

DECISION



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

18622

FILE: B-200482.2

DATE: June 25, 1981

MATTER OF: Photonics Technology, Inc.--
Reconsideration

18621

DIGEST:

1. Although protester requests reconsideration on five of six issues raised in original protest, prior decision, denying protest, is affirmed as to first four issues since protester does not show that, as to those specific issues, decision contains any error of fact or law.
2. Where protester may have been unintentionally led to believe that, in granting extension for filing comments, GAO actually waived time limits on raising new basis of protest, fairness dictates that GAO consider later-raised allegation which previously had been found untimely.
3. Use of Manufacturing Methods and Technology type procurement is not unreasonable where contracting agency wishes to purchase information on automated production facility process and on operating procedure to produce item that meets certain specified standards.

Photonics Technology, Inc. (Photonics), requests reconsideration of our decision in the matter of Photonics Technology, Inc., B-200482, April 15, 1981, 81-1 CPD 288, in which we denied Photonics' protest. The pertinent facts in that case follow.

[Protest of Army Contract Award]

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The United States Army Electronics Research and Development Command (Army), Fort Monmouth, New Jersey, issued request for proposals (RFQ) No. DAAK20-80-Q0512, soliciting quotations for a Manufacturing Methods and Technology (MM&T) project to establish production techniques for Military Plasma-Panel Displays (plasma-panels). Plasma-panels are relatively thin electronic glass panels which replace conventional cathode ray tubes. They are used, for example, with weapons or electronic surveillance systems which require screen displays for their operation. In the past, the production of plasma-panels required a considerable amount of the work to be done by hand. Consequently, the purpose of this MM&T procurement was to make the production of the panels more automated as a means of supporting the Army's Industrial Preparedness Program. Thus, the RFQ required the successful contractor to devise and establish an automated pilot-production facility capable of producing plasma-panels of two specified sizes at a rate of at least 50 acceptable panels of each size per month.

Only three firms submitted quotations. After negotiations and the receipt of best and final offers, the contract was awarded to Norden Systems (Norden), a subsidiary of United Technologies. Photonics' price was the highest of the three. Upon learning of the award, Photonics filed a protest with our Office arguing that it was misled by the Army during negotiations, that the Army's evaluation of Norden's technical proposal was defective, that the award to Norden violated a prior agreement Photonics had with the Department of the Navy, that the Army was discriminating against a woman-owned, small business, and that it was questionable whether the Army should have used an MM&T procurement at all since Norden claimed that it already had a fully automated facility built and ready for production.

We denied Photonics' protest on all grounds, holding that:

1. Since the only available evidence that Photonics was misled during price discussions was the conflicting statements of Photonics

and the Army, Photonics had not met its burden of affirmatively proving its case;

2. The Army's evaluation of Norden's technical proposal would not be questioned since the evaluation was shown to have a reasonable basis;
3. Since our Office does not conduct investigations to establish whether a protester's speculative statements are valid, Photonics had not presented sufficient evidence to show that any prior contractual agreement ever existed between itself and the Department of the Navy by which the Federal Government was allegedly prohibited from financing a plasma-panel manufacturing facility for Norden nor had Photonics presented sufficient evidence to prove that the Army and the Navy were acting in unison to help Norden get into the plasma-panel business;
4. Since the solicitation contained no special evaluation factor giving preference to women-owned concerns, it would have been improper to select Photonics for the award on that basis;
5. There was no basis to question the contracting officer's decision not to set this procurement aside for small business since there was no evidence that the competition required by the Defense Acquisition Regulation for a set-aside existed in this case and both the Army's Small Business Advisory Office and the Small Business Administration

Procurement Center representative concurred in the contracting officer's decision; and finally,

6. Since Photonics did not challenge the Army's use of a MM&T procurement until the submission of its final written comments, this issue was not raised in a timely manner and would not be considered on the merits.

Requests for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 20.9(a) (1980); Data General--Reconsideration, B-197776, August 22, 1980, 80-2 CPD 139.

Photonics disagrees with all our findings except for our conclusion that there was no basis to question the contracting officer's decision not to set the procurement aside for small business. However, on the first four issues, Photonics arguments are generally a restatement of its initial protest. While it challenges our interpretation of the facts and our application of the law to those facts, Photonics has not demonstrated that we have made any errors of law nor has it presented any information which was not previously considered. On these issues, therefore, we find no basis to reverse or modify our decision.

