

Protest of) Date: September 25, 1992
))
AUTOMATED CONVERSION)
TECHNOLOGIES, INC.)
))
Solicitation No. 104230-92-A-0166) P.S. Protest No. 92-63

DECISION

Automated Conversion Technologies, Inc. (ACT) protests the award of a contract for conversion of two automated procurement information systems from WANG VS COBOL to MicroFocus COBOL. ACT complains that award was not made correctly and that the awardee is incapable of performing the contract successfully.

Solicitation No. 104230-92-A-0166 was issued by the Office of Procurement, Headquarters on June 24, 1992, with an offer due date of July 1. Competition was restricted to three prequalified companies pursuant to Procurement Manual 3.1.6 c..^{1/} ACT, American Cybernetics Corporation (ACC) and International Digital Scientific, Inc. (IDS). The solicitation specified that award would be made to the offer representing the best value to the Postal Service, enunciated the criteria which would be used to evaluate the technical proposals, and stated that price would be considered in the award decision but that award would not necessarily be made to the lowest priced offeror. The solicitation was silent as to whether the technical score would be the more or less important than price. Offers were received from all three offerors, and the technical proposals were evaluated. The proposals' scores and prices were as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Price</u>
ACC	100	\$113,452
ACT	40	\$ 98,000
IDS	25	\$155,000

^{1/} PM 3.1.6 c. provides that, with the approval of the Assistant Postmaster General, solicitations can be restricted to prequalified companies "that have previously demonstrated their ability to perform consistently to high standards of quality and reliability" in order to award a contract "primarily on the basis of price proposals without undue performance risks."

Based on these findings, ACT's and IDS' proposals were found to be technically unacceptable and award was made to ACC on July 10, 1992. ACT was notified by telephone call of the award decision on that date and requested a copy of the Postal Service's protest procedures. This information was transmitted by telefax to ACT on July 14, and ACT was debriefed on July 17. ACT's protest was received by our office on August 6.

ACT's protest first alleges that award was improperly made because it was not made to the lowest technically acceptable offeror and that the difference in technical scores does not justify spending 15% more money. ACT also claims that ACC is not qualified to perform the required work, as ACC has no significant experience in the type of software conversion required by the solicitation.^{1/} ACT also alleges that ACC lacks the technology and staff to perform the requirement successfully within the required delivery schedule.

The contracting officer notes that ACT's protest is untimely. Pursuant to Procurement Manual (PM) 4.5.4 d., protests must be received not more than ten working days after the information on which they are based known or should have been known and not more than fifteen days after award. ACT's protest was received by our office on August 6, which was nineteen working days after award and fourteen working days after ACT's debriefing, by which it knew of the basis for its protest. Therefore, the protest should be dismissed as untimely.

As to the merits of ACT's protest, the contracting officer notes that the evaluation criteria did not require award to be made to the offeror submitting the lowest price, but that price and technical factors would be weighed to determine which offer provided the best value to the Postal Service. He states that award to ACC was appropriate as it submitted the only technically acceptable offer. The contracting officer also notes that the evaluation committee found that ACC demonstrated in its proposal the necessary experience to perform the solicitation's requirements, a determination which has been supported by ACC's performance to date.

ACT has responded to the contracting officer's statement by strongly urging that ACC's proposal was misleading and false in several aspects concerning the experience of ACC employees and incorporated elements of ACT's proprietary conversion methodology. ACT argues that ACC had to misrepresent itself in order to win the competition and objects that this type of blatant misrepresentation subverts the competitive process. ACT also notes that its protest was timely filed because information necessary to file protest was not given to it until its debriefing.

ACT's protest must be dismissed as untimely filed. As we have recently held:

^{2/} ACT argues that ACC's only successful conversion experience for the Postal Service was a project on which ACT did all the work as a subcontractor for ACC.

[W]e are without authority to consider a protest which is untimely. See, e.g., International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; Southern California Copicois , Inc., P.S. Protest No. 83-2, August 31, 1983 (citing cases). Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. See, e.g., Amerijet International, Inc., P.S. Protest No. 87-45, September 2, 1987; Wilton Corporation, P.S. Protest No. 83-45, September 9, 1983.

Paragon Dynamics, Inc., P.S. Protest No. 92-58, September 10, 1992. ACT filed its protest more than ten working days after it knew of the grounds for its protest and more than fifteen working days after award; therefore, it is untimely. See, e.g., GF Office Furniture, Ltd., P.S. Protest No. 92-07, March 19, 1992 (ten day rule); M. Ross Masson Company, P.S. Protest No. 92-14, April 23, 1992 (fifteen day rule). However, we will briefly give our views on the merits of ACT's protest. See American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (citing cases).

ACT's complaint that award was not made to the lowest priced offer conflicts with the finding by the contracting officer, which ACT does not dispute, that its proposal was technically unacceptable. The contracting officer can reject a technically unacceptable proposal, see Doninger Metal Products Corporation, P.S. Protest No. 90-50, October 10, 1990, and therefore, the contracting officer's decision not to award to ACT was correct.

ACT's attack on ACC's capability to perform the solicitation requirements successfully is an allegation contesting the contracting officer's affirmative determination of ACC's responsibility. We do not review such allegations in the absence of fraud or bad faith on the part of the contracting officer or a failure to apply definitive responsibility criteria. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. At most, ACT has alleged misrepresentation by the offeror in the preparation of its proposal, which is not an adequate justification for overturning a contracting officer's affirmative determination of responsibility.

The protest is dismissed.

For the General Counsel:

William J. Jones

