



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Onyx Computers, Inc.

File: B-247663

Date: May 11, 1992

Cyrus E. Phillips IV, Esq., Keck, Mahin & Cate, for the protester.

Justin M. Dempsey, Esq., Steven S. Diamond, Esq., and James A. Dobkin, Esq., Arnold & Porter, and Jeffrey H. Schneider, Esq., for Digital Equipment Corporation, an interested party.

Jonathan H. Kosarin, Esq., and Brian Kau, Esq., Department of the Navy, for the agency.

Catherine M. Evans, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester abandons original basis for challenging agency's nonresponsibility determination, and raises new challenge to determination for the first time in comments on supplemental agency report, new challenge is untimely because not filed within 10 days after basis of protest was known; since nonresponsible protester is not eligible for award, it does not have standing to protest the award on other grounds.

DECISION

Onyx Computers, Inc. protests the Department of the Navy's determination that it is nonresponsible under invitation for bids (IFB) No. N60921-92-B-A401, for refurbished Digital Equipment Corporation (DEC) rack-mounted minicomputers and associated DEC-proprietary software.

We dismiss the protest.

The IFB advised offerors that award would be made to a single offeror for all items and bids for less than all items would be considered nonresponsive. Onyx, the low bidder under the IFB, was determined nonresponsible because it failed to provide the Navy with firm commitments for hardware and software delivery by an established deadline. The Navy subsequently made award to DEC, the second-low bidder.

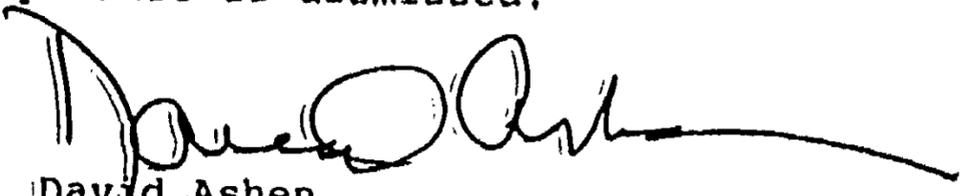
In its initial protest of the award, Onyx challenged the nonresponsibility determination based on the Navy's failure to consider certain information about the firm's ability to furnish the required software. Subsequently, according to Onyx, after filing its protest, it learned that it could not have obtained the necessary software under any circumstances because it is not a DEC authorized dealer. In its comments on the agency report, Onyx conceded that it could not meet the RFP's software requirements, but asserted as a new protest ground that the IFB's software requirement was unduly restrictive because it limited competition to DEC authorized dealers. Onyx concluded that the Navy should have purchased the software items separately to allow firms that are not authorized DEC dealers to compete for the hardware portion of the requirement.

In responding to this new protest ground, the Navy reported that even if it had purchased the required software separately, Onyx still would have been found nonresponsible to supply the hardware. Onyx disagrees, arguing that it would have been able to furnish the required supplier commitments for the hardware if it had not been delayed by its futile attempt to obtain commitments for the software.

Onyx's admission in its comments on the agency report that it could not furnish the software as required renders academic the issue of the Navy's nonresponsibility determination as to the software portion of the requirement. Further, with respect to its ability to provide the hardware, Onyx has not challenged the Navy's nonresponsibility determination in this regard in a timely manner. Under our Bid Protest Regulations, a protest must be filed within 10 working days after the basis of the protest is known or should have been known. (48 C.F.R. § 21.2(a)(2) (1992)). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the new allegations must independently satisfy our timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. EER Sys. Corp., 69 Comp. Gen. 207 (1990), 90-1 CPD ¶ 123. Since Onyx was informed by the agency report, received on March 18, 1992, that it had been found nonresponsible for failure to provide supplier commitments for both software and hardware, its challenge to that determination as it relates to the hardware requirement, raised for the first time in its April 15 comments on the supplemental agency report, is untimely. Since Onyx did not timely object to the Navy's determination of its ability to furnish the hardware, we have no basis to question that determination. As Onyx thus is nonresponsible with respect to the hardware portion of the requirement, and therefore is ineligible for award, it is not an interested party to protest the software

requirement. See 4 C.F.R. § 21.0(a); Mar-Mac Precision Corp., B-221561, Jan. 22, 1986, 86-1 CPD ¶ 72.

The protest is dismissed.



David Ashen
Acting Assistant General Counsel