

7/1/85

DECISION



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

FILE: B-219797 **DATE:** October 23, 1985
MATTER OF: Environmental Systems Research
Institute

DIGEST:

1. Allegation that specifications contained in request for proposals (RFP) are unduly restrictive of competition states a basis of protest under our Bid Protest Regulations. Fact that specifications are based on agency policy which, standing alone, would not be reviewable generally by GAO does not alter our conclusion since the policy was incorporated into the RFP specifications which are subject to review by our Office.
2. Under GAO Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. Dismissal is not warranted where, as here, the protester could have refiled the protest timely if the protest was dismissed for failure to furnish a copy to the contracting officer timely. Furthermore, the agency has not been prejudiced by the delay in receiving a copy of the protest since it filed its report within 25 working days of the contracting officer's receipt of the copy of the protest.
3. To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A firm which supplies software to potential bidders or offerors, but which is not a potential bidder or offeror in its own right, is not an interested party.

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Environmental Systems Research Institute (ESRI), a firm which develops and supplies computer software, protests, as unduly restrictive, request for proposals (RFP) No. FWS-9-NWI-85-014 issued by the United States Department of the Interior (Interior) for the procurement of computers and related software to process geographic information.

We dismiss the protest.

The RFP requires that the awardee furnish a minimum of three complete computerized geographic information systems (GIS) and operational software and provides for a total estimated option quantity of 302 systems. In addition, the RFP provides that the successful contractor will convert existing geoprocessing software developed by Interior to assure compatibility with the proposed equipment.

ESRI claims Interior's policy decision to continue to fund in-house development of GIS software inhibits commercial efforts to provide this software and is not cost effective for the government. ESRI seeks the opportunity to offer its GIS software under this RFP. ESRI believes its software meets Interior's needs and is a less costly alternative to continued development of the in-house software.

Initially, we note that Interior requests that we dismiss the protest for two reasons. First, Interior contends that ESRI failed to set forth a detailed statement of the factual and legal grounds of its protest as required by 4 C.F.R. § 21.1(c)(4) (1985) because the protest, in the agency's view, merely challenges the Interior's policy to continue to use and improve existing in-house software. However, the protest is against the RFP specifications which implement the policy. In this regard, ESRI essentially protests that the agency has stated its needs under the RFP in a way which unduly restricts competition, and GAO will consider protests such as this one alleging that specifications are unduly restrictive. See for example, Superior Boiler Works, Inc., B-216472, Mar. 25, 1985, 85-1 C.P.D. ¶ 342.

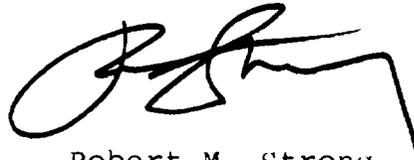
Interior additionally argues that we should have dismissed the protest because ESRI failed to comply with our Bid Protest Regulations, 4 C.F.R. §§ 21.1(d) and (f) (1985), which require that the protester file a copy of the protest with the contracting officer within 1 day of filing its protest. The contracting officer did not receive a copy of the protest until August 9, 4 days after ESRI filed its protest with GAO.

We have recognized, however, that the cited regulations provide that failure to comply with the procedural requirements set forth in 4 C.F.R. § 21.1 "may" be cause for dismissal; therefore, dismissal is not required in all circumstances. See Rolen-Rolen-Roberts International, et al., B-218424, et al., Aug. 1, 1985, 85-2 C.P.D. ¶ 113. Here, the protester initially pursued its protest with the agency. Interior denied ESRI's protest on July 26, 1985. The protester apparently learned on July 30 (the date ESRI sent its protest to GAO) that its agency-level protest was denied and, while ESRI's protest was filed on August 5, ESRI had until August 13 to timely file its protest with our Office. 4 C.F.R. § 21.2(a)(3) (1985). Accordingly, ESRI could have refiled its protest timely and also complied with the 1-day requirement if we had dismissed the August 5 protest. Thus, in our view, a dismissal in these circumstances would have constituted a technicality which would not have served a useful purpose. Furthermore, Interior was not prejudiced by the delay in receiving a copy of the protest since it filed its agency report within 25 days from the date it was furnished a copy of the protest.

Nevertheless, we dismiss the protest because ESRI is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0 (1985). Under 31 U.S.C. § 3551, et seq., as added by § 2741(a) of the Competition in Contracting Act of 1984 (CICA), (this Office only decides protests filed by interested parties. Under CICA, an "interested party" is defined as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." This statutory definition is reflected in our Bid Protest Regulations implementing CICA. 4 C.F.R. § 21.0(a), supra.

In its protest letter, ESRI does not claim to be a potential prime contractor capable of supplying both the hardware and compatible software under this RFP, but instead describes itself as a small computer business that has worked to develop GIS software.

Under the RFP, the contractor is required to provide a computer system consisting of hardware and compatible software, and ESRI is a potential supplier of only the required software. Therefore, ESRI is not an actual or prospective bidder or offeror on the protested solicitation, but only a supplier to firms capable of competing for this project. Under these circumstances, ESRI is not an interested party under CICA and our implementing Bid Protest Regulations and, thus, is not eligible to protest this procurement. See Julie Research Laboratories, Inc., B-219370, Aug. 16, 1985, 85-2 C.P.D. ¶ 185.



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