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DECISION



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

Protest Alleging Solicitation Was Unduly Restrictive

FILE: B-193695

DATE: June 9, 1980

MATTER OF: Security Assistance Forces and
Equipment International, Inc.

DLG03851

DIGEST:

1. Protest which is refiled after GAO has closed initial protest file because protester failed to respond to GAO request for additional information is treated as initial protest and must independently satisfy timeliness requirements of Bid Protest Procedures.
2. Protest (alleging that solicitation requirement for photoelectric, hard-wired smoke detectors is overly restrictive) is untimely where protest was initially filed with contracting activity before proposal due date, but protest to GAO was filed more than 10 days after initial adverse agency action on protest to agency (receipt of proposals without modifying solicitation requirement for photoelectric, hard-wired smoke detectors).
3. Protest alleging that agency official made improper statements about protester is denied where there is no evidence that protester has lost awards as result of remarks.
4. Claim for anticipated profits and other unspecified financial losses incurred allegedly due to deliberate delay in awarding contract will not be considered where protester files untimely protest, even if they would otherwise be for consideration, since to do so would allow protester to circumvent timeliness requirements of GAO Bid Protest Procedures.

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Security Assistance Forces and Equipment International, Inc. (SAFE), protests a solicitation by the United States Air Force in Europe Contracting Center for the furnishing of United States-manufactured smoke detectors under an indefinite-delivery-type contract pursuant to the BUSH (an acronym for Buy United States Here) program. The BUSH program is an Air Force program to enable overseas contracting activities to buy United States end products overseas. It is similar to the Federal Supply Schedule in that, once a vendor is awarded a BUSH contract, overseas contracting activities may order goods directly from the vendor. Essentially, SAFE is protesting that the solicitation was unduly restrictive of competition because it requested proposals for photoelectric, hard-wired smoke detectors only, thereby excluding battery-powered and ionization-type smoke detectors from consideration for the BUSH program.

SAFE originally filed a protest under this solicitation with our Office on December 21, 1978. SAFE protested that the Air Force had suspended negotiations for a BUSH contract. We wrote to SAFE on February 28, 1979, and requested more specific information so that we could process the protest in accordance with our Bid Protest Procedures (4 C.F.R. part 20 (1980)). When SAFE did not provide the information we requested, or respond to our February 28, 1979, letter in any other way, we closed our file without further action by letter of April 6, 1979. On April 26, 1979, we received a letter from SAFE requesting that we reopen our file, but no additional information was supplied by SAFE. We did not reopen our file at that time.

On August 20, 1979, the Air Force wrote to SAFE and informed it that negotiations for a BUSH contract for smoke detectors were being reopened. SAFE was invited to submit a new proposal. Proposals were due by September 17, 1979. The request for proposals limited proposals to "photoelectric light emitting diode (LED) hard-wired style smoke detectors." By

letters dated August 23 and September 13, 1979, SAFE protested to the contracting officer on the bases that the solicitation was unduly restrictive, that SAFE had suffered financial losses due to the deliberate delays in awarding this BUSH contract, and that the Director of Contracting, United States Air Force in Europe, had made false allegations concerning SAFE and suggested to the contracting officer that SAFE should be found nonresponsible. On September 17, 1979, SAFE submitted a proposal to the contracting activity and quoted prices for ionization and photoelectric smoke detectors as well as for battery-powered and hard-wired smoke detectors. On October 22, 1979, SAFE refiled its protest in our Office.

In our view, a protest which is refiled after the file has been closed by our Office on the basis that the protester failed to provide us information we requested should be treated as an initial protest and must independently satisfy the timeliness requirements of our Bid Protest Procedures. 4 C.F.R. part 20. See Crestwood Furniture Company, B-195109, October 15, 1979, 79-2 CPD 255.

Under our Bid Protest Procedures, a protester may initially file a protest with the contracting agency, but any subsequent protest to our Office must be filed within 10 days of the initial adverse agency action on the protest to the contracting agency. 4 C.F.R. § 20.2(a). In this regard, receipt of initial proposals by the contracting activity on September 17, 1979, without amending the solicitation so as to allow proposals for battery-powered and/or ionization-type smoke detectors, constituted the initial Air Force adverse action denying SAFE's protest against the solicitation requirement for hard-wired photoelectric smoke detectors only. See Black Business Association, B-187379, December 22, 1976, 76-2 CPD 524. Since SAFE refiled its protest in our Office more than 10 working days after the initial adverse agency action, this issue of its protest is untimely and will not be considered further.

SAFE alleges that the Director of Contracting, United States Air Force in Europe, made improper statements and otherwise interfered with SAFE's negotiations with overseas contracting activities. SAFE requests that our Office order the Director of Contracting to retract his statements and to remove all references to such remarks from procurement files concerning SAFE. SAFE has not identified any awards it lost by these alleged remarks. Moreover, if awards were lost, we question whether SAFE has protested the losses timely. Thus, this aspect of the protest is dismissed.

In the present procurement, SAFE alleges that the Director of Contracting suggested that SAFE should be held nonresponsible by the contracting officer, but there is no evidence that the contracting officer has or will follow the suggestion. Accordingly, we find no prejudice to SAFE on the immediate procurement and this portion of the protest is denied. Insofar as SAFE desires a retraction of the alleged remarks, the matter is properly for resolution between the contracting agency and the protester. It is not an appropriate matter for our review under the Bid Protest Procedures which are concerned with procurement officials' statements only to the extent that awards or the failure to make awards in particular cases are based upon the statements.

The protest is denied in part and dismissed in part. 11

SAFE's claim in an unspecified amount for financial losses incurred as a result of alleged deliberate delay in making award of the BUSH contract is dismissed. Considering SAFE's claim for financial losses after having dismissed as untimely SAFE's protest on the basis of the alleged restrictiveness of the specifications would allow SAFE to circumvent the timeliness requirements of our Bid Protest Procedures. See Mr. Henry R. Stevenson, B-198071, March 26, 1980, 80-1 CPD 224. In any event, insofar as SAFE's claim represents anticipated profits which SAFE might have earned had it been awarded a BUSH

contract, such claims are speculative and have been rejected consistently as noncompensable. See Tennessee Valley Service Company, 57 Comp. Gen. 125 (1977), 77-2 CPD 442.

Milton J. Jordan

Acting Comptroller General
of the United States