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DECISION



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

D. Low
Proc I

FILE: B-190056

DATE: April 4, 1978

MATTER OF: Hammer Security Service of California
Inc., - Reconsideration

DIGEST:

1. Prior decision dismissing protest as untimely is affirmed, but on different basis. Prior decision held protest against specifications untimely because not filed prior to bid opening. Present record shows protest was filed with agency before bid opening and denied, but protest to GAO was filed more than 10 working days thereafter contrary to 4 C.F.R. § 20.2(a) (1977).
2. Circumstances of protest do not constitute compelling reason requisite to showing of "good cause" for GAO consideration of untimely protest.

Hammer Security Service of California, Inc. (Hammer), has requested reconsideration of the decision in Hammer Security Service of California, Inc., B-190056, September 28, 1977, which dismissed, as untimely, Hammer's protest against allegedly defective specifications contained in an invitation for bids (IFB) issued by the Department of the Army (Army); Fort Ord, California, for guard services at the Patton Reserve Center, Bell, California.

In our prior decision, we held that Hammer's August 12, 1977, letter requesting clarification was not a protest (our decision refers to an August 2, 1977, letter but both Hammer and the Army agree that the letter should have been dated August 12, 1977) and that Hammer's August 22, 1977, protest by mailgram was untimely since it was not received by the Army until after bid opening. Hammer maintains that its protest was received by the contracting officer prior to the August 22, 1977, 3:30 p.m., bid opening and has submitted a copy of a Western Union mailgram of protest confirming it was telephoned to the contracting office at 2:25 p.m. The contracting officer acknowledges that at approximately 2:25 p.m., his office received

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a telephone message from Western Union conveying Hammer's protest against the terms of the IFB and requesting that bid opening be delayed. The contracting officer states that he did not, however, consider the telephone call from Western Union an oral protest pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8 (1976 ed.), since it was not received orally from the bidder or one of his authorized representatives.

Although our decision dismissing Hammer's protest as untimely was made without knowledge of the Western Union telephone call prior to bid opening, it is not necessary to decide whether this constituted a timely protest because of other information revealed in connection with the request for reconsideration. In its report on the reconsideration, the Army points out that in response to Hammer's letter of August 12, 1977, seeking clarification of the specifications, the contracting officer advised Hammer in a letter dated August 18, 1977, received by Hammer the following day, that clarification would not be provided because of the short time remaining until bid opening. In a memorandum dated August 19, 1977, the contracting officer reports receiving a call from Hammer "to further demand we change the specifications of subject solicitation to remove the Liability Clause, L-2, to take away the responsibility from Contractor and define the number of guards needed." In response the contracting officer declined to make the demanded changes.

The Army contends that this telephone call constituted an oral protest by Hammer and a denial thereof by the contracting officer. We agree Hammer had sought clarification of the specifications on August 12 and this request had been denied by the contracting officer's letter of August 18. From the contemporaneous memorandum of the telephone conversation of August 19, we believe it is clear Hammer was protesting the specifications and demanding their change and the contracting officer denied the protest. Under § 20.2(a) (4 C.F.R. part 20 (1977)) of our Bid Protest Procedures any subsequent protest to our Office from an agency denial of a protest to the agency must be filed within 10 days to be timely.

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Since Hammer's protest was not filed in our Office until September 6, 1977, it was received more than 10 days after the agency denial and is therefore untimely.

Hammer argues that its protest should nevertheless be considered on the merits under the "good cause" exception to our timeliness rule (4 C.F.R. § 20.2(c)). The "good cause" exception is limited to circumstances where some compelling reason beyond the protester's control prevents the filing of a timely protest, which is not the case here. Corley Mechanical Contractor - Reconsideration, B-189110, September 22, 1977, 77-2 CPD 216.

Accordingly, our prior decision that Hammer's protest is untimely is affirmed, but on a different basis.

Deputy Comptroller General
of the United States