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DECISION



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

FILE: B-198230

DATE: July 23, 1980

MATTER OF: Zinger Construction Company, Inc.

DIGEST:

1. Pre-bid-opening contacts with procuring agency-- demand for immediate clarification of specification drawings on basis of specific alleged ambiguities, any necessary bid opening postponement, and intent to protest--can reasonably be interpreted as bid protest to agency. Therefore, protest filed with GAO within 10 working days after adverse agency action--bid opening without the demanded clarification--is timely and for consideration.
2. Protest is denied where potential bidder, which understood Government requirements, does not show how it would be prejudiced vis-a-vis competitors by alleged ambiguities in invitation, and three lowest bids are in line with Government estimate.

Zinger Construction Company, Inc. (Zinger), protests any award under invitation for bids (IFB) No. DACA51-80-B-0028, issued by the United States Army Corps of Engineers (Army) for certain rehabilitation work on the plating area of an engine plant.

The day prior to bid opening, the Army received Zinger's request for clarification of a portion of the IFB's specifications as follows:

"* * *REQUEST CLARIFICATION OF SHEET 13 SECTION AA-AMBIGUOUS 'TYPICAL FOR ALL FLOOR OPENINGS' DOES THIS APPLY TO NEW AND EXISTING TRENCH COPING OR ONLY TO NEW OPENINGS THE WORK (sic) OPENING REQUIRES A DEFINITION ITEM 2 TYPICAL CONNECTION SHEET 15 DRAWINGS DEFECTIVE CLARIFICATION REQUIRED ON 2 TANKS INDICATED IN EACH SECTION DOES

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[Protest Against Any Contract Award]

DRAWING DEPICT FRONT AND REAR OF SAME TANK
OR TWO DIFFERENT TANKS PROTEST WILL FOLLOW
IF CLARIFICATION IS NOT RECEIVED.* * *

On the same day, Zinger telephonically spoke with the Army project manager and requested a bid opening postponement until the clarifications could be made. Zinger admitted that it understood the pertinent drawings but feared that other bidders might not and, consequently, they would be erroneously induced to submit lower bid prices preventing equal competition. The Army reports that, prior to opening, the specification was reviewed and it was determined to be unambiguous; thus, no clarification was required. Since Zinger understood the specifications and in the absence of any inquiry from the other potential bidders, the Army proceeded with the scheduled opening. By mailgram sent prior to but received the day after opening, Zinger, which did not bid, protested to our Office any award due to the failure of the agency to make the clarifications.

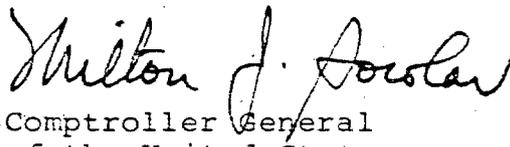
The Army contends that because the protest against alleged patent solicitation improprieties was not filed with our Office or the agency prior to bid opening, it is untimely and not for consideration, citing our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980). The agency further states that the Zinger's pre-bid-opening contacts did not constitute a protest but rather were merely prebid inquiry, especially in view of the advice that a "PROTEST WILL FOLLOW IF CLARIFICATION IS NOT RECEIVED."

While we have held that the mere request for clarification of an invitation's specifications is insufficient to constitute a protest (Hewitt Construction Company, B-183961, May 28, 1975, 75-1 CPD 324, affirmed July 8, 1975, 75-2 CPD 21), we find that Zinger's pre-bid-opening actions did more than merely request clarification. Rather, Zinger complained with specificity and demanded immediate clarification of the specifications and expressed an intent to protest in the absence of the demanded clarification. While we recognize the above-quoted Zinger language might be construed to show a future intention to protest, we find that Zinger's actions, taken as a whole,

reasonably can be interpreted as a protest, particularly in view of the telephonic conversation with the project manager. See Gibson & Cushman Dredging Corporation, B-194902, February 12, 1980, 80-1 CPD 122. Since the protest was timely filed with the agency before bid opening, the opening of bids without the demanded clarifications constituted adverse agency action on the protest. Accordingly, since the protest to us was received the day after the bid opening, or within 10 working days of the adverse agency action, the Zinger protest is timely and for consideration. See 4 C.F.R. § 20.2(a) (1980).

Zinger states that the alleged ambiguities might cause competitors to misinterpret the actual Government requirements and to submit lower bid prices prejudicial to Zinger. In our view, this amounts to mere speculation. Zinger does not show how the alleged ambiguities would cause the submission of lower rather than higher bid prices. In fact, we observe to the contrary at least with respect to the first ambiguity raised by Zinger which, if misinterpreted by others, would result in higher rather than lower bid prices. Further, we note that Zinger understood what the Government required and that the three lowest bids are in line with the Government estimate for the procurement.

Accordingly, the protest is denied.



For the Comptroller General
of the United States