



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ACRO-TECH, Inc.--Reconsideration

File: B-270506.2

Date: April 18, 1996

Reggie D. Huff for the protester.

Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of dismissal of protest as untimely is denied where protest was not filed within 14 days from when the protester first learned basis for protest.

DECISION

ACRO-TECH, Inc. requests reconsideration of our December 11, 1995, dismissal of its protest under Environmental Protection Agency (EPA) Fiscal Year 1995 Small Business Innovation Research Program (SBIR) solicitation No. D500001M1 for pollution prevention research.¹ We dismissed the protest because it was untimely filed.

We deny the request for reconsideration.

The EPA announced its SBIR award selections in early October 1995. On October 13, the protester—who had not been selected—contacted the contracting officer and asked her to send the firm the results of the agency's technical evaluation for its proposal. On October 16, by facsimile, the contracting officer transmitted a copy of the agency's one-page "PROPOSAL TECHNICAL

¹The SBIR Program was established under the Small Business Innovation Development Act, 15 U.S.C. § 648 (1994), and requires federal agencies to reserve a portion of their research requirements for small businesses. Pursuant to the Act, agencies enter into funding agreements in the form of grants, cooperative agreements or contracts with small businesses after receiving and evaluating proposals submitted in response to a solicitation. In this case, EPA has advised our Office that the agency will award a research contract to each small business selected under the current solicitation.

EVALUATION" form to the protester which detailed ACRO-TECH's proposal deficiencies. In response, by facsimile to the contracting officer dated October 18, ACRO-TECH requested a telephone debriefing; ACRO-TECH advised the contracting officer that it wanted to discuss EPA's failure to award the firm an SBIR contract in 1995 as well as its nonselection under the prior year's 1994 SBIR solicitation. On November 8, a telephone debriefing was conducted by the contracting officer and the agency's SBIR program director, and on November 9, EPA sent ACRO-TECH a second copy of the "PROPOSAL TECHNICAL EVALUATION" form that it had provided to the protester on October 16, along with a list of the contractors who had been awarded contracts under the 1995 SBIR program. On November 13, ACRO-TECH filed this protest at our Office, essentially arguing that the reasons set forth by EPA in the "PROPOSAL TECHNICAL EVALUATION" summary were invalid, and that the protester was not awarded either a 1994 or 1995 SBIR contract as a result of bias by the agency's SBIR director.

In accordance with our Bid Protest Regulations, section § 21.2(a)(2), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(2)), we dismissed ACRO-TECH's protest as untimely since it was filed more than 14 calendar days after the protester learned of its basis for protest. The record showed that although ACRO-TECH had first received the written evaluation summary that formed the basis for its protest on October 16, it had delayed filing its protest at our Office until November 13.² We dismissed the protest on December 11.

On reconsideration, ACRO-TECH argues that its November 13 protest to this Office was timely filed because it was unable to proceed with a protest at this Office until it had obtained the November 8 telephone debriefing. In this regard, ACRO-TECH maintains that the evaluation summary faxed to the protester on October 16 did not equip it with "enough logical basis for a credible protest."

ACRO-TECH never mentioned--either in its original protest, its comments on the agency dismissal request, or its reconsideration request--any details from the November 8 telephone debriefing. Instead, ACRO-TECH's November 13 protest, on its face, only attacked the agency's evaluation results outlined in the "PROPOSAL TECHNICAL EVALUATION" form, which it had received on October 16; ACRO-TECH's protest challenged each finding in the written evaluation on a paragraph-by-paragraph basis. Moreover, although the agency filed a detailed request for summary dismissal on the grounds that ACRO-TECH's protest was untimely since it was not filed within 14 days of October 16, the protester's response to this dismissal request failed to mention any details from the November 8 debriefing to rebut the

²To be timely, ACRO-TECH should have filed its protest by Monday, October 30--14 calendar days after its October 16 receipt of the written evaluation summary.

agency's untimeliness arguments.³ Nor does the request for reconsideration refer to any information first obtained at the debriefing that formed the basis for the protest. Accordingly, the record clearly shows that ACRO-TECH was on notice of its basis of protest as of its receipt of the evaluation results on October 16. Compare S-Cubed, A Div. of Maxwell Labs., Inc., B-242871, June 17, 1991, 91-1 CPD ¶ 571 (protest is timely where, prior to agency debriefing, protester was only informed about contract award amount, and therefore did not have any reason to suspect or know that its technical proposal had been misevaluated by the agency) with Martin Marietta Data Sys.; National Data Corp.; Technicon Data Sys., B-216310 et al., Aug. 26, 1985, 85-2 CPD ¶ 228 (protest challenging agency's application of cost/technical tradeoff criteria is untimely where, as a result of agency's telephone award notice, protester knew the specifics and basis for its protest prior to the agency's debriefing). Since the protest was filed more than 14 days later, it was properly dismissed as untimely.

