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**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Dayton-Granger, Inc.--Reconsideration

**File:** B-279553.3

**Date:** October 2, 1998

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Richard A. Ciambrone, Esq., Thompson, Hine & Flory, for the requester.  
Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.  
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### **DIGEST**

Where solicitation advised offerors that evaluation of proposals would be based on price and automated best value model (ABVM) score (a measure of past delivery performance), and indicated how offerors could access and, if they desired, challenge their score, protest that agency used wrong score for protester properly was dismissed as untimely where it was not filed prior to the closing time for receipt of offers.

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### **DECISION**

Dayton-Granger, Inc. requests reconsideration of our June 12, 1998, dismissal of its protest of the award of a contract to Dorne & Margolin, Inc. under request for proposals (RFP) No. SPO970-98-R-X017, issued by the Defense Supply Center, Columbus (DSCC), Defense Logistics Agency, for 368 antennas. We dismissed the protest on the basis that it was untimely filed.

We deny the request.

Dayton-Granger initially protested (B-279553) on the basis that, in awarding to Dorne & Margolin, the agency improperly had rejected Dayton-Granger's proposal based on a nonresponsibility determination, without referring the matter to the Small Business Administration. Dayton-Granger subsequently withdrew that protest. Thereafter, the agency advised the firm that its automated best value model (ABVM) score of 64.8 (a 100-point scale measure of delivery performance on prior similar contracts) erroneously had included numerous delinquent delivery orders actually caused by the agency, and thus was being revised upward to 81.4. Dayton-Granger then filed a protest (B-279553.2) within 10 days after receiving this information, maintaining that it should have received the award under the RFP based on its corrected ABVM score of 81.4, which was higher than Dorne & Margolin's score of 80.

We dismissed the protest as untimely, finding that the protest should have been filed prior to the closing time for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1998). We noted in this regard that, while the RFP did not expressly indicate each offeror's ABVM score, it stated that the evaluation of past performance would be based on each offeror's score, and that offerors could obtain their scores and performance information--and, if they desired, challenge their scores--by contacting the agency or by accessing the Electronic Bulletin Board (EBB). Based on the availability of the information, and the fact that offerors were on notice that it would be integral to the evaluation, we concluded that any alleged discrepancies in the ABVM scores or performance information were in the nature of a solicitation defect, and thus had to be protested prior to the closing time, the point at which scores could be reviewed by the agency and, if necessary, corrected without affecting the evaluation. Thus, we held, Dayton-Granger's protest filed on April 16, 1998, well after the November 24, 1997 closing time and March 3 award, was untimely.

In its reconsideration request, Dayton-Granger disputes our conclusion that the ABVM score deficiencies constitute solicitation deficiencies which had to be challenged prior to the closing time, since they were not actually included in the solicitation. Dayton-Granger instead characterizes its protest as one challenging the propriety of the agency's making award to a firm which neither offered the lowest price nor had the highest ABVM score. As such, it asserts, the timeliness of its protest is governed by the rule under 4 C.F.R. § 21.2(a)(2), which provides that protests based on other than alleged solicitation deficiencies must be filed within 10 days after the protester knew, or should have known, the protest basis. Dayton-Granger argues that its protest is timely under this rule because it diligently pursued its ABVM information and then filed the protest within 10 days after it learned that the agency had conceded that the firm's ABVM score was erroneous, which allegedly rendered the award improper.

We find no basis to change our conclusion. While Dayton-Granger is correct that potentially defective ABVM scores were not actually included in the solicitation, we think--as discussed generally above and in our decision--the RFP's notice as to the accessibility of the scores was sufficient to put potential offerors on constructive notice of their scores, and thus warrant considering the scores incorporated into the RFP. The scores were not unlike provisions incorporated into a solicitation by reference; in such situations, although the language of the provisions is not set forth in the solicitation, protesters are deemed to be on notice of the provisions, and must protest any alleged deficiency in them prior to the closing time. See Telos Computing, Inc., B-190105, Mar. 27, 1978, 78-1 CPD ¶ 235 at 8.

Moreover, as a policy matter, it is clear--again, as discussed in our decision--that the accuracy of ABVM scores for purposes of a specific evaluation is a matter that is best addressed as a solicitation deficiency. Only where a prospective offeror accesses its ABVM score and challenges it prior to receipt of proposals is the

agency able to attempt to resolve any dispute prior to embarking upon the evaluation; a challenge raised any later--if found to be meritorious--would potentially nullify the evaluation and any award decision. Indeed, that is precisely the effect Dayton-Granger's late-filed protest would have in this case. See Soltec Corp.--Recon., B-234598.2, Mar. 28, 1989, 89-1 CPD ¶ 321 at 2-3. While Dayton-Granger's protest, on its face, purported to challenge the propriety of the award, the specific claimed impropriety was the agency's use of the wrong ABVM score for Dayton-Granger in the evaluation. Thus, the propriety of the score used was the real protest basis for purposes of determining timeliness; delaying the protest until the agency actually used the allegedly defective ABVM information in the evaluation and award decision did not convert it into a post-award protest.<sup>1</sup>

