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DECISION



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

FILE: B-191414

DATE: June 13, 1978

MATTER OF: Freund Precision

DIGEST:

1. Protest of agency's alleged inclusion of proprietary data in solicitation is untimely when filed with GAO after bid opening and where record does not support contentions that protest letter was tendered to agency and oral protest communicated to contracting officer prior to opening.
2. Protest of alleged improper inclusion of proprietary data in solicitation does not raise significant issue so as to justify consideration of late protest.

Freund Precision, Inc. (Freund) protests any award under IFB DAAA09-78-B-0008 issued by the United States Army, Rock Island Arsenal. Freund contends that the agency used drawings in the bid package which improperly incorporated technology developed by Freund and submitted to the Army as an unsolicited value engineering proposal. The firm's protest letter to our Office indicates that it was not submitted until after bids were opened.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1977) conditions the consideration of protests based upon alleged improprieties apparent in a solicitation prior to bid opening upon the filing of the protest prior to bid opening. If a protest is initially filed with the agency within the time constraints, any subsequent protest to our Office within 10 days of initial adverse agency action will be considered timely. 4 C.F.R. 20.2(a) (1977). In this matter the significant time is the 10:00 a.m., February 27, 1978, bid opening.

Freund maintains that its protest is timely because it attempted to deliver a protest letter to the contract specialist on February 27, prior to bid opening, and its

president orally protested the inclusion of its data in the solicitation prior to opening.

In support of its position that but for the contract specialist's refusal to accept its protest letter, the protest would have been timely, Freund has submitted affidavits from its president and marketing agent. These individuals state that they attempted to present a protest letter to the contract specialist prior to bid opening but they were informed that the letter could not be accepted by anyone other than the contracting officer. They were not able to locate the contracting officer until after bid opening. The record also contains affidavits from the contract specialist and the bid opening officer to the effect that no tender of the protest letter was made to the contract specialist until after bids were open.

Freund did submit a bid on this procurement, but it was not low. In view of the specific denials that Freund tendered the protest letter prior to bid opening, and the lack of other evidence supporting Freund's position, we are unable to affirmatively conclude that the alleged tender actually took place. See Reliable Maintenance Service, Inc.--Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Regarding its contention that it protested orally to the contracting officer prior to bid opening Freund has submitted another affidavit from its president, this time stating that on February 15, 1978 he phoned the contracting officer and asked whether Freund would be compensated for its value engineering proposal, some of which allegedly was incorporated into the subject solicitation. The affidavit states that the contracting officer indicated that no protest letter was necessary and that he would look into the matter and contact the Freund representative. No such contact occurred.

The contracting officer has submitted an affidavit alleging that his conversation with Freund's president dealt only with matters relating to payments Freund claimed were due it under its value engineering proposal because of changes made to another contract. The contracting officer denies promising to contact Freund's representative and states that no mention was made of a protest in connection with the subject solicitation.

In this connection we note that the record includes a letter dated February 15, 1978 to an individual other than the contracting officer or contract specialist under the subject solicitation complaining that the solicitation contains Freund's drawings. The thrust of the letter is a claim by Freund that it is entitled to compensation under its value engineering proposal. There is nothing in this letter, which is addressed to an individual in the agency who is not identified with the solicitation but with the value engineering proposal, to indicate it was intended as a protest of the solicitation.

We do not believe that these communications with the agency constitute a protest under this solicitation. Both communications appear to be centered on Freund's value engineering proposal rather than this procurement. In both instances Freund neglected to object to the inclusion of the data in the solicitation except in terms of that inclusion entitling Freund to additional compensation under its value engineering proposal. In fact, the contracting officer understood the conversation to be an inquiry concerning the value engineering proposal while the letter which referenced the value engineering proposal and an earlier contract was addressed to "Value Engineering, Rock Island Arsenal." In view of the above and considering the fact that Freund submitted a bid pursuant to the solicitation we do not believe the record establishes that these communications were intended to constitute a protest against the incorporation of the data in the solicitation.

Freund argues that even if its protest is determined late, it should be considered because it could not discover the basis for the protest until a short time before bid opening. This delay was caused, Freund insists, because the Federal Stock Number of the bid item was different from the one previously assigned this item. Since Freund's own correspondence dated February 15, 1978 indicates that it made the identification in January, long before the February 27 closing date, this argument is without merit.

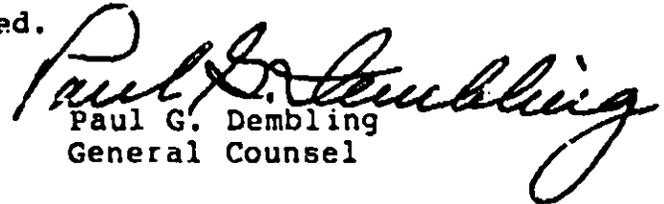
Finally, Freund contends that the matter should be considered as a significant issue pursuant to 20.2(c) of our Bid Protest Procedures, supra. We do not believe that this protest raises issues of widespread interest since the questions involved concern the alleged inclusion

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of alleged proprietary data in a particular procurement.
Francis & Jackson, Associates, B-190023, January 31,
1978; 78-1 CPD 79.

The protest is dismissed.


Paul G. Dembling
General Counsel