



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Illumination Control Systems, Inc.

File: B-237196

Date: December 12, 1989

DIGEST

Protest based on agency actions prior to bid opening; on information available at time of award; and on information provided in response to a Freedom of Information Act (FOIA) request submitted 2 months after award, is dismissed as untimely when initially filed with the contracting agency 4 weeks after receipt of FOIA response, and more than 3 months after contract award.

DECISION

Illumination Control Systems, Inc. (ICS), protests the award of a contract to North Landing Line Construction Company (NLLCC), under invitation for bids (IFB) No. N62470-87-B-8630, issued by the Naval Facilities Engineering Command, Naval Air Depot, Norfolk, Virginia, for an automatic lighting control system. ICS claims that the Navy was biased against it, that NLLCC's bid was not responsive to the terms of the IFB, and that NLLCC lacks experience in the design and installation of automatic lighting controls.

We dismiss the protest.

The IFB was issued on January 17, 1989, with bid opening set originally for February 16. Amendment 0002 to the IFB postponed the bid opening date until March 21, and converted the procurement from a small business set-aside to an unrestricted procurement. Bids were received and opened on March 21, and the contract was awarded to the low bidder, NLLCC, on March 31. ICS asserts that it subsequently tried to obtain the awardee's bid from the Navy on an informal basis. When it was unsuccessful, ICS filed a Freedom of Information Act (FOIA) request on May 24, seeking "the engineering equipment and installation submittals" delivered

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by NLLCC to the Navy after contract award.^{1/} The Navy provided the requested information by letter dated June 5, and ICS filed a protest with the Navy on July 3. On September 15, the Navy denied ICS' agency protest; on September 29, ICS' protested to our Office.

Our Bid Protest Regulations contain strict timeliness requirements for filing protests, i.e., protests must be filed no later than 10 days after the basis for protest is known or should have been known, and protests based on an alleged impropriety in the solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1)-(2) (1989); ACCESS for the Handicapped, B-234233, May 15, 1989, 68 Comp. Gen. ____, 89-1 CPD ¶ 458. Our Regulations also require that a protest filed initially with the contracting agency likewise meet the above-cited timeliness requirements to warrant subsequent consideration by our Office. 4 C.F.R. § 21.2(a)(3); Valentec Kisco, Inc., B-234421, Mar. 9, 1989, 89-1 CPD ¶ 261. To ensure meeting these long-standing timeliness requirements, a protester has the affirmative obligation to diligently pursue the information that forms the basis for its protest. Horizon Trading Co., Inc., et al., B-231177 et al., July 26, 1988, 88-2 CPD ¶ 86.

In this case, ICS argues that the Navy evidenced bias against it by issuing an amendment to the IFB that delayed bid opening and dropped the solicitation's small business set-aside requirement, by allegedly leaking certain proprietary prices included by the protester in a previously submitted unsolicited proposal, and by rapidly approving certain submittals provided to the Navy by the awardee. We find that none of these arguments is timely raised.

In the first instance, ICS was required to raise its concerns regarding changes to the IFB prior to bid opening. Since any protest based on these issues should have been filed with the agency or our Office prior to March 21, we will not consider these issues in a protest filed 6 months after bid opening. 4 C.F.R. § 21.2(a)(2).

ICS' allegations regarding leaked prices and speedy approval of NLLCC's submittals also are untimely. ICS argues that it

^{1/} Paragraph 22 of the IFB requires the awardee to remit written proof of qualifications and experience with respect to equipment and equipment installers when the specification indicates such proof is required. These remittances, termed "submittals" by the IFB, were due within 45 days of contract award. These submittals were the subject of ICS' FOIA request.

could not file its protest on these grounds until it received a response to its FOIA request; however, even if ICS gained every basis for its protest from the June 5 FOIA response, and it clearly did not, it nonetheless failed to act in a timely fashion at that late date--more than 2 months after contract award.

With respect to its allegation of leaked prices, ICS does not say when it deduced that the Navy allegedly leaked its price information to other bidders.^{2/} Further, the record contains no evidence of any communication with the Navy between the time ICS received the June 5 FOIA response and the time it filed the agency protest on July 3. Thus, based on the record before us, ICS has made no showing that it learned of this basis for its protest any later than its receipt of the June 5 FOIA response. Because ICS failed to file a protest within 10 days of receipt of the FOIA response, the protest is untimely. We note for the record, however, that we find no evidence in the Navy's June 5 FOIA response that it leaked ICS' price to other competitors.

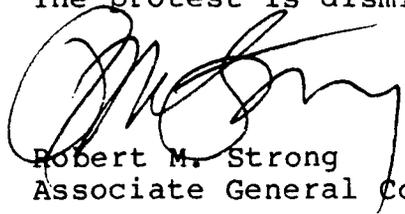
The protester's argument that the Navy's speedy approval of NLLCC's submittals evidences bias is also untimely. The date on the submittal documents and the date those documents were approved by the Navy is readily apparent in the information provided with the FOIA response. As stated above, ICS failed to file a protest in a timely fashion after receiving this information. In any event, the Navy's approval of such drawings in no more than 4 days, taken alone, cannot be construed to establish bad faith, or bias, on the part of Navy contracting officials.

ICS' remaining allegations--that NLLCC lacks experience designing lighting control systems and that NLLCC submitted a nonresponsive bid--are also untimely. With respect to the responsiveness of NLLCC's bid, the date of receipt of the June 5 FOIA response is the latest possible date the protester was aware of this basis for its protest. As

^{2/} We note that the protester proffers no evidence that its prices were leaked to other bidders other than its bare assertion. In its comments on the agency report, ICS claims to have proof its prices were leaked and claims to be willing to provide such proof to the Navy. We believe if the protester has such information it should have provided it to our Office or to the Navy. Absent compelling evidence, we will not find agency bias in response to bald assertions of agency wrongdoing by a disappointed bidder. Metrolina Medical Peer Review Foundation, B-233007, Jan. 31, 1989, 89-1 CPD ¶ 97.

discussed above, the protester failed to file a timely protest based on receipt of this information. Similarly, NLLCC's experience, or lack thereof, is a matter that should have been protested within 10 days of award to NLLCC. In any event, the protester's contention in this regard constitutes a challenge to the Navy's affirmative determination that NLLCC is a responsible firm, a matter not reviewed by our Office absent a showing of possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5); HLJ Management Group, Inc., B-225843.6, Mar. 24, 1989, 89-1 CPD ¶ 299. No such showing has been made here.

The protest is dismissed.



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