

C1226

DECISION



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

FILE: B-186491

DATE: October 19, 1976

MATTER OF: Scobey Moving & Storage Co.

DIGEST:

Upon protester's request for reconsideration of GAO decision declining to consider protest on merits because of untimely filing, prior decision is affirmed since if prebid opening conversation between GSA and protester is construed as protest, opening of bids without changing complained of method of bid evaluation and award was initial adverse action; if not so construed, protester knew of ground for protest prior to bid opening and therefore should have protested prior to bid opening.

By letter dated June 30, 1976, Scobey Moving and Storage Company (Scobey) requests reconsideration of our decision in Scobey Moving & Storage Co., B-186491, June 23, 1976, 76-1 CPD 402, in which we declined to consider Scobey's protest of an award of a contract by the General Services Administration (GSA) under solicitation No. 7-76-FSS(7FZT), to Merchants Delivery Service, the aggregate low bidder on the San Antonio and Fort Worth portion of the procurement, on the merits because of an untimely filing.

Quoting from our June 23, 1976, decision:

"Scobey's protest is based on the allegation that the method of evaluation contained in the invitation for bids (IFB) did not result in the award of the contract to the bidder offering the actual lowest cost to the Government. Bids were opened on April 26, 1976, and Scobey was advised on April 28, 1976, of the awards to be made. Scobey protested the awards orally to the contracting officer on April 29. On May 4, 1976, the protest was denied and on May 10, 1976, Scobey protested to our Office."

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"The IFB provided the following as regards the method of award:

"10. METHOD OF AWARD

"Award will be made separately for: New Orleans, Louisiana; Oklahoma City, Oklahoma; and San Antonio, Texas, (including loading at Fort Worth, Texas) to the lowest qualified bidder or bidders whose bids are responsive and produce the lowest aggregate cost to the Government."

"Scobey contends that by including the loading at Fort Worth, Texas, in the evaluation for award, the Government did not receive the lowest cost. In effect, Scobey is protesting the method of bid evaluation and award."

We held Scobey's protest untimely pursuant to section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20 (1976), which requires that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening be filed prior to bid opening.

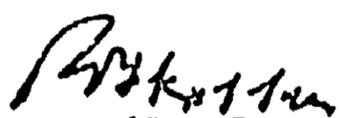
In its request for reconsideration, counsel for Scobey argues that "Scobey did not know nor could they be reasonably expected to know that based upon the bid documents the award would have been made as it was." It is apparently counsel's position that the award did not result in the lowest cost to the Government since Scobey was low bidder on the San Antonio portion and should have received the award for that portion rather than Merchants, the second low bidder on the San Antonio portion. Counsel contends, therefore, that Scobey's protest to GAO, within 10 days of initial adverse agency action (in the form of notification to Scobey of award to another bidder) was filed in a timely manner.

GSA reports that after receiving the IFB, but prior to bid opening, Mr. Richard L. Fite, Vice President of Scobey, called GSA to complain about the method of bid evaluation. GSA's Assistant Division Director of the Transportation Services Division asserts; and Scobey does not deny, that he advised Mr. Fite of Scobey that "* * * Scobey would have to be low in the aggregate

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for both the San Antonio and Fort Worth areas in order to qualify for the award for the San Antonio portion. At the conclusion of the conversation, Mr. Fite emphasized that he didn't like the method of award because of the possibility that he might have to perform the Fort Worth portion."

It is our view that the above-quoted conversation, which Scobey has not denied, directly contradicts counsel's assertion that Scobey did not know and could not be reasonably expected to know, until after award, the method of bid evaluation and award. In this regard, if we consider Mr. Fite's telephone call as a protest to GSA, the opening of bids without changing the method of evaluation was the initial adverse agency action. Under those circumstances, pursuant to section 20.2(a) of our Bid Protest Procedures, Scobey's protest to our Office is untimely since it was not filed within 10 days after bid opening. On the other hand, if we do not consider Mr. Fite's telephone call as a protest to GSA, it is clear from the record that Scobey was aware of the grounds for its protest, i.e., the method of bid evaluation and award, prior to bid opening. As indicated in our original decision, in order for Scobey's protest to be timely under this circumstance, it was incumbent on Scobey to file its protest prior to bid opening. Thus, in either event, Scobey's protest was filed in an untimely manner and our decision not to consider the case of the merits is therefore affirmed.


Deputy Comptroller General
of the United States