



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** York International Corporation  
**File:** B-234895  
**Date:** April 24, 1989

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### **DIGEST**

1. Where a firm initially protested to the contracting activity alleging that the solicitation is overly restrictive prior to the closing date for receipt of proposals, the agency's receipt of initial proposals without taking the requested corrective action constitutes initial adverse agency action on the protest, such that a protest to the General Accounting Office (GAO) more than 10 working days later, based on agency's written denial of the agency-level protest, is untimely under GAO's Bid Protest Regulations.
2. Prospective subcontractor is not an interested party to protest specifications in request for proposals.

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### **DECISION**

York International Corporation protests as unduly restrictive of competition the specifications in request for proposals (RFP) No. F09650-89-R-0066, issued by Warner Robins Air Logistics Center for replacement of two chiller systems. Specifically, York objects to the specifications requiring that the chiller's compressor motor be a hermetic type and that tubes in both the evaporator and the condenser have smooth bore tubes. We dismiss the protest because it is untimely and because York is not a prospective offeror under the RFP and therefore is not an interested party to maintain a protest before our Office.

The record shows that York protested the RFP requirements for a hermetic type motor and smooth bore type tubes to the agency by letter dated February 13, 1989. Notwithstanding the protest, the agency accepted offers under the RFP on February 22 without changing the protested requirements. By letter dated March 10 the agency denied York's protest, and that firm filed its protest with our Office on March 22.

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Where a protest initially has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely under our Bid Protest Regulations, must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1988). The quoted phrase is a term of art construed to include knowledge that the agency proceeded with the receipt of proposals in the face of the protest. See Maddux & Assocs.--Request for Reconsideration, B-228285.2, Oct. 27, 1987, 87-2 CPD ¶ 403; Sunrise Assocs.--Request for Reconsideration, B-219356.2, June 27, 1985, 85-1 CPD ¶ 738 (bid opening occurring 1 day following filing of agency-level protest constitutes initial adverse agency action). It is our general view that, once the contracting activity proceeds with accepting offers, the protester is on notice that the contracting activity will not undertake the requested corrective action; timeliness is thus measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. See Computer Dynamics, Inc., B-217585, Jan. 25, 1985, 85-1 CPD ¶ 106.

Here, York filed its agency-level protest on February 13 and the Air Force nevertheless proceeded with the scheduled February 22 closing date. Because York did not file its protest with our Office until March 22, more than 10 working days later, the protest is untimely. See Consolidated Industrial Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58.

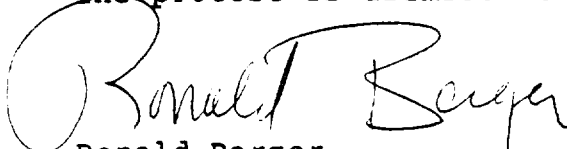
Moreover, even if the protest were timely, we would not consider it because York is not an interested party entitled to protest. The Air Force explains that the work to be accomplished under the solicitation will require the services of a general construction contractor since in addition to replacement of the chiller systems the project includes asbestos abatement, electrical work, and replacement of cooling towers, piping, electronic controls, pumps, and valves. According to the agency, York is a manufacturer of air conditioning and cooling units, including chillers, and does not perform general contracting work. The Air Force argues that York's status is therefore that of a prospective subcontractor and supports its position by reporting that York has not submitted a proposal on its own but does appear as a supplier of equipment under two offers submitted by general contractors. York does not dispute the agency's position.

The Competition in Contracting Act of 1984 (CICA) authorizes our Office to decide only protests submitted by interested parties, 31 U.S.C. § 3553(a) (Supp. IV 1986), and defines an

"interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract," 31 U.S.C. § 3551(2). This definition is reiterated in our Regulations at 4 C.F.R. § 21.0(a). A prospective subcontractor or supplier does not have the requisite interest to be considered an interested party to protest under CICA because it is not a prospective or actual offeror. Perma-Pipe Division of Midwesco, Inc., B-230702, Apr. 14, 1988, 88-1 CPD ¶ 368.

Since the only reasonable conclusion we can draw from the record before us is that York's interest in the protested procurement is that of a potential supplier to the prime contractor and not that of a potential offeror, it is not an interested party for purposes of protesting to our Office.

The protest is dismissed.



Ronald Berger  
Associate General Counsel