

Benejam

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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wolverine Supply, Inc.

File: B-245687

Date: October 1, 1991

James O. Blomsness and Jeanette Van Buskirk for the protester, Captain Gerald P. Kohns, Department of the Army, for the agency.

Aldo A. Benejam, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging terms in invitation for bids related to asbestos removal is untimely when filed after bid opening.

2. Even assuming that letter submitted to contracting agency prior to bid opening requesting clarification of terms of invitation for bids (IFB) can reasonably be considered a timely filed agency-level protest challenging the terms of the IFB, General Accounting Office will not consider a protest filed more than 10 working days after the protester receives oral notification of initial adverse agency action on its agency-level protest.

DECISION

Wolverine Supply, Inc. (WSI) protests the terms in invitation for bids (IFB) No. DAHC76-91-B-0046, issued by the Department of the Army to renovate kitchens in 111 family housing units in Fort Richardson, Alaska. WSI contends that the IFB's asbestos removal requirements are ambiguous.

We dismiss the protest.

Bid opening occurred on September 5, 1991. On August 23, approximately 2 weeks prior to bid opening, the protester submitted a letter to the contracting officer raising several questions concerning the terms of the IFB. As relevant to this protest, WSI stated in paragraph No. 3 of its letter "that the asbestos removal requirements included in the [IFB] are irregular, misleading, and ambiguous. The amount of asbestos to be removed and its location is not identified." Following paragraph No. 3, WSI requested the agency to "please clarify in writing to all bidders, the following [4] questions." In its closing paragraph, WSI stated that

"without answers and directions regarding the above questions a responsive, fair bid . . . does not appear to be possible."

WSI states that on August 28, one week prior to bid opening, an agency employee orally responded to WSI's August 23 letter. According to WSI, the employee simply directed WSI to paragraph D of Addendum No. 1 to the IFB; stated that she was unable to obtain any further information; and reiterated that she did not believe that an additional addendum clarifying WSI's questions could be issued. Although WSI states that Addendum No. 1 to the IFB only added to its confusion concerning the IFB's asbestos removal requirement, WSI did not subsequently file a protest challenging the terms of the IFB prior to bid opening.

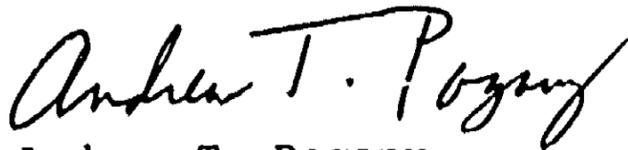
To be considered timely, a protest concerning an alleged impropriety apparent from the face of the solicitation is required to be filed either with the agency or with this Office before bid opening. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Had WSI considered that if any terms of the IFB remained "irregular, misleading, and ambiguous" following its August 28 conversation with the agency, WSI should have filed a protest raising that issue before bid opening. See, e.g., Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287. Since WSI only filed with our Office on September 16, 1991, well after bid opening, its protest is untimely and will not be considered.

Even assuming that WSI's August 23 letter to the agency reasonably could be interpreted as a timely agency-level protest challenging the terms of the IFB, WSI's protest in our Office is untimely. Where a protest initially has been filed with a contracting activity in a timely manner, any subsequent protest to our Office must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). A protester's receipt of oral information forming the basis of its protest is sufficient to start the 10-day time period running; written notification is not required. Swafford Indus., B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268, aff'd, B-238055.2, July 30, 1990, 90-2 CPD ¶ 79. The term "adverse agency action" is defined in our Bid Protest Regulations as any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(f); see Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58.

By the agency employee informing WSI that "she was unable to obtain any further information" regarding the challenged terms of the IFB, and that "she did not believe that an additional addendum clarifying WSI's questions could be issued," WSI was put on notice that the contracting activity would not take the

action WSI requested. In our view, the August 28 oral communication with WSI was sufficiently prejudicial to the protester's position to start running the 10-day time period for filing a protest in our Office. By this standard, WSI had to have filed a protest in our Office within 10 working days from August 28, or by September 12. See Discount Mach. & Equip., Inc.--Recon., B-233541.2, Apr. 3, 1989, 89-1 CPD ¶ 341. Since WSI did not file in our Office until September 16, its protest is untimely on this basis as well.

The protest is dismissed.



Andrew T. Pogany
Acting Assistant General Counsel