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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-205210.2

DATE: December 15, 1981

MATTER OF: Mission Hardwood Company - Reconsideration

DIGEST:

Prior decision dismissing protest as untimely is affirmed where protester has failed to establish decision was based on erroneous interpretation of fact or law.

Mission Hardwood Company requests that we reconsider our decision Mission Hardwood Company, B-205210, November 4, 1981, 81-2 CPD. In that decision, we dismissed as untimely Mission's protest regarding a solicitation issued by the Department of the Air Force, because the protest was not filed with our Office within 10 working days after the agency had denied Mission's earlier protest to the agency. For the reasons given below, we affirm our prior decision.

Briefly, the facts are as follows: The Air Force solicited bids on repairing and resurfacing a gym floor at the Davis-Monthan Air Force Base in Arizona. Bid opening was scheduled for September 15. On September 15, prior to the opening of bids, the protester received verbal instructions from the project engineer which, in the protester's opinion, substantially changed the nature and scope of the IFB. Accordingly, Mission requested that bid opening be postponed and a written clarification issued. This request was denied by the contracting officer.

Thereafter, Mission sent a telegram to the contracting officer protesting the opening of bids. The protester was orally advised by the contracting officer that its protest was denied, and bids were opened as scheduled. Later that day, Mission sent another telegram protesting any award under the IFB. The following day, on September 16, Mission sent a letter confirming its protest

and outlining the basis of its protest further. Subsequently, by letter dated September 30, and received by Mission on October 2, the Air Force denied Mission's protest of any award under the IFB. The protester then filed its protest with our Office on October 16.

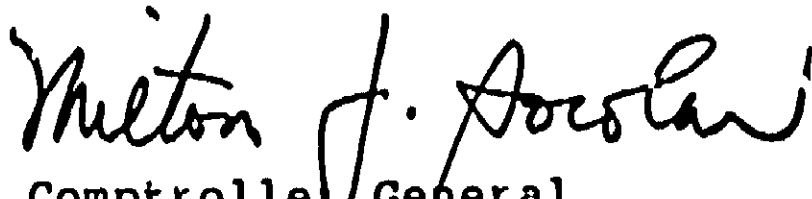
In our prior decision, we found that while the protester had, as required by our procedures, filed a protest with the Air Force prior to bid opening, it had not filed a protest with our Office until more than 10 working days after the Air Force had adversely acted upon its initial protest, both by verbally denying it and proceeding with bid opening as scheduled. Thus, we determined that Mission's subsequent protest to our Office was untimely under section 21.2(a) of our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1981). We also held that the fact that Mission had filed a second protest with the agency concerning the award of a contract under the solicitation was of no consequence because it merely restated the protester's earlier allegation that the solicitation was ambiguous. See U.S. Financial Services, Inc. - Request for Reconsideration, B-197859, October 8, 1980, 80-2 CPD 254. Consequently, we declined to consider Mission's protest.

Mission takes exception with our conclusion that its protest was untimely. It does so on the basis that its September 15 telegram was so fragmentary that the agency could not have been expected to give it serious consideration. Instead, Mission argues, its September 16 letter constituted "the first, complete, formal" and "actual" protest which could be considered by the contracting officer. Therefore, the protester contends that its protest to our Office was timely because we received it on October 16, which was within 10 working days after Mission learned its protest of September 16 had been denied.

The effect of Mission's argument would be to shift its "protest" and the agency's "denial" thereof from a pre-bid opening occurrence to one which took place after bid opening and close enough in time to the filing of its later protest to our Office that the timeliness obstacle would be removed. We do not agree with Mission's characterization of its correspondence with the agency. Its pre-bid opening telegram specifically stated that it was protesting the opening of bids because sections 2-A and 3-A of the specifications were ambiguous since they did not properly explain the use of new materials or re-use of existing materials. We do not think we would be warranted in disregarding this as a "protest" which the agency denied later the same day both by verbal message and by proceeding with the opening of bids in the face of the protest. This occurred one month before we received Mission's later protest to our Office.

Moreover, Mission's argument on reconsideration is self-destructive. If we accept Mission's position that its "first" "actual" protest was its letter of September 16, that was the day after bid opening. Our Bid Protest Procedures require that protests based upon alleged improprieties in a solicitation be filed with either the contracting agency or our Office prior to bid opening. 4 C.F.R. § 21.2(b). Accordingly, Mission's own argument leads to the conclusion that its protest was untimely.

As Mission has not established that our prior decision was based on an erroneous interpretation of either fact or law, our decision is affirmed. Federal Sales Service, Inc. - Reconsideration, B-198452, June 16, 1980, 80-1 CPD 418.

for 
Comptroller General
of the United States