



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McDonald Welding & Machine Co., Inc.--
Request for Reconsideration
File: B-224014.2
Date: September 5, 1986

DIGEST

Dismissal of a protest against alleged solicitation defects as untimely is affirmed because the protest was not filed prior to the closing date for receipt of proposals as required by Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

DECISION

McDonald Welding & Machine Co., Inc. (McDonald) requests reconsideration of our dismissal of its protest, concerning request for proposals (RFP) No. N00140-86-R-0987 issued by the Department of the Navy. We affirm our dismissal of McDonald's protest.

On August 26, 1986, McDonald protested that the RFP contained unduly restrictive award provisions as established by the contracting officer in an August 4, 1986, cover letter to amendments under the RFP. We viewed the protest as one against solicitation defects and we dismissed the protest against these alleged solicitation defects as untimely because it was not filed before the closing date for the receipt of proposals (August 25, 1986), as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

In its request for reconsideration, McDonald argues that its August 26 protest was timely filed. McDonald contends that section 21.2(a)(2) of our Bid Protest Regulations applies to its protest. Section 21.2(a)(2), provides that, in cases other than those covered in paragraph (a)(1) (which concerns solicitation improprieties apparent prior to the closing date), protests shall be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1986). McDonald asserts that the protest is based on the agency's

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improper "interpretation" of the award provisions which was indicated in the agency's cover letter of August 4, and in subsequent discussions with the Navy on August 13, 21, and 27. McDonald concludes that its protest properly was filed on August 26, 1986, since it was filed within 10 working days of when McDonald first became aware of the Navy's interpretation.

Furthermore, McDonald contends that to this date, the Navy has not confirmed interpretation of the award provisions and that the protest may be premature.

Under 4 C.F.R. § 21.2(a)(1), alleged improprieties which become apparent prior to the closing date for receipt of proposals or which do not exist in the initial solicitation but are subsequently incorporated into the solicitation, must be protested not later than the next closing date for receipt of proposals following the incorporation of the alleged impropriety. 4 C.F.R. § 21.2(a)(1) (1986). See Shaw Aero Development, Inc.--Request for Reconsideration, B-221980.2, May 28, 1986, 86-1 C.P.D. ¶ 495.

McDonald's protest against unduly restrictive award provisions concerned subsequently incorporated solicitation improprieties which McDonald was on notice of before the closing date of August 25. Since McDonald's protest of August 26 was filed after the August 25 closing date, we properly dismissed the protest.

McDonald now argues that its protest is timely because it is based on continued "discussions" with the agency subsequent to the Navy's letter of August 4. While McDonald states it discussed with the Navy the alleged restrictive provisions, before the August 25 closing date, it does not indicate it filed a timely agency-level protest before the closing date. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), provides that if a protest has been filed timely, initially with the contracting agency, any subsequent protest to the General Accounting Office must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action. In the absence of a showing that there has been a prior timely agency-level protest, we do not find this provision of our Regulations applies.

Finally, McDonald argues that its protest may be premature because the agency has never confirmed its interpretation of the solicitation award provisions. In our view, McDonald's initial protest filing, specifically challenged as unduly restrictive certain solicitation provisions based on the Navy's cover letter and solicitation revisions amendment of

August 4. Thus, it is apparent from the protest that the basis of protest was provided in the August 4 solicitation documents. Under these circumstances, we find no basis to conclude the protest was premature.

We affirm our decision.

for Seymour Efron
Harry R. Van Cleve
General Counsel