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PLII 14601

**DECISION**



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

*[Protest of Army Contract Award]*

FILE: B-197696

DATE: August 13, 1980

MATTER OF: Energy Research Corporation

**DIGEST:**

1. Protest based on allegation that agency violated DAR § 4-117 by encouraging party to teaming agreement with protester to submit quotation to competitor is untimely under GAO Bid Protest Procedures since protester knew of alleged violation more than 10 working days prior to filing protest.
2. Protest allegations that design to cost data should have been required in technical proposals rather than cost proposals and that solicitation improperly placed greater emphasis on technical rather than on management and cost considerations are untimely under Bid Protest Procedures since requirements were apparent on face of solicitation and issues were not raised until after closing date for receipt of proposals.

Energy Research Corporation (ERC) protests the award of a contract to United Technologies Corporation (UTC) by the U.S. Army Mobility Equipment Research & Development Command (Army) under request for proposals (RFP) No. DAAK70-79-R-1816. The RFP called for proposals to design, fabricate, test and deliver 8 DC and 8 AC silent power fuel cells with power conditioners. ERC contends the Army improperly interfered with its teaming agreement with Delta Electronic Control Corporation (Delta) by forcing Delta to provide a quotation to UTC, the only

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other competitor, thereby reducing the competitive advantage ERC should have enjoyed as a result of its exclusive right to Delta's services as a subcontractor. For reasons discussed below, we find this protest to be untimely.

The RFP was issued on July 19, 1979 and provided for a four-step procurement in accordance with Defense Acquisition Regulation (DAR) § 4-107.5 (DAC 76-17, September 1, 1978), under which step 1 technical proposals were due on September 19, 1979 and step 2 cost proposals were due on October 26.

Under previous contracts with the Army, Delta had designed a power conditioner for the AC model of the silent fuel cell and on August 1, 1978, entered into a teaming agreement with ERC. Under this agreement, Delta was to cooperate with ERC in the preparation of ERC's proposal for this procurement. The agreement provided that if ERC received the prime contract, the parties would negotiate in good faith with respect to a subcontract for Delta. The agreement prohibited each party from divulging confidential or proprietary information of the other and provided that each party could pursue "their own independent programs; programs with other private parties; other programs with DOD or other government or other funding agencies such programs including the design and/or development of both fuel cells and inverters alone, apparatus directly associated with fuel cells and systems incorporating fuel cells."

On August 28, 1979, UTC issued a request for quotations for the power conditioner to Delta and one other vendor. After several follow-up telephone calls, UTC was told that Delta could not quote because of its teaming agreement with ERC. On September 19, UTC submitted its technical proposal to the Army which stated that the description and data with respect to the power conditioner were based on the RFP purchase description and that while Delta probably had a favored position due to its previous experience with the Army, UTC would award its subcontract after conducting a competitive procurement. ERC's technical proposal, also submitted on September 19, identified four proposed subcontractors and stated that Delta would supply both the AC and DC power conditioners.

After submission of the technical proposals and before the cost proposals were due, the president of Delta had a conversation with an Army contracting officer who had administered Delta's previous Army contracts but who had no official connection with this procurement. In this conversation, the contracting officer indicated that in his opinion Delta should provide quotations on the configuration of the power conditioner developed under the earlier Army contract to any firm which requested it. ERC concedes that on October 17 or 18, it was informed by Delta that a quotation had been sent to UTC as a result of the conversation with the contracting officer.

The cost proposals for both ERC and UTC were submitted on October 26 and UTC states its cost estimate for the AC power conditioner was based upon a quotation from Delta. The evaluation of the technical proposals was completed on October 28 and submitted to the Proposal Evaluation Advisory Board on November 5. By letter of October 26, which the Army received sometime after that date, Delta informed the contracting officer it had spoken with earlier that it had in fact supplied a quotation to UTC and that its teaming agreement with ERC precluded its quoting to any firm but ERC for anything beyond the current power conditioner configuration. There is no indication that the technical evaluators had any knowledge of the ERC/Delta teaming agreement other than what might have been obtained from ERC's technical and cost proposals prior to receipt of Delta's October 26 letter.

During a visit to ERC on November 19 on matters regarding another contract, ERC's president expressed concern to the contracting specialist assigned to this procurement that Delta had violated its agreement with ERC by submitting a quotation to UTC. By letter of January 31, 1980, ERC was informed that negotiations would be conducted with UTC.

The Army argues that ERC's protest, which was not filed until February 6, after ERC was informed that UTC had been selected for final negotiations, is untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980). It is the agency's view that ERC knew of any alleged improper activity by Army personnel by mid-October because an affidavit submitted by ERC's president in connection with this protest describes a conversation he had with a Delta official on

either October 17 or 18, regarding Delta's submission of a quotation to UTC and the Army's suggestion that Delta supply quotations to firms which requested them. The Army further notes that the president of ERC has also described a conversation he had on November 19 with the contracting specialist assigned to this procurement which also illustrates that ERC was aware of the basis of its protest long before February 6.

