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DECISION



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

FILE: B-203279

DATE: April 27, 1982

MATTER OF: Arrowpointe Corporation

DIGEST:

1. Protest of agency's failure to delay awards on one program until completion of evaluation of proposals submitted under related interim program so as to reduce possible competitive advantage of first awardees under second program is untimely under GAO Bid Protest Procedures because protest was not filed within ten days from the date that agency informed offerors that award was planned under initial program.
2. Protest that no small business firms were included among awardees and that a foreign firm was improperly included is without merit since solicitation clearly was not restricted to small businesses or to domestic firms nor did it contain any evaluation factor which gave offerors credit for their domestic small business status. Agency, therefore had no legal basis for excluding foreign firms or giving preferential treatment to small business firms.
3. Protester's contentions that it was unfairly denied opportunity to have its vehicle tested in 1980 when agency sought to determine capabilities of existing vehicles to develop guidelines for procurements and refused to provide it with data it requested are untimely since protester discussed matters with the agency in February but did not file its protest until May. Under our Bid Protest Procedures protester cannot stand idly by, but must protest within a reasonable period.

Arrowpointe Corporation protests the timing of two contract awards for a Mobile Protected Weapons System (MPWS) by the Naval Sea Systems Command for the U.S. Marine Corps on grounds that the awardees on these two procurements would have an unfair advantage in the competition for a third related procurement. Arrowpointe requests that awards under requests for proposals (RFP) Nos. N0024-80-R-2213Q (2213) and N00024-80-R-2193Q (2193) be postponed until after competitive testing and evaluation has been completed for the related program known as the Light Armored Vehicle (LAV) program. Arrowpointe also objects to the inclusion of three firms of "non-United States origin" among those selected for award of MPWS contracts and complains that no small businesses were included among those receiving contracts. The protester also complains that the Marine Corps refused to accept an Arrowpointe vehicle in an earlier testing program related to the MPWS program and denied Arrowpointe data it requested. We find most of the protest to be untimely and the remainder to be without merit.

Background

As the first phase of a four-phase MPWS development program, the Navy in September 1980 issued solicitation No. 2213, calling for proposals for hybrid designs of existing vehicles, and solicitation No. 2193, calling for proposals for new concept vehicle designs. The goal of the development program is an operational vehicle in either 1986 or 1988, depending on whether the hybrid or the new concept design approach is selected for development. Eleven firms submitted proposals on solicitation No. 2193 and ten firms, including Arrowpointe, submitted proposals under solicitation No. 2213. On April 16, 1981, the Navy selected seven firms for awards under RFP 2193 and three firms for awards under RFP 2213. By letters dated either April 29 or 30, all offerors were notified whether they had been selected. Arrowpointe was informed that it was an unsuccessful offeror. The selected firms were awarded contracts in June.

In the meantime, on April 14, 1981, a request for proposals for the first phase of the LAV program was issued with a June 30 date for receipt of initial proposals. This program involves the ultimate acquisition of an "off-the-shelf" vehicle to serve the Rapid Development Force until the MPWS vehicle becomes operational. Under Phase I, three vehicles are to be processed for testing and evaluation. Phase II involves award of a production contract.

Unfair Competitive Advantage

Arrowpointe contends that the similarity of the LVA and MPWS programs provides MPWS contractors with a competitive edge over others who wished to compete for the LAV procurement and that the Navy has a duty to prevent the accrual of this "unfair competitive advantage."

Our Bid Protest Procedures require that protests involving other than solicitation deficiencies be filed within 10 days of when the grounds for protest are known. 4 C.F.R. § 21.1(b)(2) (1981). The Navy reports that Arrowpointe picked up a copy of the LAV solicitation on April 14, 1981. Thus, Arrowpointe knew or should have known by that date of the similarity it alleges between the LAV and MPWS programs and therefore should have protested the Navy's continuing with the MPWS procurements within 10 working days of that date. The protest was not filed, however, until May 12.

