

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

60370

FILE: B-185520

DATE: January 8, 1976

MATTER OF: Rowe Industries

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DIGEST:

1. Initial protest to agency is untimely since protest was filed more than 10 working days after the bid opening at which protester became aware of the basis for protest. Furthermore, subsequent protest to GAO is also untimely since it was filed more than 10 working days after protester's receipt of notification of adverse agency action.
2. Fact that agency did not honor protester's request that agency's "Chief of Procurement" consider its appeal from initial denial of its protest by contracting officer, is not matter for review by GAO.
3. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by other Government agencies.

Rowe Industries (Rowe) protests against the award of a contract under invitation for bids (IFB) N00024-76-B-6019, issued by the Naval Sea Systems Command (NAVSEA).

The record furnished by Rowe with its protest indicates that by letter dated October 20, 1975, Rowe protested to NAVSEA against the award of a contract to the low bidder under the subject IFB on the basis of a report by Rowe's representative present at bid opening on September 16, 1975 that one of the bids was based on the "use of some 15 pages of Government-owned tools, dies, and fixtures, the existence of which was not disclosed in the solicitation * * *". Rowe states that its bid price was predicated on the expenditure of large sums for tools, die and fixtures, and had it been aware of the availability of such Government tooling, it may have been able to offer a substantial reduction in its quoted price.

By letter dated November 4, 1975, NAVSEA responded to this protest. In his response, the contracting officer conceded that while a bidder did in fact base his bid on the rent-free use of approximately 15 pages of Government-owned tools, dies and fixtures as alleged, such property could not be made available to others participating in the procurement since the bidder was currently using the equipment in production on another contract. More significantly, however, the contracting officer advised Rowe that the low bidder under the subject IFB did not predicate his bid on the use of any Government-owned property other than that which was listed in the solicitation for all bidders to utilize in the preparation of their respective bids. Therefore, the contracting officer stated, "this procurement will not be resolicited."

By letter dated November 11, 1975, Rowe again protested the award, this time to the "Chief of Procurement", NAVSEA, on essentially the same grounds as before but emphasizing that the requirement for "full and free competition" had not been satisfied since the previously-mentioned Government-owned tooling could not be made available to all bidders. On November 26, 1975, a different NAVSEA contracting officer advised Rowe that for the same reasons referenced above "it is the opinion of this office that your protest has no validity and no further action is contemplated thereon." By letter dated December 10, 1975, received in this Office on December 12, 1975, Rowe filed a formal protest with our Office. Rowe's letter asserted its original ground for protest with the additional observations that NAVSEA's reply to its protest letter of November 11, 1975, was not signed by the addressee thereof, the Chief of Procurement, and that NAVSEA has not complied with Rowe's request for certain documents under the Freedom of Information Act.

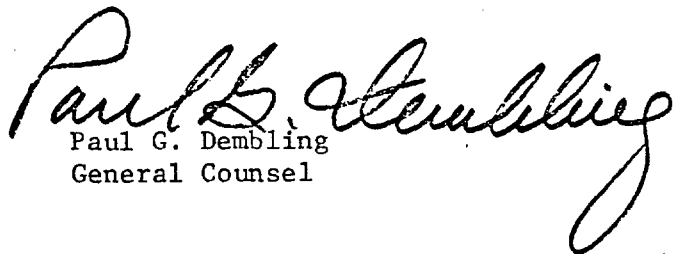
Standards applicable to the timeliness of protests are provided in section 20.2(a) of this Office's Bid Protest Procedures (40 Fed. Reg. 17979 (1975)) in pertinent part, as follows:

"* * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 [working] days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section* * *".
(Emphasis supplied.)

Section 20.2(b) states that protests based on other than an alleged impropriety in the solicitation, must be filed within 10 [working] days after the basis of protest is known or should have been known, whichever is earlier.

In this case it appears that Rowe, through its representative, first became aware of its basis for protest at the September 16, 1975 bid opening. Since Rowe's initial protest to NAVSEA was not filed with the contracting agency until the latter's receipt of Rowe's letter of October 20, 1975, the protest was untimely and therefore is not for consideration by our Office. Furthermore, as Rowe's letter of protest to GAO was filed more than a month after the Navy initially denied its protest, Rowe has not complied with the time requirement of section 20.2(a) of our regulations. In this connection, we believe the contracting officer's letter of November 4, 1975, denying Rowe's protest constitutes the "notification of adverse agency action" from which time Rowe had ten working days in which to protest to GAO. While we realize that a protester may consider an agency's initial adverse agency action to be ill-founded or inadequately explained, leading the protester to engage in further correspondence with the agency, it is nevertheless obligatory that the protest be filed after notification of initial adverse agency action. 52 Comp. Gen. 20 (1972). Accordingly, Rowe's protest is untimely and will not be considered on its merits.

Rowe's complaint that the agency's "Chief of Procurement" did not sign NAVSEA's response to its protest letter of November 11 is not a matter for GAO in the course of our resolution of bid protests. Finally, our Office has no authority under the Freedom of Information Act to determine what information must be disclosed by other Government agencies. 53 Comp. Gen. 40 (1973).


Paul G. Dembling
General Counsel