

DECISION



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

118239

FILE: B-205418

DATE: April 26, 1982

MATTER OF: Nielsen, Maxwell & Wangsgard

DIGEST:

1. Fact that only one person would evaluate cost proposals was not clear from solicitation, and, therefore, protest filed after closing date for receipt of initial proposals is timely. However, composition of evaluation panel and procedures used to evaluate proposals are within discretion of contracting agency, and we see nothing inherently improper in having only one person evaluate cost.
2. Postaward protest that procurement should have been conducted under Brooks Bill procedures for procuring architect-engineering services is untimely since solicitation indicated that procurement was not to be conducted as one for these services and alleged improprieties apparent from solicitation must be filed before closing date for receipt of initial proposals.
3. Untimely protest alleging that certain services should be procured under Brooks Bill procedures is not significant issue and will not be considered on that basis.
4. Protest based on grounds that were revealed in debriefing must be filed within 10 days of that debriefing. Protest filed 10 days after post-debriefing meeting at which same grounds were discussed is untimely even as to ground which protester states was not discussed until post-debriefing meeting. Under circumstances, agency's position that ground was discussed at debriefing is accepted.

Nielsen, Maxwell & Wangsgard (NMW) protests the award of a contract to CH2M Hill Central, Inc., under request for proposals No. 40-S1637, issued by the Department of the Interior (Interior), Bureau of Reclamation. The contract is for the study and analysis of data concerning the salinity of the Price and San Rafael Rivers in Utah.

NMW has raised a number of issues concerning the evaluation of proposals. NMW argues that the cost evaluation was inherently arbitrary because only one person evaluated cost proposals and that Brooks Bill, 40 U.S.C. § 541, et seq. (1976), procedures for the procurement of architect-engineering services were not followed. The protester also contends that award was not made to the offeror with the highest rated technical proposal and the lowest estimated cost and that it was improperly penalized for including a service charge in its cost proposal.

We deny one ground of protest and dismiss the others because they were not timely filed.

Timely Issue

Interior argues that it was obvious from the solicitation that only one person would evaluate cost and that this ground is untimely because it was not filed prior to the closing date for receipt of initial proposals. Interior points to the "evaluation process" section of the solicitation which states that a committee will evaluate technical proposals and that the contracting officer will then determine the competitive range. According to Interior, since this includes a consideration of cost, the solicitation implies that only one person, the contracting officer, will evaluate cost.

We do not think that this statement is sufficiently clear to put potential offerors on notice that only one person will evaluate cost. However, we see nothing inherently improper in having one person evaluate cost proposals, and we have consistently held that the composition of evaluation panels and the procedures used to evaluate proposals are matters within the discretion of the

contracting agency. See, e.g., Underwater Systems, Inc., B-199593, May 6, 1981, 81-1 CPD 350; MAYIMUS, B-195806, April 15, 1981, 81-1 CPD 285.

Untimely Issues

Section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21 (1981), requires that protests based on alleged, apparent solicitation improprieties be filed prior to the closing date for receipt of initial proposals. The solicitation indicated that the procurement was not being conducted as one for architect-engineering services. The basis of NMW's complaint that the Brooks Bill was not followed was, therefore, obvious from the solicitation. NMW did not file its protest, however, until long after the closing date for receipt of initial proposals. Therefore, this ground of protest is clearly untimely. See Consulting Engineers Council of Metropolitan Washington, B-199569, September 5, 1980, 80-2 CPD 180, in which the protester argued that certain services should have been procured under the Brooks Bill; we found the protest to be untimely because it was not filed prior to the closing date for receipt of initial proposals.

NMW admits that this ground is untimely, but argues that it presents an issue of widespread interest to the procurement community and, therefore, should be considered under the "significant issue" exception to our timeliness requirements. 4 C.F.R. § 21.2(c) (1981). In support of this contention, NMW cites our decision in Association of Soil and Foundation Engineers, B-199548, September 15, 1980, 80-2 CPD 196, in which we considered an untimely protest concerning the application of the Brooks Bill under that exception.

In that case, however, the significant issue was whether the Brooks Bill applied per se to an entire class of procurements--all Department of Defense procurements for architect-engineering services. That question was one of first impression and resolution of the question had consequences that went far beyond that procurement. Here, on the other hand, the issue is merely whether the particular services being procured should be classified as architect-engineering services within the coverage of the Brooks Bill. Similar questions concerning the applicability of Brooks Bill procedures

to a given procurement have been previously decided. See, e.g., Association of Soil and Foundation Engineers, B-199970, June 8, 1981, 81-1 CPD 455. Therefore, the issue raised by NMW is not significant. See CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225.

