

DECISION



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

61268

FILE: B-186539

DATE: July 26, 1976

MATTER OF: E. C. DeYoung, Incorporated

98906

DIGEST:

1. Timely oral protest to agency against alleged impropriety in invitation for bids which was reduced to writing and received by procuring agency on tenth day after bid opening is not for consideration since protester did protest here and section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1976), requires that protests be filed with GAO within 10 working days of constructive or actual knowledge of initial adverse agency action. Furthermore, request to agency to obtain our views does not constitute filing in GAO even if timely.
2. Since protester did not mark data with restrictive legend at time furnished to agency or within 6 months thereafter, as provided in Armed Services Procurement Regulation § 9-202.3(d)(2), Government has acquired unlimited rights in data.

This is a protest by E. C. DeYoung, Incorporated (DeYoung), against the inclusion of certain alleged proprietary technical data in invitation for bids (IFB) No. DACA01-76-B-0017, issued by the Department of the Army (Army), Corps of Engineers, for repairs to a jet engine test cell at Tyndall Air Force Base, Florida.

The Army reports that prior to bid opening, the president of the firm contacted the Mobile District Counsel by telephone to protest the use of what was considered proprietary drawings furnished by the protester under a previous contract at MacDill Air Force Base, Florida. The protester was advised to reduce its protest to writing prior to February 3, 1976, the date of bid opening. The protest was not received by the Army until February 18, 1976.

Armed Services Procurement Regulation (ASPR) § 2-407.8(b) (1975 ed.) provides:

"(b) Protests Before Award. If award has not been made, the contracting officer may require that written confirmation of an oral protest be submitted by a specified time and inform the protester that award will be withheld until the specified time. If the written protest is not received by the time specified, the oral protest may be disregarded and award may be made in the normal manner unless the contracting officer, upon investigation, finds that remedial action is required, in which event such action shall be taken."

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1976), provides that 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 DeYoung's protest was against an alleged impropriety apparent prior to bid opening, it had to be filed prior to bid opening in order to be timely. The protester, although its oral protest to the Army was timely, did not reduce its protest to writing as instructed by the Mobile District Counsel prior to bid opening. However, this would not cause DeYoung's protest to be untimely at the agency level as contended by the Army. The Army disregarded the protest in view of the provisions in ASPR § 2-407.8(b), supra, since it had not been reduced to writing prior to bid opening, and proceeded to open bids on February 3, 1976, which constituted adverse agency action. See B-178990, October 26, 1973, affirmed at Kleen-Rite Janitorial Service, Inc., B-178990, February 18, 1974, 74-1 CPD 78.

Section 20.2(a) of our Bid Protest Procedures, supra, provides in part that "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 timely. Since bid opening occurred on February 3, 1976, any protest to our Office was required to be filed in our Office by February 18, 1976. As no protest was filed here by that date, we will not consider the matter. Furthermore, although DeYoung indicated by letter to the Army dated February 11, 1976, that it wanted our views on its protest, such a request to the agency would not constitute the

B-186539

filing of a protest here even if timely. See Energy Piping Systems, Inc., B-185573, January 29, 1976, 76-1 CPD 64.

Parenthetically, it should be noted that the drawings submitted by DeYoung pursuant to contract No. F08602-74-90115 at MacDill Air Force Base, Florida, which are the subject of this protest were not marked with any type of restrictive legend. ASPR § 9-202.3(d)(2) (1975 ed.) provides that "[t]echnical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, within six months after delivery of such data the contractor may request permission to place restrictive markings on such data at his own expense * * *." DeYoung did not request permission to mark the drawings within the 6-month limitation. Therefore, it appears the Government has acquired unlimited rights in the data previously supplied by DeYoung. See 50 Comp. Gen. 271 (1970) and B-176146, January 22, 1973.

Milton Rosen

for Paul G. Dembling
General Counsel