



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: McAllister Brothers, Inc.
File: B-223888
Date: August 27, 1986

DIGEST

1. Protest of allegedly defective specifications filed 3 months after award is untimely even if protester initially filed a timely protest with the contracting agency, since proceeding with the closing date for receipt of proposals without taking action on the protest constituted initial adverse agency action after which any protest to General Accounting Office was required to be filed within 10 working days.
2. Protest that contractor is not complying with specification requirements involves a matter of contract administration, not reviewable by the General Accounting Office.

DECISION

McAllister Brothers, Inc. protests the alleged failure of the Department of the Navy, Naval Supply Center, Norfolk, Virginia, to adhere to the specifications contained in request for proposals (RFP) No. N00189-86-R-0168 in awarding and administering the resulting contract. The RFP, for tugboat services, required that the contractor have available 3 tugboats meeting certain specifications not later than 90 days after award. The protester alleges that before the closing date for receipt of proposals it informed the Navy that no potential contractor had the capability to comply with this requirement, and further alleges that the awardee has failed to meet this requirement.

We dismiss the protest.

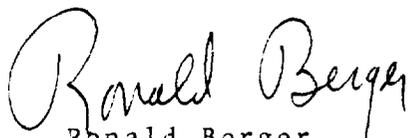
The complaint that the specifications were defective is untimely. Our Bid Protest Regulations require that protests of apparent solicitation improprieties must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1986). In a case where an alleged impropriety is timely protested to a contracting agency, any subsequent protest to this Office must be filed within 10 days of actual

or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3). An agency's proceeding to the closing date for receipt of proposals without taking corrective action constitutes constructive notice to the protester of initial adverse agency action. 4 C.F.R. § 21.0(e); Computer Dynamics Inc., B-217585, Jan. 25, 1985, 85-1 CPD ¶ 106. Since McAllister Brothers filed its protest with this Office almost 3 months after award, the protest is untimely even if McAllister Brothers initially filed a timely protest with the Navy as its protest submission suggests.

Regarding the awardee's capability of complying with the RFP's requirements, this issue involves a matter of responsibility. Before awarding a contract, the contracting agency must determine that the proposed contractor is responsible--that is capable of complying with the solicitation's material terms at the offered price. Federal Acquisition Regulation, 48 C.F.R. §§ 9.103 and 9.105.2(a) (1985). We will not review an agency's affirmative determination of an offeror's responsibility unless there is a showing that the determination may have been made fraudulently or in bad faith, or that the solicitation contained definitive responsibility criteria that allegedly were not applied. 4 C.F.R. § 21.3(f)(5); Trail Blazer Servs., B-220724, Feb. 12, 1986, 86-1 CPD ¶ 275. The protester does not allege any improper motives of procurement personnel. Further, the RFP's requirements, with which the awardee allegedly failed to comply, constituted performance requirements to be met after award, and not definitive responsibility criteria that any offeror was required to meet as a condition for award. See Hatch & Kirk, Inc., 63 Comp. Gen. 414 (1984), 84-1 CPD ¶ 614.

Whether or not a contractor actually performs in compliance with the solicitation's requirements is a matter of contract administration that is the responsibility of the contracting agency and is not reviewable under our Bid Protest Regulations. 4 C.F.R. § 21.3(f)(1); Satellite Servs., Inc., B-219679, Aug. 23, 1985, 85-2 CPD ¶ 224. While we will consider a protest that an agency, prior to award, intended to later materially alter the contract, ManTech Field Eng'g Corp., B-218542, Aug. 8, 1985, 85-2 CPD ¶ 147, there is no allegation nor indication that the agency intended to waive the RFP's requirement that 3 tugboats be available within 90 days after award.

The protest is dismissed.


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