DECISION

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

FILE: B-206444.3 DATE: January 18, 1983

MATTER OF: Stanley Furniture Company--Request for Reconsideration

DIGEST:

Prior decision denying protest in part and dismissing it in part is affirmed because protester has failed to establish decision was based on erroneous interpretation of fact or law.

Stanley Furniture Company requests that we reconsider our decision Stanley Furniture Company, B-206444, December 2, 1982, 82-2 CPD ___, in which we dismissed in part and denied in part Stanley's protests of two Air Force procurements of dormitory furniture. For the reasons stated below, our prior decision is affirmed. We discuss Stanley's three objections to our decision in the order in which the company has raised them.

Prior to the opening of bids under invitation for bids (IFB) No. F49642-81-B-0115, Stanley wrote to the contracting officer, objecting to the solicitation specifications in two respects. First, Stanley objected to the Air Force's use of a "brand-name-or-equal" specification which, in Stanley's view, did not adequately describe the salient characteristics of each item, particularly those relating to the internal construction of the furniture. Second, Stanley objected to the fact that the IFB contemplated an aggregate award for upholstered items, case goods and mattresses. Stanley's position was that very few furniture manufacturers offer all three types of items and that the aggregate award provision would eliminate some bidders from competition. The combined effect of these deficiencies, Stanley asserted, was to unduly restrict competition. Stanley specifically requested that the solicitation be amended to permit separate awards for upholstered items, case goods and mattresses and to state the salient characteristics of the brand name items in more detail.

The Air Force's contracting officer responded to Stanley's protest by letter dated December 15, 1981 which in its entirety reads as follows:

"1. You state in subject letter that solicitation F49642-81-B0115 is restrictive. On the contrary, this solicitation provides for maximum possible competition among all prospective bidders. This is accomplished by using brand name or equal line item purchase descriptions which meet Defense Acquisition Regulation (DAR) 1.1206.2 requirements. This DAR reference specifically states that a brand name or equal procurement set forth minimum salient features necessary to obtain products meeting Government functional needs. It is for this reason that solicitation F49642-81-B0115 does not address furniture construction specifications. Instead, it calls only for basic requirements of size, fabric color, pattern, wood type, grade and style. This allows a bidder to easily offer a currently available commercial product without the necessity of a comprehensive specification for internal furniture construction. Such detail would only serve to limit competition. Also, the purchase descriptions do set forth to the extent possible permissible dimension tolerances through the use of the word 'approximate'.

"2. The furniture must be delivered by one truck load at a time with each load consisting of one or more complete grouping of furnishings for one or more rooms. This is called for in Paragraph E-1 of the solicitation. These arrangements are necessary because of the one-room-at-a-time manner in which the Government must move the old furnishings out and the new furnishings into the dormitory involved. Obviously such delivery arrangements could not logically be made if more than one contractor held a contract or contracts for the requirements. Thus we cannot consider your idea of providing for multiple awards in the solicitation.

> "3. In consideration of the above facts, your protest is denied. Should you desire further comments concerning our position please contact Capt Peter L. Drinkwater/ 981-7256."

Upon receipt of this letter, Stanley asked for, and received, an extension of the bid opening date until December 22. Stanley submitted a bid as did several other firms. The Air Force subsequently rejected as nonresponsive Stanley's low bid for several items; after further discussion with the Air Force, Stanley filed a protest with our Office on February 16, 1982.

In our initial decision, we stated:

> "To the extent that Stanley's protest to our Office is based on the same grounds as its protest to the agency which was denied on December 15, 1981, it must be dismissed as untimely under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1982). These procedures provide that once a protest has been filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action concerning the protest. Stanley acknowledges that on December 18, 1981 it received the Air Force's denial of its protest; its subsequent protest to this Office was not filed until February 16, 1982, more than 10 days later. Our 10 day requirement is not tolled by the protester's continued pursuit of the matter with the contracting agency after its receipt of the denial of its protest. Spectrum Leasing Corporation, B-206112, February 4, 1982, 82-1 CPD 94." (Emphasis added.)

