

DECISION



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

FILE: B-222429.2

DATE: May 5, 1986

MATTER OF: Hampton Roads Holdings, Inc.--Request for
Reconsideration

DIGEST:

Protest that agency provided insufficient time to revise proposals after altering a solicitation requirement, filed after the closing date for best and final offers, is untimely under GAO Bid Protest Regulations where protester had an adequate opportunity to protest prior to the closing date.

Hampton Roads Holdings, Inc. (Hampton), requests reconsideration of our decision in Hampton Roads Holdings, Inc., B-222429, Apr. 7, 1986, 86-1 C.P.D. ¶ _____. In that decision, we dismissed as untimely Hampton's protest, filed almost 1 month after the closing date for receipt of best and final offers, that the firm was provided insufficient time to submit its best and final offer in connection with request for proposals (RFP) No. N00033-86-R-4005, issued by the Military Sealift Command (MSC) for a berth for a training vessel. Hampton's best and final offer was submitted after the time specified for receipt of best and final offers and rejected by MSC as late.

Hampton had alleged that on February 24, 1986, only 1 day prior to the closing date, it received a letter from MSC advising offerors that the agency required a berth for a training vessel which provided "a minimum lateral clearance of 110 feet from the outboard side of the vessel." The firm complained that because of the inadequate time to respond to this requirement, it was forced to rely on a commercial carrier rather than the United States Postal Service to deliver its offer.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based upon alleged solicitation improprieties which do not exist in the initial solicitation, but are subsequently incorporated therein, must be

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filed not later than the next closing date for receipt of proposals. Institute of Gerontology, University of Michigan, B-205164, Mar. 3, 1982, 82-1 C.P.D. ¶ 191. We explained in our prior decision that an allegation of insufficient response time for best and final offers involves the type of impropriety contemplated by this requirement. Institute of Gerontology, University of Michigan, B-205164, supra. Therefore, since Hampton's protest was filed here after the closing date, we dismissed it as untimely.

On reconsideration, Hampton argues that its protest that it had insufficient time to submit its best and final offer is timely. Hampton maintains that our holding in Culligan, Inc., B-192581, Mar. 6, 1979, 79-1 C.P.D. ¶ 149, should apply here. In that case, we held that where the protester received an amendment which created the alleged solicitation defect 3 hours before bid opening, the filing requirement in 4 C.F.R. § 21.2(a)(1) was inapplicable because the protester did not have a reasonable opportunity to file its protest before bid opening. Instead, the protester was permitted to file its protest within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2).

Here, Hampton states that it submitted a protest with its best and final offer and also filed another agency-level protest only a few hours after the closing date. Therefore, the firm maintains that its agency-level protests were timely filed under 4 C.F.R. § 21.2(a)(2). Further, Hampton states that since it protested to this Office on March 21, 1986, within 10 working days after receiving MSC's March 11, 1986, denial of its agency-level protest, the firm's protest to our Office also is timely filed. 4 C.F.R. § 21.2(a)(3).

We have found timely protests against alleged solicitation defects filed after the closing date where the protester receives an amendment which creates the alleged defect too close to the next closing date to protest. See e.g. The Big Picture Company, B-210535, Feb. 17, 1983, 83-1 C.P.D. ¶ 166; Culligan, Inc., B-192581, supra. However, these cases are distinguishable from the present case because, as discussed below, Hampton was aware of the revised requirement several weeks prior to the closing date.

The protester's submissions show that during technical discussions, held on February 7, 1986, Hampton was advised of the 110-foot lateral clearance requirement. In fact, at that time, because the berth offered by Hampton provided only a 60-foot clearance, MSC required that Hampton obtain written permission from the Coast Guard for periodic obstruction of the channel in which Hampton's berth was located to meet the 110-foot clearance requirement. Hampton was advised that without such permission, its proposal would be technically unacceptable. Rather than change the location of its berth or protest the requirement at this time, Hampton elected to try to obtain the clearance permission from the Coast Guard. Hampton states that it changed the location of its berth on February 24, 1986, when it did not receive the clearance permission.

In our view, since Hampton was aware of the 110-foot clearance requirement on February 7, 1986, the firm had adequate time to protest by the February 25, 1986, closing date if it believed it did not have sufficient time to prepare and deliver its best and final offer. Therefore, we affirm our prior decision that Hampton's protest filed after the closing date is untimely.

Additionally, to the extent Hampton is alleging that the cover letter of its best and final offer which requested that MSC "solicit another round of best and final offers" constitutes a protest, a protest filed with a proposal is not a timely protest. Cosmos Engineering, B-217430, Jan. 18, 1985, 85-1 C.P.D ¶ 62.

Our prior decision is affirmed.

for Seymour Efron
Harry R. Van Cleve
General Counsel