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DECISION



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

FILE: B-189532

DATE: November 8, 1977

MATTER OF: American Electric Construction Co., Inc.

DIGEST:

1. Protester's telephone conversation prior to bid opening concerning allegedly restrictive IFB specifications was a timely protest to agency since conversation covered subject matter of protest. Therefore, protest made to GAO within 10 working days of bid opening (initial adverse agency action) is timely. However, new contention raised after bid opening is untimely and not for consideration.
2. Specification in IFB for electrical switchgear will not be questioned by GAO since on basis of existing record it cannot be concluded that specifications were impossible to meet and not in accordance with actual needs of contracting agency.

American Electric Construction Co., Inc. (American), protests against the award of Project No. 402-047 at the Veterans Administration Center, Togus, Maine. The bases of American's protest are that the specifications for the electrical switchgear cannot be met and that channeling under the existing high voltage transformer section, while the above is energized, violates safety requirements.

Since American did not file its protest with this Office until after bid opening, the VA questions the timeliness of the protest. The record reflects that an employee of American telephonically contacted the Office of the contracting officer regarding the solicitation prior to bid opening and was referred to the Project Engineer. American then contacted the Project Engineer and asked for clarification on the electrical switchgear. The VA does not consider the telephone conversation to be a protest and feels the protest by American to this Office is untimely as having been filed after bid opening.

The proper time to protest a defective solicitation provision under our Bid Protest Procedures is prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1976). If a protest is timely filed initially with the contracting agency, any subsequent protest to this Office will be considered provided, inter alia, that the protest is filed with GAO within 10 working days of formal notification of actual or constructive knowledge of initial adverse agency action.

It is noted that Federal Procurement Regulations (FPR) § 1-2.407-8 (1964 ed. amend. 139) provides that if the protest is oral and the matter cannot otherwise be resolved, written confirmation of the protest shall be requested. Thus, the filing of an oral protest with an agency is permissible under the FPR. While the VA does not consider the telephone conversation prior to bid opening to be a protest, the record indicates that the conversation concerned the restrictiveness of the IFB with regard to the switchgear, and that American asked for an extension of the bid opening date in order to correct the specification. During the conversation the Project Engineer stated that he would refer the matter to the Architectural Engineer and an amendment would be issued if necessary. It was not until bid opening (June 20, 1977) that American was aware that the VA did not intend to change the specification. Therefore, it is our opinion that, under these circumstances, the telephone conversation is to be viewed as a protest by American and that bid opening was the initial adverse agency action. American filed its protest with this Office on July 5, 1977, which was within 10 working days of bid opening.

The thrust of American's first basis of protest is that the IFB specifications are impossible to meet. The responsibility for drafting proper specifications reflecting the needs of the Government is primarily that of the contracting agency. This Office will not substitute its judgment for that of the procuring agency unless there is clear and convincing evidence that the specifications are impossible to meet. Patterson Construction Co., B-180290, February 28, 1974, 74-1 CPD 113.

The VA advises that the Architectural Engineer took the Federal specifications on breakers and modified them for the switchgear. The general contractor, who was awarded the contract, states that the specification can be met and exceeded. Further, Westinghouse Electric Corporation (one of several potential subcontractors) advises that its switchgear is in line with and exceeds the requirements of the specification. The above is in direct conflict with American's bare allegation that no supplier could manufacture to the specification. Under these circumstances, we cannot conclude that the IFB specifications were impossible to meet.

American's objection against channeling under the existing high voltage transformer section was not raised until after bid opening. Accordingly, this aspect of the protest is untimely and not for consideration on the merits.

The protest is denied.

R. Z. K. 11/12
Deputy Comptroller General
of the United States