



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tremco, Incorporated--Request for
Reconsideration
File: B-223623.2
Date: September 4, 1986

DIGEST

1. Dismissal of original protest is affirmed, and protest will not be considered on the merits, where protester failed to file protest within 10 working days of agency denial of firm's agency-level protest.
2. General Accounting Office (GAO) will not consider the merits of an untimely protest under either the significant issue or good cause exceptions to GAO timeliness requirements, since there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of a protest, and the protest does not present a unique issue of widespread interest to the procurement community.

DECISION

Tremco, Incorporated (Tremco) requests reconsideration of our decision in Tremco, Inc., B-223623, Aug. 20, 1986, 86-2 C.P.D. ¶ _____. We dismissed Tremco's protest as untimely because its protest was filed with our Office more than 10 working days after the contracting agency denied the firm's agency-level protest.

We affirm our decision.

On reconsideration, Tremco argues that its letter of March 7, 1986, which we concluded was a protest to the agency, was merely an inquiry which indicated Tremco's intent to protest if and when Tremco conclusively learned the contract was awarded to a nonresponsive bidder. Tremco argues it could wait until an award was made and then first seek information concerning the alleged improper award before filing its protest.

In our original decision we found that Tremco's letter of March 7 to the Federal Bureau of Prisons was a protest. In that letter Tremco asserted that the products bid by the proposed awardee failed to comply with the IFB specifications. The letter stated that if an award was made on the basis of a nonconforming bid, Tremco would not hesitate "to bring legal action" to block . . . a contract and further stated, "we trust you will govern yourself accordingly." Thus, we read the letter as expressing dissatisfaction with the proposed award and threatening further action if the agency failed to take corrective action to remedy the contemplated allegedly improper award. Although the protester characterizes its letter as an "inquiry," it did not solicit any information from the contracting officer but expressed dissatisfaction with the proposed agency procurement action and appeared to seek to influence the agency to take corrective action. Consequently, we think we properly considered the letter to be a protest. See Reeves Brothers, Inc.; H. Landau & Co., B-212215.2; B-212215.3, May 2, 1984, 84-1 C.P.D. ¶ 490. Furthermore, the Federal Bureau of Prisons' response to Tremco's letter acknowledged Tremco's "letter of protest concerning the anticipated award," and stated its claim was "without merit." Tremco did not in any way challenge the agency's characterization of its letter of March 7 as a protest.

Under these circumstances, we affirm our conclusion that the letter of March 7 constituted a protest and that the agency's letter dated March 27 was a denial of that protest. Accordingly, since Tremco filed its protest with our Office on July 14, well beyond the 10 day period permitted for filing under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1986), we properly concluded Tremco's protest was untimely.

In any event, even if we were to assume that the letter of March 7 was a letter of inquiry and not a protest, Tremco's protest to our Office is untimely. Tremco should have known its basis of protest upon receipt of the Federal Bureau of Prisons' letter of March 27, in which the agency advised Tremco of the agency's intent to award the contract "based on the lowest cost to the government" and also stated its view that all bids met the IFB requirements. Our Bid Protest Regulations provide that protests alleging other than solicitation improprieties must be filed within 10 working days of the date the basis for protest is first known or should have been known. 4 C.F.R. § 21.2(a)(2) (1986). Since Tremco knew its basis of protest, at the latest, on receipt of the March 27 letter from the agency and did not file here until July 14, the protest is untimely. We note that Tremco apparently filed a Freedom of Information Act (FOIA) request on April 16, which has not been answered. However, we have stated that if a protest is based upon facts of which the

protester is or should have been aware of before the FOIA request, we will consider the protest untimely. See Canberra Industries, Inc., B-213663, June 22, 1984, 84-1 C.P.D.

¶ 649. As stated above, Tremco's protest is based upon information it was aware of on or about March 29. In fact, it filed its protest before receiving the documents it requested (we note that Tremco advises it received many of the documents in the agency protest report) and was very specific in detailing the areas in which the awardee's bid was allegedly nonresponsive.

Tremco further contends that if its protest is untimely, we should consider the merits of its protest under the provision of 4 C.F.R. § 21.2(c), which states that an untimely protest may be considered for good cause shown or where the protest raises issues significant to the procurement system.

The good cause exception to the timeliness requirements is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. ABC Appliance Repair Service, B-221850, Feb. 28, 1986, 86-1 C.P.D. ¶ 215. That is not the case here.

The significant issue exception to our timeliness rules will be invoked only where the subject matter of the protest is of widespread interest or importance to the procurement community and involves a matter which has not been considered on the merits in a previous decision of this Office. Taurio Corp., B-219008.2, July 23, 1985, 85-2 C.P.D. ¶ 74. The subject matter of this protest--the allegation that the awardee's bid deviates from the IFB specifications--is a matter which we have previously considered (See, for example, Spectrum Communications, B-220805, Jan. 15, 1986, 86-1 C.P.D. ¶ 49) and since it involves only the evaluation of a particular bid, we do not consider the matter to involve an issue of significance to the Federal procurement system. Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394 at 6-7.

We affirm our decision.

for 
Harry R. Van Cleve
General Counsel