



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tate Engineering, Inc.--Request for
Reconsideration
File: B-227600.2
Date: August 21, 1987

DIGEST

Dismissal of protest as untimely is affirmed. Protester's position that award of contract and not the opening of bids constitutes initial "adverse agency action" in response to an agency-level protest of solicitation improprieties is contrary to express language of General Accounting Office Bid Protest Regulations and decisions.

DECISION

Tate Engineering, Inc., requests that we reconsider our dismissal of its protest as untimely in Tate Engineering, Inc., B-227600, July 28, 1987, 87-2 C.P.D. ¶ _____. For the reasons that follow, we affirm our dismissal.

The ground for Tate's protest is that the specifications for the repair of a boiler are unduly restrictive of competition in that they allegedly can be met by only one vendor. As we pointed out in our prior decision, although Tate filed a protest to that effect with the contracting agency before bid opening, the agency proceeded with bid opening and with the award of the contract to another firm in the face of Tate's protest. Although Tate further corresponded directly with the contracting agency between bid opening and award, the firm did not file a protest with our Office until 1 week after the contracting agency had formally denied its protest and advised it of the award to another bidder.

We dismissed Tate's protest on the basis that the opening of bids constituted initial action adverse to Tate's agency-level protest, an event which triggered the 10-working day period within which Tate would have to file a subsequent protest with our Office in order to be timely under our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(3) (1987). Since Tate's protest was not filed with us until almost 2 months after bid opening, we dismissed it as untimely.

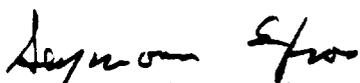
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Tate objects to our dismissal on the basis that it does not consider the opening of bids in the face of its agency-level protest to be "adverse agency action." Rather, it considers the award of the contract to be "adverse agency action" and argues that its protest is timely because it was filed with us within 10 days of when Tate was advised of the award.

In drafting our Bid Protest Regulations, we specifically considered, and addressed, situations such as Tate's. We emphasized that "adverse agency action" could consist of something less than the award of a contract and the need for protesters to timely file with our Office if a contracting agency took steps adverse to a protest then before it. We defined "adverse agency action" as:

" . . . any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. It may include but is not limited to: a decision on the merits of a protest; a procurement action such as the opening of bids . . .; the award of a contract. . . ." (Emphasis added).

4 C.F.R. § 21.0(e). Our decision in U.S. Elevator Corp., B-224237, Feb. 4, 1987, 87-1 C.P.D. ¶ 110, cited in our dismissal of Tate's protest, is only one recent example of numerous cases in which we have held that the opening of bids without taking the corrective action sought by the protester constitutes "adverse agency action" in response to a protest involving an apparent defect in the solicitation. Since Tate's position is contrary to the express language of our regulations and established caselaw it is without merit and our dismissal of its protest is affirmed.

for 
Harry R. Van Cleve
General Counsel