

Woods

DECISION



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

FILE: B-222541

DATE: June 24, 1986

MATTER OF: Brussels Steel America, Inc.

DIGEST:

Where an offeror writes to the agency after learning of its basis for its protest, but fails to express dissatisfaction with the agency's action and to request corrective action, the offeror's letter does not constitute a protest to the agency, and a protest filed with the General Accounting Office more than 2 months later is untimely.

Brussels Steel America, Inc., protests any award of a contract to either Guggenheim International Corporation or Edgcomb Metals under invitation for bids (IFB) No. DLA500-86-B-0469, issued by the Defense Industrial Supply Center, Philadelphia, for quantities of sheet steel. Brussels contends that both firms' bids were nonresponsive because the bids contained restrictions on disclosure of the firms' manufacturing facilities, contrary to the provisions of the IFB. We dismiss the protest as untimely.

The solicitation required bidders to indicate the name and location of the manufacturing facility where the sheet steel had been or would be produced. The solicitation also stated in clause D-21 that bids that failed to provide this information, or that restricted its disclosure, would be rejected as nonresponsive. When bids were opened on February 7, 1986, and evaluated under the solicitation's multiple awards clause, Guggenheim, Edgcomb, and Brussels were the lowest, second lowest, and third lowest bidders, respectively. Guggenheim's bid listed the firm's manufacturing facility, but immediately below the listing was a hand-stamped notation reading "WE REQUEST PRIVILEGED INFORMATION." Edgcomb's bid also listed that firm's manufacturing facility, but the listing was concealed by a piece of paper taped to the page. The piece of paper contained only the notation "PRIVILEGED." The agency

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reports that it considered Guggenheim's bid to be responsive because, while the bid requested confidentiality, it did not restrict disclosure of the manufacturing facility. The agency says it did not consider the responsiveness of Edgcomb's bid because it was not low.

On February 14, a representative of Brussels telephoned the agency and stated that he intended to file a protest based on the alleged restrictions on disclosure contained in the two lowest bids. The agency's record of the telephone call indicates that the representative was informed that after legal review the agency had determined Guggenheim's bid to be responsive because the firm had merely requested, rather than required, that the identity of its manufacturing facility be regarded as privileged information. The representative was informed further that he could file a written protest if he wished.^{1/}

By letter dated February 21, Brussels wrote to the contracting officer asking to be informed of his interpretation of clause D-21 in connection with both this and any future sealed bid solicitation. Brussels noted that both of the two lowest bids contained claims of privilege. The letter stated that Brussels' objective was "to avoid any formal protests" and that a copy of a letter to the firm's attorneys seeking additional clarification was attached. The agency responded to Brussels' by letter dated April 14 explaining why it considered Guggenheim's bid to be responsive and advising that an award would be made to that firm unless the bid should be rejected for other reasons. The agency awarded a contract to Guggenheim on April 28. Brussels filed its protest with this Office within 10 days of its receipt of the agency's letter.

^{1/} Brussels' telephone call cannot be viewed as a protest to the agency because oral protests are no longer provided for under the Federal Acquisition Regulation (FAR). See FAR § 33.101, as added by FAR Circular No. 84-6, Jan. 15, 1985; K-II Construction, Inc., R-221661, Mar. 18, 1986, 86-1 CPD ¶ 270.

Our Bid Protest Regulations provide that protests based on other than solicitation improprieties must be filed no later than 10 days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1986). If a protest was filed initially with the contracting agency, section 21.2(a)(3) of the Regulations provides that any subsequent protest to this Office filed within 10 days of knowledge of initial adverse agency action on the protest will be considered, provided the protest to the agency was filed within the 10-day period described in section 21.2(a)(2).

In this case, the basis for Brussels' protest is the agency's determination that Guqgenheim's bid was responsive despite the request that the information concerning its manufacturing facility be regarded as privileged. The record indicates that Brussels was informed of this determination during the telephone conversation on February 14. Such oral notice of the basis for a protest starts the 10-day period for filing a protest; formal, written notification is not required. Auburn Timber, Inc.--Request for Reconsideration, B-221523.2, Feb. 20, 1986, 86-1 CPD ¶ 182. Since Brussels' protest to this Office was filed more than 2 months after February 14, the protest can be considered as timely only if Brussels' letter of February 21 was a timely protest to the agency. In our view, the letter to the agency was not a protest.

To be regarded as a protest, a letter need not state explicitly that it is so intended. J.S. Mechanical Contractors, Inc., B-218456, Apr. 12, 1985, 85-1 CPD ¶ 426. What is required, however, is that the letter contain both an expression of dissatisfaction over the agency's conduct of the procurement and a request for corrective action. See Finalco, Inc., B-220651, Jan. 2, 1986, 86-1 CPD ¶ 4 at p. 4. Brussels' letter of February 21 did not complain of any improper agency action or determination. The letter contained no request for corrective action. At best, the letter is a request for the agency to clarify its interpretation of clause D-21. A mere request for clarification, however, does not constitute a formal protest. Conner Building Maintenance, Inc., B-221301, Jan. 15, 1986, 86-1 CPD ¶ 51. Although in its protest to this Office Brussels characterizes the letter of February 21 as a protest, the statement in the letter that Brussels wished to avoid a formal protest is clearly at variance with this construction.

Brussels' protest is dismissed.

Ronald Berger

Ronald Berger
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