

Ms. Perry



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W. D. McCullough Construction Company and M&A
Equipment and Constructors Inc., a joint
venture--Request for Reconsideration

File: B-238460.2

Date: March 5, 1990

W. D. McCullough, for the protester.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Reconsideration of prior dismissal of protest as untimely is
denied where protester fails to show any error of fact or
law that would warrant reversal or modification of prior
decision.

DECISION

The joint venture of W. D. McCullough Construction Company
and M&A Equipment and Constructors Inc. (McCullough)
requests that we reconsider our decision in W. D. McCullough
Constr. Co. and M&A Equip. and Constructors Inc., a joint
venture, B-238460, Feb. 8, 1990, 90-1 CPD ¶ _____ where we
dismissed as untimely McCullough's protest challenging its
rejection as nonresponsible under invitation for bids (IFB)
No. DACW56-90-B-0003, issued by the Department of the Army
for embankment rehabilitation of Wister Lake, Poteau River,
Oklahoma.

We affirm the dismissal.

McCullough's rejection as nonresponsible was based on the
contracting officer's determination that its proposed
individual sureties were nonresponsible. On December 10,
1989, McCullough was orally notified by the contracting
officer that its bid was going to be rejected because its
individual sureties were determined to be unacceptable.1/

1/ McCullough received the written notification that its bid
was rejected on December 14.

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The protester filed an agency-level protest on that same day. The contracting officer met with McCullough on December 15, and during this meeting informed the protester that he was abiding by his decision.

McCullough then filed a "reiteration" of its first protest, again at the contracting agency, on December 18, and sent a copy to our Office, which we did not receive until January 11, 1990.^{2/} In response to this letter, we sent the protester a letter which stated that we were treating its correspondence to us as an information copy of an agency-level protest, and pointed out that any subsequent protest to the General Accounting Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1989). (Contrary to what McCullough now argues, this letter did not "solicit" the filing of a protest with our Office such that any timeliness defects should be waived.)

On January 31, McCullough filed a protest in our Office challenging the contracting officer's rejection of its bid. We dismissed the protest as untimely on February 8, because it was filed more than 10 days after the meeting of December 15, where the contracting officer told McCullough that he was abiding by his original determination that the proposed individual sureties were nonresponsible.

On February 20, McCullough requested that we reconsider our dismissal on the basis that the contracting agency had not yet formally denied McCullough's agency-level protest. Specifically, McCullough disagrees with our characterization of the statements made by the contracting officer during the December 15 meeting as initial adverse agency action, and argues that the only thing accomplished at that meeting was the contracting officer's failure to get McCullough to withdraw its protest.^{3/}

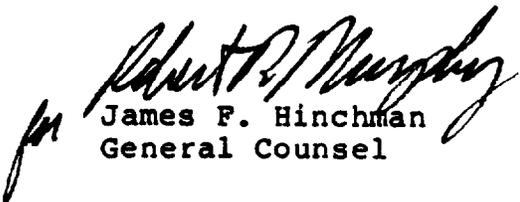
^{2/} We received the copy of McCullough's agency-level protest approximately 3 weeks after it was sent because McCullough sent it to our Seattle Regional Office, which then forwarded it to our Office in Washington, D.C.

^{3/} On February 26, McCullough supplemented its request for reconsideration by protesting the award of the contract to the second low bidder, of which it was allegedly informed on February 20. In this supplement, however, McCullough simply reasserts its original basis for protest: that the rejection of its own bid was improper because its sureties are responsible.

The General Accounting Office will not consider a request for reconsideration where the protester does not specify any error of law made or information not previously considered which would warrant reversal or modification of our earlier decision. Bid Protest Regulations, 4 C.F.R. § 21.12(a); Roth Bros., Inc.--Reconsideration, B-235539.2, Sept. 15, 1989, 89-2 CPD ¶ 233. The only error specified by McCullough is a factual one--that a letter of December 22 in which, we stated, the contracting officer "confirmed" his December 15 denial of the protester's agency-level protest, actually concerned the Army's rejection of a McCullough bid under a different procurement of levee repairs, because of McCullough's use of the same two individual sureties as here. McCullough is correct in that the December 22 letter pertains to another procurement. Since our dismissal was based on the December 15 meeting as the initial adverse agency action, and our reliance on the December 22 letter was only as confirmation of the December 15 denial, this mistake does not warrant reversal or modification of earlier decision. The essence of McCullough's remaining basis for reversal of our dismissal, therefore, is its disagreement with our decision on the effect of the December 15 meeting.

We are not persuaded by McCullough's contention that the December 15 meeting did not constitute initial adverse agency action. Initial adverse agency action is, by definition, the first action a contracting agency takes, after it is in receipt of the agency-level protest, which is adverse to the protester's position, regardless of whether that action is the official denial of the agency-level protest. 4 C.F.R. § 21.0(f); see Discount Mach. & Equip., Inc.--Reconsideration, B-233541.2, Apr. 3, 1989, 89-1 CPD ¶ 341. Since, while in possession of McCullough's agency-level protest, the contracting officer informed McCullough that he was abiding by his initial decision, this constituted the initial adverse agency action under our Regulations, and to be timely, McCullough was required to file here within 10 days after that date, notwithstanding the contracting officer's alleged statements concerning further agency review of McCullough's protest.

Accordingly, the request for reconsideration is denied.


James F. Hinchman
General Counsel