



Comptroller General
of the United States

123555

Washington, D.C. 20548

Decision

Matter of: Oracle Corporation

File: B-260963

Date: May 4, 1995

Stephen M. Ryan, Esq., and Nanette L. Davis, Esq., Brand, Lowell & Ryan, for the protester.

Robert D. Hogue, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where record shows that protester was aware of bases for protest more than 10 working days prior to filing protest.

DECISION

Oracle Corporation protests the actions of the Department of the Navy in connection with the acquisition of a relational database management system (RDBMS). Oracle principally maintains that the agency improperly conducted an improper de facto procurement for its requirements.

We dismiss the protest as untimely filed.

On August 17 and 23, 1994, representatives of the protester and the Navy met to discuss the Navy's requirements for an RDBMS. Thereafter, on September 9, the Navy provided Oracle with a one-page document that contained estimates of the Navy's configuration and deployment plan. On September 16, in response to these estimates, Oracle attended a meeting with the Navy and presented an unsolicited offer that outlined the firm's proposed solution to the Navy's requirements. Of significance for our purposes, this proposal contained a listing of preexisting contracts between Oracle and the Department of Defense (DOD) which Oracle considered potentially available to be used by the agency to acquire the RDBMS.

After this initial presentation, representatives of Oracle and the agency had numerous meetings; these meetings resulted in various changes to Oracle's unsolicited proposal. On February 17, representatives of the Navy indicated to Oracle that the Navy would not be obtaining an

Oracle RDBMS. The Navy stated that it intended to meet its requirements through the issuance of a delivery order against an existing DOD contract with another (as yet unidentified) firm or, if necessary, through the issuance of a modification to a preexisting contract. The Navy indicated at this meeting that, although currently it no longer was considering Oracle, it might reconsider whether the requirement could be met through an Oracle contract if it was unable to identify a suitable contractual vehicle with another firm. Subsequently, on March 16, the parties again met at the request of Oracle. At this meeting, the Navy reiterated that it did not intend to satisfy its requirement using Oracle's products, and that it was still looking for an existing contractual vehicle that could be ordered against or modified to meet the Navy's needs. Oracle filed its protest within 10 working days of the March 16 meeting.

Oracle contends that the Navy: (1) is conducting a de facto procurement for its RDBMS but has failed to issue a solicitation; (2) has evaluated proposals using improper criteria; (3) miscalculated Oracle's proposal; (4) engaged in an improper auction; and (5) intends to meet its requirement by improperly modifying another firm's existing contract beyond its current scope.¹ The Navy responds that it was never engaged in the conduct of a procurement; rather, its actions were pursuant to market research, the results of which were to be used in deciding how to fill the requirement under existing contracts.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1995), require that protests be filed in our Office within

¹Oracle alleges that the agency may have improperly failed to protect its proprietary bid information. We dismiss this allegation for failure to state a basis of protest. Protesters are required to provide more than a bare allegation; the allegation must be supported by some explanation or evidence that establishes the likelihood that the protester will prevail in its claim of improper agency action. Federal Computer Int'l Corp.--Recon., B-257618.2, July 14, 1994, 94-2 CPD ¶ 24. Oracle's protest contains neither evidence to support its claim, nor a statement of the circumstances giving rise to its allegation. The protest merely states, without elaboration, that Oracle has "significant concerns" about the timing and knowledge brought by other competitors entering the procurement, and that the protester believes that there is "strong circumstantial evidence" to believe that an improper leak of its bid information occurred. In the absence of either a supporting explanation or evidence, this bare allegation is insufficient to constitute a protest.

10 working days after the protester knows or should know the basis of protest. The record shows that Oracle was aware of the Navy's actions relating to the alleged improper acquisition no later than September 9, 1994, when the protester received from the Navy what it describes as a statement of work (SOW). As of that date, the protester was or should have been aware that the Navy had not issued what could be described as a solicitation. See Federal Acquisition Regulation (FAR) §§ 14.201 and 15.406. Thus, to the extent the protester had a concern relating to the absence of a solicitation, it was required to protest to our Office within 10 working days of receiving the alleged SOW. Oracle did not do so.

Similarly, since this SOW document also did not contain any evaluation criteria or basis for award, the protester knew or should have known as of September 9 that the Navy intended to proceed in its actions without a basis for proposal evaluation; the protester therefore also knew of this basis for protest by September 9 and, likewise, was required to raise this allegation within 10 working days after that date.

Oracle's challenge to the evaluation of its proposal is related to the absence of evaluation criteria; it follows from the absence of such criteria that there would be no basis for a proper evaluation. Consequently, the protester also knew or should have known as of September 9 that its submissions could not be properly evaluated. Oracle therefore was required to raise this allegation within 10 working days of that date.

Oracle's contention that the Navy was conducting an improper auction also is untimely. Oracle's letter of protest specifically states:

" . . . throughout this procurement the conduct by the Navy has been characteristic of an auction. The degree of information provided by the Navy induced even greater competition. . . . Due to the effectiveness of the auction . . . Oracle's proposed discount [was significant]."

This statement shows that Oracle actually knew of the agency's alleged auction technique "throughout this procurement." Instead of participating in the auction by lowering its prices in response to the information disclosed, Oracle was required to promptly protest on this basis.

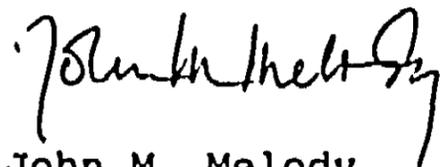
Oracle's argument that the Navy intends to satisfy its requirement by improperly amending an existing contract rather than through the award of a new contract is untimely

as well. The record includes a copy of Oracle's September 16 proposal to the agency. Included in this document is a list of numerous preexisting contractual vehicles identified by Oracle as potentially available for modification. Thus, Oracle was aware no later than September 16 that modification of an existing contract was the course of action being considered by the agency. This allegation thus had to be raised within 10 working days of that date.

Oracle maintains that, even if these allegations are untimely, we nonetheless should consider them under either the good cause or significant issue exception to our timeliness requirements, 4 C.F.R. § 21.2(c). The good cause exception will only be invoked where the record shows that some compelling reason beyond the protester's control prevented it from timely filing its protest. American Material Handling, Inc.--Recon., B-255467.2, Feb. 25, 1994, 94-1 CPD ¶ 158. Oracle does not allege that any compelling reason prevented it from filing a timely protest; it maintains only that dismissal of the protest would be "particularly unfair." Thus, this exception does not apply here.

The significant issue exception will be invoked only where the protest involves issues of first impression that would be of widespread interest to the procurement community as a whole. None of the issues raised in Oracle's protest are matters of first impression. We have previously considered whether an agency's actions amounted to a de facto procurement, see Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11, as well as whether an agency used improper or unstated evaluation criteria, improperly evaluated proposals, or engaged in an auction. Information Sys. Networks, Inc., B-254384.3, Jan. 21, 1994, 94-1 CPD ¶ 27; Science and Technology Corp., B-254405 et al., Dec. 14, 1993, 93-2 CPD ¶ 318. We also have considered whether agencies have improperly issued modifications that are beyond the scope of an existing contract. National Linen Serv., B-257112; B-257312, Aug. 31, 1994, 94-2 CPD ¶ 94. Accordingly, this exception also does not apply.

The protest is dismissed.



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