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Ms. Schatz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: C&S Carpentry Services, Inc.

File: B-250643

Date: November 25, 1992

Gordon R. Newton for the protester.
Antonio Martinez-Monfort for Major Construction Company, Inc., an interested party.
Capt. William B. Boyce, and Timothy A. Beyland, Esq., Department of the Air Force, for the agency.
Sylvia Schatz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's opening of bids without acting on agency-level protest constituted constructive notice to protester of adverse action; protest to the General Accounting Office of agency's subsequent adverse decision, filed more than 10 days after bid opening, therefore is dismissed as untimely.
2. Protest that awardee's product has a hazardous toxicity level is dismissed where record shows that protester, the fifth low bidder, was not in line for award based on bids received, and therefore is not an interested party to challenge the award on this basis.

DECISION

C&S Carpentry Services, Inc. protests the award of a contract to Major Construction Company, Inc. under invitation for bids (IFB) No. F08602-92-BA028, issued by the Department of the Air Force for the installation of stove top automatic fire extinguishing devices for the kitchen range heads in military family housing units. The protester argues that the IFB's provision with regard to the fire extinguishing devices' gas valves is defective and that the awardee's proposed product has a hazardous toxicity level.

We dismiss the protest.

The IFB was issued on August 7, 1992. By letter dated September 4, C&S complained to the Air Force that the IFB's provision with regard to the fire extinguishing devices' gas valves was defective and requested further clarification. The agency, without responding, opened the bids of seven firms, including C&S's, on the September 9 bid opening date.

Major was the apparent low bidder (\$302,000) and C&S was the apparent fifth low bidder (\$369,563). On September 30, the Air Force denied C&S's protest and made award to Major. C&S then filed this protest with our Office on October 8, raising the same argument, and also contending that the awardee's proposed product should be rejected due to a hazardous toxicity level.

Our Bid Protest Regulations provide that where a protest initially has been filed with the contracting agency, any subsequent protest to our Office, in order to be considered, must be filed within 10 working days of the protester's actual or constructive knowledge of the initial adverse agency action taken on that protest. 4 C.F.R. § 21.2(a)(3) (1992). Where, as here, a contracting activity proceeds with the opening of bids following an agency-level protest without taking the requested corrective action, the protester is on notice that the agency has acted adversely to its interests; timeliness thus is measured from the bid opening date. Sunbelt Indus., Inc.--Recon., B-245780.2, Oct. 29, 1991, 91-2 CPD ¶ 399. Here, assuming that C&S's September 4 letter to the agency constituted an agency-level protest, the September 9 bid opening constituted initial adverse agency action. Since C&S did not file its protest with regard to the allegedly defective IFB provision until October 8, more than 10 working days after the September 9 bid opening, this basis of protest is untimely.¹

We also dismiss the protester's contention that the awardee's proposed product has a hazardous toxicity level. To be eligible to pursue a protest, a party must be "interested" within the meaning of our Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a), that is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award a contract. 4 C.F.R. § 21.0(a). Where a protester would not be in line for an award even if its protest were sustained, the firm generally lacks standing as an interested party. See Corrugated Inner-Pak Corp., B-233710.2, Mar. 29, 1989, 89-1 CPD ¶ 326. Here, the bid abstract furnished by the agency shows that C&S was the fifth low bidder. Since C&S does not challenge the four lower bidders' eligibility for award, C&S would not be in line for award even if its protest were sustained on the ground that the awardee's product has a hazardous

¹If the September 4 complaint is not deemed an agency-level protest, the firm's October 8 protest is untimely under another provision of our Regulations requiring that protests of alleged solicitation deficiencies be filed with the agency or our Office prior to the bid opening. 4 C.F.R. § 21.2(a)(a).

toxicity level. C&S therefore is not an interested party eligible to challenge the award on this basis.

The protest is dismissed.



John M. Melody
Assistant General Counsel