



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Joseph E. Carter--Reconsideration
File: B-227094.3
Date: December 22, 1987

DIGEST

1. Fact that protester is incumbent contractor does not in itself make it an interested party to protest subsequent solicitation.
2. Protester was not prejudiced by agency's failure to notify it that its best and final offer (BAFO) was late where the BAFO was not otherwise for consideration.
3. Where protester had insufficient time to respond to an amendment by closing it should have protested within 10 days of the receipt of the amendment and should not have waited until receiving notice of its rejection from the agency at a later time to then file its protest.
4. The General Accounting Office (GAO) will not consider the merits of an untimely protest under the significant issue exception to GAO's timeliness requirements where the protester is not an interested party.
5. The GAO will not consider the merits of an untimely protest under the good cause exception to GAO's timeliness requirements where there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of a protest.

DECISION

Joseph H. Carter (Carter) requests reconsideration of Joseph H. Carter, B-227094.2, Nov. 9, 1987, 87-2 C.P.D. ¶ _____, in which we dismissed Carter's protest of the award of a contract to A.M. Rieser, M.D., Inc. (Rieser), under solicitation for offers (SFO) No. GS-09B-86159, issued by the General Services Administration (GSA) for the 8-year lease of approximately 7,379 square feet of office space for a Social Security Administration (SSA) field office. We dismissed the protest because Carter did not file its protest within 10 working days after the basis of its protest was known or should have been known.

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Carter had received written notification of amendment No. 5 on June 25, 1987, 6 hours prior to closing. At that time Carter knew or should have known its best and final offer (BAFO) would not be received by GSA until after the time of closing. In fact Carter's BAFO dated June 29 was not received by GSA until June 30.

We held in our prior decision that Carter had 10 days from June 25 to file its protest that it was not given enough time to submit its proposal. We found Carter's protest late because it did not file its protest until July 20, more than 10 days after it had notice of the basis for its protest. Moreover, since Carter's BAFO and proposal properly were not for consideration, its protest alleging deficiencies in the awardee's proposal and GSA's evaluation of the awardee's proposal was dismissed as Carter was not an interested party under our Bid Protest Regulations, since there were two other offerors in the competitive range who had the requisite direct economic interest in the procurement to maintain a protest. 4 C.F.R. §§ 21.0(a) and 21.1(a) (1987).

Carter now contends that it is an interested party because it is the present lessor of office space to SSA. Carter also states that if its response to amendment No. 5 was late, then GSA failed to promptly notify it of this fact as is required by the Federal Acquisition Regulation (FAR), § 14.304-2 (1987)^{1/}. Moreover, Carter states that our prior decision assumes that the basis of protest runs from 10 working days of June 25, the date Carter received amendment No. 5. Carter states this assumption is in error since the basis of protest may also rest upon adverse agency action, which includes knowledge of award of a contract to another party and knowledge of rejection of an offer. Carter argues therefore, that since it first learned of the adverse agency action on July 14, 1987, when it was informed that the contract had been awarded to Rieser, its protest, filed on July 30, is timely.

Finally, Carter states that the facts of this case and the failure of GSA to follow the regulatory requirements provide sufficient good cause and raise issues significant to the procurement system which, under our Bid Protest Regulations, would permit this office to consider Carter's protest. 4 C.F.R. § 21.2(c). In this connection, Carter states the exceptions should be invoked because: no best and final offer was issued on equal terms and no common cut-off date or reasonable opportunity for response was provided to all

^{1/} This provision applies to sealed bidding. A similar provision at FAR, § 15.412(d) applies to competitive negotiation.

offerors; Rieser's BAFO was nonresponsive; the amount of time given Carter to respond to amendment No. 5 was too short; Carter's BAFO should be considered under FAR, § 14.304-1(d), 2/ allowing late modifications of otherwise successful bidders.

The mere fact that Carter was the lessor for the SSA field office does not in itself make it an interested party under our Regulations. 4 C.F.R §§ 21.0(a) and 21.1(a) supra. Moreover, even though an agency fails to promptly notify an offeror that its BAFO was received late and will not be considered, where the refusal to consider the late BAFO was proper, the offeror is not prejudiced by this failure. See Keco Industries, Inc., B-204869, Apr. 7, 1982, 82-1 C.P.D. ¶ 324.

With regard to whether the protest was received timely, Carter concludes that since the protest was filed within 10 days of notification of its rejection and the award to Rieser, it is timely. Our Regulations require, however, that protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). In this case Carter should have known that its basis of protest arose on June 25 upon receipt of amendment No. 5 when it knew it had insufficient time to send its BAFO to GSA by closing on the same day. Accordingly, Carter should have filed its protest within 10 days of June 25 and it could not await the later notice from GSA that its offer was rejected for being late. Joseph E. Carter, supra.

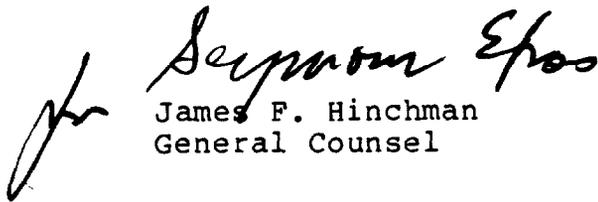
We consider untimely protests under the significant issue exception only when the matter raised is one of widespread interest to the procurement community and has not been considered on the merits in previous decisions. Dock Express Contractors, Inc.--Request for Reconsideration, B-223966.2, Mar. 4, 1987, 87-1 C.P.D. ¶ 243. The significant issue exception, however, does not pertain to or permit the consideration of a protest issue raised by a firm which is not an interested party under our Bid Protest Regulations for the purpose of filing a protest. Adrian Supply Co.--Reconsideration, B-225630.3, Aug. 7, 1987, 87-2 C.P.D. ¶ 136.

2/ This provision applies to sealed bidding. A similar provision at FAR, § 52.215-10(f) applies to competitive negotiation.

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. Tremco, Inc.--Request for Reconsideration, B-223623.2, Sept. 4, 1986, 86-2 C.P.D. ¶ 260. That is not the case here.

Finally, Carter's newly raised contention that its late BAFO should have been considered under the FAR's late modification rule was also not timely filed. 4 C.F.R. § 21.2(a)(2).

We affirm our prior decision.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel