

DECISION

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

FILE: B-208786.3

DATE: May 10, 1983

MATTER OF: Mitek Systems, Inc. - Request for
Reconsideration

DIGEST:

1. While protesters must diligently pursue information that forms the basis of a protest, when agency admits that announcement of award dated July 7 may not have been mailed until the period of July 30 to August 4, GAO will resolve doubts about the timeliness of a protest based on information obtained in a debriefing requested on August 6 in favor of protester.
2. Whether given point spread between two competing proposals indicates the significant technical superiority of one over the other depends on the facts and circumstances of each case, and is primarily a matter within the discretion of the procuring agency. That protester's proposal was considered technically acceptable does not mean that it was equivalent to that of awardee and does not render evaluation of awardee's proposal an abuse of discretion.
3. In negotiated procurement, agency need not make award on basis of lowest cost, but rather, has discretion to select highly-rated technical proposal over a lower-rated, but lower cost, proposal if such action is in the best interest of Government and is consistent with evaluation criteria in request for proposals.
4. Statute requiring the matter to be referred to the Small Business Administration before a small business concern can be precluded from award as nonresponsible does not apply when small business' elimination from competition

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is not based on a determination of nonresponsibility, but rather on decision that awardee's proposal is most advantageous to the Government.

5. GAO will deny protest that Navy used incorrect cost figures in evaluating protester's best and final offer where protester, though aware of mistake in initial proposal, failed to take advantage of opportunity to change the figures in best and final.
6. Since protester should have known when it received request for best and final offers that agency did not intend to conduct oral negotiations, protest on this basis filed 2 months after due date for best and finals is untimely.
7. New grounds of protest must independently satisfy timeliness requirements of GAO bid protest procedures and thus must be filed within 10 working days after the basis for them is known or should have been known.

Mitek Systems, Inc., requests reconsideration of our decision in Mitek Systems, Inc., B-208786.2, November 3, 1982. In that decision, we affirmed our previous dismissal for untimeliness of Mitek's protest against award of a contract to Data/Ware Development by the Naval Regional Contracting Center, Long Beach, California. See Mitek Systems, Inc., B-208786, September 24, 1982, 82-2 CPD 274. Although for the reasons outlined below we have now considered Mitek's protest, we still find it untimely in part. We deny the remainder of the protest.

Mitek responded to request for proposals No. N00123-81-R-1337 for software engineering and programming services at the Naval Ocean Systems Center, San Diego, California. Three offerors--Mitek, Data/Ware, and Systems Exploration, Inc.--were considered to be within the competitive range. By letters of April 26, 1982, the Navy advised each of

deficiencies in their proposals and requested best and final offers by May 10.

By letter dated July 7, the Navy informed Mitek that award had been made to Data/Ware. By letter of August 6, 1982 (mistakenly dated 1978), Mitek lodged a protest with the contracting officer and requested a debriefing, which took place on August 13. On August 26, Mitek protested to our Office, specifying several grounds of protest in addition to those mentioned in its August 6 letter.

Although the protest to our Office thus was filed 9 working days after the debriefing, we initially concluded that it was untimely. Under the rules spelled out in our cases, protesters must diligently pursue information that forms the basis of a protest, and if they do not do so within a reasonable time, our Office will dismiss an ultimately filed protest as untimely. Since Mitek had not requested a debriefing until a month after the date of the Navy's letter announcing the award to Data/Ware, we found that Mitek had not requested information that would provide the basis for its protest within a reasonable time. We therefore would not consider it.

In its current request for reconsideration, Mitek claims that while the Navy's letter was dated July 7, 1982, Mitek did not receive it until August 6. Therefore, Mitek argues, its request for a debriefing was made as soon as possible. The Navy has no record when the announcement actually was mailed, but suggests that since the contract was not signed by Data/Ware until July 30 and by the Navy until August 4, it probably was not mailed until some time between those dates. Since the record is unclear as to when Mitek received the announcement of the award to Data/Ware, we will resolve any doubts as to the timeliness of the protest to our Office in favor of Mitek. See Rolm Intermountain Corporation, B-206327.4, December 22, 1982, 82-2 CPD 564.

The solicitation in question stated that proposals would be evaluated on the basis of proposed personnel, company experience, management, and cost. Offerors were told that personnel was the most important of these, followed in decreasing order of importance by cost, experience, and management factors. The Navy explicitly warned that:

"although not given substantial weight, cost is an important factor. The degree of its importance will increase with the degree of technical equality of the various proposals * * *."

The actual weights assigned to each factor were not disclosed in the solicitation; however, cost was weighted at 25 percent and technical factors at 75 percent (personnel, 40; experience, 20; and management, 15).

Data/Ware's best and final offer received 66 technical points; its proposed cost plus fixed fee for a base and 1 option year was \$997,667. Mitek received 59 technical points; its proposed costs plus fee totaled \$982,400. Thus, while Mitek's total was \$15,267, or 1.5 percent less than Data/Ware's, the latter's technical score was 7 points or 11.9 percent higher than Mitek's. The Navy determined that the 7 points reflected a significant difference in technical quality, while the cost differential was relatively insignificant. Accordingly, award was made to Data/Ware.

Mitek does not challenge the reasonableness of the evaluation per se. Rather, it contends that the two firms were virtually equal technically, and that evaluators so stated during its debriefing, indicating that both Data/Ware and Mitek were acceptable to the Navy. Therefore, Mitek argues, the contract should have gone to the lowest offeror.

