



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mid-America Research

File: B-227871

Date: July 10, 1987

DIGEST

1. Protest of events which occurred during conduct of procurement is untimely where protester knew of the basis for its protest more than 10 days before filing protest with General Accounting Office (GAO).
2. Post-award protest of agency's negotiation with protester of revisions to the statement of work, taken verbatim from the protester's technical proposal and incorporated in its best and final offer, filed on the basis that those revisions placed the protester at a potential competitive disadvantage, is untimely because the protester failed to file its protest before the closing date for receipt of revised proposals. GAO finds unreasonable the protester's assumption that the request for best and final offers, to which it now objects, need not have been protested earlier because this open, non-sole-source procurement would not be subject to competition from others.

DECISION

Mid-America Research Institute protests the award by the Department of Transportation, Federal Highway Administration (FHWA), of a contract to Texas A&M Research Foundation under request for proposals (RFP) No. DTFH61-87-R-00015. Mid-America contends that it was improper for the agency to have negotiated with it, during discussions which preceded the submission of best and final offers (BAFO's) and the subsequent award of the contract, revisions to the statement of work which conformed to Mid-America's technical proposal. If, as Mid-America speculates, the same revisions were negotiated with any other offeror, then the company's technical approach would have been improperly revealed to one or more competitors. On the other hand, Mid-America asserts, if different revisions were negotiated with each offeror, then the firms were not competing on the same basis. Mid-America contends that it was reasonable for it not to have protested these circumstances until after the award, since the basis for its objection primarily relates

039470

to the disadvantage the revisions posed for Mid-America if other parties competed for the procurement. However, until the time it was notified of the award to Texas A&M Research Foundation, Mid-America allegedly understood that no other parties remained in the competition.

We dismiss the protest as untimely.

FHWA issued an RFP, entitled "Application of New Accident Analysis Methodologies," to which Mid-America responded on November 6, 1986, by the submission of a technical and cost proposal. Mid-America has alleged that it was informed by FHWA that its proposal was "responsive" and that it was "led to believe" that it had "won" the competition. The protester states that it thought the "procurement process was over" and that the purposes of a meeting with FHWA personnel on March 30, 1987, was to "initiate the project." At that meeting, however, the protester learned that it was for purposes of discussions preceding the submission of a BAFO. During that meeting, the parties discussed revisions to the statement of work. By letter dated April 13, 1987, Mid-America submitted its BAFO, which stated in part that "Mid-America accepts the changes to the work statement agreed to during the negotiations with FHWA in Washington, D. C., on March 30, 1987." Mid-America now asserts that its understanding, both at the time of the March 30th meeting and of the submission of its BAFO, was that there was "no remaining competition," i.e., that Mid-America was the only company then being considered for the award, and that the revised offer was a "formality."

By letter dated June 10, 1987, FHWA informed Mid-America that a contract had been awarded to Texas A&M Research Foundation. FHWA indicated that award was not made to Mid-America due to "cost considerations." (The award amount was \$89,726, \$132 less than Mid-America's April 13th best and final offer of \$89,858). Mid-America filed its protest with this Office on June 18, 1987.

As a preliminary matter, any protests by Mid-America relating to actions by FHWA leading it to believe that it was in line to be awarded this contract, prior to the March 30, 1987, discussions, or to the fact that discussions were held, are clearly untimely. A protester is required to file its protest not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987); Jay-Em Corporation--Reconsideration, B-226386.2, Apr. 13, 1987, 87-1 C.P.D. ¶ 403. Mid-America argues that it came to the March 30th meeting under the impression that it had "won" the procurement and that the purpose of the meeting was to "initiate the project."

However, Mid-America should have realized that this was not the case at the meeting, when it was requested to submit a BAFO based upon the revised work statement.

The remaining arguments by Mid-America concern the revisions to the statement of work, which revisions the protester asserts include verbatim passages taken directly from its proposal. Mid-America, apparently unaware as to whether passages from its proposal were also disseminated to its competitors, objects on two possible grounds. First, assuming that the same revisions were negotiated with one or more of its competitors, the protester argues that this would have put Mid-America at an unfair disadvantage in violation of federal procurement regulations. Second, assuming that FHWA did not negotiate with other companies the same revised statement of work, Mid-America objects that it would then be competing on a basis different from the other offerors.

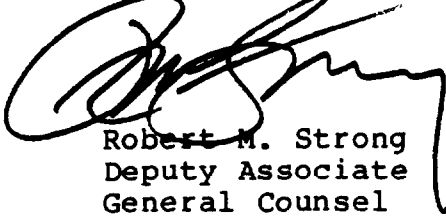
Mid-America did not protest, however, until June 18, 1987, following contract award, and over 2 months after it had submitted its BAFO. In support of its delay in not filing a protest until after contract award, Mid-America asserts that it was its understanding that there was no other competition for the RFP and that the request for a revised proposal was "a formality."

As a general rule, a protest against an alleged impropriety incorporated into a solicitation by amendment must be filed before the next closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987); Wabash Data Tech, B-224550, Feb. 11, 1987, 87-1 C.P.D. ¶ 149.

We find Mid-America's failure to raise the questions it has now included in its protest until after contract award was unreasonable. The RFP was not a sole-source procurement. In consequence, until the closing date, a competitor for the award would be expected to be aware that others could submit proposals. In fact, we note that contrary to the protester's present position, it appeared to recognize in its BAFO that it was in a competitive environment: it emphasized that the person-months it proposed were "productive" person-months exclusive of vacations, holidays, etc., and it suggested that the FHWA use a certain multiplier factor in order "to obtain equivalency with organizations that include nonproductive hours (e.g., some universities)" Regardless of whether the same or different revisions were negotiated with its competitors, these questions should have

been raised prior to the time at which Mid-America was required to submit its BAFO, and Mid-America's failure to do so requires that its protest be dismissed as untimely.

The protest is dismissed.



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