

UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-191059

FEB 27 1978

The Honorable Thomas J. Downey
House of Representatives

Dear Mr. Downey:

We refer to your communication of January 4, 1978, with which you forwarded for our consideration certain material relating to a problem encountered by Aqua-Trol Corporation in connection with request for proposals (RFP) No. DSA 700-77-R-1876, issued by the Defense Construction Supply Center, Defense Logistics Agency (DCSC).

The material shows that the solicitation was issued as a small business set-aside on September 16, 1977. Proposals were due by October 3. Clause H-12 of the RFP emphasized the need for an expedited delivery of the required items.

Three offers were received. Baumrin Bros., Inc. (Baumrin), offered to deliver the items in 80 days for \$1.3944 per unit. Aqua-Trol offered the items for \$1.19 each. Although it is not clear whether Aqua-Trol made no entry to indicate the delivery time, or offered delivery in 120 days, it appears that the latter was the case. The remaining firm offered delivery in 120 days at a unit price of \$1.30.

On the basis of clause H-12 of the RFP, award was made to Baumrin on October 19. Aqua-Trol protested the award by telegram to DCSC of October 26, and was advised by DCSC on November 3 that the matter was under investigation.

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On November 17, you furnished DCSC for its consideration a letter to you from Aqua-Trol dated November 14, which set forth the basis for the firm's protest. In that letter, Aqua-Trol contended that the RFP did not clearly indicate "quantity and time urgency"; that the contracting officer improperly failed to conduct negotiations with Aqua-Trol; and that Baumrin should not have been eligible as a small business for award under this small business set-aside.

DCSC advised you of the justification for its actions by letter of November 25, which you apparently furnished to Aqua-Trol. However, in a letter to you dated December 13, Aqua-Trol again attempted to refute DCSC's position. You then submitted the matter to our Office.

Section 20.2 of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), under which we consider protests against the awards or proposed awards of formally advertised or negotiated contracts of procurement or sale by or for Federal agencies, provides in pertinent part:

"(a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 [working] days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *.

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals.

"(2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

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In regard to the clarity of the RFP's quantity and delivery provisions, sections 20.2(a) and (b)(1) of our Procedures require that for purposes of our review a protest on those issues had to have been filed by October 3, when proposals were due. Since Aqua-Trol did not file a protest until October 26, we cannot consider the matters on their merits.

Aqua-Trol's protest of October 26 was timely filed with DCSC with regard to the remaining issues, since it was filed within 10 working days after Aqua-Trol knew of the award to Baumrin. See section 20.2(b)(2) above. However, Aqua-Trol received the "initial adverse agency action" under section 20.2(a) of our Procedures on its protest upon its receipt of DCSC's November 23 letter to you, which the record shows occurred sometime before December 13. Any subsequent protest on those issues, therefore, had to be filed in our Office within 10 working days thereafter. Accordingly, and considering your January 4 communication to our Office as a protest on Aqua-Trol's behalf, those matters are also not for consideration on their merits.

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Concerning the applicability of our Procedures to protests referred to our Office by Members of Congress, it has been decided that no protest will be considered on its merits if untimely filed, unless one of the exceptions in section 20.2(c) of our Procedures is applicable, regardless of the source of the protest. This policy was adopted because our Office can best function if it is permitted to decide an issue while it is still practicable to take effective action with respect to the procurement where the circumstances warrant. We are unable to do so if a protest is filed after what we consider to be a reasonable time for the filing of a protest. Moreover, if our Office were to consider an untimely protest on the merits when submitted by a Member of Congress, this would suggest to the procurement community that the timeliness provisions of our Procedures could be circumvented by submitting the protest through a Member of Congress.

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Section 20.2(c) of our Procedures provides that for good cause shown or where there are issues significant to procurement practices or procedures, our Office may consider any protest which is not timely filed. However, these exceptions are not involved here. See 52 Comp. Gen. 821 (1973).

Sincerely yours,

~~Paul G. Dembling~~

Paul G. Dembling
General Counsel