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M.A. Hordell

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DECISION



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

FILE: B-190573

DATE: February 15, 1978

**MATTER OF: Stadiums Unlimited, Incorporated -
Reconsideration**

DIGEST:

Prior decision dismissing protest as untimely is affirmed since it has not been shown that prior decision was based on errors of fact or law.

Stadiums Unlimited, Incorporated (Stadiums), has requested reconsideration of our decision in B-190573, December 8, 1977, in which we declined to consider its protest because of untimeliness.

Stadiums protested that the specifications were unduly restrictive and proprietary to one manufacturer. Our Office was advised, by Stadiums, that there were two amendments to General Services Administration's (GSA) invitation for bids (IFB) No. 2PN-FLF-J0550 which were in response to two letters written by Stadiums. On or about October 11, 1977, Stadiums received the second amendment which in its opinion still did not include all of Stadiums' recommended changes. Rather than protest to our Office at that time, Stadiums chose not to submit a bid, since under the existing IFB it believed it would be nonresponsive. On October 28, 1977, with no changes subsequent to amendment 2, bids were opened and Stadiums filed a protest with our Office on October 31, 1977. Based on our Bid Protest Procedures, 4 C.F.R. § 20.2(a) (1977), we held that the protest was untimely and not for consideration on the merits since no protest had been filed with our Office within 10 days of receipt of amendment 2, which we considered notification of "initial adverse agency action" under that section.

In its request for reconsideration Stadiums argues that its letters to GSA were only requests for GSA's consideration of certain proposed changes and not protests, contrary to our decision. Stadiums believes that since no protest was filed with GSA § 20.2(b)(2) of our Bid

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Protest Procedures, and not § 20.2 (a), applies to this situation and, therefore, Stadiums had 10 days from the bid opening date to file its protest. In this connection, Stadiums contends that since GSA did not notify Stadiums that the remainder of its proposed changes would not be considered and since there was still sufficient time for GSA to issue additional amendments incorporating these changes there was "no irrevocable 'adverse agency action' sufficient to warrant [its] * * * protest prior to bid opening."

Quoted below are the provisions of § 20.2 of our Bid Protest Procedures for consideration in determining the timeliness of Stadiums' protest:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 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, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. * * *

"(b)(1) Protests based on alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *.

"(2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

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In Stadiums' initial protest letter, to our Office, Stadiums stated that "[U]nder dates of September 12, 1977, and September 19, 1977, we wrote letters to the contracting officer setting forth the areas of the specifications that were both restrictive and, in some cases, simply incorrect or in conflict with industry practices." These same areas were again set forth in the protest letter to our Office. Also, in the September letters, Stadiums advised that it would like to offer a bid, but the specifications restricted it from doing so. It is our view that these letters, although never stating that Stadiums was protesting, were, in fact, protests, i.e., Stadiums' expression of disapproval of or objection to an allegedly restrictive solicitation under which Stadiums would have submitted a bid, but for its restrictive and proprietary nature.

Under this view Stadiums' protest was untimely pursuant to § 20.2(a) as it was not filed within 10 days of "initial adverse agency action," issuance of amendment 2. With respect to Stadiums' contention that it has 10 days after "irrevocable" adverse agency action in which to file a protest, we note that such standard is not in our Bid Protest Procedures; rather, the standard is "initial" adverse agency action. See 4 C.F.R. § 20.2(a), supra.

Notwithstanding this view, if we were to accept, which we do not, Stadiums' argument that its September letters were requests for consideration and not protests, our prior decision's result would have been the same. Stadiums, by its own admission, was aware that the solicitation contained allegedly restrictive and proprietary specifications, i.e., "alleged improprieties," and, therefore, pursuant to 4 C.F.R. § 20.2(b)(1), supra, the time for filing a protest with the agency or GAO was "prior to bid opening." Stadiums' protest was filed with our Office on October 31, 1977, after bid opening. Accordingly, the protest was untimely under § 20.2(b)(1).

Since section 20.2(b)(2) is only applicable to bid protests not initially filed with a contracting agency and not covered in paragraph 20.2(b)(1), it is not for application under the facts of this case as discussed above.

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In view of the foregoing, our decision of
December 8, 1977, is affirmed.

R. J. Kline
Deputy Comptroller General
of the United States



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

B-190573

February 15, 1978

The Honorable Jim Leach
Member, United States House
of Representatives
102 S. Clinton Street
Room 503
Iowa City, Iowa 52240

Dear Mr. Leach:

We refer to your letters to our Office dated December 27, 1977, and January 20, 1978, in regard to the protest of Stadiums Unlimited, Incorporated (Stadiums), and our decision of December 8, 1977.

We have carefully reconsidered our decision of December 8, 1977, denying Stadiums' protest. By decision of today, copy enclosed, our prior decision is affirmed.

Sincerely yours,

Deputy

R. Z. Kellner
Comptroller General
of the United States

Enclosure