



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Custom Programmers Inc.

File: B-235716

Date: September 19, 1989

DIGEST

Protest alleging an apparent solicitation impropriety filed after the closing date for the receipt of initial proposals is untimely where the contracting agency reports that it never received the protester's agency-level protest and the protester does not furnish any documentary proof that protest was initially filed at the contracting agency.

DECISION

Custom Programmers Inc., protests as unduly restrictive of competition the requirement that an offeror obtain an agreement from a federal prime contractor under request for proposals (RFP) No. RFP 89-10JL, issued by the Small Business Administration (SBA), for researching the commercial opportunities of small businesses.

We dismiss the protest as untimely.

SBA argues that Custom's protest is untimely because it concerns an alleged solicitation impropriety that was apparent from the face of the solicitation which should have been filed (received in our Office) prior to the closing date for the receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1989). The closing date for the receipt of initial proposals occurred on May 30, 1989, and Custom filed its protest in our Office on May 31, 1989.

Custom maintains that its protest was initially mailed to the contracting officer on April 17, 1989, and was mailed again on May 23 after it received no response from the agency. Custom contends that the protest is timely filed based on 4 C.F.R. § 21.2(a)(3), which provides for considering a protest initially filed at the contracting agency if filed with our Office within 10 working days of formal

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notification of or constructive knowledge of initial adverse agency action. The SBA contends that this timeliness rule does not govern Custom's protest because SBA never received the protest and Custom has failed to submit any proof that the SBA actually received the letter. In a sworn statement, the contracting officer states that it did not receive any letters or telephone calls from Custom during the period prior to the closing date. Moreover, the SBA contends that even if the letter had been received, it cannot legitimately be considered a protest because it does not contain the actual word "protest" and merely poses several questions concerning the specification.^{1/}

Although we believe that Custom's letter of April 17 met the definition of a protest in Federal Acquisition Regulation (FAR) § 33.101 (FAC 84-40), which is a written objection by an interested party to a solicitation, we do not find that the letter may properly serve as the basis for determining the timeliness of Custom's protest filed in our Office. The timeliness rule contained in 4 C.F.R. § 21.2(a)(3) is contingent upon the protester initially filing a timely protest at the contracting agency. Our regulations define the term "filed" regarding a protest to our Office as meaning receipt of the protest in our Office. 4 C.F.R. § 21.0(g). To determine when a protest was filed in our Office, we rely upon our time-date stamp, unless there is other evidence to show actual earlier receipt. See The Richard-Rogers Group, Inc.--Request for Reconsideration, B-234141.6, Feb. 22, 1989, 89-1 CPD ¶ 194; Kaneohe Gen. Servs.--Request for Reconsideration, B-233358.2, Nov. 28, 1988, 88-2 CPD ¶ 522. Thus, we have held that neither the fact that the protest was mailed, nor the date it was mailed, is relevant to its timeliness; a protester makes use of the mails, including certified mail at its own risk, and a delay in the mails does not serve as a basis for waiving our regulations and considering an untimely protest. The Richard Rogers Group, Inc.--Request for Reconsideration, B-234141.6, supra. We believe that the same standard should obtain for a protest initially filed at the contracting agency, and that documentary evidence is necessary to prove a protest was initially filed at the contracting agency where the agency denies its receipt.

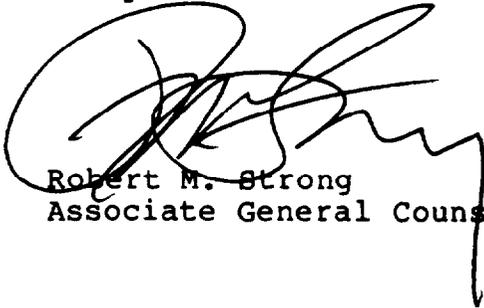
Custom alleges that its protest was twice mailed to the SBA but has furnished no documentary evidence to show that its protest was actually received by the SBA. Since the SBA reports that it never received Custom's protest, we have no

^{1/} SBA was furnished a copy of the letter in connection with the protest filed in our Office.

basis to conclude that it was received by the agency. Therefore, we find Custom's protest of an alleged solicitation impropriety to be untimely because Customs has not established that its protest was initially filed at the SBA prior to the closing date.

Finally, we note that Custom contends that the protest should be considered under our significant issue exception to our timeliness rule. 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. Oakland Scavenger Co.-- Request for Reconsideration, B-232958.2, June 1, 1989, 89-1 CPD ¶ 541. Here, we do not believe that considering a protest against an allegedly unduly restrictive solicitation specification which is particular to this single procurement would be in the interest of the procurement system so as to justify invoking the exception.

The protest is dismissed.



Robert M. Strong
Associate General Counsel