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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Virginia Telecommunications & Security, Inc.

File: B-247368

Date: May 20, 1992

David E. Pierce for the protester,
Jonathan H. Kosarin, Esq., Anita D. Polen, Esq., and Shanna Waldorf, Department of the Navy, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, CAO, participated in the preparation of the decision.

DIGEST

1. Protest issues that were initially raised with the contracting agency and were not submitted to the General Accounting Office within 10 working days after the protester received notice of adverse agency action on the agency-level protest are dismissed as untimely.
2. Protests based on other than alleged solicitation defects which are not filed within 10 working days after the bases of protest are learned are untimely.
3. Where agency submits affidavit stating that it called the protester to give it the opportunity to revise its offer and protester does not submit an affidavit to support its position, even though given the opportunity to do so, the record does not substantiate protester's contention that the agency did not give the protester an opportunity to revise its offer when the expected performance period changed.

DECISION

Virginia Telecommunications & Security, Inc. (VTS) protests the award of a contract to any other offeror under request for quotations (RFQ) No. 92-Q-1027, issued by the Department of the Navy for maintenance of telecommunications equipment.

We dismiss the protest.

On November 1, 1991, using small purchase procedures, the Navy orally solicited three firms for telecommunications equipment maintenance services for an 11-month period. VTS was not one of the firms that was solicited. Subsequently, the three firms were sent a written copy of Form 2276, Request for Contractual Procurement, which took the place of

the RFQ. As issued, the Form 2276 included a "special note" from the activity that required the services requesting the Naval Supply Center, the procuring activity, not to solicit VTS due to problems the firm had performing a current contract. The Naval Supply Center left the note on the Form 2276 when it was sent to the three firms solicited.

On November 12, after learning of the note, VTS wrote to the contracting agency and demanded: (1) a complete retraction of the "special note"; (2) that VTS be allowed to bid on the contract; (3) that the solicitation be properly posted; (4) that the individuals involved in the matter be reprimanded; and (5) a letter of apology from the Navy.

On November 20, the Navy sent VTS a letter of apology. In that letter the Navy stated that a retraction letter had been sent to the three companies that had received the Form 2276 and that the individuals involved in the matter had been counseled. In addition, the Navy extended to VTS the opportunity to submit a quotation. Finally, the Navy explained that it generally adheres to the Federal Acquisition Regulation (FAR) guidelines that solicitations be posted in public for 10 days. In this case, however, it received the request from the requiring activity on September 27, 1991, with a start date of October 1. As a result it did not post the requirement for 10 days.

On November 25, VTS sent a second letter to the Navy in which it expressed dissatisfaction with the agency's response concerning the note; stated that it had not been given the opportunity to submit an offer; and requested that it be given the opportunity to do so now. Subsequently, on December 9, after a number of requests from VTS, the Navy sent a copy of the solicitation to VTS by facsimile.

By December 11, the due date for quotations, the three companies that were initially solicited and VTS submitted quotations to the Navy. The Navy then contacted the offerors and informed them that the performance period had been reduced from 11 to 9 months. Three of the offerors chose to keep their monthly unit prices the same and reduce the overall cost to reflect the 2 months by which the performance period was reduced. According to the Navy, VTS, which had submitted an annual price without including monthly unit prices, stated that its price would remain the same for 9 months; VTS maintains that it was never contacted by the Navy. After reviewing the quotations, the Navy awarded the contract on December 19 to the offeror that submitted the lowest quotation, Orbital Technologies. On January 23, 1992, VTS filed its protest with our Office.

In its protest, VTS raised seven issues: (1) that the solicitation was issued with the improper special note

requesting that VTS not be solicited because the Navy failed to properly review it; (2) that the Navy failed to verify the information contained in the note; (3) that the Navy failed to suspend contract award pending VTS' agency-level protest; (4) that the Navy failed to properly post the solicitation; (5) that the Navy engaged in a pattern of making untrue statements concerning VTS, specifically, that in its November 20 letter, the Navy stated that VTS was given the opportunity to submit a quotation and refused to do so; (6) that the Navy failed to provide VTS a timely opportunity to bid because, although the Navy contacted VTS on December 2 and stated that it would immediately send a copy of the solicitation by facsimile, it did not do so until December 9, after VTS made numerous phone calls to the Navy; and (7) that the Navy did not give VTS the opportunity to change its quotation based on the new 9-month performance period.

