



Comptroller General  
of the United States  
Washington, D.C. 20548

850154

# Decision

**Matter of:** Eurometalli s.p.a.--Reconsideration

**File:** B-250522.2

**Date:** April 15, 1993

Charles D. Ablard, Esq., Faegre & Benson, for the protester. Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Request for reconsideration of decision dismissing protest as untimely is denied where it is based on evidence that could have been but was not submitted by protester in the course of the original protest.

## DECISION

Eurometalli s.p.a. requests reconsideration of our decision, Eurometalli s.p.a., B-250522, Nov. 20, 1992, 92-2 CPD ¶ 361, dismissing as untimely its protest challenging the Department of the Army's determination that it was not a responsible prospective contractor under request for proposals (RFP) No. DAJA02-92-R-0037, issued by the agency's Europe Regional Contracting Office, Vicenza, Italy, for the severing and demilitarization of 633 battle tanks.

We deny the request for reconsideration.

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.<sup>1</sup> On August 7, the contracting officer issued a letter to Eurometalli, advising the firm that it had been determined nonresponsible and could

<sup>1</sup>This nonresponsibility determination was made on July 27.

therefore "no longer be considered for award";<sup>2</sup> in this regard, the August 7 letter provided in relevant part that:

"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."

Because this letter clearly apprised Eurometalli of the basis for the agency's nonresponsibility determination, and because at the time it received the letter, the protester knew that no recent pre-award surveys had been conducted at its facilities, we concluded that any protests challenging the nonresponsibility determination should have been filed within 10 days of the firm's receipt of the August 7 notice.

In its September 25 protest to this Office, Eurometalli had presented conflicting accounts as to when the firm had received the August 7 notice; while its September 25 protest letter contended that the firm had received the letter on August 17, in a September 2 letter to the contracting officer--which was included in its September 25 protest letter as attachment No. 3<sup>3</sup>--Eurometalli stated:

"On August 8, 1992, 10 days after the acknowledgment 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 [§] 9.104-1." [Emphasis added.]

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<sup>2</sup>That same day, the agency selected another company, OMTES-Sud, for contract award.

<sup>3</sup>Eurometalli initially identified the September 2 correspondence as a copy of its original agency-level protest; later, in its comments on the agency's request for dismissal, Eurometalli reclassified the September 2 correspondence as a "legal writ" intended to supplement an August 27 agency-level protest which had been essentially dismissed by the contracting officer as legally insufficient.

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 considered to be more advantageous to the [g]overnment,' the contract amount being Lire 4,940,565,000."

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). 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). Additionally, where--as here--a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3). In this regard, the term "adverse agency action" is defined by our Bid Protest Regulations as any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(f).

Relying on Eurometalli's statement that it had received the nonresponsibility notification on August 8, the Army moved for summary dismissal on the ground that Eurometalli's protest was filed more than 10 working days after the firm received the agency's nonresponsibility notice. Eurometalli responded to the agency's timeliness argument by contending that its reference to the August 8 receipt date "was a clerical mistake"; however, Eurometalli provided no further explanation of how the alleged error occurred.

Based on the evidence set forth in the record--comprised of: Eurometalli's contemporaneous statement that it had received the notification letter on August 8; the agency's established practice of transmitting a facsimile copy of all mailed correspondence within 24 hours from when the correspondence was posted; and Eurometalli's failure to provide any explanation of the alleged "clerical mistake" which caused the protester to establish August 8 as the receipt date--we concluded that Eurometalli had in fact received the contracting officer's nonresponsibility determination notification letter on August 8. Consequently, because the record showed that Eurometalli's agency-level protest was not filed until August 27--more than 10 working days after receiving the nonresponsibility determination notice--we

dismissed Eurometalli's protest as untimely, pursuant to 4 C.F.R. § 21.2(a)(2).

On reconsideration, Eurometalli argues that our prior decision warrants reversal based upon new evidence which suggests that the August 7 nonresponsibility determination notice was not received by Eurometalli until August 14. Specifically, Eurometalli has now proffered a copy of the "original facsimile" transmission of the August 7 letter which--according to the facsimile legend at the top of the document--indicates that the facsimile transmission was received at Eurometalli's office on August 14 at 9:59 a.m.

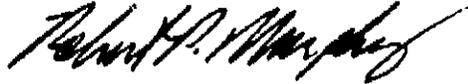
Our Regulations do not envision a piecemeal presentation of evidence, information or analysis since the failure to make all arguments or submit all information during the course of the initial protest undermines the goals of our bid protest function to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record. RC 27th Ave. Corp.--Recon., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455. In this regard, 4 C.F.R. § 21.2(b) provides that a protester has an obligation to provide information establishing the timeliness of its protest when on its face the protest otherwise appears untimely; accordingly, when a protest appears untimely on its face and is dismissed for this reason, a protester will not be permitted to introduce for the first time, in a reconsideration request, facts and information establishing its timeliness where the facts and information were in the protester's possession and could have been provided to our Office when the protest was filed. Contact Int'l Corp.--Recon., B-246937.2, Feb. 5, 1992, 92-1 CPD ¶ 150.

Even though on its face Eurometalli's protest appeared untimely, the firm was given a full opportunity to comment on the agency's dismissal request. The protester did not provide a copy of the August 14 facsimile or otherwise rebut the agency's timeliness argument. Since Eurometalli could have--but did not--provide the original facsimile document during the course of its initial protest, its presentation of this timeliness evidence on reconsideration provides no basis for reconsidering our prior decision.

Eurometalli contends that notwithstanding its untimeliness, we should consider its protest under the significant issue exception, set forth at 4 C.F.R. § 21.2(c). We strictly construe and seldom use the significant issue exception, limiting it to those protests that raise issues of widespread interest to the procurement community which have not been considered on the merits in a previous decision. Mead Data Cent., 70 Comp. Gen. 371 (1991), 91-1 CPD ¶ 330; DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Here, while we recognize the importance of the matter to

Eurometalli, its complaint does not present an issue of such widespread interest or importance to the procurement community as to justify invoking the exception. See Mirada Assocs.--Recon., B-246376.2, Jan. 2, 1992, 92-1 CPD ¶ 12; American Maintenance Co., B-228396.7, June 22, 1990, 90-1 CPD ¶ 578.

The request for reconsideration is denied.



James F. Hinchman  
General Counsel