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DECISION



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

FILE: B-207199; B-207199.4 **DATE:** June 21, 1982

MATTER OF: Pan American Services, Inc.; Kleen-Rite Corporation

DIGEST:

1. When protest concerns alleged ambiguities in solicitation, contracting agency's letter stating that solicitation will not be amended constitutes initial adverse agency action, and protest to GAO will be dismissed as untimely unless it has been filed within 10 days after protester's receipt of letter. Agency's proceeding with scheduled closing also constitutes adverse action, and protester's continuing to pursue matter with agency does not extend time for protest to GAO.
2. Offerors are responsible for timely delivery of their proposals, and risk rejection if they do not comply with exact provisions of solicitation regarding delivery. Standard clause on late proposals states that they will not be considered unless they have been sent by registered or certified mail not later than the fifth day before closing, and in this context express mail is not the equivalent of registered or certified mail.

Two prospective contractors have protested concerning a procurement by the U.S. Army Missile Command (MICOM), Redstone Arsenal, Alabama, for food services in three troop dining halls. We dismiss the protest of Pan American Services, Inc. as untimely and summarily deny the protest of Kleen-Rite Corporation.

Pan American's protest is based on alleged ambiguities in the solicitation, No. DAAH03-82-R-0070. The firm argues that certain tasks which affect pricing are not sufficiently described by the solicitation, and only the incumbent contractor will be aware of exactly what is required for contract performance. For example, the solicitation requires busing of trays from dining area to kitchen during meals; according to Pan American, this service is not being provided now and if it actually

will be required under the new contract, wages for three additional employees must be included in proposed prices. Other tasks such as replenishing milk and cleaning chairs and table tops currently are being performed during meals, Pan American states, but are not required to be done at this time by the solicitation. In addition, Pan American alleges, certain cleaning schedules either are inconsistent or are not included in the solicitation.

Pan American brought these alleged deficiencies to the attention of MICOM before the March 29, 1982, closing date for receipt of initial proposals; however, by letter of March 25, four days before closing, the contracting officer advised the firm that the solicitation would not be amended. Pan American again wrote MICOM on April 16, but when best and final offers were requested by April 20, the firm protested to our Office. The protest was filed, i.e., received, on that date.

The Army argues that the protest is untimely, citing cases which set forth the rule in our Bid Protest Procedures, 4 C.F.R. 21.2 (1981), that protests based on alleged improprieties which are apparent on the face of a solicitation must be filed before closing date for receipt of initial proposals. In addition, the Army points out, our procedures require that any protest initially made to a contracting agency subsequently must be filed with our Office within 10 days of initial adverse agency action. Since Pan American did not protest to our Office until after the closing date for receipt of initial proposals, the Army argues, the protest should not be considered on the merits.

Pan American, however, argues that its April 16 letter to MICOM must be considered as separate from its earlier protest to the agency, and that the closing date for best and final offers must be viewed as initial adverse agency action. In our opinion, the cases which Pan American cites in support of this argument clearly are distinguishable from the instant one. Both Waterbury Farrell, Division of Textron, Inc., B-203798, July 24, 1981, 81-2 CPD 60, and Southwestern Bell Telephone Co., B-200523.2, June 5, 1981, 81-1 CPD 449, involved deficiencies in amended solicitations; Microtech Industries, Inc., B-201466, August 3, 1981, 81-2 CPD 83, involved a pre-proposal conference which led a protester to believe the agency would take corrective action. In these cases, we stated that the protests would have been timely if filed before the amended closing date

or the date for submission of best and final offers. In Pan American's case, however, MICOM specifically refused to amend the solicitation and proceeded with closing as scheduled.

We find that the contracting officer's letter of March 25, refusing to amend the solicitation, constituted initial adverse agency action, and any protest to our Office should have been filed within 10 days after Pan American received that letter. MICOM's acceptance of proposals on March 29 without taking corrective action also constituted adverse agency action. See American Telephone and Telegraph Company, 60 Comp. Gen. 642 (1981), 81-2 CPD 157; J. J. Broderick Company, B-204506, November 23, 1981, 81-2 CPD 419. The basis of Pan American's April 16 protest to MICOM was no different than its earlier protest, and the fact that Pan American continued to pursue its protest with the agency did not extend the time for protesting to our Office. Blakeslee Arpaia Chapman, Inc., et al., B-206394, March 8, 1982, 82-1 CPD 213.

We cannot accept Pan American's alternate argument that its protest should be reviewed under the significant issue exception to our timeliness rules, 4 C.F.R. 21.2(3) (c), since we previously have refused to consider post-opening protests involving alleged ambiguities in solicitations for food services. See, for example, Industrial Maintenance Services, Inc., et al., B-189303, B-189425, December 15, 1977, 77-2 CPD 466 (sustained on other grounds).

Pan American's protest therefore is dismissed.

Kleen-Rite's basis of protest, involving the same procurement, is that MICOM refused to consider its late proposal. Correspondence from Kleen-Rite to MICOM, included in the record, indicates that the deadline for best and final offers was extended to 3:30 p.m. on April 29. Kleen-Rite states that its offer was sent by express mail at 10:50 a.m. on April 28, with the U.S. Postal Service guaranteeing delivery within 24 hours. However, the Army advises us that MICOM did not receive the offer until 3:15 p.m. on April 30, and accordingly refused to consider it. Kleen-Rite argues that the Postal Service has been negligent and that Kleen-Rite should not be penalized on this account.

As we frequently have indicated, offerors are responsible for the timely delivery of their proposals, and risk rejection if they do not comply with the exact

provisions of a solicitation in this regard. The standard clause on late proposals, included in this solicitation, states that they will not be considered unless they have been sent by registered or certified mail not later than the fifth day before closing. See Defense Acquisition Regulation § 7002.4 (Defense Acquisition Circular 76-18, March 12, 1979.) Although regulatory changes have been considered, for purposes of late proposal acceptance, express mail is not now considered the equivalent of registered or certified mail. Wilderness Research Institute, B-203326, June 19, 1981, 81-1 CPD 512.

Kleen-Rite's protest therefore is summarily denied.

for Milton J. Auerbach
Comptroller General
of the United States