

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 2054834
60925

FILE: B-185674

DATE: May 27, 1976

MATTER OF: St. Thomas Dairies, Inc.

98888

DIGEST:

Protest received in our Office over one month after initial adverse agency action is untimely since section 20.2(a) of Bid Protest Procedures provides that if protest is filed initially with contracting agency, any subsequent protest must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action. Protester should have been aware by letter denying its protest that original proposal would not be considered in view of amendment making major revisions in solicitation and protester's interpretation of contracting officer's letter denying protest against rejection of its late response to amendment is unreasonable.

St. Thomas Dairies, Inc. (STD), protests the award of a contract to Old Dominion Dairy Products, Inc., under request for proposals (RFP) No. N00612-75-R-0053, issued by the Department of the Navy (Navy), Naval Supply Center, Charleston, South Carolina.

The solicitation, issued March 18, 1975, requested that proposals be submitted for the production of filled milk products at the Naval Station, Roosevelt Roads, Puerto Rico. The solicitation was amended 13 times; however, only amendment No. 0004 issued on September 5, 1975, is pertinent to this protest.

Amendment No. 0004 extended the period of negotiations until 2 p.m. on October 6, 1975. In addition, amendment No. 0004 made substantial changes in the solicitation. The amendment deleted the 5-year plant amortization requirement; it deleted provisions for title to the milk plant to vest in the Government; it deleted the multiyear provisions and changed the production schedules; and it also revised the evaluation criteria so that price is the final criterion. Amendment No. 0004, in effect, changed the

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character of the solicitation so drastically as to cause all offerors to submit revised proposals.

STD's revised proposal, sent by certified mail on October 11, 1975, was received by the Navy on October 17, 1975. By letter dated October 22, 1975, STD was informed by the contracting officer that its revised proposal in response to amendment No. 0004 was received late and therefore could not be considered for award. STD responded by letter dated November 11, 1975, requesting that its late response be waived as a minor informality under clause 10(b) of standard form 33A. The contracting officer by letter dated November 21, 1975, denied the protest and stated that since STD's revised proposal was sent by certified mail later than the fifth calendar day prior to the date specified for receipt of offers, the revised proposal could not be considered for award. No further action was taken by STD until December 30, 1975, when it filed a protest with our Office, which was received on January 8, 1976. The Navy has taken the position that the protest is untimely and therefore not for consideration on the merits. We agree.

The contracting officer's letter dated October 22, 1975, reads as follows:

"Your revised proposal in response to the above subject was received Certified Mail after the time for opening, and the U.S. Postal Service postmark shows that this item was mailed less than five (5) calendar days prior to the date specified for opening.

"We regret that your proposal cannot be considered for award and hope that future proposals will be received in time for proper consideration."

STD now contends that this letter was interpreted by it to mean that its revised proposal would not be considered for award but that its original proposal was still under consideration. The term "future proposals" was interpreted by STD to mean best and final offers under the instant RFP. STD discovered, it states, through conversations with a veterinary inspector on December 29, 1975, that negotiations were still being conducted with other

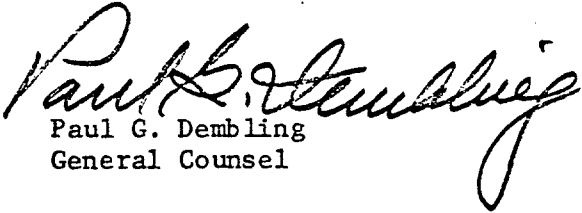
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offerors and that its original proposal had been excluded. The following day, STD's referenced protest letter was mailed to our Office.

While neither the October 22 nor November 21 letter from the contracting officer explicitly stated that the original proposal would not be considered, we view STD's interpretation of the October 22 letter to be unreasonable. STD was in receipt of amendment No. 0004 and it was aware of the major revisions that the amendment proposed to make. STD states in its protest letter of December 30, 1975, that the changes were "substantial." STD should have been aware that its original proposal did not conform to the specifications after amendment No. 0004 was issued and could not be properly considered in light of such substantial changes.

Section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), provides that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action in order for it to be considered.

We have been informally advised that STD received the November 21 letter on November 26, 1975. It was therefore incumbent upon STD to have protested within 10 working days from the receipt of that letter. Since the protest was not filed in our Office until January 8, 1976, the protest, while fully developed in order to ascertain the above-recited facts, is untimely and not for consideration on the merits.


Paul G. Dembling
General Counsel