

Transp.

**DECISION**



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

9372

FILE: B-193008

DATE: March 7, 1979

MATTER OF: Mueller & Wilson, Inc.

*[Untimely protest Alleging That Awardee's Bid Was Nonresponsive]*  
DIGEST:

Protest filed with GAO more than 10 working days after protester's receipt of notice of initial adverse agency action on protest filed with agency is untimely and will not be considered on the merits.

Mueller & Wilson, Inc. (M & W) protests the award by the General Services Administration Region 7 (GSA) of Contract No. GS-07B-30549 to Anslinger, Inc. (Anslinger). The contract is for the installation of air conditioning machines in the U.S. Post Office and Courthouse, Victoria, Texas. The protester contends the Anslinger bid was non-responsive because it consisted of several alternatives tied to different proprietary items instead of an offer to meet the IFB specifications.

The IFB was issued on July 17, 1978, and one amendment was issued on August 18, 1978, making several changes in technical specifications and extending the bid opening date. The IFB provided for the submission of a lump sum bid, with the awardee to submit specified cost information on at least three different makes of chillers meeting the IFB specifications, and to install the make with the lowest combined cost, based on purchase cost, installation cost, and life-cycle energy cost.

At bid opening, Anslinger's bid was found to consist of five bid prices ranging from \$207,000 to \$232,000, based on the use of equipment made by four different manufacturers. The bid also contained manufacturers' literature, and life-cycle cost data for the various systems. Bids were also submitted by four other contractors, of which M & W's bid of \$225,000 was the lowest. When the GSA contract specialist opened and examined Anslinger's bid he considered it nonresponsive and did not read it aloud. M & W was advised at the bid opening that it had submitted the apparent low responsive bid. After subsequent review, GSA determined that Anslinger's bid of \$207,000 was, in fact, responsive and on August 28, 1978, the bidders were advised that Anslinger was apparently the low responsive bidder.

M & W protested this determination to GSA by letter dated August 28, 1978, supplemented by subsequent letters dated August 30 and 31, 1978. The GSA contracting officer initially denied M & W's protest by letter dated September 6, 1978. The protester states that upon receipt of this

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denial it telephoned the GSA Region 7 office and was informed that its August 31 letter "had been received after the denial had been written, but that this second letter was being sent to the legal department for consideration and [M & W] would be informed of their decision." M & W further states that "at no time were we informed that the GSA letter dated September 6, 1978, constituted a final binding decision, but instead were led to believe that further consideration was being given to our protest." GSA subsequently confirmed the denial by letter dated September 13, 1978. GSA awarded the contract to Anslinger on September 22, 1978. M & W protested to GAO by letter dated September 19, 1978, received in our Office September 25, 1978.

The protest is untimely. Section 20.2(a) of our Bid Protest Procedures (4 C.F.R. 20.2(a)(1978)) provides in relevant part:

"...If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or constructive knowledge of initial adverse agency action will be considered...."  
(emphasis added)

M & W received GSA's September 6 letter on September 7; the protest was filed here more than 10 working days thereafter. Although GSA's continuing consideration of M & W's protest may have contributed to the delay in filing with this Office, we have held that under such circumstances the date of the original notification determines the timeliness of filing. Harnischfeger Corporation, B-192629, October 11, 1978, 78-2 CPD 269; Murphy Anderson Visual Concepts--Reconsideration, B-191850, July 31, 1978, 78-2 CPD 79.

It is unfortunate that M & W may not have been notified that GSA's September 6 letter constituted a final decision, and that it believed GSA was further considering its protest. However, it is partially because of the difficulty in identifying when the agency action becomes "final" in cases such as this that our Procedures require that the timeliness of a protest filed with GAO be measured from the date the protester received notice of initial adverse agency action. 52 Comp. Gen. 20, 23 (1972).

M & W has requested that its protest be "adjudged on its merits and not on the technical condition of timeliness." However, as stated in Section 20.2(c) of our Procedures, a protest which has not been timely filed may be considered only for "...good cause shown, or where...a protest raises issues significant to procurement practices or procedures....". The good cause exception normally refers to a compelling reason, beyond the protester's control, which prevented it from timely filing. 52 Comp. Gen. 20, 23 (1972); Bish Contracting Company, Inc., B-192788, November 21, 1978, 78-2 CPD 356. No such reason appears in the present record.

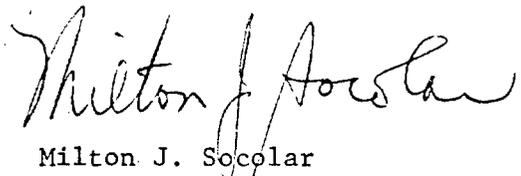
The significant issue exception is exercised sparingly so that the timeliness standards do not become meaningless. Bish Contracting Company, Inc., supra; D.A. Cruciani and Frank A. Agnone, B-187958, December 21, 1976, 76-2 CPD 518. Where the merits of a protest involve issues which have been considered in previous decisions, such issues are not "significant" within the meaning of the section. Technical Services Corporation, et al., B-190945, B-190970, B-190992, August 25, 1978, 78-2 CPD 145. The issues here have been dealt with frequently.

We have held that the submission of alternative bids is not objectionable per se. Where a bid consists of proposals to furnish any one of several alternative items at different prices, those proposals which offer material meeting specification requirements are considered responsive bids, the lowest of which may properly be accepted. The inclusion of an unacceptable alternative proposal does not preclude consideration of other proposals submitted in the same bid, which conform to the IFB requirements. 33 Comp. Gen. 499, 500 (1954); P & N Construction Company, Inc., 56 Comp. Gen. 328, 333 (1977), 77-1 CPD 88. In this case, after critical review by its contracting officer and technical staff, GSA concluded that Anslinger's proposal for installing Westinghouse equipment for \$207,000 (the low bid) was fully compliant with the IFB requirements.

We have also held that the inclusion of unsolicited descriptive literature does not automatically mandate rejection of a bid. While the literature may not simply be disregarded, the bid may be determined responsive if the contracting officer can ascertain that the material described in the literature conforms to the IFB specifications. 49 Comp. Gen. 851 (1970). We have specifically held that unsolicited descriptive literature accompanying a bid containing an unsolicited model number must be considered by the contracting officer to determine the intent of the bid and that if the contracting officer can determine that the model listed conforms in all material respects to the specifications in the IFB, then the inclusion of the model number is inconsequential with respect to the issue of bid responsiveness. Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171. As indicated above, GSA made precisely this determination in this instance.

Neither issue raised by the protester warrants consideration as an exception under Section 20.2(c) of our Procedures.

Protest dismissed.



Milton J. Socolar  
General Counsel