



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Salas Concessions, Inc.

File: B-253193

Date: July 27, 1993

Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for the protester.

Eddie Rye, Jr., for Traction Systems, Inc., an interested party.

Eric A. Lile, Esq., and L. James Gardner, Esq., Department of the Navy, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of alleged solicitation improprieties is untimely where it is filed 2 months after the protester began performance under an interim contract with a statement of work identical to that of the solicitation at issue, and the alleged defects in the statement of work should have been apparent shortly after performance began under the interim contract.

DECISION

Salas Concessions, Inc. protests the award of a contract to Traction Systems, Inc. under invitation for bids (IFB) No. N68836-92-B-0106, issued by the Department of the Navy's Fleet and Industrial Supply Center in Jacksonville, Florida, for mess attendant services. Salas contends that the IFB contained numerous defects and that the agency improperly made award to Traction Systems notwithstanding a pending agency-level protest against the terms of the IFB.

We dismiss the protest as untimely.

The IFB, which was issued on August 10, 1992, was a total small disadvantaged business set-aside. The period of performance was a 12-month base period with two 1-year options. Salas participated in a site visit prior to the submission of bids. As amended, the IFB set September 25, 1992, as the date of bid opening.

By that date, 32 bids had been received, including those of Salas and Traction Systems. Of those bids, Traction Systems's was 5th low and Salas's was 21st low. In a process that apparently lasted several months, the four lowest bids were eliminated from consideration for reasons not relevant to the protest, and Traction Systems's bid thus became the apparent low bid. Because of difficulties that arose in extending the incumbent's contract during the process of determining which bid was in line for award, the agency solicited and awarded a 3-month "bridge" contract from February 1 through April 30, 1993, using a Performance Work Statement (PWS) identical to that in the IFB at issue. Salas won the competition for that interim contract, which was awarded on January 29, 1993, at a price of approximately \$105,000. Salas had not held the predecessor contract.

After 2 months of performance, Salas sent the agency a letter, dated April 1, in which the company requested that the IFB for the full contract be canceled because of "several material deficiencies" in the solicitation's PWS. The letter stated that the alleged deficiencies had been "observed and recorded" by the company during its performance under the interim contract.

Specifically, the April 1 letter complained that certain tasks were "required in order to strictly perform the Contract," but were not addressed in the PWS;¹ other specifications were called out in the PWS, but could be modified without affecting efficient and proper performance;² and the PWS was "unreasonably vague and

¹The tasks at issue were: (1) collecting and refrigerating bottled condiments needed to be performed after each meal and the condiments redistributed prior to the following meal, where the PWS did not explicitly require that the condiments be refrigerated between meals; (2) each cashier needed \$150 in cash for change, instead of the \$100 called out in the IFB; (3) the meal times set forth in the PWS allegedly did not correspond to the actual meal times required by the agency personnel on site; (4) interior door jambs needed to be dusted and cleaned every day, while the PWS called for weekly cleaning; and (5) ventilating hoods needed to be subjected to a particular cleaning method every other day, rather than on the biweekly basis set forth in the PWS.

²Thus, Salas stated that: (1) the soup and salad bar should be eliminated; (2) the number of cashiers required at various meals could be reduced; (3) the requirement for dining patrons to identify themselves at the check-out counter could be eliminated; and (4) the PWS improperly
(continued...)

misleading" as to other tasks.³ Salas's letter also mentioned other alleged inaccuracies in the PWS without claiming that any defect arose from the inaccuracies.⁴

After reviewing Salas's April 1 letter, the contracting officer concluded that it did not constitute a protest, but that, if it were considered a protest, it was untimely, because it concerned matters which either were apparent on the face of the IFB or were known to Salas more than 10 days before the letter was received by the agency. The contracting officer nonetheless reviewed the substance of the challenges raised by Salas and concluded that they were without merit. Accordingly, the contracting officer determined to proceed with award, which was made to Traction Systems on April 20. Salas was informed on that same day of

²(...continued)

required three serving lines during the weekday lunch meal, while only two serving lines existed at the facility. Salas also contended that the practice of permitting the contractor to retain cash register surpluses when the registers were "cashed out" at the conclusion of each meal promoted dishonesty among employees.

