

R. Berger



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sector Technology, Inc.

File: B-239420

Date: June 7, 1990

Michael E. Snyder, Esq., Wickwire Gavin, P.C., for the protester.
Mark Shaffer, Esq., Leibowitz & Shaffer, for Brogan Associates, Inc., an interested party.
Terry E. Miller, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Brogan Associates, Inc., an interested party.
James T. Tate, Esq., Strategic Defense Initiative Organization, Department of Defense, for the agency.

DIGEST

Protest that does not set forth detailed basis of protest because its bases arise from material made available to protester pursuant to discovery procedures under a protective order at the General Services Administration Board of Contract Appeals prior to Board's dismissal of protest for lack of jurisdiction is dismissed because General Accounting Office and agency cannot sufficiently respond to protest and permitting a protest under such circumstances would encourage inappropriate protest filings with the Board.

DECISION

Sector Technology, Inc., protests the award of a contract by the Department of Defense's Strategic Defense Initiative Organization (SDIO) under request for proposals (RFP) No. SDIO84-90-R-0002. This case is unusual in that the protester asserts that it is unable to provide any details of its protest because of a protective order issued by the General Services Administration Board of Contract Appeals (GSCA). Although our Bid Protest Regulations require protesters to furnish "a detailed statement of the legal and factual grounds of protest," 4 C.F.R. § 21.1(c)(4) (1990), and provide that we may dismiss a protest if this requirement is not met, 4 C.F.R. § 21.1(f), Sector Technology urges that we not dismiss the protest, primarily on the grounds that the agency is well aware of the actual bases of protest. The agency and the awardee, on the other hand, request that we dismiss the protest both on jurisdictional

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grounds and because the requisite details of the bases of protest have not been furnished. After carefully considering the arguments of the parties, we find that we have jurisdiction but dismiss the protest for the reasons set forth herein.

The contract at issue is for the operation and maintenance of an access control center (ACC) at SDIO. The protester, the former incumbent contractor, states that ACC personnel are required to do such things as control the passage of visitors, escort and keep records of visitors, and make coded badges for visitors. The protester further states that the ACC relies on two computer systems and that contractor personnel operate and maintain the systems.

On March 20, 1990, SDIO awarded the ACC contract to Brogan Associates, Inc. On March 29, Sector Technology protested the award to the GSBICA. On April 4, the GSBICA issued a protective order, and shortly thereafter the protester was furnished files and material subject to the protective order. On April 20, Sector Technology filed an amended protest based on the protected material it had received. On April 24, the Board dismissed the protest for lack of jurisdiction.

On April 25, the protester sought permission from the Board to use certain protected information it had received for purposes of protesting to this Office. The Board denied the request, stating that the "only use of the material in this case . . . shall be the inclusion in the protest of citations to sections of statutes and paragraphs of regulations which protester alleges were violated by actions known through access to the protected information."

On April 25, Sector Technology filed its protest here. The protester stated that the protest was based on protested information it received on April 11 and April 13,^{1/} recited the Board's holding regarding use of the protected information, and alleged that the technical evaluation of proposals and the source selection decision were violative of Federal Acquisition Regulation sections 15.608(a), 15.608(a)(2), 15.608(a)(2)(ii), 15.608(a)(2)(iii), 15.612(d), 15.612(d)(1), 15.612(d)(2), and 15.605(c). No explanation of why these provisions were allegedly violated was provided; instead, the protester stated that the "[s]pecific facts underlying these violations . . . are contained in materials subject to the . . . protective order."

^{1/} Such a protest meets the timeliness requirements of 4 C.F.R. § 21.2(a)(2).

Our normal practice, upon receipt of a protest that does not set forth an adequate statement of the basis for protest, is to dismiss summarily the protest. See, e.g., Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2; Datametrics Corp., B-219617, Aug. 1, 1985, 85-2 CPD ¶ 122; The Pangborn Co.---Reconsideration, B-218087.3, Mar. 11, 1985, 85-1 CPD ¶ 298. Sector Technology's protest submission, containing only unsupported allegations of regulatory violations, clearly did not meet the requirements of our regulation. In light of the unusual circumstances, we requested the protester and SDIO to present their views in detail as to whether dismissal was appropriate. Both parties responded; the awardee also filed comments.

SDIO and the awardee first assert that under our own regulations, we are without jurisdiction because the matter is still pending before the Board. (Our regulations provide that a procurement, while under protest to the Board, may not be the subject of a protest here. See 4 C.F.R. § 21.3(m)(6).) This assertion is based on the fact that the Board's dismissal was not final in the sense that it was, at the time the protest was filed with us, subject to a motion for reconsideration and is still subject to appeal to the United States Court of Appeals for the Federal Circuit.

