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DECISION



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

J. Carter
Proc I

FILE: B-189571

DATE: June 5, 1978

MATTER OF: Annapolis Tennis Limited Partnership

DIGEST:

1. Protest alleging awardee is not technically qualified is protest against affirmative determination of responsibility no longer reviewed by GAO absent certain conditions not present here.
2. Sufficiency of agency's environmental impact statement is inappropriate for GAO review.
3. Bid Protest Procedures, 4 C.F.R. part 20 (1977), provide objective criteria for application to protests before GAO and may not be waived by contracting agency. Protesters are on notice of procedures since they have been published in Federal Register. Agency delay and failure to advise protester of requirements of Bid Protest Procedures do not excuse untimely presentation of bases of protest.
4. Initial general letter of protest to contracting agency was followed by letter dated July 8 to GAO and agency raising new and independent bases of protest for which information was available to protester no later than May 26. New bases of protest presented after filing of initial protest must independently satisfy timeliness criteria. Bases in letter of July 8 are untimely since not presented within 10 working days of date information supporting bases was available to protester.
5. Claim for proposal preparation costs and anticipated profits will not be considered where to do so would circumvent Bid Protest Procedures by requiring consideration of untimely issues.

Annapolis Tennis Limited Partnership (ATLP) has protested the award of a lease by the General Services Administration (GSA) to the Woodbridge Construction Company (Woodbridge) under solicitation for offers (SFO) No. 731R.

The SFO was issued to 16 potential offerors on September 20, 1976, for the lease of office, storage and laboratory space within 10 miles of Annapolis, Maryland, to house the central regional laboratory of the Environmental Protection Agency (EPA). Four offers were received with one withdrawn in October 1976. The lease was awarded to Woodbridge on March 14, 1977.

By letter dated March 16, 1977, ATLP protested to GSA the failure to award the contract to ATLP and requested documents pertaining to the proposals submitted by the other offerors; this letter stated no specific grounds of protest. On July 8, 1977, ATLP filed its protest with this Office incorporating a letter of the same date to GSA which stated in part:

"Despite repeated requests and only after several conferences at GSA's offices, the documentation necessary to ATLP in perfecting its protest was not made fully available until May 26, 1977. Because of these delays and because of the failure of GSA to take any official action on this protest, I am now writing to provide you greater detail of the bases of the protest."

The details presented pertain to the following four bases for protest:

- "1. GSA failed to make a written determination that it was impracticable to secure competition for the lease-construction of the laboratory, as required by the United States Code and the Code of Federal Regulations

- "2. The Environmental Assessment, as supplemented, fails to consider the environmental impact of the discharge of wastes through a septic system into the groundwaters of the State of Maryland required by Woodbridge's offer, and therefore is inadequate.
- "3. GSA's failure to obtain any information to establish that Woodbridge is qualified financially and technically to perform the obligations of the award is a serious contravention of the Code of Federal Regulations, especially in light of facts which indicate that Woodbridge is not so qualified.
- "4. Over an 18-month period GSA sought detailed and varied data from ATLP, presumably to gather information and to validate assumptions and estimates for the benefit of GSA and the successful offeror; hence GSA negotiated with ATLP in bad faith."

In its most recent submission to this Office, ATLP has also presented a claim in the amount of \$22,536 for its expenses incurred during the course of negotiations with GSA and an additional \$40,000 for one-fourth of its anticipated profit of \$160,000 which ATLP feels it should recover as the result of GSA's alleged bad faith negotiations.

Because ATLP's letter of July 8 purported to provide "further details" of its bases of protest, suggesting that certain of ATLP's objections might have been communicated to the GSA prior to this letter, we requested GSA to provide a report on ATLP's protest by letter dated July 14, 1977. Despite repeated inquiries, GSA's report in response to our request was not received in our Office until March 21, 1978. We are by separate letter of today commenting to the Administrator, General Services Administration, regarding the delay in obtaining the agency's report. The report questions the timeliness of ATLP's protest. GSA argues that ATLP's protest is

wholly untimely because the documents necessary to establish the bases therefor were available to ATLP on or before May 26, 1977, and ATLP submitted no protest on these bases until its letter of July 8, 1977. Conversely, ATLP argues that its initial general protest filed with the GSA within 2 days of the award to Woodbridge was sufficient to "perfect" its protest and that its protest therefore is timely. Alternatively, ATLP contends that the extended delays in the negotiation and protest process attributable to GSA require a ruling that GSA has no standing to raise the timeliness issue and, furthermore, that GSA never indicated to ATLP that speedy particularization of the bases of the protest was necessary. ATLP also states that some of the bases for its protest were made clear in a meeting on April 14, 1977, with members of the GSA staff, including questions pertaining to the technical competency of Woodbridge and the lack of responsiveness of the Woodbridge bid to the specifications. (We note that the last asserted basis for protest has apparently been abandoned since ATLP has not raised this question before this Office.)

