

*J. Washburn  
Proctor*

**DECISION**



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

8987

FILE: B-192644

DATE: January 29, 1979

MATTER OF: Leo Journagan Construction Co., Inc.

DLG 00 778

**DIGEST:**

1. Where prior to bid opening bidder protests alleged improprieties in solicitation to agency, opening of bids without taking any corrective action constitutes initial adverse action from which protester has 10 working days to file protest with GAO. Protest relating to such alleged improprieties filed more than 10 working days after bid opening is therefore dismissed as untimely.
2. [Award to lowest bidder based on revised Government estimate was proper exercise of agency's discretion] where Government estimate was revised pursuant to regulation and decisions of this Office and was reasonable.

Leo Journagan Construction Co., Inc., (Journagan) protests award of a contract under invitation for bids (IFB) No. DACW41-78-B-0092 issued by the Army Engineer District, Kansas City, Missouri, for the clearing and disposal of timber in connection with the construction of a dam. Journagan contends that the specifications contained many deficiencies and inadequacies which were not corrected despite Journagan's bringing the problem to the attention of the contracting officer prior to bid opening on August 9, 1978. Journagan further contends the Government improperly awarded the contract to a bidder whose bid exceeded the Government estimate by 41.8 percent, and that although the Government revised its estimate after bid opening and prior to award so that the low bidder's bid only exceeded the Government's revised estimate by 23.6 percent, the Government's upward revision of the estimate was erroneous and improper.

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The IFB was issued on July 12, 1978, for the clearing of timber from an area partially inundated due to the construction of a dam. Consequently, some clearing would have to be performed in the water or on wet ground. By letter dated August 2, 1978, and in discussions with representatives of the contracting agency on August 8, 1978, Journagan alleged several deficiencies in the specifications of the IFB. Journagan was orally informed at the August 8 meeting that the contracting agency would not amend the specifications. (The agency's views were committed to writing in a letter to Journagan dated August 31, 1978.) When on August 9, 1978, the bids were opened as scheduled, Journagan's bid was the highest of three bids received. The prices were as follows:

Haw Knob, Inc. (Haw Knob)	\$3,242,236
Phillips and Jordan, Inc.	\$3,804,719
Journagan	\$5,889,800

Haw Knob's low bid exceeded the Government estimate of \$2,287,200 by 41.8 percent. After bid opening the Government re-evaluated its original estimate and the District Engineer issued a revised estimate of \$2,623,500 because it then appeared that more work would have to be performed in water than had been anticipated. The revised Government estimate was sent for approval to the Division Engineer, Missouri River Division. The Division Engineer approved the revised estimate, which Haw Knob's bid exceeded by only 23.6 percent. Notice of award was sent to Haw Knob by letter dated September 8, 1978, and this Office received Journagan's protest within 10 working days thereafter, on September 19, 1978.

Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1978). The protest to this Office, however, was filed after bid opening. Even if Journagan's correspondence and discussions with the contracting agency prior to bid opening were to be construed as a protest, an issue we need not decide, the protester was required to file any subsequent protest with this Office within 10 days from

notification of the agency's initial adverse action. 4 C.F.R. § 20.2(a): Where a bidder protests alleged improprieties in a solicitation to the agency prior to bid opening, the opening of the bids without any corrective action constitutes notification of an adverse agency action, Jazco Corp., B-192407, August 31, 1978, 78-2 CPD 162. Since Journagan's protest was filed more than one month after bid opening, the portion of the protest relating to the alleged deficiencies in the specifications is untimely and is dismissed.

The portion of the protest that concerns the award to Haw Knob based on the revised Government estimate is timely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2), because it was filed within 10 days of the award to Haw Knob. Therefore, the merits of this portion of the protest will be considered.

The basic question raised by the protest as it relates to the award based on the revised Government estimate is whether the Government estimate was properly revised. In this connection the protester questions the basis for the revision to the estimate, claiming that the contractor, in fact, is clearing more areas under dry conditions because of a delay in the spillway construction.

Section 1-372(h) of the contracting agency's regulations, Engineer Regulation (ER) 1180-1-1 (change 22, April 10, 1974, as amended December 1, 1977) provides in part that if the low responsive bid exceeds the Government estimate by more than 25 percent, and the District Engineer considers that the bid is reasonable and should be accepted, he will forward the matter, with his analysis and recommendations for revision of the estimate, for consideration by the Division Engineer who may authorize correction. These regulations are consistent with our decisions holding that if the bids submitted in response to the IFB are substantially higher than the applicable Government estimate, the contracting agency should be on notice of possible error and the estimate should be carefully reviewed. Durocher, Dock & Dredge, Inc., B-189704, March 29, 1978, 78-1 CPD 241; W.G. Construction Corp., B-188837, August 9, 1977, 77-2 CPD 100. The record shows

that the contracting agency fully complied with the cited regulations and decisions of this Office.

An upward revision of a Government estimate will not be disturbed absent a showing of unreasonableness on the part of the Government agency. J.S. Mathers, Inc., B-191323, September 25, 1978, 78-2 CPD 225. In our opinion it was reasonable for the Division Engineer who approved the revised Government estimate to rely upon the information available to him at the time of the approval of the revision. See Pete Smith Company, Inc., B-182228, October 23, 1974, 74-2 CPD 225. As previously noted, information available at the time of the revision indicated that more work would have to be performed in water than had been previously anticipated. Subsequent events indicating the Government estimate may have been inaccurate do not make the estimate unreasonable or the determination of price reasonableness an abuse of discretion. We note that although Haw Knob's bid exceeded the revised Government estimate by 23.6 percent, that estimate pursuant to ER 1180-1-1 § 1-372(e) did not include a profit factor. Based on the foregoing, we believe that the contracting agency had a reasonable basis for the upward revision of the Government estimate at the time it was made and for the award to Haw Knob.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States