



The Comptroller General
of the United States

Washington, D.C. 20548

Baskin - PL

Decision

Matter of: So Cal Plastics, Inc.--Reconsideration

File: B-227874.2

Date: October 2, 1987

DIGEST

Protest based upon alleged defect in a solicitation which is apparent prior to bid opening must be filed prior to bid opening. Solicitation defect is apparent if the protester, because of its prior performance under a recent contract, knows of the defect in the solicitation regardless of whether defect is apparent to other bidders.

DECISION

So Cal Plastics, Inc., requests reconsideration of our notice of June 22, 1987, dismissing its protest as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987). We affirm the dismissal.

So Cal's protest concerns invitation for bids (IFB) No. 2FY-EBN-A-A4971-S, issued by the General Services Administration (GSA), for general purpose plastic bags. In its protest, So Cal argued that the solicitation was defective because it required the procurement of supplies in excess of the government's minimum requirements. Specifically, So Cal stated that the specifications required excessively high tear resistance for the bags, as measured by an inaccurate test method (Elmedorf tear test), and that these specifications are inconsistent with other requirements and caused the plastic bags to be twice as thick and therefore twice as costly as should be necessary. Bid opening was March 27, 1987. So Cal did not file its protest until June 19, 1987. We dismissed the protest as untimely because under 4 C.F.R. § 21.2(a)(1), protests based upon alleged solicitation defects apparent prior to bid opening must be filed prior to bid opening.

In its request for reconsideration, So Cal argues that we should not have dismissed its protest because the alleged solicitation defects, objectively viewed, were not apparent

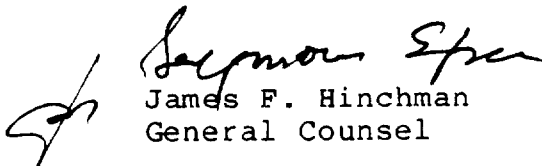
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prior to bid opening. Specifically, the specification defects, according to So Cal, would not have been known to any bidder unless it had performed an investigation of the inherent physical properties of the raw material for the bags. So Cal states that it became aware of the defects, including the specification inconsistencies, as a result of its performance under a prior contract. Thus, we understand So Cal to say that while it was itself aware of these defects prior to bid opening because of its past performance, other bidders would not and could not have been aware of them so that the solicitation defects were not apparent within the meaning of our timeliness rules. We reject this argument. We think that a bidder who knows that a solicitation is defective, even if only because of its own unique circumstances, must protest prior to bid opening regardless of whether the known defect is apparent to other bidders. Otherwise, a bidder would be able to knowingly submit a bid under a defective solicitation and thereafter delay award by filing its protest after bid opening if such a protest would serve its interest in view of the exposed prices received by the agency.

So Cal also suggests that the full extent of the defects were not known by the firm prior to bid opening. However, the record shows that So Cal (as reflected in letters dated March 5 and 9, 1987, referencing its difficulties with the tear test in connection with its contract) knew about the potential defects in the solicitation, including the inconsistencies, and was aware of the deficiency with respect to the testing method specified prior to bid opening. Accordingly, we find no merit in this contention.

Finally, So Cal argues that it did advise GSA of the tear test problem prior to bid opening in a letter dated March 9, 1987. We simply note that even if we assume this letter to be an agency-level protest, the subsequent bid opening constituted initial adverse agency action and So Cal did not protest within 10 working days thereafter. See 4 C.F.R. § 21.2(a)(3). The protest was therefore untimely filed.

Our prior dismissal is affirmed.


James F. Hinchman
General Counsel