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DECISION



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

FILE: B-202022

DATE: June 10, 1981

MATTER OF: Sperry Flight Systems

DIGEST:

Protest under two-step procurement is untimely since it was not filed with GAO within 10 working days of contracting agency's receipt of step-one technical proposals. Agency received proposals without deleting alleged restrictive provision from solicitation contrary to protester's request set forth in its initial protest to agency. Receipt of step-one proposals without agency taking requested corrective action constituted initial adverse agency action within meaning of GAO's Bid Protest Procedures.

Sperry Flight Systems (Sperry), a division of Sperry Corporation, protests a solicitation provision set forth in request for technical proposals (RFTP) No. MSN-99008 issued by the Air Logistics Center, Warner Robins Air Force Base (Air Force), Georgia.

This two-step procurement solicited offers for a Fuel Savings Advisory System (FSAS)--a computerized navigation aid which helps the pilot fly the most fuel-efficient course--to be installed in C-141 and C-5 aircraft. The Air Force estimates that its fuel savings will amount to \$2 million per month once the FSAS is installed on the aircraft. Sperry's protest is directed against RFTP paragraph 10(c), entitled "Restriction of Offerors," which states that the "solicitation is restricted to

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suppliers that have or will have integrated and installed an existing FSAS in either commercial or military aircraft in operation at the time of submission of this technical proposal." Sperry is of the view that it is excluded from the competition on the basis of this provision. Sperry, however, argues that it is fully qualified to compete for this contract and is only prevented from doing so because of paragraph 10(c) and the Air Force's faulty understanding of what type of system will actually meet its needs.

For the reasons indicated below, we dismiss the protest as untimely.

The RFTP was first issued on November 7, 1980, containing paragraph 10(c). On December 5, 1980, the RFTP was reissued to incorporate some changes discussed at a preproposal conference, but paragraph 10(c) was left unchanged. The Air Force then established January 5, 1981, as the date for the receipt of step-one proposals. By letter to the contracting officer dated December 23, 1980, which the contracting officer received on December 27, Sperry protested the inclusion of paragraph 10(c) in the solicitation. Nevertheless, the Air Force received technical proposals as scheduled on January 5, 1981, without deleting the paragraph. The Air Force formally denied Sperry's protest by a letter dated January 20, 1981. Sperry then filed a protest with our Office which was received on February 3, 1981.

The Air Force believes that Sperry's protest to our Office is untimely and should not be considered on the merits since the Air Force is of the view that the protest should have been filed in our Office by mid-January 1981, or within 10 working days of the receipt of step-one proposals. This receipt of proposals, in the Air Force's view, constituted initial adverse agency action on the Sperry protest. The Air Force first raised this issue in a letter dated May 6, 1981, which was in response to Sperry's comments on the agency report. In commenting on this new issue, Sperry has argued that the acceptance of technical proposals on January 5, 1981, "did not constitute a conscious

adverse agency action" requiring a further protest to our Office since its initial protest had been filed during the holiday period and the lack of action on the protest prior to January 5, 1981, was to be expected. In light of this, Sperry believes that its protest to our Office, which was filed within 10 days of Sperry's receipt of the Air Force's letter of January 20, 1981, is timely and should be considered on the merits. We disagree.

Under our Bid Protest Procedures, 4 C.F.R. § 20.2 (a) (1980), where a protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of "formal notification of or actual or constructive knowledge of initial adverse agency action." Moreover, we have held that the contracting agency's receipt of proposals without taking the corrective action requested in the protest constitutes initial adverse agency action as contemplated by that provision. General Leasing Corporation--Reconsideration, B-193527, March 9, 1979, 79-1 CPD 170.

Sperry's initial protest to the contracting agency was timely filed since it was filed with the agency prior to the receipt of step-one proposals. See Ahrens Aircraft Corporation, B-187605, January 12, 1977, 77-1 CPD 24. However, when the Air Force accepted step-one proposals on January 5, 1981, without deleting paragraph 10(c) from the solicitation, any subsequent protest from Sperry had to have been filed in our Office within 10 working days of that date--the date of initial adverse agency action. On this score, the fact that the Air Force subsequently denied the protest by letter did not alter Sperry's responsibility to conform to the filing requirement of 4 C.F.R. § 20.2(a), above; the 10-day filing period starts to run from the date of initial adverse agency action, not the receipt of an agency letter which formally denies a protest. Bird-Johnson Company B-199445, July 18, 1980, 80-2 CPD 49.

As to Sperry's argument that the Air Force did not consciously consider and reject its protest before January 5 because the protest had been filed during the holiday period, we consider this argument to be speculative. On this score, we think it is sufficient to note that the contracting officer actually received the protest on December 27, or 4 working days prior to the January 5 receipt of proposals. This time period suggests that the Air Force had more than sufficient time to consider and decide the protest, notwithstanding the period of the year involved.

Similarly, we also reject Sperry's argument that the Air Force's raising of the timeliness issue in its final reply to the protest--rather than in its initial protest report--necessarily shows that the contracting officer did not consider the company's protest before January 5. In our view, this circumstance suggests only that the Air Force had not fully reflected on the facts and applicable precedent bearing on this particular issue rather than that the contracting officer had not considered the Sperry protest--which involved a different issue--before January 5.

Consequently, and in the absence of probative evidence showing that the contracting officer did not consider the protest prior to January 5, the protest is clearly untimely.

Protest dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel