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Andrea Kole PL I

DECISION



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

FILE: B-190031

DATE: May 19, 1978

MATTER OF: Industrial Design Laboratories, Inc.

DIGEST:

1. Protest concerning alleged late bid modification not filed with GAO within 10 working days after agency initially notified protester that its protest was without merit is untimely.
2. Protest not filed with procuring activity or GAO within 10 working days after basis of protest is known or should have been known is untimely and not for consideration. Since protester was furnished copy of bid modification upon which alleged nonresponsiveness is based more than 10 days before protest was filed, it is untimely.
3. Alleged procedural errors by the procuring activity in handling of protest are not sufficient grounds for setting aside otherwise proper award.
4. GAO does not review Small Business Administration's issuance or denial of certificate of competency, absent circumstances not applicable here.
5. GAO will not consider protester's allegation of collusive bidding practices since jurisdiction in such matters is committed exclusively to Attorney General and Federal courts.

The United States Army Armament Materiel Readiness Command issued solicitation No. DAAA09-77-E-6256 on February 15, 1977, for chemical agent automatic alarm refill kits. On August 19, 1977, the contract was awarded to Chemical Compounding Corporation (CCC). Industrial Design Laboratories, Inc. (IDL), protests the award of this contract.

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On June 6, 1977, IDL protested to the contracting activity that CCC's modified bid was received after bid opening and must therefore be considered a late bid. The contracting officer determined, however, pursuant to the terms and conditions of the solicitation, that the telegraphic modification from CCC was received prior to the time and date of bid opening. IDL was informed of this decision denying its protest by letter dated June 20, 1977. (Although IDL contends that the protest was not denied because the word "resolved" was used, we believe the clear import of the letter was a denial.) On August 18, 1977, IDL again protested to the contracting activity that CCC's modified bid was late. It was not until September 1, 1977, however, that IDL filed a protest with our Office.

Our Bid Protest Procedures provide at 4 C.F.R. § 20.2(a)(1977) that:

"* * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office [must be] filed within 10 days of formal notification * * * of initial adverse agency action * * *."

The fact that the protester may again appeal the matter to the contracting activity does not affect the above-cited time requirement with regard to when the 10 days begin to run. Florida Filters, Inc., B-186995, October 6, 1976, 76-2 CPD 316. In this case, IDL filed its protest with our Office more than 10 days after being notified of the initial adverse agency action. Consequently, IDL's protest on this issue is not for consideration.

IDL also protested to the contracting activity by telegram on July 25, 1977, that CCC's bid was non-responsive. With regard to the timeliness of IDL's protest to the agency on this issue, section 20.2(b)(2) (1977) of our Procedures provides that protests

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must be filed within 10 working days after the basis of the protest is known or should have been known. It is clear in this case that IDL's protest was not filed within the 10-day period because its protest in this regard is based upon the content of CCC's telegraphic modification and a copy thereof was sent to IDL with the contracting officer's letter of denial on June 20, 1977. IDL's protest on this issue is therefore also untimely and not for consideration on the merits.

IDL further contends that the contracting officer made numerous procedural errors in the handling of its protest, citing Armed Services Procurement Regulation § 2-407.8 (1976 ed.). Although we do not believe the record supports IDL's arguments in this regard, it is not necessary to discuss the merits of each argument since procedural deficiencies alone are not sufficient grounds for setting aside an award. See United States Tower Services, B-185840, July 14, 1976, 76-2 CPD 44.

In addition, IDL protests the award of the contract on the basis that CCC is not responsible. However, CCC was awarded a certificate of competency by the Small Business Administration (SBA) pursuant to its authority under 15 U.S.C. § 637(b)(7) (1976). Our Office does not generally review SBA determinations on this matter. JBS Construction Company, B-187574, January 31, 1977, 77-1 CPD 79. It is only where the protester has made a prima facie showing of fraud, see Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, or where the record discloses that information vital to a responsibility determination has not been considered, see Shiffer Industrial Equipment, Incorporated, B-184477, October 28, 1976, 76-2 CPD 366, that this Office will review the matter or take other appropriate action. As neither of these requirements has been met, this Office will not review SBA's determination of responsibility.

Finally, IDL protests to our Office the possibility of collusive bidding by CCC and Bendix Corporation, the third bidder on this contract. Armed Services Procurement Regulation § 1-111.2 (1976 ed.) governs the

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reporting of possible antitrust violations. This section requires that evidence of collusive bidding in advertised procurements should be referred to the Attorney General by the procuring agency. We note that IDL may also ask the Attorney General to review such allegation. It is not within our jurisdiction to determine what constitutes a violation of a criminal statute, but is within the jurisdiction of the Attorney General and the Federal courts. Society Brand, Inc., et al., 55 Comp. Gen. 475 (1975), 75-2 CPD 327.

Accordingly, for the above reasons, the protest is dismissed in part and denied in part.


Deputy Comptroller General
of the United States