

**DECISION**

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

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**FILE:** B-208671

**DATE:** March 15, 1983

**MATTER OF:** Stewart-Warner Electronics Division of  
Stewart-Warner Corporation

**DIGEST:**

Protest to GAO is untimely where agency-level protest asserted that amendment to step 1 solicitation created confusion as to how protester should revise its proposal but GAO protest was not filed within 10 working days after offeror received step 2 IFB. Issuance of IFB was adverse agency action since it ended any possibility of further revision to step 1 proposals, and thus, was wholly inconsistent with agency-level protest.

Stewart-Warner Electronics Division of Stewart-Warner Corporation protests as ambiguous certain requirements in solicitation (LFRB) N00104-82-B-0324 issued by the Navy Ships Parts Control Center. The solicitation called for proposals in connection with the first step of a two-step procurement of electronic translator synthesizers.

The protest concerns language in the step 1 solicitation which described the desired product by identifying the Bendix Corporation part number of a translator synthesizer which has been out of production for some time. Originally, the solicitation stated that the Bendix "design shall be updated to a solid state configuration," but it was amended to read, "however, the design shall be solid state and the current state of the art."

After evaluating initial proposals, the Navy, in a further attempt to explain the requirement, issued amendment 2, which provided as follows:

"State of the Art Design - The use of this term is intended to apply to the production technology involved. [The Bendix product] is the baseline for defining state of the art. Proposals directed at providing this design or a later one will be considered to satisfy state of the art requirements.

"Solid State - The intent of [the Navy] regarding solid state is to obtain a version that uses only solid state devices, specifically meaning no vacuum tubes."

All the Navy wanted, it now states, was a unit equal to the Bendix product. Stewart-Warner, however, interpreted the original solicitation language to require a translator synthesizer similar to one it currently manufactures which it says meets state-of-the-art reliability standards. It protested to the Navy prior to the closing date for receipt of amended proposals because, it says, it could not determine what the intended effect of the amendment was. According to Stewart-Warner, the Bendix product did not use vacuum tubes, and thus that product itself would have met the Navy's needs if all the Navy wanted was a tubeless design. Moreover, Stewart-Warner thought it made no sense to characterize a design which was more than a decade old as "state-of-the-art." Had it believed that all the Navy wanted was a product equal in reliability to the Bendix unit, Stewart-Warner says, it could have significantly lowered the cost of producing its translator synthesizer by substituting less expensive components.

We dismiss the protest as untimely because Stewart-Warner failed to file it with our Office within 10 working days after learning of initial adverse action by the Navy with respect to its original protest to the Navy.

Section 21.2(a) of our Bid Protest Procedures requires that, where a protest is originally filed with a contracting agency, any protest to our Office must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action" with respect to the protest. 4 C.F.R. § 21.2(a) (1982). The Navy points out that Stewart-Warner's protest was filed with it on May 28, 1982. On July 8, 1982, the Navy issued amendment 3 to the step 1 solicitation (altering certain requirements which

are not germane to the protest), reopened negotiations and established a new closing date for receipt of best and final offers of July 19, 1982. The Navy says that, because amendment 3 did not address the concerns raised by Stewart-Warner, the protester was clearly placed on notice of the Navy's intention to proceed without correcting the defects which Stewart-Warner alleged. Moreover, the Navy says that even if amendment 3 did not constitute adverse agency action, the issuance of the second step invitation for bids (IFB) on July 23 did. Receipt of the IFB, the Navy asserts, placed Stewart-Warner on notice that the Government considered the evaluation of technical proposals to be completed.

Stewart-Warner, on the other hand, maintains that its protest is timely because it was filed with our Office on August 17, 1982, within 2 days after it was told that the Navy had decided to deny the protest. It contends that the Navy's argument that the time to protest runs from the earlier dates cited is inapposite, because the Navy had in fact made no decision regarding the protest. According to Stewart-Warner, § 21.2(a) of our Procedures,

"properly applied, means that a protester must protest to GAO within 10 days after he receives notice of an agency action that, under the circumstances, should be objectively understood by a reasonable protester as having the intent or effect of denying the protest."

Any other construction of the rule would discourage resolution of protests at the agency level, Stewart-Warner contends, because it would become impossible for an agency to resolve a protest without stopping all action with regard to the procurement.

In this instance, Stewart-Warner says, it continued to discuss the protest with the Navy throughout the period in question and was led by the Navy to believe the Government had not decided how it would resolve the protest. The Navy characterizes the protester's contention that there were discussions regarding the protest throughout this period as "exaggerated and not totally accurate," but it does not deny that such discussions took place. As the Navy points

out, however, the nature of adverse agency action is defined in section 21.0(b) of our Bid Protest Procedures as:

"any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with an agency."

We agree with Stewart-Warner that the issuance of amendment 3 and the establishment of a closing date for receipt of proposals in response to it would not constitute adverse agency action if as a result of Stewart-Warner's discussions with the Navy the protester was reasonably led to believe that the issues involved in the protest were being considered separately and would be the subject of a separate amendment should the Navy ultimately agree to the protest. Section 21.0(b) speaks of actions or inactions which are prejudicial to the protest, and excludes actions which the parties intend not to be prejudicial. As noted above, amendment 3 did not concern the issues addressed by the protest.

The issuance of the IFB calling for step 2 bids is another matter. The effect of such action was to close consideration of acceptable technical designs by defining the field for purposes of price competition. Bidders whose step 2 bids deviated in any material way from their approved step 1 technical proposals would be rejected as nonresponsive. Norris Industries, B-182921, July 11, 1975, 75-2 CPD 31. While the Navy did not formally advise Stewart-Warner of its decision on the firm's protest until after the step 2 IFB was issued, there is no basis on which Stewart-Warner, complaining that it was unable to frame its step 1 proposal adequately, could reasonably believe that issuance of the step 2 IFB was anything but a repudiation of its protest. Initiation of step 2, in other words, was wholly inconsistent with Stewart-Warner's desire, through its protest, to alter its step 1 proposal. Cf. M & M Welding & Fabricators, Inc., B-202404, March 30, 1981, 81-1 CPD 238 (where we held that award of a contract could only be construed by the protester as an adverse determination of his agency-level protest concerning the awardee's responsibility, for purposes of a subsequent protest to our Office, despite the agency's advice that the protest would be decided soon after award).

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Stewart-Warner received the IFB on July 26.  
Since the protest was not filed within 10 working days  
after that date, the protest is dismissed.

*Harry R. Van Cleve*  
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Acting General Counsel