



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kimmins Thermal Corporation--Reconsideration

File: B-238646.4

Date: January 31, 1991

Thomas Richelo, Esq., Peterson Dillard Young Self & Asselin, for the protester.

C. Stanley Dees, Esq., and Charlotte D. Young, Esq., McKenna & Cuneo, for Weston Services, Inc., an interested party.

Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Dismissal of protest as untimely is affirmed where protester fails to show that General Accounting Office conclusion as to when protester learned of basis for protest was based on error of fact or law.

DECISION

Kimmins Thermal Corporation requests that we reconsider our decision, Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198, in which we dismissed as untimely its protest of the award of a contract to Weston Services, Inc., under request for proposals (RFP) No. DACA41-90-R-0004, issued by the U.S. Army Corps of Engineers for construction of a transportable incineration system for explosives-contaminated soils. Kimmins alleges that our decision contains errors of fact and law as to the time it learned of its basis for protest.

We affirm the decision.

Kimmins' protest claimed that award to Weston was improper because of an alleged organizational conflict of interest. As background, the Corps originally determined that Weston was ineligible for award because its parent company, Roy F. Weston, Inc., had held three previous contracts involving design-related work on the incineration system, creating an organizational conflict of interest and affording Weston an unfair competitive advantage. Following a protest by Weston to our Office, the Corps reconsidered its position and determined that it would be in the best interest of the government to evaluate Weston's proposal. Weston accordingly

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withdrew its protest. During the week of May 21, 1990, in the course of a telephone conversation with a contracting specialist, Kimmins was advised that the agency had decided to consider Weston's proposal. Following discussions and two rounds of best and final offers, the agency determined that Weston's proposal was most advantageous to the government, and awarded the contract to Weston on June 27. Kimmins filed its protest against this award on July 6.

We dismissed the protest as untimely filed, finding that Kimmins did not file its protest within 10 days after it learned of its basis for protest, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990). In this regard, we noted that a protester is charged with knowledge of its basis of protest at the point where agency personnel convey to the protester the agency's intent to follow a course of action adverse to the protester's interests. MIDDCO, Inc.--Recon., B-235587.2, Oct. 31, 1989, 89-2 CPD ¶ 402. We concluded that Kimmins had learned of the agency's intent to pursue a course of action contrary to its interests during the week of May 21 when the contracting specialist informed Kimmins that the agency had decided to consider Weston's proposal for award. As Kimmins did not file its protest within 10 working days after May 25 (i.e., the last day of the week of May 21), we concluded that the protest was untimely.

In its request for reconsideration, Kimmins reiterates its argument that its basis of protest did not arise until it learned of the award to Weston. While Kimmins concedes that it learned during the week of May 21 of the agency's decision to evaluate Weston's proposal, Kimmins contends that this decision did not amount to a determination that Weston would be considered for award, and concludes that it did not have knowledge of a course of action that could result in an award to Weston. We disagree.

First, we reject Kimmins' argument that its knowledge that Weston's proposal would be evaluated did not amount to knowledge that it would be considered for award. Kimmins concedes that it knew that the agency planned to evaluate a proposal that it had previously found ineligible for award. The agency clearly would not have effected such a change in position unless it had determined that the proposal was eligible for award. Indeed, Kimmins was aware that the agency's decision to evaluate Weston's proposal was made in response to Weston's protest of the agency's initial finding of ineligibility; it therefore should have known that the agency now considered Weston eligible for award. To reiterate the fundamental basis of our prior decision, it is our view that a protester's knowledge that an agency has decided to evaluate for award a proposal it previously rejected for a

specified reason constitutes notice that the agency no longer considers the proposal unacceptable for the specified reason.

Kimmins asserts that it did not know the Corps considered Weston eligible for award because it did not know that Weston had withdrawn its protest in response to the Corps' decision to consider its proposal; Kimmins states that it assumed the issue of Weston's eligibility was undergoing review by our Office. This argument is untenable; Kimmins' knowledge of the Corps' decision is unaffected by Weston's particular response to that decision. Moreover, Kimmins should have known that Weston's protest was no longer before our Office. That protest, of which Kimmins was furnished a copy, requested that we direct the Corps to evaluate its proposal. In deciding to evaluate Weston's proposal, the Corps granted the requested relief; therefore, no useful purpose would have been served by our consideration of the matter. See, e.g., Hawthorne Power Sys., B-238447, May 8, 1990, 90-1 CPD ¶ 459.

The prior decision is affirmed.


Ronald Berger
Associate General Counsel