Whether a given point spread between two competing proposals indicates the significant technical superiority of one over the other depends on the facts and circumstances of each case and is primarily a matter within the discretion of the procuring agency. Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49. In our opinion, Mitek has failed to establish that the Navy abused its discretion by deciding that a significant technical difference existed between its own proposal and Data/Ware's higher-rated one. That Mitek may have been considered technically acceptable does not mean that its proposal was equal to Data/Ware's. Nor does it render the award to Data/Ware improper. See Charter Medical Services, Inc., B-188372, September 22, 1977, 77-2 CPD 214.

The record does not support Mitek's allegation that an undisclosed number of the evaluators believed that the proposals were technically equal. Rather, it shows that the overall evaluation by the Naval Ocean Systems Center indicated a significant technical difference. Given that the only evidence is the inconsistent statements of Mitek and the Naval Ocean Systems Center, we find Mitek has failed to carry its burden of proof on this issue. See Panuzio/Rees Associates, B-197516, November 26, 1980, 80-2 CPD 395.

As for Mitek's contention that it should have been awarded the contract, there is no requirement that a cost-type contract be awarded on the basis of the lowest proposed costs. Rather, a procuring agency has discretion to select a higher-rated technical proposal over a lower-rated, but lower cost, proposal, if doing so is in the best interest of the Government and is consistent with the evaluation criteria set forth in the request for proposals. Such a selection is in the best interest of the Government if the performance expected under the technically superior proposal outweighs the potential additional cost. We have stated that we will not disturb the judgment of the agency officials in this regard unless it is clearly without a reasonable basis. See Development Associates, Inc., B-205380, July 12, 1982, 82-2 CPD 37.

Given the significant technical superiority and the only slightly higher total cost of Data/Ware's proposal, and given the clear warning in the request for proposals that cost would not be given substantial weight, we see no reason to object to the award to Data/Ware. See Baird Corporation, B-206268, July 6, 1982, 82-2 CPD 17. The protest on this basis is denied.

Mitek further contends that the contracting officer failed to refer the question of its competency to the Small Business Administration. If an agency determines that a small business concern such as Mitek is nonresponsible, the law requires that the matter be referred to SBA before the small business can be precluded from award. 15 U.S.C.

§ 637(b)(7) (Supp. IV, 1980). The award to Data/Ware, however, was not based on a determination that Mitek was nonresponsible, but rather on the decision that Data/Ware's proposal was most advantageous to the Navy. Therefore, the Navy had no obligation to refer the matter to SBA, and Mitek's protest on this basis is also denied.

Mitek further alleges that during a preaward survey by the Defense Contract Audit Agency, it pointed out certain errors in its calculations of labor escalation and reduced its overhead rate. Mitek claims that the Navy did not use the correct figures to compare its proposed costs to those of other offerors. The record does not support this allegation. The report of the Defense Contract Audit Agency, which was included in the Navy's report to our Office, shows that Mitek actually understated its proposed costs by \$83,000 in its initial proposal. The report is dated March 15, 1982, well before best and final offers. Thus, even if the \$982,400 figure in Mitek's initial proposal was overstated, Mitek had an opportunity to change it in its best and final offer. Since it did not do so, Mitek cannot now complain that the Navy failed to use the correct cost figures in evaluating its proposal.

We find the remainder of Mitek's protest untimely. Mitek alleges that the Navy violated Defense Acquisition Regulation (DAR) § 4-106.3 (DAR 76-40, November 26, 1982) by failing to conduct oral negotiations on its technical and cost proposals. However, Mitek should have known as soon as it received the April 26, 1982 request for best and finals that the Navy did not intend to conduct oral negotiations. Since Mitek did not protest this alleged deficiency within 10 days, as required by our procedures, 4 C.F.R. § 21.2(b)(2) (1983), but rather waited until August 6, 1982, nearly 2 months after the due date for best and final offers, its protest on this basis is untimely. See PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382 (alleged deficiency in scope of negotiations).

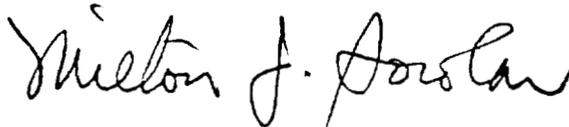
Mitek argues that the Navy also violated DAR § 4-106.3 by confining its request for best and final offers to technical areas and the fixed fee and not asking for a final total price. Mitek indicates that it is now ready to negotiate such a price, misunderstanding that, as noted above, a request for best and final offers is by definition an opportunity to revise any aspect of a proposal--

including costs. In any event, this basis of protest also is untimely, since Mitek did not raise it until an August 24 letter to the contracting officer. Where alleged deficiencies in a call for best and final offers are apparent before the date established for submission of such offers, a protest filed thereafter is untimely. Urban Transportation Development Corporation, Ltd., B-201939, August 7, 1981, 81-2 CPD 107.

In a letter dated September 13, 1982, Mitek advances several additional grounds of protest, specifically that the weighting of the evaluation criteria improperly negated cost as an evaluation factor and that it should have received 25 points for submitting the lowest proposed cost and Data/Ware no points for proposed cost. Mitek also alleges that while the request for proposals listed evaluation factors in decreasing order of importance, the sub-factors under management actually were given equal weight.

New grounds of protest must independently satisfy the timeliness requirements of our procedures, and thus must be filed within 10 working days after the basis for them is known or should have been known, whichever is earlier. Tombs & Sons, Inc., B-206810.4, August 2, 1982, 82-2 CPD 100. Since Mitek appears to have been aware of these grounds of protest at least as early as the August 13 debriefing, we will not consider these issues now.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States