

DECISION



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

FILE: B-185570

DATE: April 6, 1976

MATTER OF: Century Tool Company, Inc.

60780

99102

DIGEST:

1. Protest filed with GAO more than 10 days after agency made it clear to protester at meeting that its oral protest was denied is untimely even though protester continued to engage in discussion with agency subsequent to meeting.
2. Where record shows that agency first tested contractor's samples submitted under prior contract after award of instant contract in order to ascertain whether they met revised specifications GAO advises agency to conduct such tests prior to award.
3. Untimely protest involving propriety of agency's waiver of bid samples under bid sample waiver provision of solicitation is not significant issue as to justify decision on merits of protest.

Century Tool Company, Inc. has protested the award to another bidder of General Services Administration contract No. GS-005-11799 for two types of socket wrench sets. For the reasons stated below, we find Century's protest to this Office to be untimely filed.

Century questions whether GSA properly waived the solicitation requirement for submission of bid samples. The solicitation provided, in this connection, that a waiver could be obtained if the bidder identified a previous solicitation under which a bid sample of the same product was furnished, provided the sample had not been returned or disposed of by GSA. Upon notification of contract award, Century orally protested to GSA that it should not invoke the waiver provision since the contractor's prior samples were submitted under a solicitation which incorporated an earlier and materially different specification for the items. The protester also argued that the instant solicitation specified additional tests for the samples than those

required under the prior solicitation identified in the contractor's bid. Century contends that under Federal Procurement Regulations (FPR) § 1-2.202-4(f)(1) (1964 ed.) it was improper to waive the requirement for bid samples since in this case further testing and evaluation of the original sample was required.

In addition, Century examined one each of the several samples previously submitted by the contractor for each type of socket wrench set solicited. Century also orally protested to GSA the results of its examination, namely that each sample examined was deficient for reasons unrelated to the revisions in the current specifications and it requested GSA to test the contractor's samples for compliance with the revised specifications and tests as well for the other deficiencies observed. Century also requested copies of all prior and current test reports concerning the contractor's samples.

As indicated in GSA's report of February 2, 1976, limited testing of the contractor's samples was performed by that agency subsequent to Century's oral protests. Thereafter, in mid-November, GSA advised Century that tests had been conducted and results were available. GSA agreed to schedule a conference to discuss this matter on December 1, 1975, the earliest date acceptable to the protester. At this meeting the results of the most recent testing and its limited scope were orally communicated to Century. At this point it was apparent that GSA had not tested the contractor's samples in accordance with the request made in Century's oral protests. However, the remaining documentation requested by Century was furnished by GSA on December 2 and 5.

It should be noted that Century's oral protests appear to have been promptly made to the contracting agency but that our dismissal is based upon the protester's untimeliness in filing with this Office. Under Section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), a protest initially lodged with the contracting agency and pursued with this Office must be filed here within 10 working days of actual or constructive knowledge of the contracting agency's initial adverse action on the protest.

The protester contends it was timely in bringing its protest to this Office on December 19 even though it was filed more than 10 working days after its December 1 conference. In this connection the protester sought, both during and after the conference, more information regarding the contract award and the examination of the contractor's samples. Century apparently expected that this additional information "would enhance both parties' ability to evaluate the issues and possibly to resolve this matter at the

contracting agency level." Moreover, Century states it became apparent only after it was furnished the mid-November test report documents that such testing "was much more limited than Century had understood from the December 1 meeting." (In this connection we note that while Century was furnished documents at various times and as late as ten working days before its protest here, the record before us does not identify which documents were furnished on the most recent date.) In addition, on December 8, Century requested another conference with GSA and at that time it believed that GSA continued "to evince an interest in concluding the matter informally." However, on December 16 GSA refused to confer with Century and advised the firm to protest here. Century contends that on that date all of the necessary information finally had been gathered and the parties remained at an impasse. It feels that it was justified in pursuing its remedy with the contracting agency until December 16.

In our opinion the protester certainly had sufficient cause to protest here no later than the time of its discovery, at the December 1 conference, of the limited nature of the tests conducted by GSA. We note that the record is not entirely clear as to the agency's prior substantive responses to Century's oral protests. Even though Century may not have been made fully aware of all the possible details of its protest until it had the test reports in hand, we think the December 1 meeting made it clear to Century that GSA had not conducted sufficient tests to satisfactorily respond to its oral protests and that the agency had not changed its position with respect to the partial waiver of the bid sample requirement as applied to the contractor. As recognized in 52 Comp. Gen. 20, 22 (1972), a protester may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protester to engage in further discussion with the agency. It is for this reason that we require protesters to file with this Office upon notification of the agency's initial adverse action on the protest.

We note, in this connection, that the protester relies upon our ruling in Shippers Packaging and Container Corporation, B-184488, October 17, 1975, 75-1 CPD 241. In that case the protester made a "reasonable attempt" to resolve the matter with the agency in several discussions over the course of only six working days after the basis for its protest first became apparent and we rejected the agency's argument that the protester was required to file with this Office within 10 days from initial notification of the basis for its protest. However, that decision does not indicate that the protester should have been aware that the agency had acted adversely on its protest prior to the sixth working day. Moreover, under our

rules the protester was permitted 10 working days in which to file its protest with the agency. On the other hand Century's attempt to resolve this matter with the agency consumed a total of more than one and one-half months and we have concluded that the agency communicated its initial adverse action on the protest no later than at the December 1 conference.

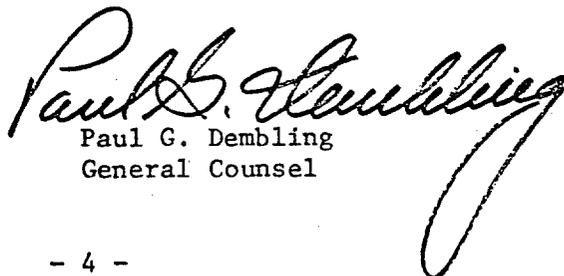
Accordingly, we think Century's protest to this Office was untimely filed.

While we have concluded that Century's protest to this Office is untimely, the record shows that after contract award GSA tested the contractor's samples to ascertain whether they met the Government's specifications which had been revised subsequent to the submission of the contractor's samples. In our opinion such tests should have been conducted prior to contract award.

Finally, Century requests that this protest be considered under section 20.2(c) of our Bid Protest Procedures since it believes it has raised issues significant to procurement practices and procedures. In this connection, Century contends that the bid sample waiver provision in use by GSA does not comply with the FPR and can mislead contractors into believing that a waiver of bid sample requirements may be possible even where previously submitted samples have not been tested. In addition Century argues that this matter is significant because of "the grossly negligent manner of awarding the * * * contract, and the stolid refusal to test fully [the contractor's] samples even after their defects were brought to the attention of the contracting officer and other appropriate GSA officials * * *."

We have recognized issues to be significant where they go to the heart of the competitive procurement process and concern matters of widespread interest. 52 Comp. Gen. 20 (1972). This exception, however, is exercised sparingly. COMTEN, B-185394, February 24, 1976, 76-1 CPD _____. In our opinion the issues in this case are not of such widespread concern as to meet the high standard required for consideration. Moreover, we see no evidence that bidders are being misled by the language of the clause.

Accordingly, the protest is dismissed as untimely filed.


Paul G. Dembling
General Counsel