

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

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FILE: B-212241

DATE: December 12, 1983

MATTER OF: Colt Industries, Fairbanks Morse Engine  
Division**DIGEST:**

1. Protester's contention that the solicitation in a two-step, formally-advertised procurement should have required the equipment manufacturer and not the contractor to certify compliance with emissions standards is untimely. The protest concerns an alleged defect apparent in the first-step request for technical proposals and therefore should have been filed before the first-step closing date.
2. An agency's initiation of the second step of a two-step, formally-advertised procurement without amending the first-step solicitation in response to an oral protest filed with the agency constitutes the agency's initial adverse action on the protest; a protest to GAO filed more than 6 weeks later is untimely since it was not filed within 10 days of the date the protester is presumed to have received the second-step solicitation.
3. Where a protest filed with an agency concerning alleged solicitation defect is untimely, a subsequent protest to GAO on the same issue is also untimely.

Colt Industries, Fairbanks Morse Engine Division, protests the award of any contract under invitation for bids (IFB) No. N62474-81-B-8610, issued on May 12, 1983 by the Naval Facilities Engineering Command. The IFB was the second step of a two-step, formally-advertised procurement of diesel electric power generators for the Puget Sound Naval Shipyard in Bremerton, Washington. We dismiss the protest as untimely.

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The protester contends that (1) the solicitation is deficient in that it does not contain a requirement for the manufacturer of the equipment to certify compliance with emission standards; (2) amendment No. 15 to the first-step request for technical proposals "effectively eliminates all requirements for demonstrated field performance"; and (3) the delivery provisions of the second-step IFB indicates that the agency is conducting the procurement too far in advance of its actual need for the generators and requires the contractor to assume inordinate risks. The protester raised the identical issues in a protest filed with the contracting officer on June 13, the day before second-step bids were opened. The contracting officer dismissed the protest on June 14 because, says the agency, it involved matters relating to the first step of the procurement. The protester filed its protest here on June 28.

Because all of the issues the protester raises involve solicitation improprieties, the protest, not filed with this Office until after bid opening, can only be timely if there was a timely protest to the agency.

Our Bid Protest Procedures, 4 C.F.R. Part 21 (1983), provide that if a protest has been filed initially with the contracting agency, any subsequent protest to this Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action, provided the protest to the agency was timely. For purposes of determining the timeliness of a protest to the agency, our procedures provide that protests based on alleged improprieties apparent in any type of solicitation must be filed prior to either bid opening or the closing date for receipt of initial proposals. In the case of a two-step procurement, improprieties apparent in the first-step solicitation must be protested prior to the first-step closing date. Julie Research Laboratories, Inc., B-207745, November 16, 1982, 82-2 CPD 446. Alleged improprieties that do not exist in the initial solicitation but are subsequently incorporated therein must be protested not later than the next closing date following the incorporation. 4 C.F.R. § 21.2(b)(1).

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The protester states that it raised the issues it raises here in a meeting with the agency on February 16, 1983, and that this constituted a timely agency protest. The protester says that because it received no response to that protest, it reasonably believed the agency was considering amendments to the solicitation that would satisfy the protester's concerns. It was not until June 13, when it learned that the agency planned to proceed with the second-step bid opening without amending the solicitation, that the protester says it became aware of any "adverse agency action." Thus, reasons the protester, its June 13 protest to the agency was timely. Presumably, the protester believes that its protest filed here on June 28 is also timely because it was filed on the 10th working day following the agency's denial of its June 13 protest.

The first issue the protester raises involves emissions standards. Section 16205, paragraph 1.2.9 of the first-step request for technical proposals requires the contractor to guarantee that its engines will meet specified Environmental Protection Agency emissions standards. The protester contends that the solicitation should have required an emissions certification from the engine manufacturer, not the contractor. This alleged solicitation impropriety should have been raised, however, prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1). In this case, the solicitation specified an amended closing date of March 4, 1982. The protester did not file a protest on this issue with the agency prior to that date. Its protest on this issue is untimely. Julie Research Laboratories, Inc., supra.

The second issue the protester raises involves amendment No. 15 to the first-step request for technical proposals. That amendment, which required acknowledgments no later than February 18, 1983, made changes in the requirement for the contractor to certify that engines similar to those being offered have performed satisfactorily in the past. The protester contends that it protested this issue to the agency by raising it in a meeting with the agency on February 16. Even if we assume, however, that this constituted a timely agency protest, the issuance by the agency of the step-two IFB on May 12 without further amendment to the

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engine experience certification requirement was the agency's repudiation of that protest. See Stewart-Warner Electronics Division of Stewart-Warner Corporation, B-208671, March 15, 1983, 83-1 CPD 256. Initiation of the second-step of this procurement on May 12 therefore constituted initial adverse agency action on the issue protested to the agency during the first step, and, to be timely, any subsequent protest to this Office would had to have been filed within 10 days of the protester's receipt of the step-two IFB. Id. Colt does not indicate exactly when it received the step-two IFB; however, we presume that Colt received it within a reasonable time of May 12, see Halifax Engineering, Inc., B-209822, December 15, 1982, 82-2 CPD 537, and we conclude that its protest filed here on June 28, more than 6 weeks after May 12, is untimely. 4 C.F.R. § 21.2(a). The protester's attempt on June 13 to protest this issue again with the agency, and the agency's rejection of that protest on June 14, did not create a new opportunity to protest to this Office.

Finally, the third issue raised by the protester involves the delivery provisions. This issue, too, is untimely.

The first-step request for technical proposals stated that no delivery under the contract may be made prior to 730 days after the commencement date, defined to be 15 days after the notice of award. First-step amendment No. 13 increased the lead time from 730 to 880 days and stated that responses to the amendment were due by September 15, 1982. There is no indication that Colt protested the 730-day delivery provision prior to the date set for receipt of initial proposals or that it protested the 880-day delivery provision prior to September 15. Rather, Colt contends that it raised the lead time issue in a meeting with the agency on February 16, 1983 and that this constituted a protest. This attempt to protest the lead time provision was untimely, however, because the issue involved an apparent solicitation impropriety and was not raised prior to the appropriate closing dates. See 4 C.F.R. § 21.2(b)(1).

Paragraph F-1 of the second-step IFB stated that no equipment or material to be furnished under the contract may be delivered to the construction site prior to 1050 days after the date for commencement of the work. Bid opening

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was June 14. In its June 13 protest to the agency, the protester did not indicate that it was protesting the second-step increase in the lead time provision from 880 to 1050 days. The protester complained only that the long period from notice of award to when the equipment will be accepted at the site is two to three times the normal lead time. The protester argues here that the questions forming the basis of the June 13 protest were raised in the February 16 meeting and does not argue that its June 13 protest was in any way different than its earlier protest. Under these circumstances, we believe that in filing a protest with the agency on June 13, the protester was simply attempting to raise anew the same issue that was already untimely when raised on February 16. Since the protester did not file a timely protest with the agency concerning the lead time issue, its protest to this Office concerning that issue is untimely. 4 C.F.R. §§ 21.2(a) and (b)(1); Gull Airborne Instruments, Inc., B-208510.2, April 13, 1983, 83-1 CPD 391.

We dismiss the protest.

*Harry R. Van Cleve*  
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