Concerning the other issues, Interior argues that they also were not timely filed. Unsuccessful offerors were notified of the award of the contract on September 15, 1981. Debriefings were arranged on October 5, with NMW's debriefing planned for October 16. Interior states that "a formal telephone debriefing was conducted with * * * NMW on October 16, 1981." During this debriefing "NMW was given all the specific details of the procurement which formed the basis for [these other grounds of] protest." On October 23, NMW requested a meeting with the contracting officer to be attended by one of its vice-presidents to further discuss the procurement. That meeting was held on October 27. Interior states that it provided essentially the same information that it had provided on October 16.

Interior argues that NMW knew the basis for these other grounds of protest on October 16 and that since the protest was filed more than 10 working days after that date, it is untimely. We agree.

NMW admits that a telephonic debriefing occurred on October 16, but argues, generally, that there was not a "clear and complete disclosure of the methods of evaluation and other facts necessary for it to prepare a protest until the meeting of October 27."

We have held that a potential protester who learns that it has not been selected for award need not immediately protest, but may wait for a debriefing scheduled within a reasonable time. See, e.g., Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312. NMW was certainly justified in waiting until the October 16 debriefing before filing its protest. Once it knew the grounds of its protest it could not, however, wait until confirmation or further discussions with the agency before protesting. See, e.g., Control Data Corporation, B-197946, June 17, 1980, 80-1 CPD 423; Storage Technology Corporation, B-194549, May 9, 1980, 80-1 CPD 333.

While there is some conflict between the parties concerning the information provided NMW in its October 16 debriefing (specifically, NMW insists that the "use of [a] cost per-man-month" evaluation factor was not disclosed until October 27), in these circumstances, we will accept the recollections of the agency officials who participated in the debriefing. The telephone conversation of October 16 was not a random or unofficial contact, but rather was a scheduled formal debriefing arranged for the purpose of disclosing to NMW the reasons that it was not selected for award.

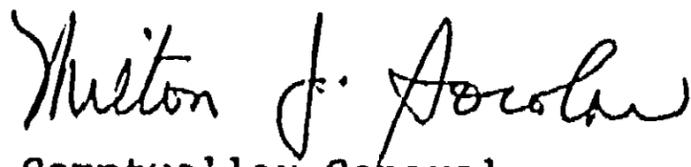
This case is similar to Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486, in which the protester and the contracting agency disagreed over whether the agency had specifically stated the grounds of protest in a meeting between the parties. In resolving the conflict in favor of the agency, we stated:

"There is an obvious conflict between the Navy's view of the February 18 conference and Brandon's view. The allegedly contemporaneous written notes which Brandon cites as confirming its view of the conference have not been submitted to our Office, nor do we think that they are determinative of the outcome even if submitted. First of all, we have no way of determining whether in fact they were "contemporaneous"; secondly, we do not agree that allegedly contemporaneous notes should carry any greater weight than the actual recollections of the agency employees who participated in the conference. Under these circumstances, we must agree with the Navy's view that Brandon was specifically informed of Navy's intent to modify the contract in ways which were later made the subject of the March 31 protest to our Office.* Reliable Maintenance Service, Inc., -- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337."

In other circumstances, we have resolved certain types of disputes regarding timeliness in favor of

the protester. For example, in Development Associates, B-188416, August 1, 1977, 77-2 CPD 64, and Honeywell Information Systems, 56 Comp. Gen. 505 (1977), 77-1 CPD 256, the protesters asserted that the critical fact or event occurred, or was learned, on a certain date which would make the protest timely, but could not prove their assertions. The agencies had no knowledge of the dates, but argued that the protesters must prove timeliness. We held for the protesters. Here, of course, both parties have equal knowledge of the critical event--the debriefing. Also, this case is unlike those cases in which there was some objective evidence favoring the protester's view of a disputed event or fact, which we turned to in resolving the dispute in the protester's favor. See, e.g., Ikard Manufacturing Co., B-192578, February 5, 1979, 79-1 CPD 80. Here, there is no such objective evidence.

We deny one ground of the protest and dismiss the others.

for 
Comptroller General
of the United States