



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Source Diversified, Inc.

File: B-259034

Date: March 1, 1995

Lawrence J. Sklute, Esq., for the protester.
Carl L. Walker, Esq., United States Marine Corps, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest (filed after protester's proposal was eliminated from the competitive range) challenging an agency's failure to obtain a Delegation of Procurement Authority (DPA) from the General Services Administration pursuant to the Brooks Act, 40 U.S.C. § 759 (1988), is dismissed as untimely where the protested solicitation failed to include a clause prescribed by the Federal Information Resources Management Regulations advising that a DPA had been obtained, from which the protester knew or should have known before initial proposals were due that no DPA had been obtained.

DECISION

Source Diversified, Inc. (SDI) protests request for proposals (RFP) No. M67854-93-R-5001, issued by the United States Marine Corps to provide software support services for the maintenance, evaluation and development of the Marine Corps's tactical command, control, communications, computer and intelligence systems. SDI contends that the requirement at issue involves the acquisition of automatic data processing (ADP) support services subject to the Brooks Act, 40 U.S.C. § 759 (1988), but that the Marine Corps failed to obtain a Delegation of Procurement Authority (DPA) from the General Services Administration (GSA), as required by the Act.

We dismiss the protest as untimely.

The Brooks Act gives GSA exclusive federal purchasing authority for all ADP equipment or support services, which GSA may delegate to other federal agencies. 40 U.S.C. § 759(a)(1), (b)(3). GSA has implemented its authority under the Brooks Act through the Federal Information Resources Management Regulations (FIRMR), 41 C.F.R.

Subtitle E (1994). The FIRMR requires that agencies seeking to purchase ADP resources obtain a DPA from GSA. 41 C.F.R. § 201-39.106-1. The FIRMR also requires agencies to insert a clause in the solicitation describing and identifying the DPA which authorizes the procurement. 41 C.F.R. §§ 201-39.106-4; 201-39.5202-3.

The Brooks Act and the FIRMR do not apply to Department of Defense (DOD) ADP procurements, which fall into one of five exempted categories defined by the Warner Amendment, 10 U.S.C. § 2315 (1988); 40 U.S.C. § 759(a)(3)(C); 41 C.F.R. § 201-1.002-2(a)(2). As relevant here, the Warner Amendment exempts from Brooks Act coverage the procurement of ADP resources, whose function, operation, or use "involves the command and control of military forces," provided that the ADP resources are not used for routine administrative or business applications. 10 U.S.C. § 2315(a)(3), (b). There is no DPA requirement for procurements that qualify for a Warner Amendment exemption. See 41 C.F.R. §§ 201-1.002-2(a)(2); 201-39.106-1.

On April 21, 1993, before issuing the RFP, the Marine Corps prepared a written request to acquire the software support services under a Warner Amendment exemption to the Brooks Act. The request and supporting documentation (including the prospective RFP statement of work) reflected that the solicited services were in support of equipment which involved the "command and control of military forces." Based upon a detailed description of the equipment to be supported under this contract, the Commander, Naval Information Systems Management Center, granted approval to conduct this acquisition under the above Warner Amendment exemption.

The RFP was issued on May 4. Because the procurement was considered exempt from the Brooks Act, no DPA was obtained, hence the solicitation did not include the DPA notification clause appearing at 41 C.F.R. § 201-39.5202-3.

The RFP requested initial proposals by June 25, to which 15 firms, including SDI, responded. The agency eliminated SDI's proposal from the competitive range on September 12, 1994, following a round of written discussions. On October 7, SDI protested its proposal's elimination to the General Services Board of Contract Appeals (GSCBA). On October 13, the Marine Corps advised that the GSCBA lacked jurisdiction to decide the protest because the procurement was exempt from the Brooks Act. On October 18, SDI withdrew its GSCBA protest and lodged this protest with our

¹The GSCBA's jurisdiction is confined to procurements subject to the Brooks Act. 40 U.S.C. § 759(f)(1).

Office. In its protest, SDI contends that the procurement was void from the outset because the Warner Amendment exemption does not apply and the Marine Corps failed to obtain the necessary DPA required by the Brooks Act.²

SDI's protest is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent before the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (1994). In this case, the Marine Corps's failure to obtain a DPA was apparent before the closing time for receipt of initial proposals, since the RFP did not include a clause describing any type of DPA, as required by the FIRMR. 41 C.F.R. §§ 201-39.106-4; 201-39.5202-3. Because this clause was not included in the solicitation, the protester knew or should have known that the Marine Corps had not obtained a DPA to conduct this procurement. See Ebon Research Sys., B-253833.2; B-253833.3, Nov. 3, 1993, 93-2 CPD ¶ 270.

If the protester believed that a DPA was necessary, it was required to protest the matter before initial proposals were due on June 25, 1993. Although the protester asserts that it did not actually learn of the agency's failure to obtain a DPA until October 13, 1994, during the course of its GSBGA protest, the solicitation's omission of the prescribed FIRMR clause constituted constructive notice that the agency had not obtained a DPA. Thus, SDI's protest of this issue, filed well over a year after initial proposals were due, is untimely. See 4 C.F.R. § 21.2(a)(1); Ebon Research Sys., supra.

SDI also asserts that we should consider its protest under the "significant issue" exception to the timeliness rules. See 4 C.F.R. § 21.2(c). Our Office will review an untimely protest under the significant issue exception only if the matter raised is of widespread interest to the procurement community and has not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Whether or not a DPA should have been obtained from GSA under the Brooks Act for a particular procurement has been considered by this Office in a variety of prior decisions, see, e.g., Ebon Research Sys., supra; Sargent & Greenleaf, Inc.; The Safemasters Co., Inc., B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208; and Aquila Technology Group, Inc., B-224373, Oct. 30, 1986, 86-2 CPD ¶ 500, and we do not view the issue of whether a delegation should have been

²We previously dismissed SDI's other grounds of protest as untimely.

obtained for a particular procurement to be of widespread interest to the procurement community. NFI Management Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548.

The protest is dismissed.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

³The GSBICA was presented with a similar issue in Science Applications Int'l Corp. v. HSO Technology, GSBICA No. 12600-P, 12616-P, 94-1 BCA ¶ 26,553, regarding whether a protest could be dismissed as untimely because the solicitation omitted the DPA notification clause required by the FIRMR and assertedly placed the protesters on constructive notice that no DPA had been obtained. The GSBICA found that, "[b]ecause protesters' allegation that the government lacked a valid DPA affects our jurisdiction to hear the merits of this protest, we may decide the issue regardless of its timeliness." However, because our Office's jurisdiction is not confined to Brooks Act procurements, we see no basis to implement a similar exception to our timeliness rules.

⁴Although the protest is untimely, it is apparent that the procurement was exempt from the Brooks Act. The protester concedes that the RFP is soliciting software support services to maintain Warner-exempt equipment. However, the protester argues that, while the equipment is exempt, the software services needed to maintain that equipment are not, because they allegedly involve routine business applications. See 10 U.S.C. § 2315(b). We disagree. In our view (as well as the GSBICA's), the equipment being supported is determinative of whether a Warner Amendment exemption should apply; if the equipment is exempt, then the software support services necessary to maintain that equipment are also exempt. See Automated Data Management, Inc., GSBICA No. 9486-P, 88-3 BCA ¶ 20,848. We also note that GSA, the agency responsible for determining when to issue DPAs, see 40 U.S.C. § 759(b)(3), offered an advisory opinion in response to this protest in which it concluded that the procurement was exempt from the Brooks Act for the reasons stated above.