



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Automated Medical Products Corporation

File: B-275835

Date: February 3, 1997

Jacob N. Erlich, Esq., and William M. Simmons, Esq., Perkins, Smith & Cohen, LLP for the protester.

J. Albert Calluso, Esq., Defense Logistics Agency, for the agency.

Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester filed its protest based on information received approximately 4 months after award pursuant to a Freedom of Information Act request, protester did not diligently pursue its basis for protest because it could have received the same information forming its basis for protest if it had requested, as contemplated by statute and regulation, a post-award debriefing.

DECISION

Automated Medical Products Corporation (AMPC) protests the award of a contract to International Hospital Supply Company (IHSC) under request for proposals (RFP) No. SPO200-96-R-8029, issued by the Defense Personnel Support Center, Defense Logistics Agency, for retractor holder sets, as identified by a commercial item number. AMPC maintains that IHSC's item fails to conform to the requirements of the solicitation.

We dismiss the protest.

The agency awarded the contract to IHSC as the low-priced, technically acceptable offeror on August 23, 1996. On August 30, after receiving the notice of award, AMPC filed a Freedom of Information Act (FOIA) request with the agency for "all available information regarding this award including, but not limited to, the full specifications submitted, drawings submitted, testing analysis, point of manufacturing, etc." On September 9, AMPC filed an agency-level protest challenging the award to IHSC on the basis of its low price. AMPC also alleged that the award to IHSC violates patents held by AMPC and that the agency should conduct a pre-award survey of IHSC. AMPC did not request a post-award debriefing.

By letter dated December 12, the agency denied AMPC's agency-level protest. On December 20, the agency released to AMPC, pursuant to its FOIA request, the requested drawings. The drawings did not contain confidential information. On December 26, AMPC filed this protest with our Office "based solely on the [FOIA] materials provided by [the agency] on December 20, 1996," contending that "the device being furnished by the awardee is not the item required by the [RFP]."¹

The agency argues that this protest is untimely because AMPC did not diligently pursue its basis for protest, that is, AMPC did not request a post-award debriefing where it could have obtained from the agency the same or similar information ultimately released by the agency pursuant to the firm's FOIA request, which formed AMPC's basis for protest. The agency states that had AMPC availed itself of the debriefing process, the agency would have explained in a timely manner after award why IHSC's proposal, but not AMPC's proposal, was selected for award, thereby providing AMPC with the same or similar information as that released to the firm under FOIA. We agree with the agency that by not requesting a post-award debriefing, and instead making a FOIA request, AMPC did not diligently pursue its basis for protest.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier; however, in the case of a protest challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, a protest filed not later than 10 days after the date on which the debriefing is held will be timely. Bid Protest Regulations, section 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)); The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.

These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In this regard, a protester may not passively await the receipt of information providing a basis for protest; rather, the protester has an affirmative obligation to diligently pursue information which may form a basis for protest. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86. When information is obtainable through alternative means, a protester's failure to utilize the most expeditious approach may constitute a failure to diligently pursue that

¹AMPC did not raise in its protest to our Office the issues it raised in its agency-level protest.

information. See, e.g., Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 (protester did not diligently pursue its basis for protest where it waited until after it received the notice of award to pursue under FOIA information forming its basis for protest, although the same information was publicly available at bid opening).

Here, the procurement was conducted on the basis of competitive proposals. Under Federal Acquisition Regulation (FAR) § 15.1004 (FAC 90-37), AMPC was entitled to request and receive a post-award debriefing. (AMPC could have requested, in writing, a debriefing within 3 days of receiving the agency's notice of award and the agency would have been required to debrief AMPC within 5 days of receiving the firm's request, if practicable. 10 U.S.C. § 2305(b)(5) (1994)). Since the agency was procuring a commercial end item, at such debriefing AMPC would have been entitled to learn the make and model of the item to be delivered by IHSC and to receive a summary of the agency's rationale for the award to IHSC and "reasonable responses to relevant questions" concerning the agency's conduct of this procurement. FAR § 15.1004(d). Although the protester asserts that it had no reason to request a debriefing because there was nothing it could expect to learn from a debriefing since award was based on low price, its FOIA request indicates that it did seek information about its competitor's offer beyond what it knew from the notice of award. While FAR § 15.1004(d) sets forth the minimum information that an agency is to provide in a debriefing, the FAR does not preclude an agency from providing additional information. Thus, while the agency could not reveal at the debriefing any information exempt from release under FOIA, it could have responded to questions about drawings associated with IHSC's proposal, and ultimately could have released to AMPC the same non-confidential drawings that were subsequently released to the firm pursuant to its FOIA request. In this regard, the agency reports that if a debriefing had been requested one would have been held "in a timely fashion . . . and [such debriefing] would have provided [the protester] with the same or similar information releasable under FOIA."

Accordingly, it appears that the information forming AMPC's basis for protest was obtainable through the debriefing process far sooner than it was obtainable (and provided) under the FOIA request. That being so, we must conclude that AMPC did not avail itself of the most expeditious means to obtain the desired information. Since almost 4 months elapsed between the award date and AMPC's receipt of the agency's response to its FOIA request, we conclude that AMPC did not diligently

pursue this information and that to consider AMPC's protest would be inconsistent with our goal of resolving protests expeditiously without unduly disrupting or delaying the agency's procurement process. In short, we consider the protest to be untimely.

The protest is dismissed.

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