

DECISION



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

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FILE: B-216036

DATE: February 12, 1985

MATTER OF: Weitzul Construction, Inc.

DIGEST:

Protest filed more than 10 working days after protester learned of initial adverse agency action (award to another firm) on protest to agency is untimely. Protester's continued pursuit of protest with contracting agency does not alter this result.

Weitzul Construction, Inc. (Weitzul), protests the award of a contract to Marisco, Ltd. (Marisco), under invitation for bids (IFB) No. N62471-82-B-1524, issued by the Naval Facilities Engineering Command for the repair and coating of fuel tanks at the Naval Air Station, Barbers Point, Oahu, Hawaii. Weitzul alleges that Marisco submitted a defective bid guarantee, thus rendering the award improper.

We dismiss the protest as untimely.

Under the IFB, each bidder indicated that, upon written acceptance of its bid within 60 calendar days after bid opening, it would within 10 calendar days after receipt of the prescribed forms execute a construction contract with the government and furnish performance and payment bonds. As guarantee that it would comply with these requirements, each bidder was required to furnish with its bid either a bid bond with good and sufficient surety or other specified security.

When bids were opened on July 29, 1983, it was revealed that Marisco had submitted the low bid while Weitzul had submitted the second low bid. However, by letter dated August 5, Weitzul protested to the Navy that Marisco's bid guarantee, an irrevocable letter of credit, did not meet the requirements of the solicitation.

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On December 1, Weitzul wrote to the Navy reiterating that the bonding documents submitted by Marisco were defective. Weitzul complained that Marisco's July 29 letter of credit had not been "produced in the proper banking form," that the letter of credit Marisco initially submitted expired by its own terms less than the required 70 days after bid opening, and that Marisco had been allowed to submit a proper bid bond 36 days after its original letter of credit had lapsed. Accordingly, Weitzul requested that any contract under the solicitation be awarded to it.

In spite of Weitzul's protest, the Navy made award to Marisco on December 28. In response, by letters of January 4 and January 30, 1984, Weitzul demanded that the Navy cancel the contract with Marisco and expanded upon its original basis for protest. Nothing in the record indicates that the Navy stopped performance under the contract. The Navy formally denied Weitzul's protest on July 31. Weitzul thereupon filed this protest with our Office on August 8, 1984, incorporating the allegation made before the agency that Marisco's bid guarantee did not meet the requirements of the solicitation.

Under our Bid Protest Procedures, protests must be filed within 10 working days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1984). Where the protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a). Weitzul's failure to protest to our Office within 10 working days of learning of the award to Marisco renders this protest untimely. Adverse agency action is any action or inaction which is prejudicial to the position taken in a protest filed with an agency. Notice of award, the possibility of which has been protested to a contracting agency, constitutes initial adverse agency action. See Media Associates, Inc., B-211153, Apr. 12, 1983, 83-1 C.P.D. ¶ 385. The fact that Weitzul continued to pursue its protest with the Navy and that the Navy formally denied the protest at a later time does not alter this result. Ray Service Company--Request for Reconsideration, B-215959.2, Sept. 11, 1984, 84-2 C.P.D. ¶ 284; Allis-Chalmers Corporation, B-214388, Mar. 16, 1984, 84-1 C.P.D. ¶ 320.

Weitzul also requests reimbursement of its bid preparation costs. However, in view of our finding that the protest is untimely, we will not consider this claim. JT Systems, Inc., 213999, Apr. 9, 1984, 84-1 C.P.D. ¶ 399.

The protest is dismissed.



Comptroller General
of the United States