

DECISION



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

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FILE: B-180039

DATE: January 31, 1974

MATTER OF: DeWitt Transfer and Storage Company

DIGEST: Where protestant failed to file protest prior to bid opening based upon alleged invalid estimated quantities included in solicitation, protest was untimely and will not be considered by GAO. Moreover, GAO has no authority under Freedom of Information Act to determine what information must be disclosed by other Government agencies.

Invitation for bids (IFB) No. N00244-74-B-0323, issued by the Naval Supply Center, San Diego, California, solicited bids from firms for services involving the preparation of personal property (belonging to Defense Department personnel) for shipment or storage and intra-city/intra-area movement for a period commencing on January 1, 1974, and terminating on December 31, 1974. Six bids were received and were opened at 10:00 AM on November 2, 1973. Evaluation of the bids resulted in a proposed primary award to MAPAC, Incorporated/Ace Van and Storage Company/Mission Van and Storage Company, a joint venture, for all the areas listed in the solicitation schedule.

In view of the guaranteed daily capability cited by the low bidder, a secondary award to DeWitt Transfer and Storage Company (DeWitt) was proposed. Subsequently, award was made to MAPAC based on an urgency determination pursuant to ASPR 2-407.8(b)(3).

By letter dated November 9, 1973, received on November 12, 1973, DeWitt filed a protest with our Office alleging that the estimated annual quantities included in the solicitation were improper and that the specifications were therefore defective. Furthermore, DeWitt alleged that the contracting officer's failure during a prebid conference on October 24, 1973, to permit DeWitt to "peruse the records for the past year in order to acquire a more realistic and accurate accounting of all tonnage handled * * *" by the 1973 contractors, violated "Government regulations."

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In this connection, counsel for DeWitt claims that the Government representative's refusal to permit DeWitt to examine the current year's estimates violated "the Freedom of Information Act, 5 U.S.C. §552(a)(3), as well as the regulations implementing the Act issued by the Department of Defense 32 C.F.R. S286 * * *." Since the information was not presented to DeWitt, counsel alleges that the entire bidding process was defective. As a remedy for the alleged violation of the Act, DeWitt requests that the award be cancelled.

Section 552 (a)(3) of Title 5, U.S. Code, provides in part that:

"* * * On complaint, the District Court of the United States * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its actions * * *."

This provision has been interpreted by the courts to confer exclusive jurisdiction upon the District Court to order disclosure of appropriate documents. Bonnercraft Clothing Company v. Renegotiation Board, 466 F. 2d 345, 358 (D. C. Cir 1972). We have stated that our Office has no authority under 5 U.S.C. 552 to determine what information must be disclosed by other Government agencies. 53 Comp. Gen. 40 (1973), citing B-165617, March 6, 1969.

Under Section 20.2(a) of our Bid Protest Procedures and Standards, protests based upon alleged improprieties in the solicitation, which are apparent prior to bid opening must be filed prior to bid opening. Furthermore, in all other cases, bid protests must be filed not later than 5 days after the basis for the protest is known, or should have been known, whichever is earlier.

Insofar as DeWitt's protest concerns the alleged invalid estimates, it is clearly untimely since it was not filed prior to bid opening. Counsel for DeWitt states that DeWitt's failure to file a protest prior to bid opening:

"* * * is attributable solely to its lack of knowledge of GAO protest procedures and the applicable rules and regulations of the

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Comptroller General. DeWitt Transfer and Storage Company was without benefit of legal counsel at the time and relied on prior practice of taking protest action only after bid opening."

Our Bid Protest and Standards were published in their entirety in Volume 36 of the Federal Register at pages 24791 and 24792 (December 23, 1971). Accordingly, we believe DeWitt, although it may have had no actual knowledge of the regulations, was on constructive notice thereof. See Winston Bros. Company v. United States, 458 F. 2d 49, 53 (Ct. Cl. 1972).

Accordingly, the protest must be dismissed as untimely.


Deputy Comptroller General
of the United States