

F706

D. Miricsh
Pl. I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190529

DATE: March 16, 1978

MATTER OF: Ampex Corporation

DIGEST:

1. Protest based on alleged defect in solicitation filed initially with agency 5 days after award but within 10 days of solicitation is not untimely where solicitation was oral, time for receipt of quote was practically simultaneous with solicitation, there was no formal or informal closing date, and protester's allegations as to knowledge of bases for protest are not contradicted by objective evidence.
2. Protest of deviation from mandatory Federal Supply Schedule (FSS) in purchase of instrumentation magnetic tape is denied where evidence shows FSS product of protester did not meet Government requirements and applicable regulations authorized off-schedule, negotiated procurement with oral solicitation on urgency basis.

Ampex Corporation (Ampex) protests the award of contract F33601-77-90519 by Wright-Patterson Air Force Base, Ohio (Air Force), for the purchase of 1,508 reels of instrumentation magnetic tape from Minnesota Mining and Manufacturing Company (3M). The tape was for use in connection with the field test portion of the Infrared Warning Receiver (IRWR) program. At all pertinent times, Ampex held Federal Supply Schedule (FSS) contract GS-00S-07218 covering instrumentation magnetic tape.

The facts show that discussions were commenced between the requiring activity and representatives of Ampex and 3M in June 1977, with respect to the need for a tape that was free of certain head abrasion problems that had been documented with respect to Ampex

B-190529

797 (since changed to and hereinafter called 795) tape, which was listed on Ampex's FSS contract. The Ampex representative recommended 798 (later changed to 799) tape, and 3M its 888 (later changed to 890) tape. The manufacturer of the recording equipment to be used in the program (Bell & Howell) made similar recommendations. As a result, the requiring activity determined that either Ampex 799 or 3M 890 tape met its requirements.

On August 18, 1977, the Air Force orally contacted both Ampex and 3M representatives to ask whether either of the designated tapes was available on an FSS contract. The answer was negative in both cases. On September 21, 1977, the procurement's priority having been upgraded because of possible work stoppages on other IRWR program contracts, Ampex and 3M were orally solicited for an open market price and delivery quote on, respectively, 799 and 890 instrumentation magnetic tape. Since 3M offered more favorable price and delivery terms, the subject contract was awarded to it on September 29, 1977.

Ampex protested the award to the Air Force on October 5, 1977, and received a denial on October 25, 1977. The instant protest was received by this Office the next day, October 26, 1977. By that time, delivery had been completed.

Timeliness

The bases of protest all arise from the failure of the Air Force to procure its requirements from the Ampex FSS contract. On several grounds, the Air Force contends that this protest is untimely because our Bid Protest Procedures provide that a protest lodged with a contracting agency must generally be filed not later than 10 days after the basis therefor is or should have been known or that a protest based upon alleged improprieties in a solicitation which are apparent before the closing date for receipt of initial proposals should be filed prior to such date, 4 C.F.R. §§ 20.2(a), (b)(1), and (b)(2) (1977).

The Air Force asserts that Ampex should have been aware of the intended FSS deviation on August 18, 1977, the date on which Air Force asked Ampex whether 799 tape was available on its FSS contract.

We do not agree that the facts compel this conclusion. Ampex might have assumed from the August 18 inquiry that the Air Force was still considering whether to purchase the FSS 795 tape or to request a waiver from the General Services Administration (GSA) allowing open market purchase of 799 tape. It was only on September 21, 1977, when the Air Force orally solicited proposals to furnish 799 tape, that Ampex was and clearly should have been aware of the FSS deviation that it protested. Since the evidence, as to the state of Ampex's knowledge prior to September 21, 1977, is conjectural, we believe that this date could be viewed as the significant one.

The Air Force argues that since this protest goes to a defect in the solicitation, Ampex should have protested before or instead of responding to the oral solicitation. The Air Force cites Irvin Industries, Inc., B-187549, March 28, 1977, 77-1 CPD 217, in which we found a protest untimely where it was not filed by the date for receipt of proposals, 2 days after an oral solicitation. The present situation is distinguishable from Irvin, in that here, as the Air Force concedes, the time for receipt of proposals was practically simultaneous with the solicitation, the entire process apparently taking only 10 minutes, and there was no formal or informal closing date. We hesitate to apply the rule of 4 C.F.R. § 20.2(b)(1) literally in this case.

The Air Force also refers us to the fact that Ampex's agency protest was not filed until after substantial performance of the contract was completed, citing Rotair Industries, B-188668, May 11, 1977, 77-1 CPD 338. There we noted that our Procedures are designed to provide a means whereby protests may be expeditiously resolved at a point in the procurement process when some meaningful relief may be offered. See 52 Comp. Gen. 20, 22 (1972). However, Rotair was a case where the protest to our Office was filed 8 months after an initial timely protest to the agency, as opposed to a matter of days in this case. We held that the protester should be charged with the knowledge of adverse action based on the agency's active support of continued performance, citing 52 Comp. Gen. 792 (1973). See 4 C.F.R. §§ 20.2(a) and 20.0(b).

Although Ampex was aware of the expedited nature of the procurement, the record fails to show that Ampex had reason to know that contract performance would be substantially completed within a period of 5 working days after award, or that the firm in effect "sat on its rights."

