

DECISION



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

11740

M. E. Eaton
Proc II

FILE: B-196040

DATE: October 23, 1979

MATTER OF: Phoenix Marine Corporation

DLG 03/24

DIGEST:

1. [Protest against change in small business set-aside] filed after closing date for receipt of proposals specified in amendment making change, is untimely and will not be considered on merits.
2. Insurance coverage required by solicitation is matter of responsibility, and need not be obtained before award.
3. Alleged award of contract after notice of protest would be procedural deficiency, not affecting validity of award.

Phoenix Marine Corporation (Phoenix) protests the award of a contract under solicitation No. N00189-79-R-0144, issued February 14, 1979, by the Naval Supply Center, Norfolk, Virginia (the Navy).

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The protest is in part untimely, and otherwise deals with an affirmative determination of responsibility, not generally reviewable by our Office, and alleged procedural deficiencies, not affecting the validity of the award. We therefore are reaching our decision without requesting a full report from the Navy.

The Navy sought a primary and secondary (back-up) contractor, each of whom was to be awarded an indefinite quantity, fixed-price contract to remove asbestos insulation from various size pipes and to install new insulation. The solicitation originally provided that both contracts were to be set aside for small business;

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however, Amendment 0004, effective June 13, 1979, incorporated a new Naval Sea Systems Command (NAVSEA) specification dealing with removal and disposal of asbestos and provided that only the back-up contract would be set aside for small business. The amendment stated that negotiations were being reopened and extended the closing date for receipt of proposals to July 6, 1979.

DLG 03/25
In its protest to our Office, filed September 11, 1979, Phoenix states that it was notified in May that WACO, Incorporated was the successful primary offeror. Phoenix protested to the contracting officer that WACO was not a small business, and subsequently learned that the Small Business Administration had made a determination to this effect. Phoenix states that it considers Amendment 0004 "an obvious attempt to circumvent the fact that the apparent low bidder was ineligible," and argues that it should have been awarded the primary contract in May.

Under our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2) (1979), protests must be filed within 10 days after the basis for them is known or should have been known, whichever is earlier. Since Phoenix knew when Amendment 0004 was issued in June that it was not going to be awarded a contract without further negotiations, its protest of the Navy's failure to do so is untimely and will not be considered on the merits.

Even if Phoenix is merely protesting cancellation of the set aside of the primary contract, this protest is also untimely. Under 4 C.F.R. 20.2(b)(1), supra, alleged improprieties which did not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation. See A & J Manufacturing Company, B-192297, December 19, 1978, 78-2 CPD 422.

DLG 03/26
Phoenix further protests that Empire Electric Company, the low offeror under the amended solicitation, lacks the insurance coverage required by Amendment 0005, including Ship Repairers' Legal Liability and Longshoremen's and Harbor Workers' Compensation.

The Navy has informed Phoenix that insurance coverage is a matter of responsibility, and that it need not be obtained before award. We agree. See Eastern Tunneling Corporation, B-183613, October 9, 1975, 75-2 CPD 218.

Our Office generally does not review affirmative determinations of responsibility unless fraud on the part of contracting officials or failure to meet definitive responsibility criteria is alleged, New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225, which is not the case here. In any event, Empire has submitted evidence of its compliance with the insurance requirements of the solicitation.

Finally, by letter delivered to our Office on September 17, Phoenix complains that the Navy made award on September 7, after receiving a copy of the protest. Phoenix alleges that the Navy disregarded applicable regulations by proceeding with the award, by not obtaining approval at the appropriate level, and by failing to give Phoenix written notice of the decision to proceed with award and the reasons for it.

The contracting officer informally advises us that the primary contract was awarded to Empire on September 7, but that the papers were signed about two hours before a copy of the protest letter was received in Norfolk. (As noted above, Phoenix's original protest was not received in our Office until September 11, 1979.) The back-up contract has not been awarded. We therefore do not believe there have been any violations of the regulations, but even if they occurred, our Office would regard them as procedural deficiencies, not affecting the validity of the award. New Haven Ambulance Service, Inc., supra.

The protest is dismissed.



Milton J. Socolar
General Counsel