



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Southeastern Chiller Services, Inc.

File: B-258982

Date: February 15, 1995

DECISION

Southeastern Chiller Services, Inc. (SCS) protests the terms of invitation for bids (IFB) No. 509-65-94, issued by the Department of Veterans Affairs for conversion of three Trane water chillers.

We dismiss the protest as untimely filed.

The solicitation was issued on August 15, 1994, as a small business set-aside. Of relevance to this protest, the agency issued amendment No. 3, on September 19, which required an engineered conversion from the Trane Company. The amendment also required that documentation on the training and experience of the bidder be submitted with the bid. Bids were due by September 23. On September 20, SCS wrote to the agency that the IFB had been "converted" into a sole-source solicitation for the Trane Company. SCS stated in its letter that "if you want to ensure the quality of performance without eliminating qualified competition, our suggestion is that the statement in the last amendment [amendment No. 3] be changed." SCS included its proposed alternate language. Upon further review, the agency decided against changing the solicitation as suggested by SCS. The agency issued amendment No. 4 on September 23, which extended the bid opening until September 29, and stated that "all other terms and conditions remain unchanged." This amendment was transmitted to all bidders, including SCS, by telefacsimile on September 26.

The agency received three bids by the bid opening date. On October 3, the agency awarded the contract to Advanced Air Technology, the low bidder. SCS, the second low bidder, filed this protest with our Office on October 14.

The agency argues that SCS' September 20 letter to the agency did not constitute an agency-level protest and, therefore, its protest of the contents of the solicitation filed after the closing date is untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (1994). For the reasons set forth below, we agree.

Our Regulations require that protests of apparent solicitation improprieties that are included in the solicitation by amendment be filed with our Office or at the procuring agency prior to the next closing date following the incorporation. 4 C.F.R. § 21.2(a)(1). In a case where an alleged impropriety is timely protested to a contracting agency, any subsequent protest to this Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3).

To be regarded as a protest, a written statement need not state explicitly that it is in fact a protest but must convey the intent to protest by an expression of dissatisfaction and a request for corrective action. Constantine N. Polites & Co.--Recon., B-233935.2, Feb. 17, 1989, 89-1 CPD ¶ 173. The written statement must contain more than simply a suggestion regarding the procurement. Id.

The September 20 letter from SCS states, in pertinent part, that, "if you want to ensure the quality of performance without eliminating qualified competition, our suggestion is that the statement in the last amendment be changed to" While the letter does express SCS' view that the requirement for an engineered conversion from the Trane Company effectively limited competition, it does not, in our view, rise above a simple expression of a hope or expectation on the part of SCS concerning the procurement. This does not constitute a formal protest.

Consequently, in the absence of a protest filed by SCS with the agency prior to the solicitation's September 29 closing date, the October 14 protest to our Office was untimely.

Moreover, even if SCS' September 20 letter was determined to be a protest, SCS' subsequent protest to our Office would still be untimely. SCS sent, by telefacsimile, its suggested alternate language for amendment No. 3 on September 20. In response, the agency issued amendment No. 4 and, on September 26, sent it to SCS and other prospective bidders by telefacsimile. Since amendment No. 4 indicated that the agency did not intend to change the solicitation language, as suggested by SCS, this letter constituted agency action adverse to SCS' September 20 "protest." In order to be timely, SCS had to protest to our Office within 10 working days of September 26, when it was notified of the agency's adverse action. Here, SCS did not file its protest until October 14, more than 10 working days after it received notification of the agency's adverse action.

SCS also challenges the award to Advanced Air on the grounds that it failed to propose employees experienced in refrigerant conversion of centrifugal chillers, as requested by the solicitation. This ground of protest concerns the ability of the awardee to perform in accordance with the specifications, and thus concerns the contractor's responsibility. See Holiday Inn Lakeside City Center, B-248040, June 17, 1992, 92-1 CPD ¶ 527. An agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); Coast Waste Management, Inc., B-251167.3, June 10, 1993, 93-1 CPD ¶ 460. None of these exceptions apply here.

The protest is dismissed.



Paul E. Jordan
Acting Assistant General Counsel