Austin.

DISCUSSION

Protest of Cancellation

Even without the contracting officer's signature on amendment No. 0017, we think that the document gave Jonathan adequate notice of the cancellation. The amendment (Standard Form 30--AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT) is a 1-page document which identifies the RFP and the issuing activity. Block No. 14 (DESCRIPTION OF AMENDMENT/MODIFICATION) clearly states: "the subject procurement No. N00024-91-R-8535 for the LSD/LPD Phased Maintenance Program . . . is hereby canceled." Given the clarity and directness of this statement, it is unreasonable for Jonathan to argue that the lack of the contracting officer's signature on the document somehow detracted from its intended communication--at a minimum, that the agency intended to cancel the solicitation.

Further, of the 17 amendments to the RFP issued throughout the procurement, none contains a signature in block 16B where the contracting officer's signature would generally appear. In light of this invariable pattern, it is illogical for Jonathan to attach any particular significance to the lack of a contracting officer's signature on amendment No. 0017. If Jonathan had any doubts concerning the amendment, it merely had to contact the buyer, whose name, address, and telephone number conspicuously appeared in block No. 6 of the amendment, and inquire as to its intended meaning. In our view, amendment No. 0017 adequately notified the protester that the agency intended to cancel the RFP.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. Id. 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. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. Accordingly, Jonathan's protest of the cancellation, filed in our Office on February 27--more than 10 working days after Jonathan received the February 10 telefacsimile transmission of the amendment notifying it of the cancellation--is clearly untimely and will not be considered.² See Adrian Supply Co.--Recon., B-242819.3, July 17, 1991, 91-2 CPD ¶ 64, recon. den., B-242819.4, Oct. 9, 1991, 91-2 CPD ¶ 321.

Reinstatement of Jonathan's protest

Jonathan asserts that even if its protest of the cancellation is untimely, since its January 3 protest challenged the award of all nine availabilities to Metro, and since NAVSEA did not take the promised corrective action, Jonathan's protest regarding the remaining availability (the USS Austin) awarded to Metro is still viable. In this regard, Jonathan asserts that its acquiescence in our dismissing the protest was premised on NAVSEA's taking the corrective action it announced in its January 15 letter. We understand Jonathan to be arguing that since the basis for our dismissing its protest was the agency's proposed corrective action which would have given Jonathan an opportunity to compete under the solicitation, and since NAVSEA's canceling the solicitation essentially precludes that promised action, we should now consider its protest.

Jonathan's attempt to revive its initial protest is untimely. We dismissed Jonathan's protest challenging the award to Metro on January 22. Our decision specifically explained that we were dismissing the protest as academic because the agency was terminating for convenience Metro's contract with respect to eight of the availabilities and reopening discussions with all offerors. Accordingly,

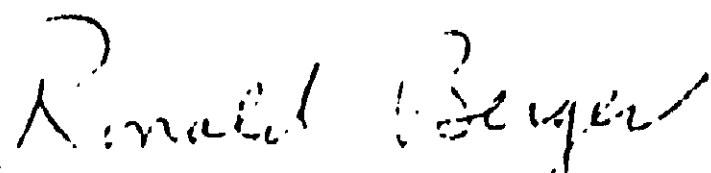
²February 17 was not a working day of the federal government and is therefore not included in our calculation of the 10-day period. See 4 C.F.R. § 21.0(e). Even assuming that Jonathan did not receive the February 10 transmission, its protest is nevertheless untimely since it was filed more than 10 working days after February 11 when Jonathan received a copy of the amendment by overnight mail.

Jonathan knew the basis for our dismissal, and it knew when it received amendment No. 0017 that the agency was not performing the promised corrective action. Jonathan was thus required to protest within 10 working days from February 10, the date it received the amendment canceling the RFP. See 4 C.F.R. § 21.2(a)(2). Since Jonathan's February 27 protest was not filed within 10 working days of receipt of the amendment, its protest is untimely. See Analytica, Inc., B-243692, July 31, 1991, 91-2 CPD ¶ 108.

Jonathan points to NAVSEA's January 15 letter requesting that we dismiss its protest in which the agency stated that "NAVSEA agrees that the dismissal [of Jonathan's protest] should be without prejudice to the right of . . . Jonathan to timely raise the same protest grounds, including claims for protest pursuit costs, in any subsequent protest of this procurement." (Emphasis added.) Jonathan argues that in view of NAVSEA's agreement, Jonathan should not be barred from "reinstating" its January 3 protest, including its claim for protest costs.¹

NAVSEA's letter does not in any way suggest acquiescence in a waiver of our timeliness rules. The agency's letter specifically states that it would not object to Jonathan's "timely" raising the same protest grounds in a subsequent protest, which, as already discussed, Jonathan failed to do here. In any event, contrary to Jonathan's suggestion, agencies may not waive our timeliness standards. Pacific Propeller, Inc., B-229868, Dec. 30, 1987, 87-2 CPD ¶ 649.

The protest is dismissed.



Ronald Berger
Associate General Counsel

¹Jonathan also submits what it purports to be a partial transcript of a telephone conference in which counsel for Jonathan, NAVSEA, and the General Accounting Office attorney handling the protest participated, whereby Jonathan's concerns about Jonathan's preserving arguments it made in its January 3 protest were discussed.