Under our Bid Protest Regulations, where a protest has been initially filed with the contracting agency, to be timely, a subsequent protest to our Office must be filed within 10 working days after the protester receives actual or constructive notice that the agency has taken action adverse to the protester's position in its agency-level protest. 4 C.F.R. § 21.2(a)(3) (1992). Once an agency takes action adverse to the interests of the protester, our timeliness requirements are not tolled even if the protester continues to pursue its protest at the agency level. Beckman Instrs., Inc.-Recon., B-239293.2, June 22, 1990, 90-1 CPD ¶ 585. Here, on November 12, VTS filed a protest with the Navy concerning the special note in the solicitation, and the Navy's failure to follow proper posting procedures for the solicitation. The Navy responded to these issues in a November 20 letter. If VTS was not satisfied with the Navy's response, VTS was required to file a protest with our Office within 10 working days after it received the Navy's November 20 response. Since VTS received the response by November 25,¹ VTS was required to raise these issues with our Office no later than December 12. Since VTS did not file these grounds of protest with our Office until January 23, 1992, they are untimely and will not be considered on the merits.

VTS' protest likewise is untimely insofar as VTS argues that the Navy failed to suspend award of the contract while its agency-level protest was pending; that the Navy made untrue statements concerning VTS; and that the Navy failed to provide VTS a timely opportunity to submit a quote. In essence, VTS contends that the Navy acted in bad faith with

¹VTS' letter responding to the Navy's November 12 letter is dated November 25.

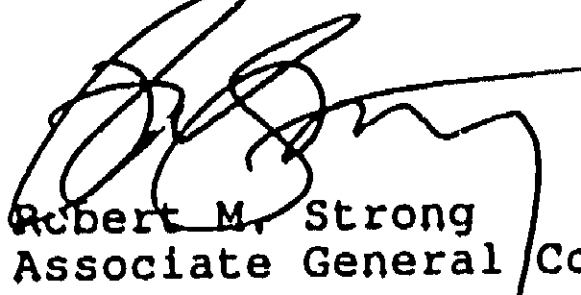
regard to the firm. A protest on such grounds must be filed within 10 working days after the protester knows or should know the protest basis, 4 C.F.R. § 21.2(a)(2). The specific events on which VTS bases its contention began with the issuance of the solicitation with the "special note" and the Navy's November 20 response to VTS' complaints in that regard; continued with VTS' subsequent letter and conversations with the Navy expressing dissatisfaction with the Navy's actions and attempting to get a copy of the solicitation; and culminated in the award to another firm on December 19. VTS thus should have filed its protest on this ground no later than January 8, 10 days after December 23, the date it was informed that award had been made. Since the protest was not filed until January 23, it is untimely.

In any event, the record does not support VTS' contention that the Navy acted in bad faith. A protester alleging bad faith or bias on the part of a procuring agency must show that the agency acted with intent to harm the protester. Indian Affiliates, Inc., B-243420, Aug. 1, 1991, 91-2 CPD ¶ 109. Here, while the Navy clearly made a number of mistakes in conducting the procurement, the evidence does not establish that the Navy acted with intent to harm VTS. First, there is no indication that the employees of the requiring activity that placed the note on the Form 2276 were prompted by an intent to harm VTS rather than a good-faith belief that VTS was not a reliable contractor. Nor is there any indication that the procuring activity's failure to remove the note from the solicitation was other than an oversight; once the note was brought to the procuring activity's attention, it acted promptly to issue a retraction and to counsel the employees of the requiring activity that were responsible for placing the note on the RFQ. Further, because the agency was using small purchase procedures and already had solicited three offerors, it was not obligated to permit VTS to submit a quotation. See FAR § 13.106. Despite this, and despite some delay, the Navy did send VTS a copy of the solicitation, permit VTS to submit a quotation, and considered the quotation that VTS submitted. The only reason that VTS' quotation was rejected is that the offer was not low. These facts do not indicate that the agency acted in bad faith.

To the extent that VTS contends that the Navy did not give VTS the opportunity to revise its quotation based on the 9-month performance period, the Navy has submitted an affidavit prepared by the contracting officer. In that affidavit, the contracting officer swears that she called the protester and gave it the opportunity to submit a revised offer and that in response VTS stated that its price was the same for 9 or 12 months performance. Despite repeated attempts by our Office to obtain an affidavit from the protester attesting to its version of the events, the protester

neither returned our calls nor submitted an affidavit. Accordingly, we find that the record before us does not substantiate VTS' contention that the Navy failed to give the protester the opportunity to revise its bid.

The protest is dismissed.



Robert M. Strong
Associate General Counsel