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DECISION



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

FILE: B-197987

DATE: September 22, 1980

MATTER OF: American Marine Decking Systems, Inc.

DIGEST:

1. Protest to agency was orally denied by agency at meeting with protester. Protest to GAO is untimely when filed in GAO more than 10 days after such initial adverse agency action. Therefore, protest is dismissed.
2. Where protest alleging defective specification was filed with agency and agency issued amendment to correct defect, protest to GAO alleging same defect is moot.
3. [Protest alleging defective specifications] was timely filed with contracting activity. Initial adverse agency action occurred when contracting agency issued amendment to solicitation only partially correcting alleged defects and not satisfying demands of protester. Protest to GAO is untimely when filed more than 10 days after initial agency action (receipt of amendment by protester). Therefore, protest is dismissed.
4. Allegation that third and fourth low bidders colluded in submitting bids in violation of certification of independent price determination contained in IFB is not for consideration by GAO. Issue of collusion is academic since agency proposes to award to lowest priced bidder and decision on merits would not change relative standing of bidders in competition.

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American Marine Decking Systems (AMDS) protests under invitation for bids (IFB) No. N00244-80-B-0752, issued by the Naval Supply Center, San Diego, California. The solicitation was issued on January 4, 1980, and called for bids for a requirements contract for the preparation of decks and installation of terrazzo tile for shipboard decking. Bids were opened on February 27, 1980, and AMDS filed its protest in our Office on March 4, 1980.

AMDS contends that the specifications are defective in several respects and that there was collusion between two of the other bidders in preparation of their bids in response to this IFB.

The protest is dismissed.

AMDS first argues that the specifications are defective because they require installation of approximately two and one-half times as much latex terrazzo deck covering as epoxy terrazzo deck covering. AMDS argues that certain of its competitors were given a competitive advantage because those competitors own distribution rights for approved latex terrazzo products, while AMDS has distribution rights for an approved epoxy terrazzo product. AMDS also contends that, since latex terrazzo products are considerably more costly than epoxy terrazzo products, the solicitation will result in a substantial increase in price to the Government for the required deck installation. We will not consider this issue on its merits because it was untimely filed in our Office.

Under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), protests based upon alleged improprieties in an IFB which are apparent prior to bid opening must be filed prior to bid opening in order to be considered on their merits. The protester may file its protest with the contracting agency under section 20.2(a) of our Bid Protest Procedures, but any subsequent protest to our Office must be filed within 10 days of actual or constructive knowledge of the initial adverse agency action on the protest before the contracting agency.

In the present case, AMDS raised the issue of latex versus epoxy products with the Naval Supply

Center during a pre-bid conference held on January 29, 1980. At that time, Navy contracting officials told AMDS representatives that the quantities were based on the Government's best estimates and that they would not be changed. AMDS protested to the Naval Supply Center on this point by letter of January 30, 1980. A meeting was held at the Naval Supply Center to discuss AMDS's protest on February 6, 1980. At the February 6 meeting, Navy contracting officials again informed AMDS representatives that this requirement would not be changed and that the protest on this point was denied.

Under our Bid Protest Procedures, as noted above, AMDS filed a timely protest with the contracting agency. However, the initial adverse agency action occurred on February 6, 1980, when AMDS was told by Navy contracting officials that the estimated quantities for latex and epoxy terrazzo would not be changed and that the protest was denied. Therefore, AMDS was required to protest this issue to our Office within 10 working days of February 6 if it wanted us to decide this issue on its merits. Since AMDS did not protest this issue until March 4, 1980, this issue was untimely filed with us.

AMDS next contends that the IFB is defective because it contains a requirement that plastic divider strips be installed with both latex and epoxy decking. AMDS admits in its protest letter of February 29, 1980, that plastic divider strips are sometimes installed in latex systems "because latex systems have a history of cracking and the strips relieve the pressure thus decreasing the chance of cracking and at least limiting the crack to a area easier to repair." However, AMDS contends that installation of plastic divider strips is contrary to proper installation of epoxy decking systems as approved for the qualified products list which is required by the IFB.

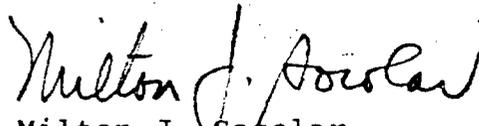
The Navy amended the IFB on February 1, 1980, in response to AMDS's protest on this point at the pre-bid conference so that plastic divider strips would only be required with installation of latex terrazzo decking. Accordingly, insofar as AMDS's protest is directed against the use of plastic divider strips with epoxy decking, the issue was resolved by the February 1, 1980, amendment and need not be decided by us.

Insofar as AMDS's protest is directed against the requirement for plastic divider strips in the installation of latex decking, we believe the protest to be untimely and, therefore, will not consider it on the merits. The issuance of the February 1, 1980, amendment was the initial adverse agency action with regard to this point of AMDS's protest. Upon receipt of that amendment, AMDS was on notice that the Navy had considered its protest against the use of plastic dividers with both epoxy and latex decking and decided to remove the requirement with regard to epoxy decking only while keeping the requirement with regard to latex decking. Since AMDS was on notice upon receipt of the amendment that the requirement for plastic dividers was not changed in connection with latex decking, AMDS had to file its protest on this point with our Office within 10 working days of this adverse agency action in order for it to be considered on the merits under section 20.2(a) of our Bid Protest Procedures. See Informatics, Inc., 58 Comp. Gen. 750 (1979), 79-2 CPD 159. In any event, there appears to be a reasonable basis for this requirement since AMDS readily admitted in its original protest letter to our Office that there are several reasons to install plastic divider strips with latex systems (including, but not limited to, the fact that latex decking has a history of cracking).

AMDS also protests that the IFB provisions regarding security requirements are inadequate because the employees of the contractor are not required to be citizens of the United States. AMDS protested this issue at the pre-bid conference, and, as a result, the security requirements were amended on February 1, 1980, to require the contractor to provide a list of employees who would board the ship to the ordering officer prior to start of work on a ship, and the list was to include "the name, social security or green card number and security clearance as applicable." Furthermore, as a result of the amendment, employees are now required to utilize a picture identification card for positive identification. AMDS protests that these measures are still inadequate because aliens will be allowed to board naval vessels and will present a threat to national security.

We consider the protest regarding security requirements to be untimely and not for consideration on the merits. The issuance of the February 1, 1980, amendment was again the initial adverse agency action on AMDS's protest on this point and should have put AMDS on notice that the Navy was not going to correct the alleged deficiencies to AMDS's satisfaction. Since AMDS did not file its protest on this issue within 10 working days of receipt of the February 1, 1980, amendment, we will not consider this issue further. See Informatics, Inc., supra.

Lastly, AMDS alleges that Mil-Spec Corporation and Fryer-Knowles, Inc., the third and fourth low bidders, respectively, colluded in preparing and submitting their bids under this IFB in violation of the certification of independent price determination clause contained in the IFB. However, since the contracting officer proposes to make award to Universal Decking Systems, Inc., the lowest responsible, responsive bidder, this issue is academic and will have no effect on the relative standing of the bidders in the competition. Accordingly, we will not consider this issue on its merits.


Milton J. Socolar
General Counsel