We find no impediment to jurisdiction. The Competition in Contracting Act (CICA), which established the current protest jurisdiction of both this Office and the Board, provides that a party who has filed a protest with either our Office or the GSBICA may not file a protest with respect to the same procurement with the other forum. 31 U.S.C. § 3552 (1988); 40 U.S.C. § 759(f)(1) (1988). We have interpreted these provisions as precluding a protester from maintaining duplicate actions in these two separate forums, but not as preventing a protester whose Board protest is dismissed without prejudice from timely protesting here. See Telos Field Eng'g, 68 Comp. Gen. 295 (1989), 89-1 CPD ¶ 238. Similarly, our regulatory provision is intended only to preclude what the statute precludes: consideration by the two forums of the same matter at the same time. In our view, once the Board has dismissed a protest, the Board's active consideration of the case is over. Thus, while it is always possible that the Board's dismissal could be reconsidered or appealed,^{2/} at least until such an event occurs the dual forum concern is not present and we have

^{2/} Here the protester has stated on the record that it does not intend to appeal the dismissal.

perceived no reason to decline jurisdiction in such circumstances. See Telos Field Eng'g, supra; Idaho Norland Corp., B-230598, June 6, 1988, 88-1 CPD ¶ 529. We are of the same view here.

That, of course, only leads us to the question of whether dismissal is nonetheless appropriate because of the absence of meaningful detail from the protest. Prior to the effective date of CICA's bid protest provisions, our bid protest procedures permitted protesters to file "bare bones" protests and to supplement the initial filing with necessary details later. See 4 C.F.R. § 21.1(c), 21.2(d) (1984). In light of the CICA-imposed 25-day deadline for submission of an agency report on the protest and the 90-day deadline for issuance of a decision by our Office, however, our regulations implementing CICA eliminated the provision for subsequent submission of protest details and instead require a protester to initially file a "detailed statement" of protest and to furnish a copy of that protest to the contracting agency within a day of the initial filing. See 4 C.F.R. § 21.1(d) (1990). These requirements are intended to provide us and the agency with a sufficient understanding of the grounds for protest and with the opportunity to expeditiously consider and resolve the matter with minimal disruption to the orderly process of government procurement. Southwest Marine of San Francisco, Inc., 66 Comp. Gen. 22 (1986), 86-2 CPD ¶ 388; Sabreliner Corp., 64 Comp. Gen. 325 (1985), 85-1 CPD ¶ 280; Military Base Management, Inc., B-224128, Nov. 26, 1986, 86-2 CPD ¶ 616.

We do not apply these rules mechanistically, however. For example, where an agency is not precluded by a protester's failure to furnish the copy of the protest within the required 1 day from timely responding to the protest, we decline to dismiss the protest. See Southwest Marine of San Francisco, Inc., supra; Container Prods. Corp., 64 Comp. Gen. 641 (1985), 85-1 CPD ¶ 727; Sixth and Virginia Properties, B-220584, Jan. 14, 1986, 86-1 CPD ¶ 37. Such circumstances arise when the contracting officer has actual knowledge of the basis of protest (because, for example, the protest was first pursued within the agency). See Motorola Inc.--Reconsideration, B-218888.2, June 24, 1985, 85-1 CPD ¶ 719; Rosemount, Inc., B-218121, May 16, 1985, 85-1 CPD ¶ 556. We similarly decline to dismiss because of an inadequate statement of protest when the agency is nonetheless aware of the basis for protest. J.M. Cashman, Inc., B-220560, Nov. 13, 1985, 85-2 CPD ¶ 554; Rosemount, Inc., supra. Thus, our initial focus here is whether the agency is sufficiently aware of the basis of protest, despite the lack of detail in the protest submission, so that it can timely and effectively respond.

The protester asserts that SDIO is aware of the protest bases. The protester states that: (1) the facts set forth in its amended protest at the Board "include some of the same facts giving rise to the" protest before us, (2) while the protest was pending at the Board, it made the agency aware of the procurement deficiencies it had identified, (3) the deficiencies were identified in a memorandum filed by the protester at the Board, (4) the deficiencies were enumerated on during a telephone conference call that included the GSBICA judge, the protester, and SDIO counsel, and (5) the factual grounds for the protest and aspects of the procurement asserted to be illegal were set forth with specificity in a letter sent by the protester to the GSBICA judge, a copy of which was furnished to SDIO counsel. The protester also states that its bases for protest were discussed in subsequent conversations with SDIO counsel and concludes that for SDIO "to insist that it does not know the facts underlying the protest is incredible."

SDIO does not deny that it has some knowledge of the protester's concerns. It states, however, that to frame an appropriate response "it must necessarily draw upon the allegations presented to it by the protester" outside of the protest submission and "identify those most likely" to have been encompassed by the protest filed with us. SDIO further states that to do so it would have to rely on a "confidential conversation" between counsel for SDIO and the protester that was held for settlement purposes only; SDIO objects to the possible use of confidential settlement discussions for establishing the sufficiency of the initial protest filing.

