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M. Eaton PL II

DECISION



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

FILE: B-191715

DATE: August 9, 1978

MATTER OF: Better Business Machines

DIGEST:

Under facts of this case, 10-working-day period for filing protest began when contracting officer telephoned protester's headquarters, stating that award had been made to another bidder; protest received after that time will not be considered on the merits. Federal Procurement Regulations specifically permit oral notice to unsuccessful bidders. Moreover, absence of protesting firm's president from country for two working days after call does not toll running of protest period, since authority to protest could have been delegated, or brief telegram, establishing timeliness of protest, could have been sent to GAO immediately upon president's return.

Better Business Machines (BBM) protests the award of a contract under solicitation No. IRS-SE-78-3, issued March 6, 1978, by the Facilities Management Branch of Internal Revenue Service (IRS), Atlanta, Georgia. The IRS sought photocopy services for its Memphis, Tennessee, Service Center for the period from May 1, 1978 through April 30, 1979, with two 12-month options.

Following bid opening on April 14, 1978, the contracting officer found that BBM was nonresponsive, primarily because it offered copiers which required 12 seconds to produce a first copy. In addition, BBM bid on only two sizes of paper. The specifications required a 7-second first copy time and four sizes of paper.

Although it was not clear until comments on the IRS report were received, for the following reasons, we believe BBM's protest is untimely. Award was made to American Duplicating Company on April 26, 1978, and the contracting officer notified all unsuccessful bidders, including BBM, by telephone on that date. No protest was filed with IRS, and our Office did not receive BBM's letter of protest, dated May 9, 1978, until May 12, 1978.

In its comments, BBM argues that its copier, which has "stream feed" and is capable of producing 30 copies a minute, is actually faster than that offered by the awardee, which produces only eight copies a minute because the operator must raise the cover, position the original, close the cover, and press the print button for each copy. To the extent that this is a protest against the 7-second first copy requirement, it should have been made before bid opening. Our procedures, 4 C.F.R. 20.2 (1977 ed.), require that alleged improprieties which are apparent on the face of a solicitation be protested before opening.

As for the determination of nonresponsiveness, protests of this type must be received by our Office within 10 working days after the basis for them is known or should have been known, whichever is earlier. To be considered on the merits, BBM's protest should have been received no later than May 10, 1978, 10 working days after the firm was notified that award had been made to another bidder.

The president of BBM states that he had been told that a decision on the award would be made on April 17, 1978; during the next few days, he made several calls to IRS, but was told that a decision had not been reached. He was out of the country from April 22 to 29, 1978 and, upon returning to Memphis on May 1, 1978, learned of the contracting

officer's call to his company. He argues that since he was not formally notified, and did not actually know of the award until May 1, 1978, the protest is timely.

We disagree. The Federal Procurement Regulations (FPR) 1-2.408(b) specifically state that unsuccessful bidders may be notified either orally or in writing. The record is not clear as to whether BBM was informed of the precise reasons for its rejection, but we believe notice of award to a competitor provided a sufficient basis for filing a protest if BBM believed itself to be the lowest responsive bidder. See Hy-Gain Electronic Corporation, B-185468, April 13, 1976, 76-1 CPD 250; Hannibal Company, B-183067, February 25, 1975, 75-1 CPD 113.

BBM's headquarters had notice of the award on April 26, 1978. We do not believe that the absence of BBM's president from the country for two working days after such notice tolled the running of the protest period. Even if the individual with whom the contracting officer spoke was not authorized to protest on behalf of BBM (and we need not decide that question here), such authority could have been delegated. See generally Automated Processes, Incorporated, B-181262, September 4, 1974, 74-2 CPD 143. Alternatively, upon his return to BBM, the president could immediately have sent a brief telegram containing the information required by our procedures. Such a submission will establish the timeliness of a protest and may be supplemented by a letter detailing the basis for the protest. In-Trol, B-182055, November 7, 1974, 74-2 CPD 246.

In the absence of such a timely submission, we must decline to consider the merits of BBM's protest.

Milton J. Dembling
for Paul G. Dembling
General Counsel