



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morey Machinery, Inc.

File: B-256101; B-256101.2

Date: April 14, 1994

Sam Z. Gdanski, Esq., for the protester.
Walker L. Evey, National Aeronautics and Space
Administration, for the agency.
Richard P. Burkard, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's failure to explain during discussions the basis for its rejection of protester's offer of equipment which did not conform to solicitation requirement is essentially a challenge to the solicitation requirement; the protest is untimely since it was filed after closing date for receipt of proposals.

DECISION

Morey Machinery, Inc. protests the award of a contract to Hermes Machine Tool Co., Inc. under request for proposals (RFP) No. 5-38087/064, issued by the National Aeronautics and Space Administration (NASA) for a 6-Axis Machining Center using a Fanuc 15-MA computer numerical control (CNC) unit. Morey alleges that NASA failed to hold adequate discussions concerning Morey's proposed alternate CNC unit, which the agency considered unacceptable. The protester also contends that the agency's requirement for a Fanuc CNC unit overstates its minimum needs and demonstrates a lack of procurement planning on the part of NASA.

We dismiss the protest as untimely.¹

The RFP provided that award would be made to the responsible offeror whose proposal conformed to the solicitation and was most advantageous to the government, price and other factors considered. It stated further that price is significantly more important than the other factors. NASA received four

¹Morey filed its initial protest on December 27, 1993; it filed a "supplemental" protest on January 18, 1994. We have consolidated the two protests for purposes of this decision.

proposals, including Morey's, by the September 24, 1993, closing date. Morey's proposal stated that its machine "is offered as standard" with a Dynapath CNC and briefly described some of its capabilities. The proposal stated further that "Morey Machinery will offer at an additional cost a Fanuc [CNC] in full compliance with the specification."

The agency included only the Hermes and Morey proposals in the competitive range. The agency provided the protester with written discussion questions dated November 30, and requested that it submit a best and final offer (BAFO) by December 9. The questions specifically advised Morey that the Dynapath CNC was unacceptable and directed the firm to "base your bid exclusively on the use of a Fanuc controller as specified" in the RFP.

Notwithstanding the agency's admonition, Morey submitted a BAFO which included the Dynapath CNC and a total price of \$430,000. Alternatively, Morey offered the Fanuc CNC and a total price of \$460,000. Hermes' proposed price was \$451,835, and its proposal was considered technically acceptable. Accordingly, on December 22, NASA awarded the contract to Hermes.²

Morey argues that the agency failed to conduct adequate discussions with it since NASA did not explain its reasons for concluding that the Dynapath CNC was unacceptable. The protester also contends that the requirement for the Fanuc units overstated the agency's needs and reflected inadequate procurement planning. These arguments, in our view, constitute a protest of an alleged solicitation impropriety.


Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of proposals must be filed not later than the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1993). As stated, the requirement for the Fanuc CNC was clearly set forth in the RFP. If the protester believed that this requirement was not justified or was unreasonable in that it excluded the Dynapath CNC, it was required to raise the issue by the September 24 closing date. Since Morey did not object to the requirement until December 27, Morey's

²Morey does not argue that it should have received the award on the basis of its higher-priced offer of the Fanuc unit.

challenges to the requirement are untimely. American Int'l Global, B-247896, July 2, 1992, 92-2 CPD ¶ 3. While the protester apparently expected that the agency would advise it of the reasons for requiring the Fanuc CNC and, therefore, not allowing the Dynapath, in the absence of a timely challenge to the RFP requirement, there was no requirement to do so.

To the extent that Morey argues that NASA's inclusion of its proposal in the competitive range did not put Morey on notice of the agency's final position concerning the Dynapath CNC, we find the argument to be without merit. First, since the RFP specifically required the Fanuc units, the agency's "position" was clear. Second, while the agency requested a BAFO from Morey, the language in the BAFO request also made clear that the Dynapath did not comply with the specifications and that NASA would only consider an offer including the Fanuc unit. Morey's decision to disregard the RFP terms and to continue to offer the Dynapath in its BAFO does not suspend our timeliness requirements. See William G. Tadlock Constr., B-251996, May 13, 1993, 93-1 CPD ¶ 382.

The protest is dismissed.


John Van Schaik
Acting Assistant General Counsel

¹In its March 2, 1994 comments submitted in response to the agency report on the protests, for the first time, Morey argues that the machine offered by Hermes does not comply with the specifications. We find this allegation to be untimely. The record shows that Morey had the information on which it bases this allegation in January since correspondence attached to its January 18 submission questioned the acceptability of Hermes' machine. Since the protester did not raise the matter as a protest issue within 10 working days, we dismiss the issue as untimely. 4 C.F.R. § 21.2(a)(2).