



Comptroller General  
of the United States

41122

Washington, D.C. 20548

## Decision

**Matter of:** Chemwest, Inc.  
**File:** B-259064.2  
**Date:** February 2, 1995

### DECISION

Chemwest, Inc. protests the award of a contract to Plas-Tanks Industries by the Department of the Navy under request for proposals No. N00123-94-R-0455 for storage tanks. Chemwest argues that the Navy improperly extended the delivery date for Plas-Tanks from the October 31, 1994 date included in the initial solicitation, to April 1, 1995.

We dismiss the protest because Chemwest is not an interested party to challenge the agency's decision to relax the delivery terms.

On June 21, 1994, the Navy issued the RFP to procure Secondary Containment Treatment Tanks for the Navy's Fleet and Industrial Supply Center Detachment in Long Beach, California. When the September 16 closing date passed without receipt of any offers, the Navy contacted several potential offerors, including Chemwest, to again request that they submit a proposal. Although Chemwest decided to submit a proposal in response to the reopened competition, there is no dispute that it missed the deadline. In addition, Chemwest was late filing a protest of the agency's rejection of its proposal, and the protest was dismissed as untimely.<sup>1</sup> Chemwest, Inc., B-259064, Jan. 6, 1995.

In our view, Chemwest is not an interested party to challenge the change in the delivery schedule because it is not a participant in this procurement and therefore would not be in line for award were its protest sustained. Chemwest is not a participant here because it: (1) failed to submit a timely proposal in response to the solicitation; and (2) failed to file a timely protest challenging the rejection of its late proposal.

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<sup>1</sup>This supplemental protest was timely filed within 10 days of Chemwest's receipt of a copy of the awarded contract pursuant to a Freedom of Information Act request.

The Competition in Contracting Act of 1984 and our regulations define an interested party entitled to pursue a protest 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," 31 U.S.C. § 3551(1) (1988); 4 C.F.R. § 21.0(a) (1994). A party is not interested to maintain a protest if it would not be in line for award if its protest were sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

In this case, since Chemwest's proposal was rejected as late and Chemwest did not file a timely challenge to that decision, it has no proposal under consideration in this procurement. Where the protester has no proposal under consideration--and thus could not be considered for award under a reopened competition--it is generally not an interested party to challenge the award. Loral Fairchild Corp., B-242957.2, Aug. 29, 1991, 91-2 CPD ¶ 218; Moltech Corp.--Recon., B-236490.2, Dec. 6, 1989, 89-2 CPD ¶ 519.

We agree with the protester that in certain instances a party may be interested to challenge an award even though the party has no viable offer before the agency. In such cases, a party gains its interested status because of the nature of the protest issue raised, and/or the type of solicitation at issue. For example, in Dantec Elecs., Inc., B-243580, July 17, 1991, 91-2 CPD ¶ 68, where only two bids were received, and the protester's bid was rejected as nonresponsive, the protester was nonetheless interested to challenge the responsiveness of the other bidder because the potential remedy, if its protest were sustained, was resolicitation, giving the protester a renewed opportunity to participate in the procurement.

Here, however, since the procurement was conducted using negotiated procedures (and not sealed bids), if Chemwest's protest were sustained, the remedy would be to amend the solicitation, and request revised proposals. See Federal Acquisition Regulation § 15.606; Dairy Maid Dairy, Inc., B-251758 et al., May 24, 1993, 93-1 CPD ¶ 404 at 7, 10; 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420 at 15; IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378 at 7. Since Chemwest failed to submit a proposal prior to the closing time, the agency would not be required to include Chemwest in this process.<sup>2</sup> Moltech Corp.--Recon., supra.

<sup>2</sup>Another area where a party without a viable bid or offer before the agency has the requisite interest to protest the award is where the protest challenges the eligibility of an awardee to receive an award reserved for a small business.

(continued...)

As we view the procurement here, the protester cannot claim it was harmed by the agency's decision during negotiations to extend the delivery date for the awardee.<sup>2</sup> On the one hand, had the protester submitted a timely proposal, it could argue that all offerors must be permitted to amend their offers to include the extended delivery date. See Louisiana Dock Servs., Inc., supra at 5-7 (change in performance schedule and delivery dates should have been communicated to all competitive range offerors, even though no offeror was prejudiced in this particular procurement); Rix Indus., Inc., B-241498, Feb. 13, 1991, 91-1 CPD ¶ 165 (protest sustained and competition reopened among competitive range offerors where agency decided that the requirements set forth in the solicitation could be significantly relaxed). Since Chemwest failed to submit a timely proposal, however, this argument is foreclosed.

On the other hand, had the protester not submitted an offer, it might now be heard to argue that it would have participated in the procurement had it known that the agency would have considered proposals with longer delivery times. See Information Ventures, Inc., B-241641, Feb. 14, 1991, 91-1 CPD ¶ 173. However, in this case, the protester cannot make such a claim since the terms of the solicitation clearly did not prevent the protester from preparing an offer. Instead, it prepared an offer but was late submitting it. In our view, since Chemwest attempted to participate, but simply failed to submit its proposal on time, it is not an interested party for the purpose of

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<sup>2</sup>(...continued)

In such cases, an other-than-small business offeror (or potential offeror) may be interested to challenge the small business size status of the awardee if there are no other eligible small businesses in the competition because the remedy would be resolicitation. See Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151; Eagle Marketing Group, B-242527, May 13, 1991, 91-1 CPD ¶ 459; Automation Mgmt. Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

<sup>3</sup>Even where an agency has changed a solicitation's delivery date without providing notice to all offerors, a protester must nonetheless show prejudice to prevail in a protest of the agency's action. Louisiana Dock Servs., Inc., B-241671, Feb. 25, 1991, 91-1 CPD ¶ 206.

claiming that the changes made during the subsequent negotiations were improper. Flight Resources Inc. 65 Comp. Gen. 619 (1986), 86-1 CPD ¶ 518.

The protest is dismissed.

  
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