Liebermann

30210

DECISION

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

FILE: B-217105 **DATE:** January 16, 1985

MATTER OF: BHT Thinning

DIGEST:

1. Protest filed with GAO more than 10 days after protester receives notice of adverse agency action regarding protest filed with contracting agency is untimely.

2. The fact that a protester continues to pursue its protest with the contracting agency after notice of adverse agency action does not extend the time for filing the protest with GAO.

3. Protest regarding an alleged solicitation impropriety apparent on the face of the solicitation must be filed prior to bid opening and will not be considered by GAO when it was initially filed with the contracting agency after bid opening.

BHT Thinning (BHT) protests the rejection of its bid on item 4, under solicitation No. RI-04-84-78 for tree thinning on the Fernan Ranger District, issued by the United States Department of Agriculture, Forest Service (Forest Service). We dismiss the protest as untimely.

Bid opening occurred on September 7, 1984. Award was made only on two of the five areas solicited because the Forest Service determined that the bids received on the other three areas were excessive. For item 4, BHT's bid of $54,595, the lowest of three bids received, was 54 percent higher than the Forest Service's original estimate of $35,399.84 and 35 percent higher than the Forest Service's revised estimate of $40,265. BHT's primary basis of protest is that the government estimate improperly calculated cost on the basis of horizontal acreage, which does not reflect the actual surface area which is greater because of the slope of the area in question.

BHT asserts that it was clear from the solicitation that the specified acreage figures which constituted the basis for the Forest Service's estimate did not reflect

031000

the actual surface area. BHT points out that the solicitation's acreage figures conflicted with information in the solicitation on how to calculate the acreage on sloped areas. BHT first raised this objection in its September 18, 1984, protest letter to the Forest Service after BHT had been advised of the agency's determination not to make any award for item 4 because of excessive prices. On September 27, BHT supplemented its protest by raising procedural objections to the procurement process, in particular alleging that award had been made in an inordinately short period after bid opening, and that it had not been properly advised that it had been the low bidder on item 4 before the Forest Service made its decision not to award this item.

BHT indicates that on September 28, the Forest Service advised BHT that it would not make an award for item 4, thus denying BHT's protest. Thereafter, BHT continued to correspond and meet with the Forest Service, reiterating its arguments. The Forest Service reaffirmed its decision not to make award on item 4 and attempted to clarify its basis for acreage calculation cost estimates. BHT's final letter to the Forest Service is dated October 16, repeating the same issues, after which BHT states that the Forest Service declined to provide further response. BHT filed its protest with GAO on November 13.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984), clearly provide that when a protest is initially filed with a procuring agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse agency action. NDE Technology, Inc., B-216419, Sept. 24, 1984, 84-2 C.P.D. ¶ 345. This is defined as any action or inaction that is prejudicial to the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(b). Moreover, the fact that the protester continues to pursue the matter with the agency does not extend the time for protesting to GAO. Trane Air Conditioning, B-214259, Sept. 26, 1984, 84-2 C.P.D. ¶ 359.

Here, in response to BHT's protest letters, the Forest Service examined its cost estimate and advised BHT on September 28 that it would not make an award on item 4. This constituted initial adverse agency action. The fact that the Forest Service considered and responded to subsequent letters submitted by BHT and continued to

attempt to clarify its acreage calculations did not extend the time for protesting to our Office. Trane Air Conditioning, B-214259, supra. BHT's protest was not filed in our Office until a month and a half after the initial adverse agency action.

In addition, the underlying basis of BHT's protest is an alleged apparent impropriety in the solicitation, i.e., the alleged discrepancy between the stated acreage and the solicitation formula for calculating sloped acreage. Under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), such alleged improprieties must be protested prior to bid opening. T.L. Garden & Associates, Inc., B-216318, Sept. 28, 1984, 84-2 C.P.D. ¶ 368. BHT did not file its initial protest with the Forest Service until after bid opening and, therefore, its initial protest to the agency was untimely. Consequently, we will not consider the protest, notwithstanding the fact that the agency may have considered it because our timeliness requirements provide objective criteria which may not be waived by action taken by an agency. Evans, Inc.--Request for Reconsideration, B-213289.3, Feb. 27, 1984, 84-1 C.P.D. ¶ 240.

Accordingly, we dismiss the protest as untimely.

For The Comptroller General
of the United States