

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

621552

FILE: B-187382

DATE: September 24, 1976

MATTER OF: The Ellis Company

97971

DIGEST:

Where protest alleging impropriety in solicitation is filed with procuring agency, contracting officer's notification to protester of denial of protest, or agency's opening of bids as originally scheduled, constitutes initial adverse agency action within meaning of GAO Bid Protest Procedures and subsequent protest filed with GAO more than 10 working days later is untimely and will not be considered on the merits.

The Ellis Company (Ellis) protests the inclusion of a 5 year warranty provision in the terms and specifications of three solicitations for roofing issued by the United States Air Force. Ellis believes that the provision is unfair to small business contractors because of the additional cost of providing a 5 year (as opposed to the more commonly required 1 year) warranty on all roofing work.

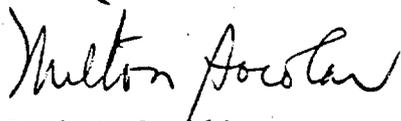
Ellis first protested the inclusion of the warranty provision in invitation for bids (IFB) F41652-76-09038, issued by Dyess Air Force Base, Texas. This protest was denied by the contracting activity in a letter dated August 11, 1976, which was received by Ellis on August 18, 1976. Ellis filed similar protests, prior to bid opening, against IFB 04699-76-09145, issued by McClellan Air Force Base, California, and IFB F26600-76-09108 issued by Nellis Air Force Base, Nevada. In both instances, the contracting activity went forward with bid opening (on August 23, 1976, and August 12, 1976, respectively) notwithstanding the protests.

Under these circumstances, we must regard the protest as untimely. Our Bid Protest Procedures require that when a protest is filed initially with the contracting agency, any subsequent protest to this Office must be filed "within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action * * *." 4 C.F.R. § 20.2(a) (1976). "Adverse agency action" is defined in our Procedures

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as "Any action * * * on the part of a contracting agency which is prejudicial to the position taken in a protest," 4 C.F.R. § 20.0(b). We have held that the opening of bids in the face of a protest especially where, as here, the protester requests a delay in bid opening, constitutes such adverse agency action. Ward & Paul, Inc., B-184563, October 31, 1975, 75-2 CPD 268; Square Deal Trucking Company, Inc., B-182436, February 19, 1975, 75-1 CPD 103. Ellis filed its protest in this Office on September 8, 1976, which was more than 10 working days after it learned of the denial of its protest by the Dyess Air Force Base contracting officer and more than 10 working days after the bid opening at the other two installations. Furthermore, with regard to the August 23 bid opening at McClellan Air Force Base, we note that Ellis was informed as early as July 21 that McClellan procurement officials would not postpone the scheduled bid opening notwithstanding Ellis' objections to the specifications. We have held that such notice alone is sufficient to constitute adverse agency action. See 52 Comp. Gen. 821 (1973); Square Deal Trucking Company, Inc., supra.

In view of the above, the protest will not be considered on the merits.

for 
Paul G. Dembling
General Counsel