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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20540

J. Cohen
Pres. E

FILE: B-190350

DATE: October 26, 1977

MATTER OF: Dupont Pacific, Ltd.

DIGEST: Protest to GAO against allegedly restrictive specification, filed more than 10 working days after initial adverse agency action on protest to contracting activity, is untimely and will not be considered on its merits.

Invitation for bids (IFB) No. N62766-77-B-0025 was issued on July 14, 1977, by the Naval Facilities Engineering Command for the restoration of typhoon-damaged family housing facilities at Anderson Air Force Base, Guam, M.I. Bids were to be opened on September 13, although the date was later extended to September 21.

At the end of August, Dupont Pacific, Ltd. (Dupont), a manufacturer's representative for two elastomeric roof coating firms, instructed its "applicator contractor," Oripac Painting Co. (Oripac), to protest to the contracting activity that a specification in the IFB concerning "Elastomeric Membrane Coating" was unduly restrictive in that it could only be met by one roof coating manufacturer. On September 15, Oripac was informed by the Navy Officer in Charge of Construction (OICC) that the specification would not be amended. Dupont itself filed a protest on behalf of its two clients with the OICC on that same date.

Bids were opened under the IFB as initially issued on September 21, and award was made on September 26. Dupont's protest was denied by the OICC by telegram of September 28. Dupont protested the matter to our Office by letter dated October 3, filed here on October 6.

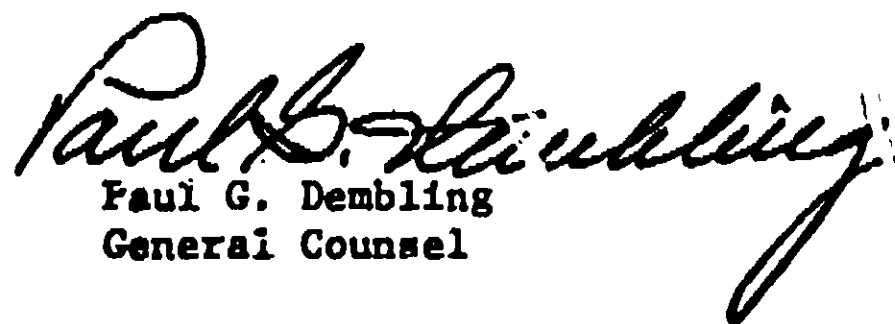
Section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), provides in part:

" * * * If a protest has been filed with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 [working] days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered. * * *"

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For purposes of Dupont's protest to our Office, we consider the "initial adverse agency action" here to have been the OICC's September 15 notice to Oripac, which had protested at that level at the instruction of Dupont, that the specification in issue would not be amended. Accordingly, Dupont's protest to our Office, filed October 6, is untimely under section 20.2(a) of our Procedures and will not be considered on its merits.

In regard to the above, we recognize that Dupont itself pursued the matter with the OICC in its letter of September 15. However, while we realize that a protester may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protester to seek reconsideration or clarification at the agency or other level, it is nevertheless obligatory that the protest be filed after notification of initial adverse agency action. Mr. Scrub Car Wash Systems, Inc., B-186586, July 9, 1976, 76-2 CPD 29; 52 Comp. Gen. 20 (1972). Furthermore, even if we were to consider Dupont's letter of September 15 to the OICC, rather than Oripac's earlier communication with the OICC, as Dupont's initial protest, the opening of bids on September 11 without taking the requested corrective action must be considered "adverse agency action" within the meaning of section 20.2(a) of our Procedures. Kinetic Systems, Inc., B-189146, July 1, 1977, 77-2 CPD 5. Thus, the protest to our Office, filed more than 10 working days thereafter, cannot be considered on that basis either.


Paul G. Dembling
General Counsel