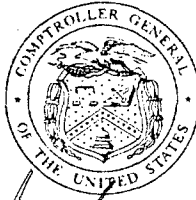


DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Reconsideration of Untimely Protest]

FILE: B-195109.3

DATE: January 21, 1980

MATTER OF: Crestwood Furniture Company--
Reconsideration

DLG03047

DIGEST:

Protester filed timely protest. Protest was withdrawn and refiled at later date. Refiled protest was untimely. In seeking reconsideration, protester asserts that it was misled by procuring activity and, as consequence, it withdrew protest. Procuring activity denies that it misled protester. Protester has burden of affirmatively proving its case. Where, as here, only evidence of record is conflicting statements of protester and procuring activity, protester has not carried its burden. Moreover, protest is not for consideration as it raises hypothetical issue.

In Crestwood Furniture Company, B-195109, October 15, 1979, 79-2 CPD 255, we considered a situation where the protester filed a timely protest which was subsequently withdrawn and refiled. We stated that a subsequently refiled protest should be considered as an initial protest and must independently satisfy the timeliness requirements of our Bid Protest Procedures, 4 C.F.R. part 20 (1979). Since the protest of Crestwood Furniture Company (Crestwood) was refiled more than 10 days after the bases of protest were known, the protest was considered untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1979), and not for consideration on the merits. However, we indicated in our decision that Crestwood's refiled protest would be timely if the procuring activity misled Crestwood or offered to take corrective action acceptable to Crestwood which was not accomplished.

In seeking reconsideration, Crestwood asserts that it was misled by the General Services Administration (GSA), the procuring activity. Specifically, Crestwood alleges that GSA counsel stated that one of GAO's prior

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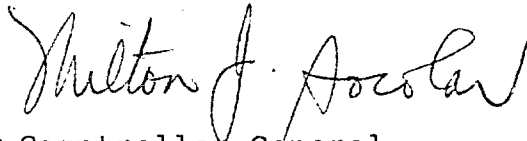
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decisions sanctioned the protested bid of another bidder. As a consequence, Crestwood withdrew its protest. According to Crestwood, it obtained a copy of the decision and concluded that it was not applicable. Crestwood then refiled its protest by letter received on October 29, 1979.

GSA, on the other hand, contends that it never informed Crestwood that one of our prior decisions was dispositive of its protest. Rather, GSA reports that its counsel stated that he did not think the method of bidding employed by the successful bidder was prohibited and agreed to make available to Crestwood any authorities uncovered in his research. Further, it reportedly was stated that a Comptroller General decision on the question would be helpful since no case on point could be found.

The protester has the burden of affirmatively proving its case. Where, as here, the only evidence of record is the conflicting statements of the protester and procuring activity, the protester has not carried its burden. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Consequently, we are unable to conclude that GSA misled Crestwood.

Moreover, we decline to consider the merits of the protest since the condition stated in the protested bid never materialized and, consequently, the basis of protest presents a hypothetical issue.



For The Comptroller General
of the United States