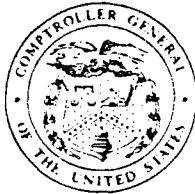


DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-185052

DATE: February 11, 1976

MATTER OF: Raven Industries, Inc.

DIGEST:

1. Where protest allegations not filed within 10 days after basis for protest was known or should have been known, contentions are untimely filed and ineligible for consideration by this Office. 4 C.F.R. § 20.2(b)(2).
2. Agency not required, by terms of contract's 100-percent option clause, to exercise option either in part or entirety. Accordingly, decision to exercise approximately 55 percent of option and to procure remainder from another contractor because items were urgently required and agency determined that protester's capabilities were insufficient to accommodate all of its existing requirements, is not subject to legal objection by this Office.

The subject protest has been filed against the course of action taken by the United States Army Electronics Command, Fort Monmouth, New Jersey, to fulfill an urgent requirement for 14,667 AM-1780 amplifiers. The protester has urged that a letter contract for 6,000 of the items, awarded on a sole-source basis to AVCO Corporation, be cancelled; that the Government exercise the balance of its 100-percent option under Raven's contract DAAB07-75-C-0154 (awarded June 30, 1975 for 5,457 each); and that the remainder of the requirement be competitively procured.

The record shows that after the award of contract -0154 to the protester, the requirement for 14,667 amplifiers was received. The contracting officer developed a threefold plan to meet this need. He divided the most urgent portion of the requirement between the protester and AVCO Corporation by exercising an increase option under the protester's contract -0154 to the extent of 3,000 units and by awarding a sole source letter contract for 6,000 units to AVCO, which had just completed a contract for the same item. The remainder of 5,667 units was to be procured through competitive negotiations.

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Since the protester's contract -0154 was for 5,457 items, the 100-percent increase option available to the Government was only partially exercised by the increase of 3,000 units. The contracting officer states that the extent to which the option was exercised reflected his judgment of the protester's production capacity. The basic thrust of the protest is that the contracting officer has underestimated Raven's capacity and that it would be more advantageous to the Government to fully exercise its option under Raven's contract at a price which is probably lower than that which will be definitized under AVCO's letter contract.

Having reviewed the record before us, we have determined that the protest against the sole-source award to AVCO was untimely filed and is therefore ineligible for our consideration on the merits.

The record shows that the contracting officer advised the protester on August 18, 1975, that the letter contract had been awarded to AVCO on August 15, 1975, for 6,000 of the subject items. However, a protest was not filed with the contracting agency until September 15, 1975, at which time the agency received the protester's protest letter dated September 12, 1975. A copy of the September 12 protest letter to the agency was received in this Office on September 17, 1975, and the protester subsequently requested, by letter of September 30, 1975 (received by our Office on October 3), a ruling on the protest by this Office.

In this regard, our applicable Bid Protest Procedures (4 C.F.R. § 20 et seq. (1975)), published April 24, 1975, in the Federal Register, Vol. 40, No. 80, provide, in pertinent part, that our Office will consider protests filed initially with the contracting agency only if such initial filing was timely (§ 20.2(a)). To be timely filed with the contracting agency, a protest must be filed not later than 10 days after the basis for the protest is known or should have been known, whichever is earlier (§ 20.2(b)(2)). The term "filed", as so used, means receipt in the contracting agency or this Office (§ 20.2(b)(3)), and the "days" referred to in the time constraints (referenced above) for the filing of protests are construed as "working days" (§ 20.0(a)).

Since the protester was expressly advised on August 18 of the sole-source award to AVCO and the reasons therefor, its protest "filed" on September 15 with the contracting agency is accordingly untimely by virtue of the foregoing provisions, and therefore ineligible for our consideration.

Concerning the failure by the contracting officer to exercise the entirety of the 100-percent option, the option clause in the protester's contract states that:

"The Government may increase the quantity of supplies or services called for * * * up to but not exceeding one hundred percent * * *."
/Emphasis added./

As so phrased, the exercise of the option in any quantities would be at the sole discretion and election of the Government. We have pointed out that such options are purely for the interest and benefit of the Government, and a determination thereby that the exercise of an option would be contrary to its interests may not be subject to legal objection by this Office. See The National Cash Register Company, B-179045, March 5, 1974, 74-1 CPD 116, and citations therein.

In the instant case, the contracting officer indicated that his decision to limit the exercise of the protester's option to 3,000 units was predicated upon an urgent requirement for the item in quantities which, in the judgment of the contracting officer based upon a review at the time of Raven's capabilities, exceeded the protester's existing monthly production capacity. (Although the protester has subsequently contended it can produce the required 1,100 items per month, it has conceded that such acceleration "is not particularly attractive because it places an unnecessary burden on employer-employee relationships.")

Under similar circumstances, we have not interposed legal objection to the failure to exercise a 100-percent option where the decision not to exercise was based upon an urgent and critical need for the articles and where, as in the instant case, the contracting officer has concluded that it was questionable whether the Government's delivery requirements could be satisfied under the option without difficulty or jeopardy thereto. See B-175548, July 26, 1972. Accordingly, we discern no basis for legal objection to the contracting officer's determination to limit the exercise of the option to 3,000 units.

The remaining 5,667 units (after the 3,000 option to Raven and the 6,000 to be procured under AVCO's contract) were the subject of a competitively negotiated procurement under request for proposals DAAB07-76-R-0169. That solicitation was issued September 5, 1975, with proposals due on October 9, 1975. The record advises that 15 proposals were timely received on that date.

In its initial protest to the contracting agency and this Office, Raven indicated its knowledge of the proposed competitive procurement but did not take exception thereto. Rather, the protester only


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requested that the award to AVCO be cancelled; that the protester be awarded the balance of its 100-percent option; and that the remainder be competitively procured. On January 7, 1976, this Office received the protester's comments to the agency report and, for the first time, the protester objected to a competitive procurement of the remainder, suggesting that the competition should be limited to itself and AVCO since they are currently in production. Raven also made the inconsistent contention, for the first time, that the solicitation should have been issued as an invitation for bids wherein all companies' prices (that participated) are immediately available to any interested party.

Inasmuch as the record shows that the protester was aware of this competitively negotiated procurement in September 1975, but did not first raise these objections until 3 months after proposals thereunder had been received and evaluated, such objections are manifestly untimely under the provisions of our Bid Protest Procedures, set forth previously in this decision, and therefore will not be considered.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States