



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eurometalli s.p.a.

File: B-250522

Date: November 20, 1992

Charles D. Ablard, Esq., Faegre & Benson, for the protester. Mjr. Bobby G. Henry, Jr., Department of the Army, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging nonresponsibility determination is dismissed as untimely where protest documents contain conflicting statements regarding timeliness of protest, and protester fails to explain the "clerical error" which it alleges as the cause of this discrepancy; since initial protest submission contains un rebutted contemporaneous evidence establishing that agency-level protest was filed more than 10 days after the protester received separate written and oral notice of its nonresponsibility determination, subsequent protest to this Office is untimely.

DECISION

Eurometalli s.p.a. protests the determination by the Department of the Army that it is not a responsible prospective contractor under request for proposals (RFP) No. DAJA02-92-R-0037, issued by the Army's Europe Regional Contracting Office, Vincenza, Italy, for the severing and demilitarization of 633 battle tanks.

We dismiss the protest.

The RFP was issued to 36 prospective offerors on July 7, 1992, and provided that award would be made to the lowest priced, technically acceptable, responsible offeror. By the July 22 closing date, 12 offers were received; although Eurometalli was the lowest priced offeror, the Army rejected the firm for award based on the agency's determination that the firm was nonresponsible.¹ On August 7, the contracting

¹This nonresponsibility determination was made on July 27.

officer issued a letter to Eurometalli, advising the firm that it had been determined nonresponsible and could therefore "no longer be considered for award"; that same day, the agency selected another company, Omtes Sud, for contract award. On September 25--after several rounds of oral and written discussions with the agency--Eurometalli filed this protest with our Office.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based on other than an apparent solicitation impropriety--such as Eurometalli's challenge to the agency's nonresponsibility determination--must be filed within 10 working days from when the protester first knew or should have known its basis for protest. 4 C.F.R. § 21.2(a)(2) (1992). Our Regulations further provide that a matter initially protested to the agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3).

With respect to the timeliness of its protest to this Office, Eurometalli asserts that "it was first informed of the basis for the rejection of its [offer] at an August 24 meeting with the contracting officer." However, in a November 9 request for dismissal, the Army argues that the contracting officer's August 7 letter sufficiently apprised Eurometalli of the basis for its nonresponsibility determination. In this regard, the August 7 letter provides in relevant part:

"The [c]ontracting [o]fficer has determined your firm to be non-responsible based on an assessment of the criteria set forth in [Federal Acquisition Regulation (FAR) §] 9.104-1.

"Your firm was determined to have numerous production and facilities deficiencies which considered in the aggregate resulted in a summary determination of non-responsibility when measured against the responsibility criteria of FAR [§] 9.1 such that your firm can no longer be considered for award."

Although Eurometalli argues that it could not know the basis for its protest until it met with the contracting officer on August 24, given the language of the contracting officer's August 7 notification letter, we find that Eurometalli should have ascertained its basis for protest upon receiving this letter. In its current protest to this Office, Eurometalli asserts that the contracting officer's nonresponsibility determination is erroneous since no pre-award survey of Eurometalli's facilities was conducted; in

this regard, Eurometalli contends that it has been "continually upgrading its facilities" since participating in this requirement's predecessor procurement. As noted above, the contracting officer's letter clearly advised Eurometalli that it was determined nonresponsible due to "production and facilities deficiencies"; further, at the time it received this letter, the protester also knew that no recent pre-award survey had been conducted at its facilities. Under these circumstances--and given the protester's current allegations--we find that Eurometalli was required to file its protest against the agency's nonresponsibility determination within 10 working days of its receipt of the contracting officer's letter. See The Jonathan Corp., B-247053.7, May 15, 1992, 92-1 CPD ¶ 446; Mantech Tech. Servs. Corp.--Reccn., B-244240.5, Dec. 6, 1991, 91-2 CPD ¶ 517; Swafford Indus., B-38055, Mar. 12, 1990, 90-1 CPD ¶ 268.

With regard to when it received the August 7 letter, Eurometalli has presented conflicting accounts. In its September 25 protest to this Office, Eurometalli claims that it received the contracting officer's letter on August 17.¹ However, in a September 2 letter to the contracting officer--which was included in its September 25 protest as attachment 3--Eurometalli stated:

"On August 8, 1992, 10 days after the acknowledgement of our offer, instead of the invitation to the discussions we reasonably expected, we received your letter stating that our firm had been determined to be non-responsible after an assessment of the criteria set forth in FAR [S] 9.104-1." (Emphasis added.)

