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DECISION

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

FILE: B-213904, B-213904.2 B-213904.3, B-213904.4 **DATE:** August 8, 1984

MATTER OF: American Mutual Protective Bureau; W.M.P. Security Service Co.; Inter-Con Security Systems, Inc.; Young Patrol Service

DIGEST:

1. If protester cannot compete for small business set-aside contract because it is large business, protester is not an interested party, and its protest will not be considered under our Bid Protest Procedures.

2. Contract awarded by Air Force appears to have been based on same wage determination on which bidders competed. It is speculative whether Department of Labor (DOL) would have issued--prior to award--new wage determination based on collective bargaining agreement arising out of one of two prior contracts which were combined to result in protested procurement. Moreover, there is no indication in record that DOL ever resolved issues--raised by the procuring agency--relating to the validity of the bargaining agreement and its relevance to the protested procurement.

3. An information copy of a protest letter addressed to a contracting officer is not a protest when filed with our Office. Conversely, an information copy of a protest letter addressed to our Office is not a protest when filed with the contracting officer.

4. Agency's opening of bids on scheduled date, without taking the corrective action urged by the protester, constitutes initial adverse agency action on the protest. Consequently, a subsequent protest to our Office is untimely when filed more than 10 working days after the bid opening.

5. Protest filed within 10 days of date protester alleges it first learned of basis for protest is timely.

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American Mutual Protective Bureau (AMPB) protests the Air Force's award of a contract to Danguard, Inc. (Danguard), under invitation for bids (IFB) No. F04700-84-B0001, which was issued on November 4, 1983, for guard services to protect the flight test facilities at Edwards Air Force Base, California, for a 1-year period with the possibility of up to two additional option years. This procurement, the Air Force reports, resulted from the combination of requirements stemming from two predecessor contracts--an Air Force contract and a smaller contract awarded by the National Aeronautics and Space Administration (NASA).

Bid opening was held at 2 p.m. on December 2, 1983, and Danguard was the successful bidder. The Air Force confirmed authorization of the award prior to resolution of the protest in a letter to our Office dated January 24, 1984.

AMPB alleges that: (1) a collective bargaining agreement (CBA) was in existence prior to the bid opening on the previous NASA contract and that the CBA should have been reflected in a new wage determination to replace the wage determination dated September 8, 1983, incorporated in the IFB; and (2) the solicitation was ambiguous. Inter-Con Security Systems, Inc. (Inter-Con), the incumbent contractor under the prior NASA contract and contracting party under the CBA, has joined with W.M.P. Security Service Co. (WMP) and Young Patrol Service (Young) in the first ground of protest. Young and WMP also argue that the IFB was ambiguous.

For the reasons discussed below, the protests are dismissed in part and denied in part.

The Air Force states that Inter-Con is no longer a small business. As a consequence, Inter-Con could not compete for the contract, which was a small business set-aside. Our Bid Protest Procedures require that a party be "interested" in order for its protest to be considered. Since Inter-Con was ineligible for the award of this contract, it is not an interested party, and its protest will not be considered. Apex International Management Services, Inc., B-195735 et al., Apr. 8, 1980, 80-1 C.P.D. ¶ 259.

CBA

The Air Force argues that AMPB, Young and WMP have filed untimely protests on this particular issue since the protesters allegedly should have filed this protest as one contesting a solicitation defect before bid opening. But WMP alleges that it was unaware of the "fact of a CBA"--which gave rise to the present protest--until December 14, 1983, and that its protest therefore was timely filed with our Office on December 23, 1983. The Air Force has not contested WMP's assertion about the date it says it learned of the existence of the CBA. Consequently, we consider the protest timely; therefore, it is unnecessary to decide the timeliness of the other protests since WMP discusses this issue in detail.

There is no indication that the Department of Labor (DOL) ever issued a new wage determination based on the CBA which is alleged by the protesters to be applicable to this procurement. Consequently, the contract awarded by the Air Force appears to have been based on the same wage determination on which all bidders competed. Whether DOL would have issued a new wage determination based on the CBA prior to the award of the contract--the critical time for purposes of this protest--is speculative. Therefore, we will not question the award of the contract based on the September 8, 1983, wage determination.

Alternatively, WMP argues that the CBA rates should have been inserted directly into the solicitation even in the absence of a new wage determination. In reply, the Air Force makes two arguments. First, the Air Force argues that the CBA was invalid because it was not entered into pursuant to "arms-length" bargaining. Second, the Air Force argues that the CBA--even if it should be assumed to be valid--should not be viewed as applicable to the new procurement for several reasons.

WMP disputes the Air Force's analysis, but there is no indication that the Air Force's determination concerning the validity and relevance of the CBA has ever been appealed to, or reversed by, DOL, which has the final authority to decide these issues. See, for example, Defense Acquisition Regulation § 12-1006, reprinted in 32 C.F.R. pts. 1-39 (1983), which affords any "interested party" the right to a DOL hearing concerning these issues. Consequently, we deny this alternative ground of protest.

Ambiguities in Solicitation

AMPB

On the day of the bid opening, AMPB presented the contracting officer with a copy of a protest letter (dated November 28) addressed to our Office protesting the award "based on the ambiguous nature of the solicitation" and requesting "that the Contracting Officer be directed to issue an amendment clarifying the items described in the protest, and that the contract be resolicited." AMPB asserts that the letter "was described as a protest, it described the solicitation in question; it set forth all protested items. . . in great detail."

Our Bid Protest Procedures require that protests based upon alleged improprieties apparent on the face of the solicitation be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1984). We do not consider the filing of an information copy of a protest letter with a contracting officer as a direct protest to our Office. See, e.g., Envirotronics, B-202094.2, June 10, 1981, 81-1 C.P.D. ¶ 477. Conversely, we cannot consider the filing with the contracting officer of an information copy of a protest letter addressed to our Office to be a direct protest to the contracting officer. Furthermore, since the original of the November 28 letter was received in our Office after bid opening, we find the protest untimely.

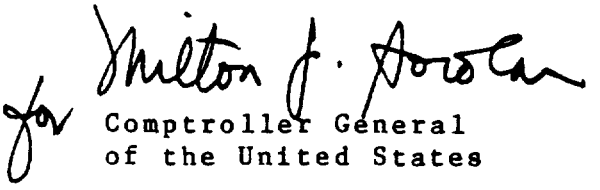
WMP

In its December 23, 1983, letter to our Office, WMP included a copy of its November 17, 1983, protest letter to the contracting officer, which, it alleges, was submitted prior to the bid opening. This letter protested ambiguities and inconsistencies in the solicitation. WMP notes that "the Contracting Officer never clarified the ambiguities or inconsistencies."

Assuming that this protest to the agency was timely, we find the subsequent protest (received in our Office on December 23, 1983) to have been untimely. The agency's opening of bids on December 2, 1983, without taking the corrective action urged by the protester, constituted initial adverse agency action on the protest. See Beelner &

Thomas, B-202978, May 4, 1981, 81-1 C.P.D ¶ 341. Consequently, WMP had 10 working days after December 2 to file its protest here. See 4 C.F.R. § 21.2(a) (1984). But WMP's protest was filed here on December 23, 1983, or more than 10 working days after December 2. Consequently, this ground of protest is untimely filed and will not be considered.

The protests are dismissed in part and denied in part.



for Comptroller General
of the United States