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**DECISION**



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

FILE: B-188999

DATE: October 11, 1977

MATTER OF: Hydro Conduit Corporation

**DIGEST:**

Potential subcontractor protesting restrictive nature of solicitation is an interested party within 4 C.F.R. § 20.1(a) (1977), however, agency's determination to include patented item in solicitation will not be disturbed as protester has not shown its inclusion is without reasonable basis.

Hydro Conduit Corporation (HCC), a potential subcontractor, has protested solicitation No. NA0600-7-7066, issued by the Department of the Interior, Bureau of Indian Affairs (BIA), Navajo Area Office, Gallup, New Mexico. The work contemplated by the solicitation consists, inter alia, of constructing approximately 16 miles of asphalt roadway together with necessary drainage facilities.

HCC, which is a manufacturer of corrugated steel pipe, protests the solicitation as being restrictive because one of the types of pipe specified by the solicitation, a slotted corrugated drain pipe, is a patented item. HCC maintains that inclusion of the patented item in the solicitation has not been adequately justified by BIA and that it placed HCC at a competitive disadvantage.

Under our Bid Protest Procedures a party must be "interested" in order for its protest to be considered. 4 C.F.R. § 20.1(a) (1977). In California Microwave, Inc., 54 Comp. Gen. 231 (1974), 74-2 CPD 181, this Office held that we would consider subcontractor protests alleging that the specifications contained in a solicitation were unduly restrictive. While we recently held in Elec-Trol, Inc., B-188959, June 20, 1977, 56 Comp. Gen. \_\_\_, 77-1 CPD 441, that a protester's mere expectation of subcontract

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award, does not, by itself, satisfy the interested party requirement of 4 C.F.R. § 20.1(a) (1977), we recognized that there are situations where the interests of a subcontractor will be inadequately protected if our bid protest forum is restricted solely to offerors. Such a situation is where a subcontractor is protesting the restrictive nature of specifications contained in a solicitation. However, such protests must be made in a timely manner to be considered by this Office. 4 C.F.R. § 20.2 (1977).

There is some question as to whether the instant protest was made in a timely manner to BIA. A report received in this Office from BIA implies that HCC's protest was filed after bid opening and that since the alleged impropriety in the solicitation was known to HCC prior to the bid opening its protest was not timely. However, the record is not entirely clear on this matter. Although HCC discussed the restrictive nature of the IFB with BIA prior to bid opening, there is some question as to whether those discussions were intended as a protest. One indication that they were so intended, is a telegram sent by HCC to BIA on the day of bid opening purporting to "confirm" an oral protest. (The file does not show when the telegram was received.)

Section 1-2.407-8 of the Federal Procurement Regulations (FPR) (amend. 139) allows the oral protesting of a solicitation. In Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4, we determined that discussions held prior to bid opening constituted a timely protest. In that case, like the instant one, it was unclear from the record whether such conversations constituted a protest. We held they did and that the protester's subsequent protest to GAO after bid opening did not constitute an untimely protest. Here, we believe that there is sufficient evidence that an oral protest was made prior to bid opening to justify concluding that a timely protest was made to BIA.

HCC alleges that the inclusion of a patented item in the solicitation has not adequately been justified and that HCC has been placed at a competitive disadvantage

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as to the other non-patented items of corrugated steel pipe. HCC also implies that a patented item cannot be included in a formally advertised procurement. Our Office has long recognized the discretion vested in procuring agencies to draft specifications reflective of their minimum needs, see Digital Equipment Corporation, B-183614, January 14, 1976, 76-1 CPD 21, and will not disturb an agency's determination of minimum needs unless clearly shown to be without a reasonable basis.

BIA in its justification for use of the patented slotted drain pipe dated March 24, 1977, states that experience has shown that concrete curbing on average grades of 3 to 4 percent will tend to creep downhill and eventually slide off the shoulder of the road or into the roadway. BIA also states that curb damage from snow removal equipment is frequently experienced and that such damage allows water to escape, eroding fill slopes. BIA contends that use of the slotted drain pipe will eliminate the creeping problems experienced by curbing since it will be buried. The agency also states that snow removal equipment can operate directly over the pipe without causing damage. In the absence of evidence to the contrary, this Office believes that BIA's determination that their minimum needs required use of the patented slotted drain pipe was reasonable and will not be questioned. Likewise, HCC's inference that a patented item cannot be included in a formally advertised solicitation is not in accordance with general rules of procurement law. See 34 Comp. Gen. 337 (1955) and FPR § 1-1.307-1(b) (amend 139).

  
Acting Comptroller General  
of the United States