

DECISION



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

10,838
10,543

FILE: B-193851

DATE: July 24, 1979

MATTER OF: Crosby and Overton, Inc. DLG 02260

[Protest of Agency Issuance of Amendment and Reopening of Negotiations]

DIGEST:

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Protest filed with ~~C&O~~ more than 10 working days after receipt by protester of notification of initial adverse agency action ~~on protest filed with agency~~ is ~~was~~ untimely and not for consideration on the merits.

~~The protest was dismissed~~

Crosby and Overton, Inc. (C&O) protests the award of a contract under request for proposals (RFP) No. 00406-78-R-0956 for cleaning of an underground petroleum tank and the removal and disposal of oily waste sludge on the basis that issuance of an amendment and reopening of negotiations was unnecessary and prejudicial.

DLG 02261

On the closing date, September 19, 1978, offers were received only from C&O and Northwest Tank Service (Northwest). However since both offers exceeded the estimated cost of the procurement cited in the purchase request, additional funds were requested.

While awaiting the requested funds it became known to the contracting officer that the amount of sludge to be removed was approximately twice the 1,000 barrels stated in the solicitation. Accordingly, on November 2, 1978, both C&O and Northwest were notified that best and final offers, based upon removal of 2,000 barrels, must be received by November 9. In addition both offerors were informed of the only authorized disposal site.

Since the requested additional funds had not been authorized by November 9, both C&O and Northwest were requested to extend their latest offers to December 19.

005984

Thereafter, Northwest inquired whether barrels (drums) were required to remove and dispose of the sludge since it understood that the disposal site required burial in drums because of possible leakage of liquid toxic material. The contracting officer ascertained from officials at the tank site that the solicitation incorrectly stated that the contents of the tank contained 50 percent liquid, and that there would be no liquid waste since the water had been drained from the oily sludge. Since no water should drain from the sludge at the disposal site, the site owner would not require containers for burial of the sludge. Accordingly, the contracting officer decided on November 15 to reopen negotiations and issue a clarifying amendment, which stated:

"The following information is issued for clarification purposes:

Removal and disposal of sludge is not required to be in barrels but may be transported and disposed of in any type of container that meets Federal, State and local regulations."

Both firms were given the opportunity to submit second best and final offers, in light of this information, which offers were due December 11.

C&O immediately protested to the contracting officer the reopening of negotiations, asserting that the clarification was unnecessary and prejudicial to its November 9, 1978 offer. C&O further alleged that someone in its organization had revealed its offer to Northwest. (This allegation was not later pursued before our Office.)

On November 22, the requested additional funds were received, but award was not made pending response to C&O's protest. On November 30, the contracting officer advised C&O that in his opinion the clarification was necessary since it could have more than a trivial effect on price, and that all offerors should compete on a common understanding of the specifications.

(The second round of best and final offers was received as scheduled: C&O's price remained unchanged while Northwest reduced its price and became the low offeror.)

C&O, after receiving the contracting officer's letter of November 30, took issue with his conclusions in a letter dated December 5. By letter dated December 27, the contracting officer affirmed his earlier conclusions and again denied C&O's protest. On December 29, award was made to Northwest.

Our review of the correspondence between the parties, contained in the Navy's report, shows that although C&O's protest to the agency was timely filed, its subsequent protest to our Office was not. Section 20.2(d) of our Bid Protest Procedures (4 C.F.R. 20.2(a)(1978)) provides in relevant part:

"* * * 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 constructive knowledge of initial adverse agency action will be considered.* * *"
(emphasis added)

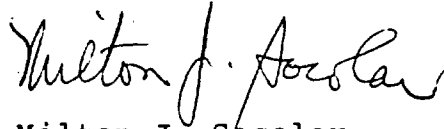
C&O received the agency's initial rejection of its protest some time prior to December 5, 1978. In addition, the second round of best and final offers was received as scheduled on December 11. However, C&O then engaged in further correspondence with the Navy, rather than protesting to our Office. Only after the second denial by the Navy did C&O protest to our Office, as a result of which we did not receive the protest until January 8, 1979. This was more than 10 days after initial adverse agency action. Although the Navy's continuing correspondence with C&O may have contributed to the delay in the filing with this Office, we have held that under such circumstances the date of the original notification

B-193851

4

determines the timeliness of filing. Harnischfeger Corporation, B-192629, October 11, 1978, 78-2 CPD 269;
Murphy Anderson Visual Concepts - Reconsideration, B-191850, July 31, 1978, 78-2 CPD 79.

The protest is dismissed.

A handwritten signature in cursive script that reads "Milton J. Socolar". The signature is written in dark ink and is positioned above the typed name.

Milton J. Socolar
General Counsel