



Comptroller General
of the United States

123729

Washington, D.C. 20548

Decision

Matter of: Alfred Conhagen, Inc.

File: B-257833; B-257837

Date: September 2, 1994

DECISION

Alfred Conhagen, Inc. protests the specifications under request for proposals (RFP) Nos. SPO750-94-R-0164 (RFP-164), and SPO750-94R-0472 (RFP-0472), issued by the Defense Logistics Agency (DLA) for centrifugal pump units.

We dismiss the protests as untimely.

Both solicitations sought proposals for a Carver Pump Company centrifugal pump unit, part number D-13N-0-98-009. The RFPs permitted proposals of alternate products, and required the submission of data clearly describing the characteristics and features of the alternate product being offered. RFP-0164 was issued on October 13, 1993, and Conhagen submitted a proposal for an alternate product, along with a technical data package and a protest letter to the agency by the November 12 closing date. In this agency-level protest, Conhagen contended that the pump specifications should be set forth in terms of a design specification rather than by reference to a proprietary Carver Pump Company code and part number, and that the solicitation should be set aside for exclusive small business participation. The agency proceeded with the receipt of proposals as scheduled on November 12.

RFP-0472 was issued on March 7, 1994. Conhagen filed an agency-level protest concerning this solicitation, dated March 15, in which it again argued that the specifications, should be set forth in terms of design specifications rather than referencing a proprietary Carver Pump Company code and part number. This protest, along with Conhagen's protest concerning RFP-0164, was forwarded to the appropriate Engineering Support Activity for review. Conhagen was notified by letter on April 4 that action had been suspended on both procurements until review was completed, and the agency issued amendment No. 1, on

April 26, extending the due date for initial proposals to May 16. The agency proceeded with receipt of proposals as scheduled on May 16, after learning that the Engineering Support Activity was unable to verify that Conhagen's alternate offer was interchangeable with the required product. Conhagen did not submit a proposal.

By letter dated June 24, the agency notified Conhagen that the alternate product that it had submitted in response to RFP-0164 was found technically unacceptable. Conhagen then protested to our Office on July 8.

RFP-0164

Under our Bid Protest Regulations, where a protest is filed first with the contracting agency, a subsequent protest to our Office will be considered only if the initial agency-level protest was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3) (1994); Mobile/Modular Express, B-246183, Nov. 13, 1991, 91-2 CPD ¶ 459. Conhagen's protest does not meet this requirement.

Conhagen submitted its agency-level protest of the solicitation specifications with its proposal of an alternate product. Our regulations provide that protests based upon alleged apparent improprieties in an RFP, to be timely, must be filed prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). A specification protest which is included in a proposal does not constitute a timely pre-closing time protest to the agency, since there is no requirement that an agency open or read proposals on or before the closing time, when a protest of this type must be filed. Paramount Sys., Inc., B-229648.2, Dec. 30, 1987, 87-2 CPD ¶ 646. The fact that DLA considered the untimely protest on the merits does not alter this result; our timeliness regulations may not be waived by action or inaction on the part of the contracting agency. WildCard Assocs., B-241295; B-241300, Oct. 19, 1990, 90-2 CPD ¶ 321. Since Conhagen's initial protest to DLA was untimely, its subsequent protest to our Office is also untimely.

RFP-0472

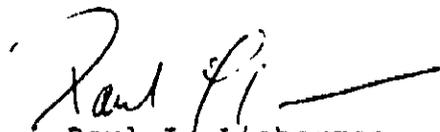
Here, Conhagen submitted its agency-level protest and the agency proceeded with the receipt of initial proposals, without modifying the RFP to reflect the changes set out in Conhagen's protest. Where a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of initial agency adverse

action regarding that protest, 4 C.F.R. § 21.2(a)(3); Electronic Assistance Corp.--Recon., B-248886.2, June 19, 1992, 92-1 CPD ¶ 536. 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 thus is measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. 4 C.F.R. § 21.0(f); Fatigue Technology, Inc.--Recon., B-250251.2, Oct. 15, 1992, 92-2 CPD ¶ 247. Thus, the agency's acceptance of initial proposals as scheduled on May 16, without modifying the RFP to reflect the changes set forth in Conhagen's March 15 protest, constituted initial adverse agency action. Alpha Technical Servs., Inc., B-250878; B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104. Accordingly, the 10-day period for filing a timely protest with our Office commenced on May 16. Id. Since Conhagen did not file its protest with our Office until July 8, more than a month later, its protest is untimely.

"SIGNIFICANT ISSUE" EXCEPTION

In the alternative, Conhagen requests that we consider its protests under the "significant issue" exception to our timeliness rule. 4 C.F.R. § 21.2(c). We decline to do so. Application of the "significant issue" exception to our timeliness rules is limited to untimely protests that raise issues that have not been considered on the merits in a previous decision and are of widespread interest to the procurement community. See, e.g., DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Conhagen's complaints do not have widespread significance to the procurement community, a precondition to the invocation of the exception. See NPF Servs., Inc.--Recon., B-236841.2, Jan. 3, 1990, 90-1 CPD ¶ 9.

The protests are dismissed.



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