In the same September 2 correspondence, Eurometalli further asserted that:

"On August 11, 1992, [the contracting officer] advised us that award had been made to OMTES-Sud 'whose proposal has been determined to be more advantageous to the [g]overnment', the contract amount being Lire 4.940.565.000."

In its comments on the agency's request for dismissal, Eurometalli claims that the August 8 receipt date indicated in its September 2 correspondence "was a clerical mistake." To support this assertion, the protester has submitted an

¹Eurometalli's September 25 protest letter states that "[i]t first heard of the 'non-responsibility' determination on August 17, 1992, when it received the [c]ontracting [o]fficer's letter"

affidavit from its General Manager which presents a different series of events from those set forth in the September 2 letter; according to this new chronology, after delivering its offer to the contracting officer on July 22, the protester did not have any contact with the agency until August 10--when the General Manager claims to have left a telephone message for the contracting officer, requesting the award results. After this date, the General Manager asserts that Eurometalli's office was closed for a religious holiday, and, accordingly, the protester did not hear from the agency regarding its August 10 telephone request until August 17, when the protester's office reopened and the contracting officer's August 7 letter was received. The General Manager further asserts in his affidavit that "[t]he two dates of August 8 and August 11 referred to at page 4 of the September 2 . . . legal writ were a mistake because we received the documents only on August 17, 1992." We find this account unpersuasive.

In its September 25 protest to this Office, Eurometalli initially identified the September 2 correspondence as its agency-level protest; however, in its comments, the protester now contends that the September 2 letter merely constitutes a "legal writ" intended to supplement an agency-level protest which was received by the contracting officer on August 27.³ Whether we view Eurometalli's September 2 letter as an agency-level protest or a supplement to the August 27 letter, both of the protester's explanations--as well as the correspondence itself--clearly indicate that this document was carefully drafted with the intent of presenting correct, detailed factual grounds to support Eurometalli's agency-level protest, including a specific,

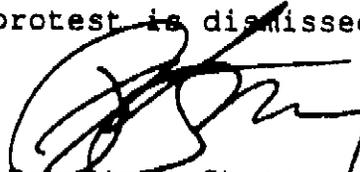
³The record shows that on August 24--immediately after the agency's conference with Eurometalli--the contracting officer wrote a letter--received by the protester on August 25--which reiterated the basis for the agency's determination that Eurometalli was nonresponsible. In response, Eurometalli sent a letter to the contracting officer which was received by the agency on August 27; by letter dated August 28, the contracting officer advised Eurometalli that this correspondence was insufficient as a protest since:

"[Y]our protest among other omissions does not include a detailed statement of the legal and factual grounds for the protest, including copies of relevant documents nor a statement as to the relief requested. I therefore assume that this information will be provided in the legal writ to which you refer in your letter and of which you state will be following in due time."

chronological outline of the events which transpired between the agency and Eurometalli from December 1991 until the August 11, 1992, conversation with the contracting officer.

A protester has the obligation to provide information establishing the timeliness of its protest when on its face the protest otherwise appears untimely. See Quantum Research, Inc., B-242020, Mar. 21, 1991, 91-1 CPD ¶ 310. Here, the protester has not attempted to explain or provide any details regarding the alleged "clerical mistake" which it contends resulted in its inconsistent statements regarding receipt of the Army's August 7 letter; nor do we see any basis in the record for such an error. Absent such an explanation, we fail to see how the detailed narrative provided in the September 2 correspondence could result from a clerical error. Under these circumstances, we find that, on balance, the September 2 letter--an unrebutted, contemporaneous document--establishes that the protester received the contracting officer's letter on August 8. See Rapides Regional Med. Center, B-242601, Feb. 12, 1991, 91-1 CPD ¶ 159; Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398. Since Eurometalli did not file its agency-level protest until (at the earliest) August 27--more than 10 working days later--its subsequent protest to this Office is untimely.

The protest is dismissed.


Robert M. Strong
Associate General Counsel

In its comments, the protester asserts that it received a facsimile transmission of the contracting officer's August 7 letter on August 14. The protester has not provided a copy of the facsimile transmission of this letter--which would verify the alleged facsimile receipt date. The Army has informed this Office that it facsimiled the contracting officer's August 7 letter to Eurometalli on August 8; Eurometalli's initial presentation of events--set forth in the September 2 letter--as well as the history of correspondence between the agency and the protester--for example, the record shows that the contracting officer's August 24 correspondence was facsimiled 1 day later to the protester--supports the August 8 receipt date.