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DECISION



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

FILE: B-218003.2

DATE: February 25, 1985

MATTER OF: Pierce Coal Sales International--
request for reconsideration

DIGEST:

Protest filed with GAO more than 10 working days after protester learned of initial adverse action--agency determination that the change in the specifications requested by the protester was not considered practical--in response to protest filed with agency, is untimely. Protester's continued pursuit of protest with contracting agency does not alter this result.

Pierce Coal Sales International (Pierce) requests reconsideration of our January 15, 1985, dismissal of its protest as untimely under section 21.2 of our Bid Protest Regulations, 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified in 4 C.F.R. part 21). Section 21.2 provides that a protest which was initially filed with the contracting agency is untimely if it is not filed with our Office within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action.

We affirm our prior dismissal.

By invitation for bids No. DLA600-85-B-0018, the Defense Fuel Supply Center (DFSC) solicited offers for the supply of an estimated 15,000 net tons of coal for Loring Air Force Base, Limestone, Maine. The solicitation required that the coal must have a minimum of 14,200 B.T.U., dry.

By letter of December 6, 1984, Pierce alleged that the B.T.U. requirement was unduly restrictive and requested that DFSC either justify the requirement or reduce it to a minimum of 13,500 B.T.U., dry.

In response, DFSC wrote Pierce on December 21 that it had discussed the matter with the Air Force and had determined that "a reduction in B.T.U. levels is not considered practical." In particular, DFSC pointed out that a decrease in B.T.U. levels would result in a significant

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increase in transportation costs since more coal would be required and that past experience indicated that a decrease in B.T.U. levels would decrease boiler efficiency and increase operational costs.

After expressing dissatisfaction with DFSC's decision in a letter dated December 24, Pierce filed a protest with our Office on January 15.

We considered DFSC's letter of December 21 to constitute initial adverse agency action on Pierce's protest to DFSC. Since Pierce's subsequent protest to our Office was not filed until January 15, more than 10 working days later, we dismissed this latter protest as untimely.

In its request for reconsideration, Pierce disputes our characterization of DFSC's December 21 letter as adverse agency action. Pierce argues that the December 21 letter did not represent a final decision by DFSC. Pierce points out that it continued to pursue the matter with DFSC and, for the first time, informs us that it engaged in discussions with DFSC as late as January 4 and had arranged a tentative meeting with contracting officials at which it had intended to supply additional evidence in support of its position. Pierce therefore believes that an earlier protest to GAO would have been "premature, since there lacked a definitive act which was prejudicial to Pierce Coal."

We disagree. Adverse agency action is any action or inaction which is prejudicial to the position taken in a protest filed with an agency. See Media Associates, Inc., B-211153, Apr. 12, 1983, 83-1 C.P.D. ¶ 385. DFSC's determination that a reduction in B.T.U. levels was not practical was prejudicial to Pierce's request that the solicitation specifications be changed. Moreover, the fact that Pierce was continuing to pursue the matter with DFSC in hopes of convincing DFSC to change its adverse decision does not alter the requirement that a subsequent protest to our Office was required to be filed within 10 working days of actual or constructive notice of initial adverse agency action. See Allis-Chalmers Corporation, B-214388, Mar. 16, 1984, 84-1 C.P.D. ¶ 320.

Since Pierce has failed to provide new evidence or legal arguments which show that our prior dismissal was

erroneous, that decision is affirmed. Koch Corporation--
Reconsideration, B-212304.4, July 31, 1984, 84-2 C.P.D.
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Harry R. Van Cleve

Harry R. Van Cleve
General Counsel