ERC maintains that its protest is timely. It is the protester's view that the Army had express notice of the teaming agreement during the October/November 1979 time period while both cost and technical proposals from ERC and UTC were being evaluated and that the Army then had to protect the rights and interests flowing from the teaming agreement. Since during this period the Army did not indicate to ERC that it would not respect the teaming arrangement as required by DAR § 4-117, ERC concludes that it had no reason to know prior to the selection of UTC that any action contrary to DAR § 4-117 had been taken.

Our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2), require protests to be filed not later than 10 working days after the basis for protest is known or should have been known. We have held that the basis of protest does not arise until the protester has learned of agency action or intended action which is inconsistent with what the protester believes to be incorrect or inimical to its interest. See Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. ERC insists that until the Army actually evaluated the UTC proposal which included the Delta quotation and selected UTC, the agency's actions were not incorrect or inimical to its interest. We do not agree.

Although implicit in ERC's position is the notion that it was the Army's acceptance of UTC's proposal which was violative of DAR § 4-117 and which is the subject of protest, we believe it is clear from ERC's initial submissions, which refer to the Army's "intentionally \* \* \* influencing Delta to provide a quotation to a competitor," that the actual basis of ERC's protest is the alleged inducement of Delta to submit a quotation to UTC. In

October ERC knew that Delta submitted a quotation to UTC; that the Army suggested that Delta take such action and that the Army was aware of the existence of the agreement. ERC's president knew that Delta brought these facts to the attention of the Army by letter of October 26 and in fact discussed the incident with the contract specialist on November 19. At no time during this period was there any indication that the agency would disavow the suggestion made by its contracting officer. Since the actions inimical to ERC's interest were the Army's encouragement of Delta to submit a quotation to UTC and since ERC was aware of the factual basis of that action in October/November, the protest filed in February was clearly untimely and will not be considered. To permit ERC to sit back without protesting until a selection was made that was not in its interest and then contend that actions taken by the agency months prior to that selection were improper is not consistent with the intent of our Bid Protest Procedures. Moreover, it does not appear that the November 19 conversation between ERC and the Army could reasonably be considered a protest to the agency. In that conversation ERC complained not of the Army's action but of Delta's conduct.

After filing its original protest, ERC filed a supplemental statement contending that this procurement deviated from the requirements set forth in DAR § 4-107.5(a)(6) in that the design to cost data was called for in the cost proposal rather than in the technical proposal. ERC also objected to the statement in the solicitation that greater emphasis in the evaluation would be placed on technical considerations than on management and cost considerations. ERC, however, did not raise these matters, which relate to solicitation provisions, prior to submission of its proposals. Therefore, to the extent that these contentions might constitute grounds for protest, they too are untimely and will not be considered on their merits, as our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1), require that protests based upon alleged improprieties in solicitations which are apparent prior to the closing date for receipt of initial proposals be filed prior to the closing date for receipt of such proposals.

Although this protest has been dismissed on a procedural point, we have reviewed the record in the light of ERC's allegations that the improper conduct of Army personnel forced Delta to violate its teaming agreement and

thereby violated DAR § 4-117. This provision reads, in part, as follows:

"\* \* \* The Government will recognize the integrity and validity of contractor team arrangements, provided they are identified and company relationships are stated in a proposal. Under a contractor team arrangement, the prime contractor is fully responsible for the performance of the contract. The Government normally will not require or encourage dissolution of contractor team arrangements. These policies do not authorize arrangements in violation of anti-trust statutes and do not limit the Government's rights to:

- (i) approve subcontracts in accordance with [DAR] requirements;
- (ii) determine the responsibility of a prime contractor on the basis of the stated contractor team arrangement;
- (iii) provide the selected prime contractor with data rights owned or controlled by the Government; and
- (iv) pursue its policies on competitive procurement, subcontracting and component breakout, after initial production procurement or at any other time."

ERC has provided no support and we have found none, for its allegation that prior to the submission of the cost proposals, the Army should have known that the teaming agreement precluded Delta from offering its expertise and the technology developed under Army contracts to anyone other than ERC. While ERC's technical proposal emphasized its "team approach" and its "strong subcontractor team", this proposal terminology is at least as consistent with the usual subcontractor relationships as it is with a teaming agreement binding Delta exclusively to ERC. ERC's cost proposal of October 26 referred to its arrangement with Delta as a teaming agreement only once and without any indication that it was considered exclusive. The terms and conditions of the agreement did not become available to the Army until after this protest was filed.

We note that even if ERC had attached the agreement to its technical proposal, the Army would have been justified in regarding it as nonexclusive. While the agreement provided for cooperation between the parties, it did not

specifically prohibit Delta from quoting to other private parties. It prevented Delta from revealing ERC's confidential or proprietary information. A quotation to other competitors however, would not have required a revelation of ERC's information. In fact, ERC does not contend that any confidential or proprietary information was revealed by Delta. Moreover, the agreement did not guarantee a subcontract to Delta upon ERC's receipt of the prime contract but only that the parties would enter into good faith negotiations. The agreement provided that it would terminate upon final acceptance or rejection of ERC's proposal except with respect to confidential and proprietary information and at that time, Delta was free to contract with the awardee. Under these circumstances, the Army's advice that Delta quote to UTC did not encourage conduct prohibited by the agreement or by DAR § 4-117.

The protest is dismissed.

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for Milton J. Socolar  
General Counsel