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DECISION

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

FILE: B-218545.2 **DATE:** May 22, 1985

MATTER OF: Bromion Incorporated--Request for Reconsideration

DIGEST:

1. Untimely protest will not be considered under significant issue exception to GAO's timeliness rules where the issue, that the specifications were inadequate to meet the agency's minimum needs, is one that GAO has previously considered.

2. GAO will deny a request for reconsideration where no new facts or legal arguments are raised which show that a prior decision was erroneous.

Bromion Incorporated (Bromion) requests reconsideration of our decision in Bromion Incorporated, B-218545, May 2, 1985, 85-1 C.P.D. ¶ ____, dismissing a protest against the award of a contract to Technology Research Corporation (TRC) under invitation for bids No. DAAJ10-84-B-A323, issued by the Department of the Army's (Army) United States Army Troop Support Command (TROSCOM) for watt transducers. We deny the request for reconsideration.

Under the solicitation as amended, bid opening was scheduled for 2 p.m., February 14, 1985. By a February 13 letter to contracting officials, with a copy to the commanding general of TROSCOM, Bromion protested that the specifications were inadequate to meet the Army's minimum needs. By letter of March 4, the contracting officer denied Bromion's protest. After award was made to TRC on March 6, Bromion filed a protest with our Office.

In response to Bromion's protest, the Army reported that both the February 13 letter to contracting officials and the copy to the commanding general of TROSCOM were not received by TROSCOM until their delivery by Express Mail at TROSCOM's central mailroom at its St. Louis, Missouri, headquarters at 2:25 p.m. on February 14, i.e., after bid opening. In support of its claim, the Army submitted copies of Express Mail receipts which, as we indicated in our decision, "appear to support its claim."

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As we also indicated in our decision, our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985), provide that where a protest has been filed initially with the contracting agency, a subsequent protest to our Office filed within 10 working days of actual or constructive knowledge of initial adverse agency action will be considered if the initial protest to the agency was timely filed. Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be timely. 4 C.F.R. § 21.2(a)(1). Since Bromion's initial protest concerned an alleged impropriety apparent prior to bid opening, but was not filed until after bid opening, we dismissed its protest to our Office.

In its request for reconsideration, Bromion points to our statement that the Express Mail receipts "appear to support" the Army's claim as to the time and date for receipt of Bromion's February 13 protest and asks whether there was any indication that the Army's claim "might not be all it 'appeared' to be."

Nothing in the record casts doubt on the Army's claim that the February 13 letters were received at TROSCOM's central mailroom at 2:25 p.m. on February 14. Our use of the word "appears" merely reflected the fact that while our copy of the Express Mail receipt for one of the letters clearly indicated delivery at 1425 hours (2:25 p.m.) on February 14, our copy of the receipt for the other letter was less clear, with the date obscured. Since, however, the Express Mail receipts were consecutively numbered, Nos. B18747027 and B18747028, and dispatched at the same time, and since the second receipt also indicated delivery at 1425 hours (2:25 p.m.), we concluded that the receipts supported the Army's claim that both letters were received at 2:25 p.m. on February 14. We note in this regard that Bromion has not disputed the Army's claim as to the time of receipt.

Bromion, however, contends that even if its initial protest to the agency was untimely, we should apply the "significant issue" exception to our timeliness rules, 4 C.F.R. § 21.2(c), and consider the merits of its subsequent protest to our Office. Cf. Technical Services Corporation, B-190942, Apr. 13, 1978, 78-1 C.P.D. ¶ 282. Bromion argues that the alleged deficiencies in the specifications it has identified reflect a pattern of Army noncompliance with Army directives and Army bias against Bromion, thus raising issues significant to the procurement system.

In order to invoke the significant issue exception, the subject matter of the protest not only must evidence a matter of widespread interest or importance to the procurement community, but also must involve a matter that has not been considered in previous decisions. We construe this exception strictly and use it sparingly to prevent our timeliness rules from being rendered meaningless. Scott Fischman Company-Request for Reconsideration, B-216671.2, Dec. 4, 1984, 84-2 C.P.D. ¶ 623; cf. Yardney Battery Division, Yardney Electrical Corporation, B-215349, Nov. 8, 1984, 84-2 C.P.D. 511. The protest here does not fall within the exception, since the issue of inadequate specifications, whether allegedly in excess of the agency's minimum needs, see Sunbelt Industries, Inc., B-214414.2, Jan. 29, 1985, 85-1 C.P.D. ¶ 113, or insufficiently restrictive to meet the agency's minimum needs, see Olson and Associates Engineering, Inc., B-215742, July 30, 1984, 84-2 C.P.D. ¶ 129, has been previously considered by our Office.

Moreover, we point out that, in the absence of evidence of possible fraud or willful misconduct by government officials, we have consistently refused to review allegations that a contracting agency should have used more restrictive specifications. See Olson and Associates Engineering, Inc., B-215742, supra, 84-2 C.P.D. ¶ 129 at 1-2. Likewise, we have held that the contention that specifications issued by a procuring activity are not consistent with agency policy is an internal matter to be resolved within the agency rather than by our Office. See SAFE Export Corporation, B-209391; B-209392, Dec. 20, 1982, 82-2 C.P.D. ¶ 554.

Since Bromion has failed to provide new evidence or legal arguments which show that our prior decision was erroneous, see Amarillo Aircraft & Sales, Inc.--Request for Reconsideration, B-214225.2, Nov. 28, 1984, 84-2 C.P.D. ¶ 582, we deny the request for reconsideration.

for Seymour Efros
Harry R. Van Cleve
General Counsel