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DECISION



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

FILE: B-194523

DATE: August 2, 1979

MATTER OF: NGC Investment & Development Corporation, d.b.a. Nieman Glass & Paint

DLG 02394

DLG 02395

DIGEST:

1. Protest that specifications were proprietary and in violation of Uniform Building Code, filed after bid opening, is untimely because these alleged problems were apparent from face of solicitation and protest based on such alleged defects must be filed prior to bid opening.
2. Protester alleged that awardee was permitted to modify its product and deviate from specifications, while protester's bid was not considered because of deviation. Agency has denied allegation and protester has presented no evidence to prove its allegation. Therefore, protester has failed to carry burden of affirmatively proving allegation.

NGC Investment & Development Corporation, d.b.a. Nieman Glass & Paint (NGC), has protested the award of a contract to Aluminum Marts, Inc., for window replacement at St. Paul Island, Alaska, under invitation for bids (IFB) No. NASO-279-00131, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

NGC has ^{ation} alleged that the specifications are proprietary and that they do not meet the Uniform Building Code (UBC) provisions concerning emergency egress. NGC also alleges that Aluminum Marts is now unfairly being permitted to alter its window to deviate from the specifications, while NGC's alternate bid was not considered, even though it was low, because it deviated from the specifications.



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NGC's complaints concerning the proprietary nature of the specifications and their alleged failure to meet UBC requirements are untimely and will not be considered. These alleged improprieties were apparent from the face of the solicitation. Section 20.2(b) (1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), requires protest based on such improprieties to be filed prior to the date of bid opening. Here, bid opening was March 21, 1979, and NGC's protest was filed on April 3, 1979.

Regarding NGC's allegation that Aluminum Marts is being permitted to deviate from the specifications by modifying its windows, NOAA stated in its response that Aluminum Marts presented its product for inspection prior to award, that the product met the specifications, and that Aluminum Marts will not be modifying its windows. In letters of May 8 and June 13, 1979, NGC did not dispute this assertion. Consequently, we assume that NGC no longer believes that Aluminum Marts is being permitted to modify its window. Even if NGC still maintains that allegation, where the only evidence with respect to a disputed question of fact consists of contradictory assertions by the protester and the agency, the protester has failed to carry the burden of affirmatively proving its allegation. Aero-Dri Corporation, B-192274, October 26, 1978, 78-2 CPD 304.

Accordingly, the protest is denied.


for the Comptroller General
of the United States