



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Formal Management Systems

File: B-260412.3

Date: October 4, 1995

Robert L. Novey for the protester.

James J. Wiese for Kunkel-Wiese, Inc., an interested party.

Albert J. Joyce, Esq., Panama Canal Commission, for the agency.

Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where firm failed to participate in original protest (of which it was on notice) as interested party, or otherwise, even though its interests would be directly affected by requested corrective action, firm is not eligible to protest corrective action taken by agency in response to original protest.

DECISION

Formal Management Systems (FMS) protests the award of a contract to Kunkel-Wiese, Inc. (KWI) under request for proposals (RFP) No. CNP-87955-RN-29, issued by the Panama Canal Commission (PCC) for asbestos removal and disposal from, and the subsequent sale of, Barge No. 226, located in Gamboa, Republic of Panama.

We dismiss the protest.

The solicitation was issued on September 12, 1994. Two offers were received, those of FMS and KWI. The evaluators concluded that both offers were technically acceptable, but that FMS' offer represented the best value to the government; award was made to FMS on January 30, 1995. On February 10, KWI filed a protest with our Office, claiming that the award to FMS was improper because FMS did not meet the RFP requirement that offerors be "approved and certified asbestos removal contractors." After reviewing the merits of the protest, the contracting officer concluded that the requirement was material and had been improperly waived for FMS; it terminated FMS' contract for the convenience of the government on February 23. By letter of March 15, FMS protested the termination to the agency, arguing that the RFP provision in question did not constitute a requirement and that, in any case, its subcontractor possessed the asbestos removal certification. On

March 22, the contracting officer dismissed FMS' protest on the basis that the issues raised were contract administration matters governed by the contract's disputes clause.

On March 21, the day before advising FMS of the dismissal of its protest, the PCC canceled the solicitation citing two deficiencies in the procurement: (1) the failure of the solicitation to state the relative importance of the evaluation factors; and (2) the agency's failure to adhere to 41 C.F.R. § 101-43.3, "Utilization of Excess," which required the agency to offer the barge to other federal agencies prior to disposing of it. On March 22, in light of the cancellation, we dismissed KWI's protest (B-260412) as academic.

On April 3, KWI protested the cancellation to our Office (B-260412.2), arguing that the reasons asserted by the PCC did not justify cancellation, and that KWI, the only remaining acceptable offeror, instead should have been awarded a contract. Subsequently, the agency elected to take corrective action based on the protest, and KWI, accordingly, withdrew its protest. On August 4, the PCC rescinded the cancellation and made award to KWI.

FMS argues that its contract was wrongfully terminated in February because it was, in fact, a certified asbestos removal contractor at the time of award. It argues further that the award to KWI was improper because, based on information contained in the agency report in response to KWI's protest of the cancellation, the asbestos abatement plan contained in KWI's proposal was not prepared, signed, and sealed by an industrial hygienist who was certified by the American Board of Industrial Hygiene and was in comprehensive practice, as required by the RFP.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. A matter initially protested to an agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office, *i.e.*, not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) and (3) (1995); WesternWorld Servs., Inc. d/b/a The Video Tape Co.--Recon., B-243808.2, July 3, 1991, 91-2 CPD ¶ 20. In this case, the record indicates that FMS was notified of the termination of its contract and the basis thereof (*i.e.*, the agency's determination that FMS was not a certified asbestos removal contractor) by letter of February 23, which FMS received by telefacsimile the same day. Therefore, any protest of the matter at the agency level had to be filed no later than March 9 in order to be timely under our Regulations. FMS' agency-level protest of the termination was set forth in a March 15 letter to the agency; since the protest was not filed with the PCC within 10 working days after the protest basis was first known, it was untimely under our Regulations. It follows that the allegation now is untimely, and we therefore will not consider it.

We also decline to consider FMS' protest that KWI was ineligible for award due to alleged deficiencies in its proposal. The protester's submissions make it clear that FMS was fully aware of KWI's protest of the cancellation (B-260412.2), and was furnished a copy of the agency report on the protest which thoroughly discussed the facts and issues involved. In fact, FMS refers to specific portions of the report as the basis for its assertion that KWI's asbestos abatement plan was noncompliant with the RFP's requirements. Therefore, it is clear that FMS either knew or should have known the information which provided the basis for the protest it brings now during the pendency of the original proceedings. Further, because the appropriate relief if KWI's protest were sustained (and the relief specifically requested by KWI) was rescission of the cancellation and award to KWI as the only remaining eligible offeror, FMS was or should have been fully aware that award to KWI was a possible outcome of the protest, either through corrective action by the agency or a decision by our Office sustaining the protest. Notwithstanding the protest's potential direct effect on its interests, FMS never raised its objection to award to KWI; it neither formally participated in KWI's protest as an interested party, nor otherwise furnished our Office with a statement of its position.

Our Regulations do not specifically address the eligibility of a protester to challenge agency corrective action where the protester declined to participate in the original protest which led to the corrective action. However, our Regulations do limit eligibility to request reconsideration of a decision to "any interested party who participated in the protest." 4 C.F.R. § 21.12. In promulgating that regulation, we intended to limit those who could request reconsideration of a protest decision to parties who had sufficient interest in the matter, and who had engaged in the effort necessary to reasonably participate in the protest process before a decision was reached, thus minimizing the possible disruption to the procurement process that could arise from a decision on reconsideration. Sippial Elec. & Constr. Co., Inc.-- Recon., B-229839.2, Apr. 26, 1988, 88-1 CPD ¶ 406.

The same principle applies here. Although FMS' arguments are raised in the context of a protest rather than a reconsideration request, this is due solely to the fact that the agency initiated corrective action before we issued a decision in the matter. This fortuity does not change the fact that the circumstances of this case are the same as those which the above principle was designed to address: FMS was fully aware of the protest arguments and was furnished with the full agency report; FMS could have participated in KWI's protest but chose not to; and FMS' failure to participate precluded consideration of its arguments before corrective action was initiated. To permit FMS to eschew participation in the original protest in favor of

subsequently challenging the ultimate result of the protest would be inconsistent with the aim of minimizing disruption to the procurement process. Accordingly, we conclude that FMS is not now eligible to challenge the corrective action.

The protest is dismissed.

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