Arrowpointe argues that the protest is nevertheless timely because when the LAV solicitation was issued "there was no indication that awards of MPWS contracts were imminent" and because the MPWS program "had been postponed several times previously [and] there was no reason to believe that further postponements should not be expected." According to Arrowpointe, since the LAV program was urgent and in light of the program similarities "it was logical to suspect that the MPWS might be postponed or withdrawn in order to prevent redundancy."

We are not inclined to accept this argument. We do not believe an offeror is free to assume that there will be cancellation or postponement of award action without some explicit indication from the agency that such action is to be expected. Here, Arrowpointe admits that on April 22, 1981 it received a letter from the Navy advising that the necessary approval from the Secretary of Defense for the MPWS procurements had been received but that contractor selection had not yet been made. We believe that at that point Arrowpointe could not reasonably assume further delay, but rather should have understood that with the approval that had been received the procurements would go forward. Thus, we believe Arrowpointe, at best, had 10 working days from April 22 to file its protest. As it did not do so, we find the protest on this issue to be untimely.

We point out, however, that there is nothing unusual or improper in an offeror's enjoying a competitive advantage arising by virtue of its current or previous contracts or its own particular circumstances; it is only when the advantage results from unfair or improper Government action that the situation is legally objectionable. Communications Corps Incorporated, B-195778, February 20, 1980, 80-1 CPD 143. We further point out that an agency's timetable for a procurement which reflects its program needs does not give rise to unfair or improper action.

Foreign Competition and Small Business Concerns

Arrowpointe asserts that it was poor policy for the agency to make award to foreign firms and to displace small business firms from the MPWS program. The protester further complains that no small business like itself received an award under this program.

The answer to these concerns is simple. The MPWS RFPs contained no restriction on the submission of proposals by foreign firms; consequently, it would not have been proper for the Navy to deny award to a competitor merely because it was not a domestic firm. See Hawaiian Dredging & Construction Company, a Dillingham Company, Gibbs & Hill, Inc., B-195101; B-195101.2, April 3, 1980, 80-1 CPD 258. Similarly, because the procurement was not set aside for small business and the solicitation did not provide for special consideration of small business status, the agency had no legal basis for giving preferential treatment to small business concerns in the selection and award process. Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254.

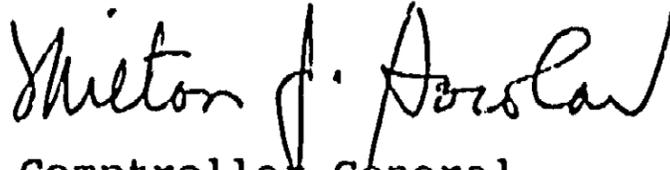
Other Issues

Arrowpointe contends that it was unfairly denied an opportunity to submit one of its vehicles for testing in 1980 while those of other firms were tested in connection with the MPWS program and that the agency has failed to furnish it requested data. The Navy denies testing any vehicle other than the ones leased from the Canadian Government to evaluate the way an MPWS-type vehicle could be integrated into Marine units. The Navy states that it so limited the vehicles used "in order to prevent prejudice to contractors" and, in any event, did not use the tests to measure the capabilities of any individual vehicle.

Even if these are protestable issues, we think they are untimely raised. Arrowpointe concedes it became aware of the scheduled test and its possible competitive implications in late November 1979 and expressed concern to the Navy in a letter dated December 7, 1979. However, it also sent a letter dated February 11, 1980 to the agency clearly conveying its intention not to protest at that time because of possible adverse effects on the program. Arrowpointe states it agreed to do so in exchange for a promise that the Navy would furnish it certain data. It claims it is still waiting for that data.

Under our protest procedures, a potential protester cannot wait indefinitely for the agency action it desires. If, after a reasonable period of time, the agency does not take any action, the potential protester cannot stand idly by; rather, it must file a protest. See Entron, Inc., B-202397, August 12, 1981, 81-2 CPD 128. The file contains no indication that Arrowpointe subsequently protested until its protest was filed with our Office on May 12, 1981. This, we believe, far exceeded any reasonable period. Therefore, we find both the complaint regarding vehicle testing and the complaint regarding the requested data to be untimely.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States