Regarding the sixth and final issue, which we found to be untimely, Photonics argues that the issue was raised in a timely manner and should have been considered on the merits. In our prior decision, we held that, if Photonics believed that the Army should not have used an MM&T type procurement, this was an alleged impropriety in the solicitation apparent prior to the closing date for the receipt of initial proposals and therefore had to be protested prior to that closing date. Since the issue was actually first raised in Photonics' final written comments on the agency's supplementary protest report, we concluded

that the issue was untimely raised. In the alternative, we held that even if Photonics was not aware of this basis for protest until it had received the agency report and Norden's comments on the protest, its protest on this ground was still untimely because, contrary to our Bid Protest Procedures, this issue was not raised until more than 10 working days after Photonics knew or should have known this particular basis of protest from the aforementioned documents.

On reconsideration, Photonics contends that it was unaware of this ground for protest until it received a Norden letter dated February 13, 1981, in which Norden stated that it already had an automated plasma-panel manufacturing facility. Photonics states that it received this letter on February 17, 1981, and the agency's supplementary report on February 26, 1981. According to Photonics, on March 4, 1981, a member of our Office of General Counsel granted Photonics an extension of time for filing its comments on these two documents. Thus, Photonics maintains that its comments to GAO of March 9, 1981, in which the issue in question was first raised, although filed more than 10 days after receipt of the Norden letter, must still be considered to have raised the issue in a timely manner in view of the extension of time it had been granted.

At the outset, we note that Norden first claimed that it had already built a facility for the automated production of plasma-panels in a letter to the contracting officer dated October 15, 1980. This letter was in response to Photonics' protest letter to our Office dated September 15, 1980. Thus, if Photonics was aware of this letter, its protest on the issue in question is clearly untimely. However, apparently Photonics never received a copy of Norden's letter of October 15, 1980.

While it is the policy of our Office to grant reasonable time extensions for the filing of comments, when a protester seeks to raise new protest allegations, the 10-day filing period specified in 4 C.F.R. § 20.2(b)(2) (1980) must be met. Arawak Consulting Corporation--Request for Reconsideration, B-196010.2, September 5, 1980, 80-2 CPD 178. When the member of the

Office of General Counsel granted Photonics an extension of time for filing its comments, he had no intention of waiving the time limits of 4 C.F.R. § 20.2(b)(2) as to a later-raised basis of protest. Under these circumstances, therefore, the issue still remains untimely raised.

Nevertheless, we are concerned that Photonics may have been misled, although unintentionally, into believing that, in granting the extension for filing comments, the time limits of 4 C.F.R. § 20.2(b)(2) also were waived. Therefore, fairness dictates that we consider the merits of the allegation in question. Arawak Consulting Corporation--Request for Reconsideration, supra.

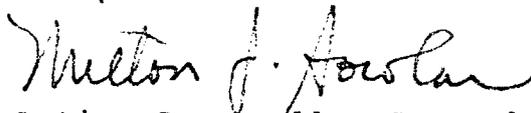
Photonics argues that the existence of Norden's automated facility means that the MM&T solicitation was not needed and, therefore, that it is in the best interests of the Government to terminate Norden's contract. In this connection, Photonics also points out that International Business Machine Corp. (IBM) can presently produce an estimated 50,000 to 100,000 plasma-panels per year.

As noted above, the RFQ states that the purpose of this MM&T procurement is "to devise and establish an automated pilot-production facility capable of producing plasma display-panels of the two specified sizes at the rate of at least fifty acceptable panels of each size per month." Also, in its supplementary report, the Army states that even though "a number of firms have the required technology and have fabricated prototype panels, there is no existing United States manufacturer producing plasma panels to a military specification, nor is there a proven efficient manufacturing method and technique."

The general rule is that the determination of the Government's minimum needs and the best methods of accommodating those needs is primarily the responsibility of the Government contracting agencies. Consequently, our Office will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis. East Bay Auto Supply, Inc., B-195325, October 23, 1979, 79-2 CPD 281.

We believe that Photonics' emphasis on the existence of Norden's automated production facility reflects a misunderstanding of the purpose of this procurement. The final objective is not the creation of an automated production facility; it is obtaining "manufacturing method and technique" information. Through the procurement, the Army is purchasing information on the automated production facility process and on the operating procedure to produce an item that meets certain specified standards. It is this information that the Army intends to obtain from Norden. In light of this, we do not believe that Photonics has shown that the Army's use of an MM&T type procurement in this situation is unreasonable.

Therefore, we affirm our prior decision as to the first four issues and, on reconsideration, find Photonics' final ground for protest to be without merit.



Acting Comptroller General
of the United States