We note at the outset that ATLP's objection to the qualifications of Woodbridge is essentially a protest against an affirmative determination of Woodbridge's responsibility. This Office no longer reviews protests against affirmative determinations of responsibility absent certain conditions not present here. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. We also have held that the question of the sufficiency of an agency's impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970), is inappropriate for our review. Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329. Accordingly, these bases of ATLP's protest are dismissed.

Turning to the question of timeliness, we find no merit in ATLP's contentions that GSA has no standing to question the timeliness of ATLP's protest and that GSA failed to inform ATLP of the necessity for speedy particularization of the bases of its protest. Our Bid Protest Procedures provide

objective criteria for application by this Office to all protests before us and may not be waived by a contracting agency. With regard to ATLP's second contention, we need note only that protesters are charged with constructive notice of the contents of our Bid Protest Procedures since they have been published in the Federal Register, 40 Fed. Reg. 17979, April 24, 1975. See DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. We find no basis here to excuse an untimely presentation of ATLP's bases for protest.

As a general rule, we have viewed the question of the timeliness of specific bases of protest raised after the filing of a timely initial general protest to revolve around that relationship the later-raised bases bear to the initial protest. See Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 12. Where the later bases have presented new and independent grounds for protest, we have considered that they must independently satisfy the timeliness criteria of our Bid Protest Procedures, 4 C.F.R. part 20 (1977). See State Equipment Division of Secorp National Inc., B-186404, September 22, 1976, 76-2 CPD 270; Consolidated Airborne Systems, Inc., B-184369, October 21, 1975, 75-2 CPD 247. Conversely, where the later bases have merely provided additional support for earlier timely raised objections, we have considered these additional arguments in our evaluation of the protest. Kappa Systems, Inc., supra. In this connection, our Bid Protest Procedures provide in part:

"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) * * *." 4 C.F.R. § 20.2(a) (1977).
(Emphasis added.)

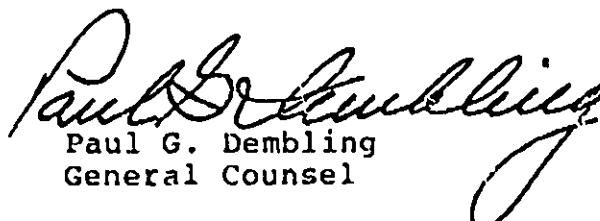
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"[b](2) * * * bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier." 4 C.F.R § 20.2(b)(2) (1977).

We consider the objections raised in ATLP's letter of July 8 to constitute new and independent bases of protest rather than additional supporting material for earlier timely objections. In that regard, the March 16 letter stated that ATLP had been advised that its offer had not been accepted and that award had been made to another offeror and the name and details of the offer had been withheld. Beyond that ATLP requested that it be furnished documentation of the offers received and merely protested the action by GSA "in failing to award this contract to it." However, the tenor of the July 8 letter was that no award should have been made because of deficiencies in the procurement procedures. The information underlying the bases of protest espoused in its letter of July 8, 1977, was made available to it on or before May 26, 1977, more than 10 working days prior to the date on which this letter was filed with either our Office or GSA. Consequently, we must conclude that these bases of protest are untimely and not for consideration.

Furthermore, the consideration of ATLP's claim for proposal preparation costs necessarily would involve our consideration of the same issues which we found untimely above. In these circumstances, we do not consider it appropriate for this Office to consider ATLP's claim because to do so would permit ATLP to circumvent the requirements of our Bid Protest Procedures for the timely submission of protests.
DWC Leasing Company, B-106481, November 12, 1976,
76-2 CPD 404.

In view of the foregoing, the protest and claim are dismissed.


Paul G. Dembling
General Counsel