We recognize that the facts lend possible support to the conclusion that Ampex was dilatory in filing the protests. However, we conclude that since the agency protest was filed on October 5, 1977, within 10 working days after the September 21, 1977, solicitation, and the protest to this Office was filed within 10 working days following notification to Ampex of adverse agency action, both were timely filed and we will consider the merits. We have held that any doubt as to the date on which knowledge was or should have been obtained as to a protest basis should be resolved in favor of the protester, absent objective evidence refuting its assertions. See Honeywell Information System, Inc., B-186313, April 13, 1977, 77-1 CPD 256.

The Solicitation

Ampex claims that its 795 tape is "essentially identical" to 3M 890 tape, and that since the Ampex tape is listed on the FSS, its purchase therefrom was mandatory on the Air Force. Ampex also asserts that 795 tape meets Federal Specification WT-001553 while 3M 890 does not, and that it could have quoted immediate delivery while 3M was unable to quote delivery in less than 2 weeks after the date of the contract.

The Air Force concedes that the FSS is mandatory with respect to instrumentation magnetic tape, pursuant to Armed Services Procurement Regulation (ASPR) § 5-102.3 (a) (1976 ed.). However, it asserts that the action taken here was proper because (1) the Government's requirements could not be met by the FSS product, and (2) ASPR § 5-102.2(b)(2) (1976 ed.) provides for non-FSS procurement with post-notification to GSA:

B-190529

"* * * [w]hen supplies or services are to be procured from other sources and the situation will not permit the delay incident to following the normal channels of obtaining a waiver from the General Services Administration prior to purchase * * *."

In other circumstances, ASPR § 5-102.2 provides that where purchase of an item similar to one on a mandatory FSS is specified, the purchasing office shall seek a waiver of the mandatory schedule from GSA. If GSA does not grant the waiver, the final decision to authorize non-FSS procurement is made at the appropriate level within the agency.

As noted, the procurement was upgraded from Issue Priority Designator 6 to Designator 2 under the Uniform Materiel Movement and Issue Priority System. Either designator would have permitted use of the "public exigency" exception for negotiation, 10 U.S.C. § 2304(a)(2) (1970), without further justification, pursuant to ASPR § 3-202.2(vi) (1976 ed.). ASPR § 3-501(d)(ii) (1976 ed.) authorizes oral solicitation:

"* * * where the processing of a written solicitation would delay the furnishing of the supplies or services to the detriment of the Government. Examples of such circumstances may include those listed in 3-202.2. However, oral solicitation is not to be considered justified solely because a high Issue Priority Designator has been assigned to the requirement. In addition to other applicable documentation requirements (see -308), the record of contract actions above shall include a resume of the circumstances which justified use of an oral solicitation, item description, quantity, deliveries required, sources solicited, prices quoted (including name of individual contacted), date and time contacted,

B-190529

and the solicitation number (see 20-203)
provided the prospective sources. * * *

The oral solicitation in this case was appropriately documented and justified on the same basis as the upgraded Issue Priority Designator--that a work stoppage on other IRWR contracts would result if delivery were not made by September 30, 1977. It therefore appears to us that the Air Force complied in all respects with the applicable regulations.

There remains for consideration the issue of whether deviation from the mandatory FSS was proper. We see no basis to question the Air Force determination that Ampex 795 tape was not suitable for its requirements. This conclusion was based on actual comparative testing of both 3M 890 and Ampex 795 tape for abrasiveness, the quality Air Force states was specifically discussed with representatives of Ampex, 3M, and Bell & Howell in June 1977. All companies recommended that either Ampex 799 or 3M 890, rather than Ampex 795, be used to reduce the abrasion problem. In light of its recommendation, and its later participation in the oral solicitation by quoting price and delivery for 799 tape, Ampex is in a particularly poor position to now assert that the 795 is "essentially identical" to 3M 890 tape. Nor can we find support for Ampex's claim that confusion as to the nature of the requirement led it to recommend 799, rather than 795, tape.

Air Force states that it solicited the only two manufacturers known to produce suitably nonabrasive tape. We believe that the specifications here, though limited to two brand name products, were reasonable in light of the testing and the manufacturer's recommendation. See Boonton Electronics Corporation--Reconsideration, B-186854, August 8, 1977, 77-2 CPD 85.

Since the FSS-listed tape, Ampex 795, did not meet the Government's needs, off-schedule purchase was appropriate. Further, the same exigency that justified negotiation and oral solicitation here

3-190529

seems to us to meet the criterion in ASPR § 5-102.2(b) (2) for dispensing with the requirement of obtaining an PSS waiver from GSA prior to purchase.

Ampex's remaining contentions are without merit. The fact that Ampex 795 tape met Federal specification WT-001553 and 3M 890 did not is irrelevant both because Ampex recommended 799 tape for the intended use and the Air Force determined by independent testing that Ampex 795 was unsuitable. Whether Ampex could have quoted immediate delivery on 795 tape is irrelevant for the same reasons. Further, Ampex has misstated 3M's delivery quote for 890 tape. 3M quoted partial delivery in 3-4 days, the remainder in 15-20 days. Ampex's less favorable delivery quote for 799 tape was one of the factors leading the Air Force to award the contract to 3M.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States