As its first basis for requesting reconsideration, Stanley asserts that our legal conclusion--that this aspect of its protest to our Office was untimely--is wrong because it rests upon an erroneous statement of fact. The factual "error," Stanley maintains, is our characterization of the contracting officer's December 15 letter as a "denial" of Stanley's protest.

Stanley explains as follows its reasoning why the contracting officer's letter which we have quoted above was not, in fact, a "denial" of its protest from which Stanley had an obligation to protest to our Office. In the sixth sentence of paragraph 1 of his letter, Stanley notes, the contracting officer provided the "assurance" that "a bidder" could easily offer a currently available commercial product. "Accordingly," Stanley now states, "the Contracting Officer, while denying the protest in result, effectively affirmed the Stanley protest on its merits, since Stanley protested the IFB as advertised as being overly restrictive of competition. Thus, the [contracting officer's response] was not an adverse action which had to be protested to the GAO within ten days." (Emphasis supplied by Stanley.)

There is no merit to this contention.

Stanley's position is dependent upon lifting a portion of a sentence out of the context in which it was written. We think that it is so patently clear that, when read as a whole, the contracting officer's letter was not only nominally but substantively a denial of Stanley's protest that the matter does not deserve an extended discussion. We note briefly, however, that after acknowledging Stanley's argument that the specifications were unduly restrictive of competition, the contracting officer stated that "on the contrary" the solicitation provided for maximum possible competition in accordance with the applicable procurement regulations. The contracting officer then explicitly refused to amend the solicitation in the manner Stanley had requested and concluded "In consideration of the above facts, your protest is denied." We do not believe we made a factual "error" in describing as the "denial" of a protest correspondence in which the contracting officer states that his position is "contrary" to the protester's, in which he expressly refuses to take the action requested by the protester and which he explicitly describes as the "denial" of the protest.

Stanley's second basis for reconsideration is related to its first. Stanley asserts that the contracting officer's pre-bid opening "assurance" that a bidder could easily offer a currently available commercial product "estopped" the contracting officer from subsequently rejecting Stanley's bid as nonresponsive through a "rigid" interpretation of the specifications. Stanley argues that

we therefore erred in holding that the contracting officer properly rejected Stanley's bid as nonresponsive.

This argument, like the first, hinges on the reading of a portion of a sentence apart from the context in which it was written. In our initial decision we described in detail the reasons why Stanley's bid was rejected as nonresponsive. The Air Force could not identify the bed headboards and footboards Stanley offered because they were described by model numbers which did not appear in the catalog attached to Stanley's bid. Stanley offered a storage unit with drawers and fewer shelves than required in response to a specification describing an "open" storage unit, and it offered a drop-lid desk which was 44 inches wide when the specifications required one "approximately 30" inches wide. Stanley has not disputed any of these facts. We cannot through any application of an estoppel theory conclude that the Air Force was precluded by the contracting officer's general pre-bid opening statement that the specifications should allow "a bidder to easily offer a currently available commercial product" from later rejecting Stanley's bid for furniture which either could not be identified from its bid or which materially deviated from the specification requirements.

Finally, Stanley maintains that our decision is deficient in that it does not contain a "statement" from our Office concerning the proper use of the "brand-name-or-equal" method of procurement. Stanley asserts that such a statement is necessary to correct the allegedly widespread abuse of this method of procurement within the Government, particularly the Department of Defense.

We do not believe the record in this case--in which Stanley failed to timely protest to our Office the use of the "brand-name-or-equal" method of procurement in IFB -0115--provides an adequate justification for our Office to issue a broad "statement" critical of the use of a certain procurement technique. Stanley may be disappointed at the lack of such a statement in our decision, but that circumstance does not constitute the kind of error of law or fact upon which a reversal of our decision would be warranted.

Our decision of December 2, 1982 is affirmed.

for Milton J. Socolar
Comptroller General
of the United States