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DECISION



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

FILE: B-211282

DATE: July 28, 1983

MATTER OF: Experimental Pathology Laboratories, Inc.

DIGEST:

Where firm delayed 3 months in furnishing support for its initial protest to the contracting agency, protest filed with GAO more than 4 months after initial protest was filed, during which time the agency supported continued performance of 12-month contract by another firm, is dismissed as untimely, since the protester did not diligently pursue the matter.

Experimental Pathology Laboratories, Inc. (EPL) protests the award of a contract to Pathology Associates, Inc. under request for proposals (RFP) No. CI-82-0301 issued by the Environmental Protection Agency (EPA) for pathology services to support an environmental health research program. EPL essentially contends that EPA failed to evaluate the proposals properly. We dismiss the protest because it is untimely under our Bid Protest Procedures.

The contracting officer advised EPL of the award to Pathology Associates by letter dated September 29, 1982. EPL immediately contacted the contracting officer and requested a debriefing conference, which was held on October 27. According to the protester, the debriefing conference provided the first opportunity for it to learn the basis for its protest. On November 10, EPL filed a timely protest with the contracting officer, contending that six specific violations of applicable procurement regulations and procedures rendered the award to Pathology Associates improper. EPL requested that the contracting officer "negotiate a suspension of the contract."

Under EPA procurement regulations at 41 C.F.R. § 15-2.407-8 (1982), when a protest is received by the contracting officer, he is required to prepare a protest file and forward it, through procurement channels, to the Director of EPA's Contracts Management Division. Among

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the items required to be in the protest file are a statement by the contracting officer of the facts and circumstances surrounding the protest, including a discussion of the merits addressing each allegation of the protest; the contracting officer's conclusions and recommendations with respect to the protest; and a statement by the appropriate Director of Contracting Operations.

By cover letter dated December 21, 1982, the contracting officer sent EPL a copy of the protest file, which included a lengthy "Memorandum of Contracting Officer's Findings, Conclusions, and Recommendations." In this memorandum, the contracting officer responded to each objection raised by EPL, and found each to be without merit. The file also contained a statement from the Director, Contracts Management Division, Cincinnati, that he concurred with the contracting officer's findings and found no merit to the protest. The December 21 letter from the contracting officer to EPL advised that the firm could forward any comments it had in regard to the protest file to EPA's Procurement and Contracts Management Division in Washington, D.C., addressed to the attention of the Acting Director.

The protester states that its secretary then contacted someone at EPA, and was informed that the contracting officer's recommendations were not the agency's final decision. EPL then informed EPA that it would file comments on the contracting officer's recommendations. Meanwhile, Pathology Associates continued to perform under its contract.

EPL did not file its comments on the protest file with EPA until approximately 3 months later, on March 15, 1983. The reason for the delay, according to the firm, was that EPA did not advise EPL of any time limits for filing comments on the protest file. Meanwhile, on March 11, EPA sent a letter to EPL, signed by the contracting officer, denying its protest, which the protester received on March 15, the same day that it filed comments on the protest report. The letter advised that the protest had no merit based upon the contracting officer's findings, conclusions, and recommendations that had been forwarded to EPL on December 21, 1982, in response to EPL's six specific allegations. EPL states that upon

receipt of the letter, the firm contacted EPA and was informed that this was indeed the agency's final decision, even though it was signed by the contracting officer rather than by the Director of the Contracts Management Division. EPL protested to our Office on March 29.

Our Bid Protest Procedures provide that where a protest has been filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse action by the contracting agency on the protest filed at that level. 4 C.F.R. § 21.2(a) (1983). EPL argues that its protest to our Office is timely even though it delayed filing until it received the letter from EPA denying its protest, rather than within 10 working days after receiving the contracting officer's December 21 letter. EPL argues that it was not until March 15 when it received the contracting agency's "final decision, appealable to [the General Accounting Office (GAO)]." The protester states that the contracting officer's December 21 findings, conclusions, and recommendations cannot "even be remotely taken as a final denial of the protest (that would, in turn, have triggered our right to appeal to GAO)." EPL cites as authority for this position Federal Procurement Regulations (FPR) § 1-2.407-8(a) (1964 ed.), which provides:

"General. Contracting officers shall consider all protests or objections regarding the award of a contract, whether submitted before or after award. * * * The protester shall be notified in writing of the final decision on the written protest * * *."
(Emphasis added.)

The protester, however, misreads our Bid Protest Procedures. When a protest has been initially filed with the contracting agency, our Bid Protest Procedures do not permit a firm to delay filing its protest with our Office until it receives a final decision on the merits from the contracting agency. Rather, our Procedures caution protesters to file protests with our Office within 10 days after notice is received of an agency's "initial" action adverse to the protester. The purpose of this requirement is to afford protesters and interested parties a fair and timely opportunity to present their cases while minimizing the disruption of the Government's procurements. To that

end, we require that allegations of procurement irregularities be raised when corrective action, if necessary, is most practicable, and a final decision therefore simply is not required before a protester must file its protest with our Office. Verne Woodrow Contractor, Inc., B-184921, October 28, 1975, 75-2 CPD 259.

In any event, even if we were to agree with EPL that the December 21 letter from the contracting officer transmitting the protest file and recommending denial of EPL's protest was not initial adverse agency action, we have held that a firm is only entitled to wait a reasonable time for a contracting agency's response before, in order to be timely, it must file a protest to this Office. Security Assistance Forces & Equipment Export Corporation, B-200610, April 29, 1981, 81-1 CPD 329. Here, notwithstanding that a contract had been awarded, and presumably was being performed, EPL did not comment on the contracting officer's position until more than 3 months after being invited to do so, and allowed more than 4 months to elapse between the time of its initial protest with the agency and its protest with our Office. Indeed, EPL's protest to our Office was not even filed until 6 months of work had been completed in a 12-month initial performance period. See Singleton Enterprises, B-194491, April 18, 1979, 79-1 CPD 276. We have held that where a protest is filed with an agency and more than 4 months elapses without any response, the protest to our Office is untimely because the protest has not been diligently pursued. Wyatt Lumber Company, B-196705, February 7, 1980, 80-1 CPD 108; see also Chipman Van & Storage, Inc., B-205732, December 30, 1981, 81-2 CPD 515 (3 months). We do not believe that EPL diligently pursued its complaint.

EPL also complains that the Director, Contracts Management Division, did not review the merits of the protest. The file, however, indicates that he did review the merits of the protest and agreed with the conclusions of the contracting officer.

The protest is dismissed as untimely.

Harry R. Van Cleve
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Acting General Counsel