In any case, a protester must provide information establishing the timeliness of its protest in the original protest pleading, see Bid Protest Regulations, section 21.1(c)(6), 60 Fed. Reg. supra at 40,740 (to be codified at 4 C.F.R. § 21.2(c)), and where 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 during the course of the initial protest's resolution. See Eurometalli s.p.a.—Recon., B-250522.2, Apr. 15, 1993, 93-1 CPD ¶ 323. Since ACRO-TECH did not mention the November 8 telephone debriefing—or offer any other evidence during the course of the initial protest to rebut the agency's untimeliness argument—its current timeliness arguments provide no basis for reconsidering our prior decision. Palmer Contracting—Recon., B-256461.2, Apr. 29, 1994, 94-1 CPD ¶ 284.

Alternatively, ACRO-TECH argues that if its protest is untimely, this is caused by our Office. ACRO-TECH reports that on November 9—after receiving the second copy of the agency's "PROPOSAL TECHNICAL EVALUATION" form—ACRO-TECH contacted the our Office's bid protest status line, and "after describing in detail the agency debriefing conducted the day before," was advised that it had "a minimum of 5 calendar days" to file a timely protest. Because it followed the bid protest status

³While ACRO-TECH also complains that the dismissal of its protest was "premature," apparently because the agency had not submitted a report on the protest but instead submitted a dismissal request, our Bid Protest Regulations state that our Office will dismiss a protest "any time sufficient information is obtained by [the General Accounting Office] warranting dismissal" and that "where an entire protest is dismissed, no agency report shall be filed." Bid Protest Regulations, section 21.5, 60 Fed. Reg. supra at 40,741 (to be codified at 4 C.F.R. § 21.5).

line's advice, ACRO-TECH contends that its protest's untimeliness should be waived.

As a preliminary matter, as discussed above, at the time of this telephone call, ACRO-TECH's protest, if filed then, would have been considered untimely because it was not filed within 14 calendar days of receiving the October 16 facsimile. Thus, no advice by our Office could have caused ACRO-TECH's protest to be filed untimely. See Whelen Eng'g Co., B-239189, Aug. 1, 1990, 90-2 CPD ¶ 89; Garden State Brickface & Stucco Co., B-237153, Oct. 31, 1989, 89-2 CPD ¶ 410.

Moreover, we do not think that we provided erroneous information to the protester. With its request for reconsideration, the protester provided a tape recording of the call to our bid protest status line. In that conversation, the protester advised the clerk that it had received an agency debriefing the day before, and then asked how much time it had to file a protest. We responded that in order to obtain a stay of contract performance and be considered timely filed, the protester should file its protest within 5 calendar days of the debriefing. The protester did not advise that it first learned its basis for protest prior to the November 8 debriefing--when it received the written evaluation results on October 16--and thus we reasonably assumed that the basis for protest first became known to ACRO-TECH during the debriefing. Based on this assumption--which the clerk had no reason to suspect was erroneous--our advice was accurate.⁴

ACRO-TECH also contends that its untimeliness should be excused since it resulted--in part--from the protester's efforts to comply with Federal Acquisition Regulation (FAR) § 33.102(c)(1), which "encourage[s]" contractors "to seek resolution within the agency . . . before filing a protest with GAO." However, a contractor's decision to pursue agency resolution does not waive or toll our timeliness requirements. See General Home Corp., B-242357.2, Mar. 22, 1991, 91-1 CPD ¶ 322.

ACRO-TECH requests that we consider its protest under the significant issue exception to our timeliness requirements. Bid Protest Regulations, section 21.2(c), 60 Fed. Reg. supra at 40,740 (to be codified at 4 C.F.R. § 21.2(c)). We decline to do so. In order to prevent the timeliness requirements of our Bid Protest Regulations

⁴In any event, even assuming the advice was not correct, it is well-settled that a government employee's erroneous advice--including misinformation provided by this Office's staff--regarding our bid protest filing deadlines does not toll or otherwise excuse a protest's untimeliness. This is because our Bid Protest Regulations are published in the Federal Register; as such, protesters are charged with constructive notice of our filing requirements, even where erroneous information about protest procedures is provided by a government agency. See Whelen Eng'g Co., supra; Garden State Brickface & Stucco Co., supra.

from becoming meaningless, we will invoke the significant issue exception only where the protest raises an issue of widespread interest to the procurement community that has not previously been addressed on the merits by our Office. Dash Eng'g, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363. Because our Office has considered numerous protests challenging the propriety of an agency's evaluation and selection decision under an SBIR solicitation, see, e.g., Systems Research Co., B-260280.2, Aug. 8, 1995, 95-2 CPD ¶ 62; Noise Cancellation Technologies, Inc., B-246476; B-246476.2, Mar. 9, 1992, 92-1 CPD ¶ 269, ACRO-TECH's challenge to this SBIR solicitation evaluation is not considered to be a significant issue.

The request for reconsideration is denied.

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