



The Comptroller General
of the United States
Washington, D.C. 20548

Aut/LL

Decision

Matter of: Carlisle Tire and Rubber Company

File: B-235413

Date: May 12, 1989

DIGEST

When a firm initially protested small business set-aside to contracting agency prior to closing date for receipt of initial proposals, the agency's opening of initial proposals without taking the requested corrective action constitutes initial adverse agency action, such that a protest to the General Accounting Office (GAO) 5 weeks later, based on agency's written denial of the agency-level protest, is untimely under GAO's Bid Protest Regulations.

DECISION

Carlisle Tire and Rubber Company protests the small business set-aside under solicitation No. 7FXG-C3-88-7801-B, issued by the General Services Administration (GSA) for playground equipment and related replacement parts. Carlisle, a large business concern, which manufactures playground surfaces, argues that playground surfaces, one of many items under this solicitation, should have been solicited on an unrestricted basis.

We dismiss the protest as untimely.

By letter of March 23, 1989, Carlisle filed a protest with GSA against GSA's decision to set aside the solicitation. Despite Carlisle's protest, the agency proceeded with the procurement and received proposals on March 28, the scheduled closing date for submission of initial proposals. Carlisle submitted an offer which was received late by the agency. The agency denied Carlisle's protest by letter of April 13, apparently received by the protester on April 20. Carlisle filed a protest with our Office on May 4.

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

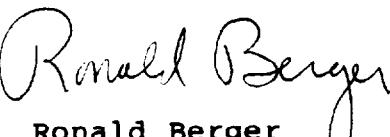
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knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1988). The term "adverse agency action" is defined in our Bid Protest Regulations to include the agency's proceeding with the receipt of proposals in the face of the protest. 4 C.F.R. § 21.0(f); Consolidated Industrial Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58 (closing 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.

Carlisle's agency-level protest was received by GSA on March 24, and the agency nevertheless proceeded with the scheduled March 28 closing date. Since Carlisle did not file its protest with our Office until May 4, more than 10 working days later, the protest against the set-aside status of the solicitation is untimely.

Carlisle requests reimbursement of its protest and proposal preparation costs. Our authority to allow the recovery of the costs claimed by Carlisle is predicated upon a determination by our Office that the solicitation, proposed award or award of a contract does not comply with a statute or regulation. 31 U.S.C. § 3554(c)(1) (Supp. IV 1986). Since we make no such determination here, there is no basis for award of costs. See Interstate Diesel Service, Inc., B-229610, Feb. 17, 1988, 88-1 CPD ¶ 162.

The protest is dismissed.


Ronald Berger
Associate General Counsel