



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Carlisle Tire and Rubber Company

File: B-235413.2

Date: August 18, 1989

DIGEST

1. Prior decision holding that where a firm initially file an agency-level protest against small business set-aside, the agency's receipt of proposals on the scheduled closing date without taking any corrective action in response to the protest constitutes initial adverse agency action, and therefore, subsequent protest to the General Accounting Office (GAO), 5 weeks later, is untimely under GAO's Bid Protest Regulations is affirmed.

2. Significant issue exception to the General Accounting Office's timeliness requirement will be invoked only where the protest involves a matter that has not been considered on the merits in previous decisions and which is of widespread interest to the procurement community.

DECISION

Carlisle Tire and Rubber Company requests reconsideration of our decision in Carlisle Tire & Rubber Co., B-235413, May 12, 1989, 89-1 CPD ¶ 457. In that decision, we dismissed Carlisle's protest of a small business set-aside under solicitation No. 7FXGC3-88-7801-B, for park and outdoor recreational equipment, issued by the General Services Administration (GSA), because Carlisle's protest was filed with our Office 5 weeks after initial adverse action was taken on its earlier protest filed with GSA and thus was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1988).

We affirm our prior decision.

Carlisle, a large business manufacturer of protective playground surfaces of the type included in the solicitation, did not qualify as a small business and therefore could not participate in the solicitation. On March 23, 1989, Carlisle filed a formal protest letter with GSA, protesting the small business set-aside. Carlisle asserted

that there would be insufficient competition among qualifying small businesses submitting proposals for protective playground surfaces and that the solicitation should be modified to a partial set-aside for playground equipment to permit Carlisle to compete for the protective playground surfaces requirement. Despite Carlisle's protest, the agency proceeded with the procurement and received proposals on March 28, 1989, at 4:15 p.m., the deadline for receipt of proposals established by the solicitation. Carlisle received GSA's response denying its protest on April 20, 1989. Subsequently, on May 4, 5 weeks after the deadline for receipt of proposals had passed, Carlisle filed a protest with our Office.

Our earlier decision stated that where a protest is first filed with a contracting agency, any subsequent protest to our Office, to be considered timely under our Bid Protest Regulations, must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). We held that the March 28, 1989, deadline for receipt of proposals was initial adverse agency action on Carlisle's agency-level protest. Carlisle now requests reconsideration of our earlier decision.

In its request for reconsideration, Carlisle alleges that GSA never advised Carlisle that it took any action prejudicial to Carlisle's protest prior to denying the protest. Consequently, Carlisle argues that adverse agency action occurred when Carlisle received the written denial of its protest. Carlisle contends that because it received GSA's denial on April 20, 1989, and filed a protest with our Office May 4, 10 working days later, its protest was timely.

Contrary to Carlisle's position, under our Bid Protest Regulations, adverse agency action may be inferred from either agency "action or inaction." 4 C.F.R. § 21.0(f). Included in that category of adverse agency action is "the receipt of proposals . . . despite the pendency of a protest." *Id.* In this case, Carlisle's agency-level protest requested that the solicitation be modified to allow Carlisle to participate in the procurement. When the scheduled time for receipt of proposals passed on March 28, 1989, without amendment of the solicitation pursuant to Carlisle's request, action that was clearly prejudicial to Carlisle's protest occurred. See Consolidated Indus. Skills Corp., B-231669, July 15, 1988, 88-2 CPD ¶ 58 (closing occurring 1 day following filing of agency-level protest constitutes initial adverse agency action).

Carlisle asserts that our Bid Protest Regulations allow us to exercise discretion in making a finding of adverse agency

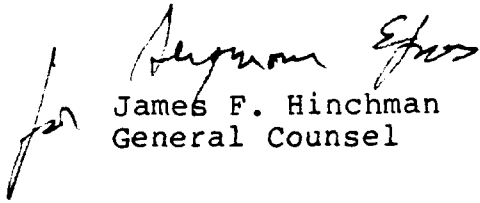
action since the adverse agency action definition states that: "[Adverse agency action] may include but is not limited to" 4 C.F.R. § 21.0(f). The word "may" is used in the definition of "adverse agency action" to provide for a situation where, for example, proposals are accepted on the closing date but the agency otherwise communicates to the protester that it does not consider this action as adverse to the protester and intends to consider the protest before proceeding further. It is our general view, however, that in the usual case the procuring agency's receipt of proposals on the scheduled closing date without taking any corrective action in response to an agency-level protest puts the protester on notice that the contracting activity will not take the requested corrective action and begins the running of the 10 day limitation period. Id. Carlisle presents no basis for not following our general rule here.

Alternatively, Carlisle argues that if we find that GSA's receipt of proposals at closing without taking corrective action constitutes initial adverse agency action, it had neither actual or constructive notice of such action. Carlisle refers to our Bid Protest Regulations, which state that where a protest has been filed with a contracting agency, any protest to our Office must be filed within 10 days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3).

Here, the solicitation contained the time and place for the receipt of proposals. Thus, Carlisle had actual notice, without an indication to the contrary from GSA, that initial adverse agency action had occurred on March 28, 1989.

Finally, Carlisle argues that, notwithstanding our earlier finding of untimeliness, we should address the merits of its protest because it raises issues of widespread significance to the procurement system. 4 C.F.R. § 21.2(b). Whether a protest presents a significant issue is necessarily determined on a case-by-case basis. We will, in a given case, invoke the exception when our consideration of the protest would be in the interest of the procurement system. See Hunter Environmental Servs., Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251. The exception is strictly construed and used sparingly to prevent our timeliness rules from being rendered meaningless. Id. Generally, it is our practice to review an untimely protest under this exception only when the protest presents an issue that has not been considered on the merits in a previous decision and is of widespread importance or interest to the procurement community. Oakland Scavenger Co., B-232958, Feb. 1, 1989, 89-1 CPD ¶ 101. We fail to see how this case would be of widespread significance to the procurement community since

it appears to affect only the protester's interest.
Therefore, we will not consider the protest under the
significant issue exception.

James F. Hinchman
General Counsel