



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Optical Energy Technologies, Inc.

File: B-401520

Date: July 13, 2009

Gerald Falbel for the protester.

Col. Timothy J. Cothrel, and Maj. John G. Terra, Department of the Air Force, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where it was filed more than 10 days after receipt of a preaward notice identifying the successful vendor, which triggered a telephone call to the contracting officer wherein the protester was told the successful vendor's price; these two pieces of information provided the basis for the protester's argument that its lower-priced quotation should have been selected for award.

DECISION

Optical Energy Technologies, Inc. (OETI), of Stamford, Connecticut, a small business, protests the selection of Electro-Optical Industries (EOI), of Santa Barbara, California, by the Department of the Air Force under request for quotations (RFQ) No. FY2333-09-Q-0007 for a secondary standard blackbody.¹ OETI argues that the Air Force improperly selected EOI at a higher price, where the RFQ provided that award was to be based on price.

¹ The item being purchased is a piece of scientific equipment that simulates the behavior of a "blackbody." According to the contracting officer, a blackbody is

a theoretical object that absorbs all the electromagnetic radiation incident upon it and radiates all of that electromagnetic radiation out. In other words, it absorbs all wavelengths of electromagnetic radiation and radiates all wavelengths of electromagnetic radiation.

Letter from Air Force to GAO, July 2, 2009, at 1.

We dismiss the protest.

The Air Force posted the RFQ on FedBizOpps.gov on February 20, 2009, as a combined solicitation/synopsis for a commercial item. The RFQ was set aside for small businesses, and requested quotations to supply the item to the Air Force Metrology and Calibration Program Office in Heath, Ohio. RFQ at 1-2. The RFQ provided for “award” to the vendor with the lowest-priced, technically-acceptable quotation. RFQ at 2. On February 26, OETI timely submitted a quote of \$5,700.

On June 8, OETI received a preaward notice, advising that the purchase order would be issued to EOI. Upon receiving that notice, the president of OETI telephoned the contracting officer (CO), who confirmed that the order would be placed with EOI, and advised OETI of the order price, \$20,950. Letter from Air Force to GAO, July 6, 2009, at 1.²

On June 23, OETI filed this protest with our Office. The Air Force requested that the protest be dismissed because, among other reasons, the protest was untimely filed.³

OETI concedes that its protest was not filed within 10 days of the telephone call, which confirmed the identity of EOI and disclosed its higher price. The protester

² According to the Air Force, the CO also told OETI that its quotation was technically unacceptable. We also note that the protester states that this telephone call occurred on June 2, rather than June 8. Fax from Protester to GAO, July 6, 2009, at 1. We do not need to resolve the inconsistency in the date of this call because the protest is untimely regardless of when the call occurred.

³ For the record, this situation does not fall within the exception in our Bid Protest Regulations for “protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.” 4 C.F.R. § 21.2(a)(2) (2009). There is no legal requirement for a debriefing here because this procurement was expressly conducted “in accordance with the format in the Federal Acquisition Regulation (FAR) Subparts 12.6 and 13,” RFQ at 1, which do not require the agency to provide a debriefing for unsuccessful vendors, and a debriefing was not otherwise legally required in the circumstances here. Cf. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(a)(2), 122 Stat. 3, 237 (2008) (to be codified at 10 U.S.C. § 2304c(d)(5)) (requirement for debriefing for task or delivery orders in excess of \$5 million); see also Computer Literacy World, Inc., B-299744.4, Aug. 6, 2007, 2007 CPD ¶ 154 at 11 n.9 (debriefing in procurement conducted under FAR Part 8.4 was not a required debriefing); MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6-7 (ground of protest that was filed more than 10 days after protester knew of its basis is dismissed as untimely, even though it was filed within 10 days of debriefing, because the debriefing exception to timeliness does not apply where a debriefing was not legally required).

nevertheless argues that it was unfamiliar with the procedure for filing a protest, it did not receive a prompt response to inquiries that it made to a member of Congress, and it mistakenly believed that it should file its protest with “the OMB,” but had no success in identifying where to direct its protest within that agency. OETI argues that it promptly filed its protest with our Office once it learned of our role in deciding bid protests.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest that is not based on alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our 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. Dominion Aviation, Inc.-- Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. A protester’s receipt of oral information forming the basis of its protest is sufficient to start the 10-day time period running; written notification is not required. Swafford Indus., B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268.

We dismiss the protest as untimely because it was filed more than 10 days after the protester learned of the basis for its protest. Neither a protester’s unfamiliarity with our regulations, nor its decision to wait for a response to a congressional inquiry, provides a basis for suspending our timeliness regulations. Professional Office Ctr., B-229704, Dec. 17, 1987, 87-2 CPD ¶ 607 at 2-3. Our Bid Protest Regulations are published in the Federal Register and the Code of Federal Regulations; protesters are charged with constructive notice of their contents.⁴ See 4 C.F.R. § 21.

The protest is dismissed.

Daniel I. Gordon
Acting General Counsel

⁴ Additionally, the solicitation incorporated by reference a provision containing the standard contract terms and conditions required to implement statutes or executive orders. Among other things, that provision (FAR § 52.212-5(a)(2)) points vendors to the FAR clause concerning bid protests. Solicitation at 2.