

DECISION



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

FILE: B-220616 **DATE:** December 10, 1985

MATTER OF: Cascade Pacific International

DIGEST:

Protest is untimely and will not be considered where initially filed with the contracting agency and then not filed with GAO within 10 working days after protester's receipt of agency's denial of the protest. Protest is not rendered timely by assertion that the denial letter misled the protester into believing that it had no basis for protest where GAO finds that the letter in fact contained nothing that should have misled the protester in that regard.

Cascade Pacific International (CPI) protests the award of a contract to Omni Distributors, Inc. (Omni), under request for proposals (RFP) No. 10PN-NBS-0377, a multiple award Federal Supply Schedule solicitation issued by the General Services Administration (GSA) for chainsaws. We dismiss the protest.

Both CPI and Omni offered Homelite chainsaws. CPI alleges that GSA evaluated Omni's offer and selected Omni as the lowest priced Homelite offeror based on reduced prices from a revised manufacturer's price list that would not take effect until August 1, 1985, after the time Omni submitted its July 23 best and final offer. CPI points out that the RFP specifically required an offeror to provide prices or discounts based on established catalog or market prices in effect on the date of the offer or on the dates of any revisions submitted during the course of negotiations. CPI argues that Omni, thus, should not have received the award.

In its protest, CPI stated that it previously had protested the matter to GSA, and enclosed a copy of the protest letter along with a copy of the agency's denial of the protest. Although the protest to our Office indicated on its face that it was filed more than 10 working days after the date GSA's letter of denial should have been

received, CPI asserted that the agency's denial was so erroneous and misleading that it did not become clear that Omni had submitted an improper price list until CPI later received documents pursuant to a Freedom of Information Act request. We requested a protest report from GSA for that reason, and because the company also raised the argument that the information it received under the Freedom of Information Act revealed that, contrary to RFP requirements, Omni never had submitted commercial catalogs or price lists, but merely submitted handwritten prices on a bid form.

In a conference held on the protest, CPI admitted that the attachments to GSA's protest report showed that Omni in fact did submit a commercial price list with its offer. Consequently, CPI agreed to withdraw this ground of protest.

With regard to the allegation that Omni improperly based its offered prices on a Homelite manufacturer's price list that was not in effect on the closing date for best and final offers, our Bid Protest Regulations provide that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of notification of initial adverse agency action. See 4 C.F.R. § 21.2(a)(3) (1985). Adverse agency action is any agency action or inaction that is prejudicial to the position taken by the protester in its protest filed with the agency. Progressive Surveillance Systems Corp.--Reconsideration, B-220918.2, Nov. 20, 1985, 85-2 C.P.D. # ____.

GSA maintains that its written response (dated August 30) denying CPI's protest met the standard for adverse agency action since it specifically stated that the protest was denied and also stated the agency's reasons for the denial. GSA concludes that since CPI's subsequent protest was not received in our Office until October 3, more than 10 days after CPI received the denial letter, the protest is untimely.

CPI argues that GSA's letter did not constitute adverse agency action because it included the statement that "a revised price list was not submitted." CPI claims it read this statement as indicating that Omni in fact had not based its best and final prices on the August 1, 1985 catalog, the information (received by CPI during an August 20 telephone

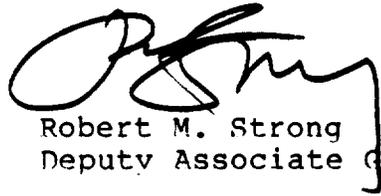
conversation) on which its protest was predicated. Omni claims that only upon receipt of Freedom of Information Act material on September 19 could it confirm that its original information--that Omni did submit the new price list with its best and final offer--was correct, and that GSA's denial letter was incorrect in this regard.

CPI's interpretation of GSA's letter is unreasonable. The language CPI claims was misleading was contained in a paragraph emphasizing that; contrary to one of CPI's protest assertions, notifying offerors that a manufacturer had published a new price list was not the contracting officer's responsibility. The paragraph then pointed out that, under the RFP, it was each offeror's responsibility to submit revised price lists during negotiations, and ended with the statement that a "revised price list was not submitted." As this entire paragraph of the agency's response clearly was in reply to CPI's argument that it should have been advised of the price list, and contained no reference to Omni, we do not see how the final sentence's reference to the nonsubmission of a revised price list reasonably could have been read as a denial by GSA that Omni had submitted a revised price list.

We conclude that GSA's August 30 letter denying CPI's protest was not misleading as to whether CPI's basis of protest existed and, thus, constituted initial adverse agency action. CPI's October 3 protest therefore is untimely.

In any case, for the protester's information, we would find no basis for objecting to the award here. Although Omni's best and final prices apparently were not in effect on the final closing date, the purpose of the standard clause containing the requirement in issue is, in large part, to assure that offered prices are not unjustifiably high; under another standard RFP clause, offerors could be required to submit cost or pricing data (another means of establishing reasonable pricing) in the event GSA found an offeror's prices were not based on established market or catalog prices. See Digital Equipment Corp., B-219435, Oct. 24, 1985, 85-2 C.P.D. ¶ 456. This clause does not preclude an offeror from giving the government the benefit of lower prices even if based on a future price list. Indeed, offerors may choose to propose reduced prices in a best and final offer for any reason.

The protest is dismissed.



Robert M. Strong
Deputy Associate General Counsel