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DECISION

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

FILE: B-196450

DATE: January 7, 1980

MATTER OF: Hydraulic Technology Inc.

CNG 02086

DIGEST:

Protest that solicitation included drawing allegedly proprietary to protester, filed after bid opening and denial of protest filed with agency, is dismissed as untimely filed with GAO.

A firm

Hydraulic Technology Inc. (HTI) protests against the use of drawing No. 6901-105 in invitation for bids (IFB) No. DLA700-79-B-1664 issued on June 26, 1979, by the Defense Logistics Agency (DLA), Defense Supply Center, Columbus, Ohio. HTI insists that the drawing was prepared and submitted to the Department of the Air Force (Air Force) on a restricted basis for a contract awarded to the firm in October 1975, that it is proprietary to HTI, and that DLA was not authorized to publicly disseminate it for competitive procurement purposes. The protester therefore asks that DLA be enjoined from the present and future use of the drawing. The protest is dismissed as untimely filed for the reasons discussed below.

DLG 03137

AGC 00025

The IFB was amended on July 13, 1979, to correct the date of the drawing in question and extend bid opening from July 17 to July 27, 1979. DLA received four bids, including that of HTI, but has withheld award pending resolution of the protest.

The protester asserts that during a telephone conversation on July 18, 1979, it informed DLA personnel of the proprietary nature of the drawing and that the matter could be verified by contacting the Air Force. HTI confirmed the July 18 conversation by letter to DLA dated July 31, 1979, followed by a letter of August 3, 1979, requesting damages for loss of anticipated profits resulting from the agency's

[ALLEGATION THAT Solicitation Included Proprietary Information] 008226 111224

use of the drawing in the IFB. DLA denied HTI's objection to use of the drawing by letter of August 10, 1979, on the bases that the Government acquired unlimited rights in the drawing which was therefore properly used in the IFB and that HTI bid on the IFB and failed to object to the use of the drawing until after bid opening when it was apparent that the firm was not the lowest bidder.

HTI appealed the contracting officer's decision on August 22, 1979, stating that the firm did not know that DLA had distributed the drawing until receipt of the July 13 amendment because the drawing was not included in the firm's bid package. The contracting officer responded by letter dated September 27, 1979, reiterating the agency's position concerning the nature of their July 18 conversation and the Government's rights in the drawing, and advised HTI that award would be withheld 10 days to permit the firm to submit additional evidence regarding its rights in the drawing.

We received HTI's October 12 protest telegram on October 16, 1979, and find it untimely filed in several respects. Initially, the fact that the drawing was to be used in performing DLA's requirements and would therefore be available to prospective bidders was apparent from the face of the IFB which included the drawing number in the item description on Standard Form 36 (page 9 of the IFB). A protest against alleged improprieties in the IFB, in order to be timely, should have been filed prior to the July 27 bid opening. 4 C.F.R. § 20.2(b)(1) (1979); ARC Electronics, Inc., B-193210, March 12, 1979, 79-1 CPD 171; Francis & Jackson, Associates, 57 Comp. Gen. 244, 246 (1978), 78-1 CPD 79.

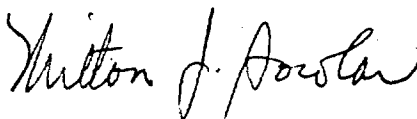
If, as the protester contends, its July 18 conversation was intended as a protest to DLA, the opening of bids as scheduled on July 27, 1979, constituted DLA's initial action adverse to HTI's proprietary interest in the drawing and its dissemination. Leo Journagan Construction Co., Inc., B-192644, January 29, 1979, 79-1 CPD 59; Jazco Corporation,

B-192407, August 31, 1978, 78-2 CPD 162. Such action requires the filing of a protest with our Office within 10 working days after the bid opening date, by August 10, 1979.

Notwithstanding the fact that the parties offer differing accounts of the nature of their telephone conversation, we do not feel it necessary to determine whether that conversation amounted to an oral protest. Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138. It is clear from the protester's submissions that it knew the basis of its protest by the bid opening date, and certainly by July 31, 1979 (the date of its letter to DLA), requiring that a timely protest be filed with our Office within 10 working days. 4 C.F.R. § 20.2(b)(2) (1979).

Finally, even assuming that either the protester's July 31 or August 3 letter constituted a timely protest to DLA, the agency's August 10 letter denying the protest constituted adverse agency action which required that any subsequent protest to our Office be filed within 10 working days of the protester's receipt of that letter. 4 C.F.R. § 20.2(a)(1) (1979).

Consequently, HTI's protest, filed with our Office more than 6 weeks after the latest of the above events is clearly untimely filed and not for consideration on the merits. The protest is dismissed.



Milton J. Socolar
General Counsel