



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Management Systems Designers, Inc.--Request
for Modification of Remedy

File: B-244383.8

Date: June 8, 1992

Thomas W.A. Barham, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.
William P. McGinnies, Esq., United States Customs Service, Department of the Treasury, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request that the General Accounting Office modify the remedy to permit an offeror to recover its proposal preparation costs is denied where claimant was not awarded proposal preparation costs in the protest decision and did not request reconsideration of the remedy within 10 working days after the basis of the claimant's request was known.

2. While the General Accounting Office Bid Protest Regulations provide for consideration of untimely protests when a significant issue is involved or good cause shown, there is no similar exception for requests for reconsideration.

DECISION

Management Systems Designers, Inc. (MSD) requests that we modify the remedy in Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD 518.

We deny the request.

The request for proposals (RFP) was issued on August 1, 1990, by the United States Customs Service, Department of the Treasury, and anticipated the award of an indefinite delivery/indefinite quantity contract for technical support services. The RFP was comprised of seven task areas under which Customs could place orders and provided an estimate of the total number of hours per year the contractor could expect to perform in each task area, and a list of the labor categories that would be required for performance of each

task area. The RFP contained a list of technical evaluation factors. Offerors were required to submit a technical proposal, and to propose an hourly rate and a total annual cost for each labor category.

Customs received 10 proposals in response to the solicitation and, after the initial evaluation, placed 4, including the proposal submitted by MSD, in the competitive range. Each of the competitive range offerors was requested to attend discussion sessions. Immediately prior to the discussion sessions, Customs learned that it would have funding only for task A in the base year. The negotiation minutes showed that only Institute for Systems Analysis (ISA), one of the four offerors whose proposal was included in the competitive range, was advised during discussions that funding was available for only task A. The other three offerors in the competitive range were only generally advised that at that time funding for certain tasks (other than tasks A and B) was unknown.

When the agency received best and final offers (BAFO), it initially scored and evaluated them with respect to task A only in light of the fact that funding was available for only task A. However, after the agency's legal department informed the evaluators that this was improper because the solicitation did not provide for the evaluation of task A only, the evaluators rescored the BAFOs for all seven tasks. In doing so, they relied on their notes from the discussion sessions and did not hold further discussions or request revised proposals. In evaluating the cost proposals, the agency, in an attempt to realistically assess the true costs of awarding the contract to any particular offeror, considered that only task A would be funded in the base year. The agency also determined that its true requirements for task A were for 24,000 hours for the base year, not 14,000 hours as stated in the solicitation. When the technical and cost scores were combined, ISA was ranked first and was awarded the contract. The three other offerors in the competitive range subsequently submitted protests to our Office.

We sustained MSD's protest because the agency failed to comply with the requirement that where there is a significant change in the government's requirements after an RFP is issued, the government must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond to them. See Federal Acquisition Regulation (FAR) § 15.606(a); Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63. We further found that Customs's failure to comply with the regulation may have been prejudicial to offerors and affected the results of the competition, since offerors might have revised their technical and cost proposals if they had been aware of the

substantial change in requirements. Finally, we expressed concern that offerors were not treated equally because, during discussions, ISA was specifically told that funding was available for task A only, while the other offerors were only generally told that funding for certain tasks might be unavailable. We recommended that Customs reopen the competition, issue an amendment reflecting its changed requirements, and permit the four competitive range offerors to submit revised proposals. If Customs determined that an offeror other than ISA was entitled to award, it was advised to terminate the ISA contract and award a contract consistent with its new determination.

In response to our decision, Customs reviewed the solicitation and reexamined its actual needs. On March 17, 1992, Customs amended the solicitation and requested the offerors in the competitive range to submit revised proposals based on the new requirements. The amended solicitation completely eliminated three of the seven tasks required by the original solicitation, and substantially reduced the amount of work in the remaining four tasks. On April 9, MSD filed its current request, arguing that the drastically reduced requirements resulting in part from Customs's reassessment of its needs and in part from Customs's decision to permit ISA to continue performance during the protest and the time it took to redefine its needs, in effect excluded MSD from the competition. MSD requests that we modify our remedy and permit MSD to recover its proposal preparation costs.

Under our Bid Protest Regulations, a request for reconsideration must be filed with our Office within 10 working days after the requesting party knows or should know the basis for reconsideration. 4 C.F.R. § 21.12 (1992). This rule applies to a request for modification of the remedy. See Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538; The Howard Finley Corp., B-226984.2, Nov. 11, 1988, 88-2 CPD ¶ 492.

Here, MSD received the revised solicitation which formed the basis of its request for modification of our remedy on March 20, 1992. MSD was therefore required to file its request no later than April 3, 10 working days later. Since MSD did not file it until April 9, it is untimely and will not be considered.¹

¹MSD argues that its submission should be treated as a protest of the amended solicitation and should be considered timely because it was filed prior to the closing date for the receipt of revised proposals. See 4 C.F.R. § 21.2(a)(1). We disagree. MSD specifically titled its submission a request for modification of remedy and

MSD asserts that since it is not arguing that our prior decision contains any errors of fact or law or that it has information bearing on our decision to sustain the protest, its request for modification of the remedy is not a request for reconsideration and should not be considered untimely under the regulation governing requests for reconsideration. In this regard, MSD argues that the cases cited above do not support the conclusion that its request is untimely because in those cases, the protester's request for proposal preparation costs reflected a disagreement with our prior decision. MSD argues that its request is not based on disagreement with our decision, but rather, on events that occurred after the decision was issued.

Contrary to MSD's position, neither The Howard Finley Corp., supra, nor Data Based Decisions, Inc.--Claim for Costs, supra, involved situations in which the party requesting proposal preparation costs disagreed with our decision. Rather, both cases involved situations where our Office sustained a protest and as part of the remedy found that the protesters should be reimbursed their protest costs. When the agency and the protester could not agree on the amount for which the protester was entitled to be reimbursed, the claims were submitted to our Office for resolution under our Regulations. See 4 C.F.R. § 21.6(f)(2). When the protesters submitted their claims, they also requested proposal preparation costs. In both cases we found that the request was untimely filed. Here, while the facts giving rise to MSD's request for modification became evident after the protest was decided, the fact is that MSD's complaint is the same, that is, that our remedy was inadequate. Accordingly, MSD was required to submit its request for modification of the remedy within 10 working days after it learned the basis of the request.

MSD argues in the alternative that if we find the request untimely, we should consider it under either the good cause or significant issue exceptions to our timeliness rules. However, while our Regulations provide for our consideration of untimely protests where a significant issue is involved or good cause is shown, 4 C.F.R. § 21.2(c), there is no similar provision regarding untimely requests for reconsideration. Instead, the timeliness standards for

referenced our decision sustaining its protest. MSD's submission did not in any way challenge the terms of the revised solicitation; rather, MSD merely argues that we should modify our recommendation and permit MSD to recover its proposal preparation costs.

filing of requests for reconsideration are purposefully more inflexible than those for filing protests, Atkinson Dredging Co., B-218030.2, July 3, 1985, 85-2 CPD ¶ 22.

The request for modification is denied.


Ronald Berger
Associate General Counsel