

**DECISION**

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

PLI

12063

FILE: B-196589

DATE: November 19, 1979

MATTER OF: General Coatings, Inc. DLG 03363**DIGEST:**

1. Section 20.2(b)(1) of GAO Bid Protest Procedures requires protests based upon alleged improprieties apparent in solicitation to be filed prior to bid opening. Protest questioning specifications filed with GAO more than 10 days after initial adverse agency action (bid opening in face of pending protest with agency) is untimely.
2. Protest of low bidder's ability to comply with IFB requirements concerns question of affirmative determination of bidder's responsibility which is not reviewed by GAO absent allegations of fraud or misapplication of definitive responsibility criteria set forth in IFB.

*Protest Alleging*

General Coatings, Inc. (Coatings), protests the award of a contract under invitation for bids DAHA 70-79-B-0008, issued for roof repairs to the Air National Guard Base in Puerto Rico. Coatings contends that the specifications were defective and impossible to meet because they required a 10-year warranty of materials by the contractor and the manufacturer, and that the manufacturer refused to offer such a warranty. Coatings also contends that the low bidder is unable to comply with the specifications. Coatings states that it submitted telegrams on September 12 and 18, 1979, prior to the September 19 bid opening, advising the procuring activity of the alleged defects but did not receive any response until October 22, 1979.

DLG 03362

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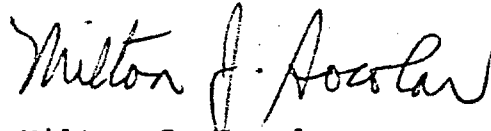
Our Bid Protest Procedures, 4 C.F.R. part 20 (1979), require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening be "filed" prior to bid opening. 4 C.F.R. § 20.2(b)(1). The term "filed" as used in that section means receipt in the contracting agency or the General Accounting Office, as the case may be. Even if we assume Coatings' protest was timely filed with the contracting agency, its protest to our Office is nonetheless untimely.

Our conclusion is based on the provisions of 4 C.F.R. § 20.2(a) which require that if a protest is initially filed with the contracting agency in a timely manner in order for any subsequent protest to our Office to be timely, it must be filed within 10 days of initial adverse agency action. When the contracting agency opened bids on September 19, 1979, without changing the specifications, Coatings was placed on notice of adverse agency action. See Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979, 79-1 CPD 31. Since we did not receive a protest until October 29, 1979, well beyond the 10-day time constraint established by 4 C.F.R. § 20.2(a), Coatings' protest is untimely and not for consideration on the merits.

With regard to Coatings' contention that the low bidder could not comply with the 10-year warranty required in the IFB, this is a question concerning the successful bidder's responsibility to perform the contract. ~~Defense Acquisition Regulation § 1-904~~ (1976 ed.) requires the contracting officer to make an affirmative determination that the prospective contractor is responsible prior to making an award. A representative of the Army has informally advised us that the contracting officer determined the low bidder to be a responsible firm. Our Office no longer reviews protests which question affirmative determinations of responsibility unless either fraud on the part of the procuring official is alleged or the solicitation contains definitive responsibility criteria which allegedly have not been applied.

Associated Electronics, Inc., B-193859, March 29,  
1979, 79-1 CPD 218. Neither exception has been  
alleged here.

The protest is dismissed.

A handwritten signature in cursive script, reading "Milton J. Socolar".

Milton J. Socolar  
General Counsel