



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Southwest Marine of San Francisco, Inc.

**File:** B-229654

**Date:** November 30, 1987

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### **DIGEST**

Protester communication of alleged solicitation defects to agency, if considered to be a timely initial agency protest, is untimely filed at General Accounting Office (GAO) where the subsequent protest with GAO was not filed within required 10 working days after the closing date for receipt of proposals--the initial adverse agency action. If the initial communication by the protester to the agency was not a protest, the protest to GAO was not timely filed before the closing date.

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### **DECISION**

Southwest Marine of San Francisco, Inc., protests request for proposals (RFP) No. N62383-87-R-0023 issued by the Military Sealift Command (MSC), Pacific, for repair and overhaul work on the United States Naval Ship MERCY.

We dismiss the protest as untimely.

The RFP which had a closing date of October 30, 1987, was for repair and overhaul work on the United States Naval Ship MERCY. The procurement was designated as a 100-percent small business set-aside for Lots I and III (topside repairs and combined drydocking and topside repairs, respectively); Lot II (drydock repairs) was not restricted to small business concerns.

Before the closing date, Southwest states that it orally and in writing challenged the terms of the solicitation to MSC. Southwest alleges that the partial small business set-aside was not appropriate, violated applicable regulations and converted the RFP into a sole-source procurement. On November 12, 1987, Southwest states that it attempted to contact MSC's procurement office to inquire as to the status of the case, but received no answer. On November 16, 1987,

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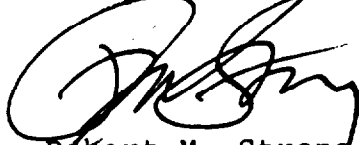
according to Southwest, an MSC representative informed Southwest that it did not regard Southwest's pre-closing date communication as a protest.

On November 20, 1987, Southwest filed a protest with our Office reiterating the allegations originally made to MSC. However, this protest was not timely filed.

First, if we were to consider the pre-closing date communication by Southwest to MSC to be a timely agency-level challenge of the specifications, the protest filed with our Office is untimely. Our Bid Protest Regulations state that where a protest has been filed initially with the contracting agency, any subsequent protest must be filed in our Office within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1987). Adverse agency action includes the protester's knowledge that the agency continued with receipt of proposals in the face of the protest. 4 C.F.R. § 21.0(e) (1987); Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357. Thus, the "initial adverse action" here was the closing date, which was October 30, 1987. Since the protest was filed in our Office on November 20, 1987, it is untimely because it was filed beyond the 10-day period required by the regulation. See ITT Cannon, B-228521, Nov. 5, 1987, 87-2 C.P.D. ¶ \_\_\_\_.

Moreover, if Southwest did not file an initial protest with the agency, Southwest's protest would be untimely. Our Bid Protest Regulations require that protests based on alleged improprieties in the solicitation, apparent prior to the closing date, must be filed with this Office before that date. 4 C.F.R. § 21.2(a)(1) (1987). Here, the closing date under the RFP was October 30, 1987. Southwest's protest was not filed with our Office until November 20, 1987, 2 weeks after the closing date for the receipt of proposals.

The protest is dismissed.

  
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General Counsel