



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Waste Management, Inc.

File: B-245530.2

Date: January 15, 1992

Roy E. Paul, Esq., Bouhan, Williams & Levy, for the protester.

Paul M. Fisher, Esq., and Marilyn W. Johnson, Esq., Department of the Navy, for the agency.

Richard P. Burkard, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Letter from contracting officer denying agency-level protest constitutes initial agency action, and a subsequent protest filed with our Office more than 10 days after receipt of letter is untimely.

DECISION

Waste Management, Inc. protests the award of a contract to another firm under invitation for bids (IFB) No. N62467-89-D-M011, issued by the Department of the Navy for portable toilets. The protester argues that its low bid was improperly rejected in favor of a higher bid from a small business.

We dismiss the protest.

The IFB, which, as amended, contained a bid opening date of August 27, 1991, provided that the procurement was a set-aside for small businesses. Waste Management, a large business, protested to the agency by letter dated August 2, alleging that under the Small Business Competitiveness Demonstration Program,¹ this procurement should not have been set aside for exclusive small business participation. By letter dated August 8 to Waste Management, the agency

¹According to Federal Acquisition Regulation § 19.1003 the Small Business Competitiveness Demonstration Program is intended to test the ability of small businesses to compete successfully in certain industry categories without the benefit of small business set asides. See Crimson Enters., Inc., B-241038.3, July 5, 1991, 91-2 CPD ¶ 22.

responded that the program does not apply to procurements such as this one for portable toilets.

Notwithstanding the IFB provision stating that the solicitation was set aside for small businesses, Waste Management submitted a bid, which the Navy rejected. On September 5, Waste Management filed a protest with our Office challenging the agency's award decision. While Waste Management argues that the protest concerns the rejection of its bid, the sole basis for the protest is that the IFB should have been unrestricted.² Thus, in actuality the protest is a complaint that the terms of the IFB improperly precluded large businesses from competing for the contract, the issue Waste Management previously raised with the agency. As such, it is untimely.

When a protest is filed initially with an agency, any subsequent protest to our Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1991). Here, the agency's August 8 letter constituted adverse agency action in response to Waste Management's protest as it clearly expressed the agency's position that the Small Business Competitiveness Demonstration Program was not applicable to the subject procurement. See 4 C.F.R. § 21.0(f); Northrop Worldwide Aircraft Servs., Inc., B-243318, Apr. 12, 1991, 91-1 CPD ¶ 371. For purposes of timeliness, we generally assume delivery of a letter within 1 calendar week of its mailing. Id. Thus, we presume that Waste Management received the Navy's August 8 letter denying its challenge to the IFB by August 15. In order to be timely, Waste Management's protest was required to be filed (received) in our Office within 10 working days of August 15. See 4 C.F.R. § 21.0(g) (1991). Since the protest was not filed with our Office until September 5, it is untimely, and we will not consider it.

Waste Management requests that even if the protest is untimely we consider it under the significant issue exception to our timeliness rules. See 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(c)). We decline to do so.

²To the extent that the protester alleges that the agency should not have rejected its bid, large businesses are ineligible for award under IFBs such as this one which was issued as a small business set-aside. Ideal Servs., Inc.; JL Assocs., Inc., B-238927.2 et al., Oct. 26, 1990, 90-2 CPD ¶ 335. Thus, the agency properly rejected Waste Management's bid.

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community which have not been considered on the merits by this Office in a previous decision. Herman Miller, Inc., B-237590, Nov. 7, 1989, 89-2 CPD ¶ 445. In our view, Waste Management's protest that this procurement for portable toilets should be covered by the Small Business Competitiveness Demonstration Program does not meet this standard. See Department of the Navy--Recon., B-235205.2, Jan. 5, 1990, 90-1 CPD ¶ 18.

The protest is dismissed.



John Brosnan
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