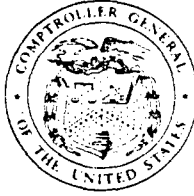


DECISION

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

57054

FILE: B-184598

DATE: September 25, 1975

MATTER OF: Aeroquip Corporation

97412

DIGEST:

1. Protest based on ground that patent infringement would result from performance under contract award is not for consideration.
2. Protest that procured gasket of awardee, which had been listed as approved source for gasket in RFP, was not equivalent to protester's gasket is untimely and not for consideration because it was not filed prior to closing date for receipt of proposals. Also, protest is untimely because it was apparently not filed within 10 working days of when protester was notified by agency that its protest to agency had been denied.

By letter dated July 22, 1975, the Aeroquip Corporation (Aeroquip), protested the award of a contract to National Utilities Corporation (NUC), pursuant to request for proposals (RFP) No. DSA500-75-R-1364, issued by the Defense Industrial Supply Center (DISC), Defense Supply Agency, Philadelphia, Pennsylvania, for 23,200 gaskets. The procured gaskets are apparently component parts to conoseal joints manufactured by Aeroquip. The closing date for receipt of proposals under the RFP was May 5, 1975, and award was made to NUC on May 14, 1975. By letter dated May 27, 1975, Aeroquip, one of the offerors, protested to DISC against the award. This protest was denied by DISC in a letter dated June 10, 1975.

Aeroquip protests that this award violates the legal patent held by Aeroquip on the conoseal joint. Aeroquip also protests that DISC erred in judging the gasket offered by NUC to be a part equivalent to Aeroquip's gasket, since no testing has been performed on NUC's gasket, the warranty on Aeroquip's conoseal joint would no longer be valid if NUC's component gasket were used and equivalency cannot be determined without access to Aeroquip's proprietary data and technical information.

Under 28 U.S.C. § 1498 (1970), a patent holder's remedy for infringement with respect to items furnished under a contract with a Federal agency is by suit in the United States Court of Claims against the Government for money damages. The courts have recognized section 1498 as constituting, in effect, an eminent domain statute, which vests in the Government the right to use any patent granted by it upon payment of reasonable compensation to the patent holder. Richmond Screw Anchor Co v. United States, 275 U.S. 331 (1928); Stelma, Incorporated v. Bridge Electronics Co., 300 F. 2d 761 (1962). The act was intended to give patent holders an adequate and effective remedy for infringement of their patents while saving the Government from having its procurement programs thwarted, delayed or obstructed pending litigation of patent disputes. Bereslavsky v. Esso Standard Oil Co., 175 F. 2d 148 (1949).

Considering the act and its purposes, our Office has concluded that Government contracts should not be restricted to patent holders and their licensees where patents are held. Instead, all potential sources should be permitted to compete for Government contracts regardless of possible patent infringement. 46 Comp. Gen. 205 (1966). Accordingly, Aeroquip's protest insofar as it is based on the ground that patent infringement would result from performance under a contract award to NUC is not for consideration. B-178124, March 9, 1973; Pressure Sensors, Inc., B-184269, July 31, 1975, 75-2 CPD 73.

With regard to Aeroquip's protest that NUC's gasket was not equivalent to Aeroquip's gasket, the RFP specifically listed NUC as an approved source for the gasket. Section 20.2 of our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)) provides in pertinent part:

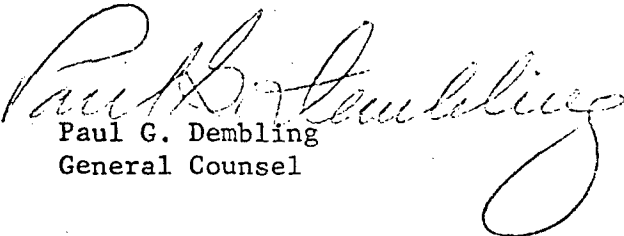
"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive

knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *.

"(b) (1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. * * *"

Since the equivalency of the NUC gasket was indicated in the RFP to which Aeroquip responded, Aeroquip's protest on this point must be considered untimely because it was not filed with either our Office or the contracting agency prior to the closing date for receipt of proposals. In any case, Aeroquip's protest is untimely because it apparently was not filed in our Office within 10 working days of when Aeroquip was notified by DISC that its protest had been denied.

In view of the foregoing, Aeroquip's protest will not be considered on the merits.


Paul G. Dembling
General Counsel