



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Sterling Environmental Services, Inc.

**File:** B-234798

**Date:** May 12, 1989

## DIGEST

1. Where a small business, protesting the award of a sole-source contract to a large business, is orally advised by the agency that the contract award was proper and that the contract would not be awarded to its firm under the previous procurement for the same requirement that was set aside for small businesses, the firm was required to file its protest with the General Accounting Office within 10 days of learning of the agency's adverse action.

2. Where a protest is initially filed with the contracting agency, a protester may only wait a reasonable amount of time for a contracting agency's response to its protest before filing a protest with the General Accounting Office.

## DECISION

Sterling Environmental Services, Inc., protests the award of a sole-source contract to Unison Transformer Services, Inc., a large business and subsidiary of Union Carbide Corporation, under small purchase order No. N62472-89-M-6737, issued by the Naval Training Center, Great Lakes Illinois, for the removal and disposal of a 500 KVA transformer containing polychlorinated biphenyls (PCBs). Sterling contends that the Navy improperly failed to award a contract to its firm under invitation for bids (IFB) No. N62472-88-B-7730 (IFB No. 7730), an earlier solicitation for the same requirement which was set aside for small business firms.

We dismiss the protest as untimely.

IFB No. 7730 required that the contractor arrange for the packaging, transportation and destruction of a PCB transformer and disposal of associated equipment in accordance with all applicable federal, state and local laws, rules and regulations, including the regulations of the Environmental Protection Agency (EPA). The IFB also required the

destruction, by high temperature incineration, of all PCB fluids removed from the transformer.

Five bids were received in response to IFB No. 7730 by bid opening on June 7, 1988. Aldridge Electric, the low bidder at \$9,900, was awarded a contract on June 29. Sterling's \$24,626 bid was the highest.

After award, the Navy learned that Aldridge planned to dispose of the transformer by placing it in a land-fill rather than by the method specified in the IFB, high temperature incineration of the PCBs. The Navy then terminated its contract with Aldridge on September 8.

In November, after questioning the four remaining bidders, including Sterling, the Navy determined that none of the bidders had the EPA license that is required to dispose of PCB transformers by incineration, as required by the IFB. Subsequently, upon being advised by EPA that only G&L Recovery, a Unison-owned company, was licensed by EPA to incinerate PCB transformers, the Navy awarded a contract to Unison under small purchase procedures on November 25.

In a December 1 letter to the Navy, Sterling protested the award to Unison on a sole-source basis. Sterling contended that since the IFB was issued as a small business set-aside with an evaluation preference for disadvantaged businesses, the Navy improperly awarded a contract to a large business. Sterling maintains that its firm should have been awarded the contract under IFB No. 7730 because it was the only responsive bidder under that solicitation.

The Navy states that it responded to Sterling's December 1 protest by informing the protester in early December that the agency had properly awarded the contract to Unison and that the contract under IFB No. 7730 would not be awarded to Sterling. The agency maintains that the current protest, filed on March 14, 1989, 3 months after the protester was so notified, is untimely because it was not filed within 10 days of notice of adverse agency action. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1988).

Sterling contends that its protest is timely. The protester states that on December 6, the contracting officer stated that it would receive a response to its protest from the Navy's legal staff; according to Sterling, it filed this protest in our Office when it became apparent that no agency response was forthcoming.

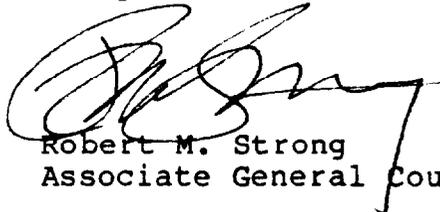
Under our Bid Protest Regulations, if a protest is filed initially with the contracting agency, any subsequent

protest to our Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3).

Here, the protester's own submission indicates that after Sterling filed its December 1 protest, the Navy discussed the protest with the firm on December 6. The Navy states, and the protester does not deny, that during that discussion, the protester was informed that its firm would not be awarded the contract. Sterling therefore had actual knowledge that the Navy was denying its protest. To be timely, Sterling was required to file its protest with our Office within 10 working days of December 6, or by December 20. Sterling's protest, filed on March 14, 1989, therefore is untimely.

Even if, as Sterling claims, the protester did not receive any agency response to its December 1 protest, the protest nevertheless is untimely because the protester failed to diligently pursue the matter. A protester cannot delay filing a protest with our Office until it eventually receives a decision from the contracting agency. Rather, a protester may wait only a reasonable time for a contracting agency's response before filing a protest here. Sacramento Metropolitan Officials Association, B-230563, Mar. 16, 1988, 88-1 CPD ¶ 274. Waiting 3 months, as Sterling did here, to file a protest in our Office after filing an initial protest with the agency is not reasonable. Id.

The protest is dismissed.

  
Robert M. Strong  
Associate General Counsel