

J. Melody



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stephan Wood Products Inc.--Reconsideration
File: B-237929.2
Date: December 19, 1989

DIGEST

1. Dismissal of protest as untimely is affirmed on reconsideration where protester initially filed agency-level protest of alleged solicitation defects, and did not then file its subsequent protest with General Accounting Office within 10 working days after agency proceeded with bid opening, the initial adverse agency action on the protest.
2. Firm that did not submit bid is not interested party to challenge propriety of award to the low bidder, since it would not be in line for the award if its protest were sustained.

DECISION

Stephan Wood Products Inc. (SWP) requests reconsideration of our December 5, 1989, dismissal of its protest challenging the award of a contract to Jewett-Cameron Lumber Corp. under Army invitation for bids (IFB) No. DAAE07-89-B-L153, for wooden truck equipment. We affirm the dismissal.

In its protest, received in our Office December 1, SWP alleged that (1) an IFB provision added by amendment 0006 contained "unresolved problems" regarding the wood treatment requirements, and improperly failed to provide the name of anyone capable of treating the wood as required; (2) a necessary specification should have been, but was not, included in the IFB; (3) contractor liability for paint requirements was not resolved; and (4) the agency allowed the awardee to acknowledge three amendments after bid opening, thereby making its nonresponsive bid acceptable. SWP had raised the first three alleged deficiencies in letters to the Army dated April 18 and July 18. The

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Army did not respond to SWP's satisfaction, and proceeded with the August 28 bid opening. SWP did not submit a bid due to the unresolved alleged deficiencies.

We dismissed the protest as untimely filed because, under our Bid Protest Regulations, when a protest is filed initially with the contracting agency, any subsequent protest to our Office is untimely if not received within 10 working days after the protester had actual or constructive knowledge of initial adverse agency action on the protest; such adverse action includes the agency's proceeding with bid opening in the face of a protest that the solicitation was defective. 4 C.F.R. § 21.2(a)(3) (1989). Here, SWP's December 1 protest to our Office indicated the firm had protested these alleged solicitation deficiencies to the Army prior to bid opening. The Army then nevertheless proceeded with bid opening on August 28 as scheduled, which constituted initial adverse agency action. Since SWP's subsequent protest to our Office was received more than 10 days later, it was untimely. See Carlisle Tire and Rubber Co., B-235413, May 12, 1989, 89-1 CPD ¶ 457.

In its request for reconsideration, SWP asserts that its agency-level protests "were in fact timely." As explained above, however, we dismissed SWP's protest as untimely because it was not filed in our Office within the required timeframe, not because its protest letters to the Army were untimely. This assertion thus provides no basis for reversing the dismissal.

SWP's fourth protest allegation, that the award to Jewett-Cameron was improper due to its failure to acknowledge amendments, also was not for consideration. Under our Regulations, a protest must be filed by an "interested party," defined as an actual or prospective bidder whose direct economic interest would be affected by the award of or failure to award a contract. 4 C.F.R. § 21.0(a). In general, a party will not be deemed interested where it would not be in line for award if its protest were sustained. T-L-C Sys.--Reconsideration, B-225496.2, July 28, 1987, 87-2 CPD ¶ 97. Since SWP did not bid, and the bid abstract shows that at least five bids with properly acknowledged amendments were received, SWP would not be in line for the award even if we sustained the protest on this issue. Accordingly, SWP does not have a direct economic interest in the award and is not an interested party. (The fact that SWP alleges it did not bid due to the perceived IFB defects is irrelevant; in deciding not to bid, SWP assumed the risk that it would be excluded from the

competition if it could not get the IFB altered, either through discussions with the Army or by protest.) This aspect of the protest therefore was properly dismissed.

The dismissal is affirmed.

for Seymour E. Hinchman
James F. Hinchman
General Counsel