

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

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FILE: B-182436

DATE: February 19, 1975

MATTER OF: Square Deal Trucking Company, Inc.

**DIGEST:**

1. Protest against contracting agency's use of refund evaluation formula contained in invitation and against failure of invitation to include revised wage determination is untimely, since 4 C.F.R. 20.2(a) requires protests against solicitation defects to be filed prior to bid opening.
2. Although agency received new wage determination after bid opening, consistent with the purposes of and interests protected by the Service Contract Act, contracting officer should give consideration to whether cancellation of invitation and resolicitation on basis of new wage determination would be warranted in view of substantial increase in wage rates in new determination over those contained in six-year-old wage determination used in invitation.

Square Deal Trucking Company, Inc. has protested against any award of a contract for trash removal and disposal services under IFB-03C5060001 issued by the Public Buildings Service, Region 3, General Services Administration. The protest is against the solicitation's allegedly arbitrary formula "for evaluating refunds on recycled paper as an element of prices bid," and also against the solicitation's failure to include the proper Department of Labor wage determination.

Our Bid Protest Procedures and Standards require that a protest against alleged improprieties in any type of solicitation which are apparent prior to bid opening must be filed prior to bid opening. If a protest is filed initially with the contracting agency, any subsequent protest filed with this Office must be filed within 5 days of notification of adverse agency action. 4 C.F.R. 20.2(a). For the reasons set forth below, we have concluded that the protest was not filed in accordance with the provisions of 4 C.F.R. 20.2(a), and therefore should not be considered.

The record indicates that the formula complained of was included in the invitation by virtue of an Addendum No. 3, which deleted another formula to which the protester had also objected. According to the

protester, it and others in the industry objected to the formula that first appeared in the invitation; that as a result three addenda were issued, each of which modified the formula previously utilized; and that when the final formula was selected, it "advised" GSA that the formula was "an arbitrary and unreasonable basis for evaluating bids." Counsel for protester asserts that this oral advice constituted a protest and that written notice of such was not thereafter required.

FPR 1-2.407-8 (1964 ed.) does permit the filing of oral protests with contracting officers. However, the record does not indicate that the oral objections to adoption of the final formula were intended as a protest at the time they were made or that GSA ever regarded them as a protest. The file reflects only that Square Deal did file a written protest with GSA 4 days after bid opening, saying "Please accept this as our protest \* \* \*." Therefore, in our view, Square Deal's protest against the refund formula was not filed until after bid opening.

However, even if we were to regard Square Deal's oral advice to GSA as constituting a protest, the protest filed here would still be untimely. As indicated above, if a protest is initially filed with an agency, any subsequent protest to GAO must be filed within 5 days of notification of adverse agency action. We have stated that initial adverse agency action may consist of a procurement action such as the award of a contract, 52 Comp. Gen. 20 (1972), or the opening of bids. See 52 Comp. Gen. 821 (1973). Thus, once Square Deal learned of GSA's intention to open bids on October 4, 1974, it had 5 days to file its protest here. The protest was not filed here, however, until October 15.

This conclusion that the protest is untimely applies equally to the issue concerning the wage determination. The solicitation, issued August 27, 1974, contained a wage determination issued by the Department of Labor in 1968. A revised wage determination was issued by the Department of Labor on September 26, 1974, 8 days prior to bid opening. However, since Square Deal did not object to the inclusion of the 1968 wage determination in the invitation until it filed its protest here, its protest on this issue must also be regarded as untimely filed. The protester claims, however, that since the revised wage determination is now more than four months old and since award has not yet been made, the intent of the Service Contract Act would be defeated if the contract to be awarded permits wage payments at a discarded wage rate significantly lower than the new wage scale.

Although the protest on this point is untimely, we note that GSA responded to it on the merits, citing FPR 1-12.905-4(a). That section provides that revised wage determinations received later than 10 days prior to bid opening shall not be effective unless the contracting agency "finds that a reasonable time is available in which to notify bidders of the revision." It has been held that contracting agencies cannot automatically rely on this type of provision to ignore wage determinations received less than 10 days prior to bid opening, but instead must make a positive finding as to the time available to notify bidders. International Union of Operating Engineers v. Arthurs, 355 F. Supp. 7 (W. D. Okla. 1973), aff'd 480 F. 2d 603 (10th Cir. 1973). Here GSA reports that it did not receive the revised wage determination until after bid opening (so presumably it has or could properly make a finding that it could not have notified bidders of the new wage determination prior to bid opening), and appears to believe that it therefore cannot, under the applicable regulations, give effect to the revised determination. We do not agree.

We have recognized that affording protection to service workers and thereby furthering the purpose of the Service Contract Act may be regarded as a compelling reason to cancel an invitation after bid opening in order to resolicit on the basis of a new wage determination. B-179338, December 21, 1973. In view of the substantial upward revision of wage rates in the new determination in this case over the rates in the 1968 wage determination, we think it is incumbent upon the contracting officer to consider the interests to be protected by the Service Contract Act and then to determine whether or not it would be in the best interests of the Government to cancel the invitation and resolicit. It does not appear that the contracting officer had made this determination. Therefore, it is our view that the contracting officer should now do so prior to proceeding further with this procurement.

Deputy

  
Comptroller General  
of the United States