³Salas complained that the IFB provided only an estimate of the number of box lunches which the contractor would be required to prepare, and that bidders other than the incumbent would have difficulty guessing how many staff hours would be required to prepare the box lunches. Salas also challenged as ambiguous the required "coordination of contractor work with military activities." Salas further contended that, while the IFB required the contractor to clean the interior of the "reefer units," it did not make clear whether that requirement applied to reach-in refrigerators, walk-in units, or both. Salas also challenged the IFB requirement that garbage be loaded into trucks because, according to Salas, "truck loading does not apply to the facility in issue." Finally, Salas contended that the IFB requirement that a salaried supervisor be on duty in the absence of the project manager was ambiguous, because it was not clear whether the requirement applied to absences caused by the project manager's need to be away from the premises temporarily during the course of a day's work, or absences caused by the project manager's illness or vacation, or both kinds of absence.

⁴Thus, the letter stated that "[t]here are no vinyl table cloths used in the dining facility" and that, contrary to the language in the PWS, there were no water coolers to be cleaned in the facility.

the award decision, but the agency did not provide Salas formal notice that the company's April 1 letter, to the extent that it constituted a protest, had been denied.

Salas contends that its April 1 letter was an agency-level protest and that the agency acted improperly by proceeding with award without first ruling on that protest. Salas also alleges that the April 1 letter accurately identified a substantial number of defects in the IFB, and that those defects were not apparent prior to bid opening in September 1992.

In addition to disputing the merits of each of Salas's challenges to the IFB terms, the agency contends that the agency-level protest was not timely filed. Because we agree that that protest was untimely, we dismiss the protest without reaching the merits.

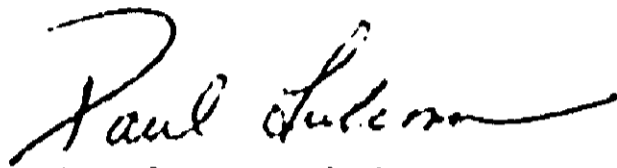
Under our Bid Protest Regulations, where a bid protest is filed initially with the contracting agency, a subsequent protest to our Office will be considered only where the agency-level protest was filed prior to bid opening (where the protest is based on alleged solicitation improprieties which are apparent prior to bid opening) or not later than 10 days after the basis of protest was known or should have been known (for all other cases). 4 C.F.R. § 21.2(a) (1993). Accepting, for the purpose of our analysis, Salas's contention that its April 1 letter should be considered an agency-level protest, we must determine whether that protest was timely filed with the agency. Because it was filed more than 6 months after bid opening, it can only be timely if it concerned improprieties which were not apparent prior to bid opening and which were not known (nor should they have been known) to Salas more than 10 days before April 1.

Several of the alleged ambiguities in the IFB were plainly apparent prior to bid opening, and Salas's agency-level protest challenging those provisions was untimely because it was filed well after bid opening.⁵ Almost all of the remaining alleged IFB defects involve matters which should have been apparent to Salas within days of beginning

⁵Specifically, we find untimely on this basis the challenges to the IFB provision requiring coordination of contractor work with military activities and the requirement that a salaried supervisor be on duty in the absence of the project manager. Salas's challenge to those two provisions is essentially based on alleged ambiguity in the IFB language; if Salas learned anything during performance of its interim contract that is relevant here, it has not been articulated.

performance under the interim contract.⁶ Certainly by March 1, when it had completed 1 month of performance, Salas was, or should have been, aware of all of the alleged improprieties in the PWS. The agency-level protest challenging those alleged improprieties, however, was not filed until April 1, more than 10 days after those grounds of protest were known or should have been known, and that protest was therefore untimely. Because Salas did not timely raise any of its challenges to the solicitation provisions in the agency-level protest, those challenges are also untimely in the protest filed with our Office.⁷

The protest is dismissed.



Paul I. Lieberman
Assistant General Counsel

⁶For example, it is hard to see how the first day's performance could have passed without Salas discovering that its employees were responsible for collecting and refrigerating the bottled condiments between meals, or that there were only two serving lines in the facility.

⁷Because the agency-level protest was not timely, the agency was not required to reach the merits of that protest before proceeding to award of a contract. To the extent that the protester is arguing that the agency was required to inform Salas that its agency-level protest was untimely before award was made to Traction Systems, such an argument, even if well-founded, would raise only a procedural matter which would not affect the validity of an otherwise properly awarded contract. See Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473. Moreover, we note that our Regulations specifically contemplate the possibility of an agency proceeding with award of a contract notwithstanding the pendency of an agency-level protest and without notice that the protest has been denied. 4 C.F.R. § 21.0(f).