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<sup>1</sup>In its comments on the reconsideration request, the agency agrees with the protester that the 10-day, instead of the pre-closing time, rule should have been applied (it believes, however, that the protest properly was dismissed as untimely based on the protester's failure to diligently pursue the ABVM information on which its protest was founded). We note that this argument ignores one of the alternative arguments set forth in the agency's original report on the protest. There, noting that raising the matter prior to the closing time would have enabled the agency to timely address the protester's concerns about its score, the contracting officer stated:

This is not unlike the GAO bid protest regulation that require[s] protests based on alleged improprieties in a solicitation, which are apparent prior to . . . the time set for receipt of initial proposals, be filed prior to the time set for receipt of initial proposals. . . . If Dayton-Granger objected to the provisions of clause L-15, it was required to protest that issue prior to the solicitation closing date. It did not. The agency cannot establish a separate procedure simply to accommodate Dayton-Granger's failure to diligently pursue its interests.

Contracting Officer's Statement, at 4 (unnumbered). Obviously, we agreed with this rationale. As the agency notes, in one published decision, United Terex, Inc., B-275962.2, May 30, 1997, 97-1 CPD ¶ 196 at 6, we actually cited a lack of diligent pursuit in addressing a challenge to the protester's ABVM score. However, that decision does not refer to our timeliness rules or indicate what would have constituted diligent pursuit. Thus, our position that the ABVM score protest had to be filed prior to the closing time is not inconsistent with the analysis in this decision and, in any case, it is our view that the pre-closing time rule is the correct one.

Dayton-Granger maintains that it could not have anticipated that it should have protested its defective ABVM score prior to the closing date, and that it thus was unfair to dismiss its protest on this basis. As is evident from our analysis, we disagree. Since the solicitation stated that the ABVM score would be considered in the evaluation, and provided potential offerors with all of the information needed to access their ABVM scores, we think Dayton-Granger reasonably should have anticipated that it could not opt to await the outcome of the competition before assessing the accuracy of the score on which the evaluation was to be based.<sup>2</sup>

The protester asserts that its efforts in disputing and trying to resolve specific contract performance discrepancies directly with the contracting activities since 1996 constituted diligent pursuit, and that its protest after award therefore was timely. We disagree. The protest was based on the agency's use of an incorrect ABVM score in the selection decision. While the protest was filed within 10 days of the protester's learning in early April that the agency had conceded that the firm's ABVM score was incorrect, the firm's belief that the ABVM score was incorrect, not the agency's concurrence in that belief, was the basis of protest. Once the protester learned of the award decision shortly after the March 3 award, it could have easily pursued its basis of protest by checking the EBB to ascertain the then-current ABVM score, upon which the agency had relied in its award decision. Had the firm checked the EBB, it would have learned in March that the EBB still listed the ABVM score which Dayton-Granger believed to be inaccurate. Because the firm failed to file a protest challenging the ABVM score within 10 days of award, we would find that the firm had failed to file a timely protest--even if we did not view the defective ABVM score as akin to a solicitation impropriety. To allow the agency's concession of the ABVM scoring error to be the event starting the 10-day protest clock would mean that, had the agency made that concession months later than it actually did, a protest challenging the award could be filed many months

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<sup>2</sup>Dayton-Granger argues, as a policy concern, that our decision will encourage offerors to challenge their ABVM score prior to closing irrespective of their rating. The overall purpose of the ABVM program was to give offerors a continuing and timely opportunity to access and seek amendment of the performance records on which the agency announced it would rely in future procurements unless the discrepancies were brought to its attention. United Terex, Inc., supra, at 6. Further, as the RFP explicitly stated, the EBB was established to provide offerors with an opportunity to review historical performance data and to provide a way to expeditiously resolve perceived discrepancies. Thus, offerors already are permitted--indeed, encouraged--to monitor their ABVM scores on a continuing basis. We see no reason to expect firms which monitor their ABVM scores to file more challenges as a result of our decision.

after award. It thus remains our view that Dayton-Granger's protest would have been properly dismissed as untimely even under the 10-day timeliness rule.<sup>3</sup>

We will reconsider a decision only where it is shown to be factually or legally erroneous. 4 C.F.R. § 21.14(a) (1998); G&C Enters. Inc.--Recon., B-233537.2, May 10, 1989, 89-1 CPD ¶ 439 at 2. Dayton-Granger has not established any error in our decision. Accordingly, the request for reconsideration is denied.

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<sup>3</sup>Dayton-Granger asserts that we should consider its protest under the significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c). However, we will invoke the exception only where a protest raises an issue of first impression or one that would be of widespread interest to the procurement community. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490 at 4. The protest issue here--the propriety of the ABVM score evaluation--is not an issue of first impression (see USA Elecs., B-275389, Feb. 14, 1997, 97-1 CPD ¶ 75) and, in any case, there is no reason to believe it would be of widespread interest to the procurement community.