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DECISION



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

FILE: B-190611

DATE: April 18, 1978

MATTER OF: Asahi Glass Company, Ltd. -
Reconsideration

DIGEST:

1. Even if protester did not learn of basis of protest involving proposed use of only one desalting process until mid-October 1977, rather than earlier as stated in prior decision, protest filed on December 9, 1977, is untimely under Bid Protest Procedures.
2. It is clear from initial protest that protester believed its proposed desalting capacity, technical approach, and price were sufficient to justify awards for two desalting processes irrespective of capacities and prices proposed by other competitors. Consequently, fact that protester did not learn of competitors' proposed prices until late November 28, 1977, does not affect conclusion of prior decision that December 9, 1977, protest against decision to award for one desalting process is untimely filed.
3. Company's initial protest clearly established untimeliness of its protest. Consequently, it was proper for GAO to summarily dismiss protest without affording protester right to comment on agency report on protest.

Asahi Glass Company, Ltd. (AGC), has requested reconsideration of our decision of March 6, 1978, dismissing the company's protest under solicitation No. PS-7186, Yuma Desalting Plant, Department of the Interior.

The company's grounds of protest were summarized in our March 6 decision as follows:

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- (1) The proposed awards for "23 and 77 percent of the capacity of the project" based on only one process (spiral wound reverse osmosis system) violate solicitation provisions which provided that the Department would not award more than 60 percent of the capacity to any one company and that a minimum of two processes would be selected for awards;
- (2) The only qualification on the Department's intent to award no more than 60 percent of the capacity to any one company and to award for a minimum of two processes was that the Government would not do so in the absence of "sufficient quantity and prices" to make the awards possible;
- (3) Asahi's proposal clearly offered "sufficient quantity" (capacity) and (reasonable) "prices";
- (4) In addition to having offered sufficient quantity and reasonable prices, the company's fourth-ranked proposal was competitive from a technical viewpoint.

We held that all these bases of protest were known by the company no later than October 5, 1977, when the company received the Department's announcement of the awards in question along with details as to the ranking of all the proposals. Notwithstanding these circumstances, the company delayed filing its protest with our Office and the Department until December 9, 1977, or considerably more than 10 working days after the date the bases of protest were known. Hence the protest had to be considered untimely filed. See 4 C.F.R. § 20.2(b)(2) (1977).

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AGC now says that it was not aware until October 18, 1977, that only one desalting process was involved in the two proposed awards. Further, the company says that it was not until November 28, 1977, when it learned of the "presumable correct prices" offered by the proposed awardees. Therefore, the company argues that it was not in a position until late November to challenge the Department's view that awards for two processes were not justified by offerors' proposed quantities and prices.

Even if we assume that AGC did not learn until mid-October that only one desalting process was involved in the two proposed awards, it is clear that as of mid-October 1977 the company had knowledge of a basis of protest against the proposed use of one desalting process. Notwithstanding AGC's knowledge of this ground of protest as of the now stated time, the company delayed filing its protest until December 9, or considerably beyond the 10 working days' limit set forth in our Bid Protest Procedures for the filing of protests against nonsolicitation defects.

As to the company's argument that it was not in a position to challenge the wisdom of the proposed use of the "one process" awards decision until November 28 (when AGC says it learned of the awardees' proposed prices), the company's initial protest showed that AGC believed its proposed desalting capacity, technical approach, and price were sufficient to justify awards for two processes irrespective of the capacities and prices proposed by other competitors. Although the company now seeks to undercut the force of its initial protest by stating that it was critical for AGC to have had knowledge of the awardees' prices before filing a protest contesting the Department's "one-process" awards, AGC has not in any way given up its position that it offered "sufficient quantity" and reasonable prices to support an award for two processes. As stated by AGC in its initial protest: "* * * it is not possible that there is such a large difference between the top-ranked company and AGC in the cost evaluation as would make implementation of the Government's intention [to award for two processes] impractical."

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Under AGC's previously stated position, we do not agree that it was critical for AGC to wait for knowledge of the proposed awardees' price (which, since the knowledge is said to have come from a non-governmental source, could have been clearly erroneous) before filing a protest. Thus, we must conclude that AGC had knowledge of a basis for protest against the wisdom of the Department's "one process" awards as of October 5, 1977, the date on which the company admits it received the Department's award letter.

The company also says our decision was "unlawful because it was rendered prior to receipt of the [procuring agency's] reports by AGC." Since the company had not received the reports, AGC argues it was "not in a position to submit its comments as it is entitled to do under 4 C.F.R. § 20.3(d)."

The company's initial protest clearly established the untimeliness of its protest. Consequently, it was proper for our Office to summarily dismiss the protest without affording the protester the right to comment on the agency report on its protest. See Emerson Construction Company, Inc. B-190702, December 15, 1977, 77-2 CPD 468; Alaska Industrial Coating, B-190295, October 12, 1977, 77-2 CPD 290.

Prior decision affirmed.


Deputy Comptroller General
of the United States