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

Decision

Matter Of: Mikros Systems Corporation
File: B-249344; B-249344.2
Date: November 16, 1992

Dennis J. Riley, Esq., and Andrew B. Katz, Esq., Elliott, Bray & Riley, for the protester.
Jonathan H. Kosarian, Esq., and Michael D. Rigg, Esq., Department of the Navy, for the agency.
M. Penny Ahearn, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging adequacy of proposal preparation period is dismissed as untimely where filed with the General Accounting Office more than 10 working days after protester's receipt of agency's response to agency-level protest, in which agency made clear its position that no further action would be taken on the protest arguments; protester's continued pursuit of protest with agency did not toll timeliness requirements.

DECISION

Mikros Systems Corporation protests the sample requirement in request for proposals (RFP) No. N00189-92-R-0039, issued by the Department of the Navy for data terminals. The protester contends that the solicitation, as amended, provided a proposal preparation period that was inadequate for development of the samples.

We dismiss the protest.

The RFP, as issued on April 10, 1992, required a bid sample and provided a 2-month proposal preparation period. Amendment No. 0001, issued on May 15, among other things, more specifically provided that the sample was to "be identical to the equipment the offeror intends to deliver to the government if awarded the contract"; it also extended the closing to June 12, a 3-calendar day extension. Mikros timely filed an agency-level protest on May 28, contending, in part, that the requirement for a sample identical to the production equipment was restrictive of competition. Additionally, the protester contended that the closing date, as amended, provided an inadequate proposal preparation period to develop the samples.

In response to Mikros' agency-level protest, the agency issued amendment No. 0002, dated June 3, and transmitted it by facsimile to Mikros that same date. This amendment changed the required sample to be either "identical or easily modifiable, to the equipment the offeror intends to deliver, if awarded the contract." Amendment No. 0002 also extended the closing date to July 10, a 28-calendar day extension, for a total 3-month proposal preparation period. By letter dated June 8, and sent via facsimile transmission to Mikros that same date, the contracting officer advised that amendment No. 0002 and the information set forth in the letter were in response to the firm's protest and that no further action would be taken.

After receiving this response to its first protest, Mikros filed a second agency-level protest, by letter dated June 16, which "reaffirm[ed]" its protest against the solicitation. In this second protest, Mikros again challenged the proposal preparation period, this time complaining that the July 10 closing date still was insufficient, since the firm had been forced to make a no-bid decision based on the requirement in amendment No. 0001 that samples be identical to production equipment.¹ In response, by letter dated June 23, the contracting officer stated that the firm's second protest did not raise any new issues, and declined to reconsider the July 10 closing date.

On July 8, Mikros filed this protest with our Office, reasserting its argument that it needed more time--beyond July 10--to prepare its sample due to its earlier no-bid decision. Mikros subsequently (in a supplemental protest) argued that the proposal preparation period could have been longer than that provided because the funds available for the procurement allegedly have been extended into fiscal year 1993, indicating that there was no rush to make award.

Where, as here, a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3) (1992). Once informed of initial adverse agency action, a protester may not delay filing a subsequent protest while it continues to pursue the protest with the agency. Tecniventas, S.A.--Recon., B-240323.2, Oct. 19, 1990, 90-2 CPD ¶ 320.

Although the agency's June 8 response to Mikros' May 28 agency-level protest actually relaxed the sample requirement

¹According to the protester, revising that decision would involve restart efforts which could not be completed by the amended July 10 closing date.

and extended the closing date, it clearly advised the protester that the information in amendment 0002 "is the response to your protest. No further action will be taken." This statement was sufficient to put Mikros on notice that, although the agency was somewhat extending the closing date and relaxing the requirements, it intended to do no more in response to Mikros' arguments. As such, this letter constituted initial adverse agency action on the issue of the adequacy of the proposal preparation time allowed. Mikros therefore was required to file any protest on this issue with our Office within 10 working days. Instead of doing so, Mikros continued to pursue the matter with the agency by means of the firm's June 16 second agency-level protest. Mikros did not then protest to our Office until July 8, more than 10 working days after its receipt of the agency's June 8 denial of the May 28 protest.

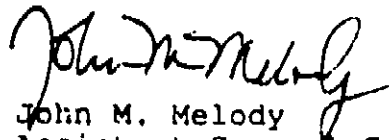
Mikros argues that its June 16 agency-level protest raised a new issue, and that the agency response to this protest constituted the adverse agency action in response to which the firm timely protested to our Office. We disagree. Although Mikros' June 16 protest to the agency for the first time referred to the firm's no-bid decision, the legal essence of the protest argument remained the same as the one to which the agency responded on June 8, i.e., that the proposal preparation period, for whatever reason, was inadequate. Mikros' June 16 protest reiterated its prior argument that the preparation time allowed was insufficient despite the agency's statement (in its June 8 response to Mikros' first protest) that no further action would be taken on the protest arguments. In light of this clearly articulated agency position that the time allowed, as extended, was sufficient, Mikros did not have the option of continuing to challenge the adequacy of the preparation time, and then timely protesting to our Office. We conclude that the protest to our Office is untimely. We therefore have no basis for questioning the amount of time provided for proposal preparation.²

In light of this conclusion, the question of whether the alleged funding extension shows that more preparation time could have been provided is academic; even if more time

²We note, however, that the proposal preparation period here was in excess of the required 30-day minimum response time for receipt of proposals from the date of issuance of a solicitation. 15 U.S.C. § 637(e)(3)(B) (1988); Federal Acquisition Regulation (FAR) § 5.203(b). Moreover, despite Mikros' continued disagreement with the proposal preparation period provided in the solicitation, as amended, it has yet to specify what it believes would have been an adequate period.

could have been provided, the import of our decision is that the July 10 closing date was legally unobjectionable since Mikros has presented no timely basis for questioning it.

The protest is dismissed.



John M. Melody
Assistant General Counsel