

DECISION

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

FILE: B-221241.2

DATE: April 30, 1986

MATTER OF: Ardrox, Inc.

DIGEST:

A protest filed with the General Accounting Office following adverse agency action on a protest that was untimely filed with the contracting agency is untimely because the initial agency protest was not timely filed. The fact that the contracting agency considered the protest on the merits does not change this result.

Ardrox, Inc. protests the rejection of its proposal and the award of a contract to any other offeror under request for proposals (RFP) No. N00189-85-R-0005, issued by the Naval Supply Center, Norfolk, Virginia, for a fluorescent dye penetrant system. Ardrox contends that its proposed system meets the agency's needs and therefore its proposal should not have been excluded from the competitive range. Further, the protester objects to the award of a contract to any other firm because it argues that the awardee would have to incorporate a feature patented by Ardrox in order to meet RFP specifications.

The protest is dismissed as untimely.

The solicitation, first issued on October 18, 1984, required a penetrant system with two separate tanks, a penetrant tank, and a drip/drain tank to collect excess penetrant. The Navy received two proposals in response to the RFP, including one from Ardrox. While the proposals were being evaluated, because of changes in the configuration of the shop where the system was to be used, the Navy issued an amendment changing the specifications (the separate drip/drain tank was still required) and reopened the RFP to all offerors, establishing a new closing date of May 9, 1985. Nevertheless, by letter of April 30, Ardrox was informed of deficiencies in its proposal submitted in response to the original RFP. The letter noted the failure to propose a separate drip/drain tank as a deficiency.

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The initial offerors were given two opportunities to revise their proposals. Although the Navy informed Ardrox again that its first revised proposal did not offer separate tanks as required by the RFP, that firm's final revised proposal also did not meet the requirement. Consequently, Ardrox was informed, by letter of October 9, that its proposal had been excluded from the competitive range because it did not include the required separate drip/drain tank and for other technical deficiencies.

By letter dated October 25 to the contracting officer, Ardrox stated that the RFP was based on Ardrox's "Carousel" design penetrant system and indicated that certain features of that system, such as a multi-armed rotating ring type conveyor, were patented by Ardrox and asked that the situation be reviewed. On November 5, the contracting officer received another letter from Ardrox this time dated October 28, and designated as a protest. This letter again stated that the specifications were based on the Ardrox patented system and complained of Ardrox' exclusion from the competitive range for not proposing a system with separate tanks. The contracting officer denied Ardrox's protest by letter of January 8, 1986.

Prior to the Navy's denial of the protest, Ardrox protested to this Office on December 5, raising the same issues as in the agency level protest.

The Navy asserts that the protest to our Office is untimely because Ardrox's initial protest to the agency was filed more than 10 days after the firm knew its basis of protest. We agree with the Navy that the protest is untimely.

To be timely, a protest either to the contracting agency or to our Office must be filed within 10 days after the date when the basis of protest is or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). If a protest is filed initially with the agency, the subsequent protest filed here, to be considered timely, must meet two tests: it must be filed within 10 days of the protester's learning of adverse action on the protest filed with the agency, and the initial protest itself must have been timely filed. 4 C.F.R. § 21.2(a)(3). Here, while the first test is met,

the second test is not, and the fact that the agency considered the untimely protest on the merits does not alter the result, since our timeliness regulations may not be waived by action or inaction of a procuring activity. P & P Brothers General Services, B-219678, Oct. 22, 1985, 85-2 CPD ¶ 438.

We find the second test is not met because it appears that the protester did not protest to the agency within the required 10 days. The Navy informed Ardrox of the rejection of its proposal by letter dated October 9. Although the record does not show when that letter was received by the protester, we generally estimate that it takes about 1 calendar week for regular mail to arrive. T.S. Head & Associates, Inc., B-220316, Sept. 30, 1985, 85-2 CPD ¶ 368. Assuming that the protester received the rejection notice on October 16, Ardrox had until October 30 to protest. Ardrox' protest^{1/}, although dated October 28, was not received by the Navy until November 5. It therefore was timely.

To the extent that the protest can be interpreted as a complaint that the solicitation should have allowed the use of a single tank, the protest is also untimely since the requirement for separate tanks was apparent from the face of the original solicitation, and therefore, should have been protested prior to the initial closing date of November 19, 1984. 4 C.F.R. § 21.2(a)(1).

Although we dismiss the protest as untimely, we point out that the Navy's rejection of the Ardrox proposal appears to have been reasonable. The RFP clearly required that the system have a separate drip/drain tank and Ardrox does not deny that it did not intend to satisfy this mandatory requirement. See Digital Equipment Corp., B-207312, Aug. 9, 1982, 82-2 CPD ¶ 118.

^{1/} Ardrox' October 25 letter was not a protest since that letter merely asked that the contracting officer review the situation and did not indicate that it was a protest or request corrective action. Moreover, neither Ardrox nor the agency treated the letter as a protest.

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Finally, with respect to Ardrex's contention that patent infringement may result from performance under the awarded contract, this is not a proper basis of protest to our Office. The exclusive remedy for patent infringement by a government contractor is a suit against the government in the United States Claims Court. See Industrial Co-Generation Systems, B-216511, Oct. 9, 1984, 84-2 CPD ¶ 396.

We dismiss the protest.


Ronald Berger
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General Counsel