It seems reasonably clear that SDIO is aware of at least some of the details underlying the protest. On the other hand, since apparently the protest filed here is not coextensive with the amended protest filed with the Board, it is not at all clear to us, even in light of the protester's statements, that the agency knows each element of protest intended by Sector Technology and the particular legal arguments the protester has in mind with respect to each element. Thus, we view this situation as one where the agency would have to surmise the protester's precise bases for protest and the arguments in support thereof.

This is not a burden the protest process places on the agency. As we said in connection with a protester's failure to furnish to the agency a copy of its protest filed with us:

". . . an agency must file a written report . . . within a strict time limit of 25 working days The report must contain a detailed response to allegations raised by a protester. We think that possession by the agency of a written copy of the protest is essential to its ability to accomplish this task, even where the protest has previously been filed with and denied by the agency. We fail to see how an agency can know, without a copy of the protest, whether the protester desires a de novo review of all the issues previously raised, whether certain issues were abandoned, whether new arguments or points of law are made, or whether entirely new protest issues are raised." Washington State Commission for Vocational Education--Reconsideration, 64 Comp. Gen. 681, 683 (1985), 85-2 CPD ¶ 59.

While the agency here has been furnished a copy of the protest, nothing in the record before us establishes that the protest submission, as augmented by documents filed with the Board and by conversations between counsel for the agency and the protester, has placed the agency on notice of exactly what issues the protester is pursuing and of the arguments and points of law the protester has in mind to support its position. Although it is clear that the protester is alleging improprieties in connection with the adequacy of discussions and the evaluation of proposals, and presumably has identified to agency counsel whatever it is in the protected material that leads it to make those allegations, we think the agency is entitled to know exactly what those improprieties are and what the legal basis is for viewing the facts as evidencing improper action.

In this regard, we point out that the allegations here involve areas of significant agency discretion, see Food Science Assocs., Inc., B-183054, Apr. 30, 1975, 75-1 CPD ¶ 269 ("the content and extent of discussions . . . is a matter of judgment for determination by the . . . agency on the basis of the particular facts of each case"); Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325 (" . . . source selection decision-making is vested in the 'considerable range of judgment and discretion' of the selection officials . . . who have a 'very broad degree of discretion . . . in determining the manner and extent to which [they] will make use of technical evaluation results'"), so that the mere identification of certain agency action purported to be improper generally will be insufficient to establish an impropriety. Rather, the protester must present some argument as to why the agency action represents an abuse of discretion; in that way the

agency can respond specifically to what the protester has in mind. The record here simply does not permit us to conclude that the protester's position has been sufficiently presented in any written document so that SDIO could effectively respond.

Moreover, the sparse protest submission does not permit us to fulfill our responsibilities. CICA authorizes us to dismiss protests that are frivolous or that do not state a basis for protest, 31 U.S.C. § 3554(a)(3), and our regulations state that we will dismiss such protests. See 4 C.F.R. § 21.3(m). Our regulations further require protests to be timely. See 4 C.F.R. § 21.2. Without a more detailed statement from the protester, we cannot determine whether the protest is in fact timely as the protester alleges or whether the protest intended by Sector Technology on its face might be legally meritorious. See Beretta USA Corp., B-232681, Oct. 26, 1988, 88-2 CPD ¶ 395, aff'd, B-232681.4, Jan. 9, 1989, 89-1 CPD ¶ 16, where we dismissed a protest because on its face it was without legal merit.

Accordingly, we think dismissal is appropriate.

There are also sound policy reasons supporting this result. Counsel for protesters who elect to file at the Board have the opportunity to obtain access to certain procurement agency information, subject to a protective order which permits the disclosed information to be used only for the protest before the Board. To allow a protester to file at the Board, obtain access to material for the limited purpose of using it in connection with the Board protest, and then use the information to file a protest in another forum if the Board protest is dismissed is inconsistent with the statutory protest scheme that essentially envisions a protester's selecting one administrative protest forum and utilizing the procedural tools available from that forum in that forum only. Moreover, as the Board, a forum with limited jurisdiction, pointed out both in an earlier case and in denying the protester's request to utilize the protected information here, allowing the use of protected material in such cases would promote protest filings at the Board over which the Board has no jurisdiction. See Computer Sciences Corp., GSBICA No. 10388-P, 90-1 BCA ¶ 22,539, 1989 BPD ¶ 394.

We think this is a valid concern. While we do not in any way suggest that Sector Technology filed a protest of doubtful jurisdictional validity with the Board solely to obtain access to information that it could then use here, we agree with the Board that permitting a protester to use

protected information obtained through the Board's discovery procedure to initiate and pursue a protest in another forum would promote protest filings clearly not intended by Congress. Consequently, while we will continue to permit protesters who initially file with the Board to protest here if they can do so timely and if the matter is no longer before the Board, we are not inclined to allow the filing of a protest that is based entirely on protected information obtained pursuant to discovery procedures at the Board.

The protest is dismissed.



James F. Hinchman
General Counsel