

**DECISION**



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

**FILE:** B-218100.2

**DATE:** March 11, 1985

**MATTER OF:** Birdsboro Corporation--Reconsideration

**DIGEST:**

Decision is affirmed on reconsideration where the protester has not shown any error of law or fact which would warrant reversal of the decision.

Birdsboro Corporation (Birdsboro) requests reconsideration of our decision in Birdsboro Corporation, B-218100, Feb. 11, 1985, 85-1 C.P.D. ¶ \_\_\_\_\_. We dismissed as untimely Birdsboro's protest that certain solicitation requirements under the first step of a two-step, formally advertised procurement preclude Birdsboro from participating in the procurement. The procurement was for a new turbine for the Snettisham Powerplant (Snettisham). Birdsboro argues that our decision was erroneous.

We affirm our decision dismissing Birdsboro's protest.

In our decision, we found that Birdsboro's protest against the allegedly restrictive specifications and the failure to require castings to be of domestic origin was apparent from the face of the solicitation and that, under our Bid Protest Regulations, Birdsboro was required to protest these step-one solicitation improprieties before the closing date for receipt of initial proposals. Thus, we concluded that Birdsboro's protest concerning the allegedly defective specifications was untimely.

Birdsboro contended that it did not learn of its bases of protest regarding the specifications until at least January 24, 1985. In this connection, Birdsboro asserted that by December 21, 1984, as a result of congressional inquiries to the Department of Defense (DOD) on its behalf, it first became aware that the solicitation permitted use of imported castings contrary to stated DOD policy that castings be procured domestically. By letter dated December 21, also after receipt of initial technical proposals, Birdsboro requested that the Army Corps of Engineers (Corps) amend the solicitation to require only domestic castings in accordance with DOD policy.

Birdsboro also stated that, on January 24, it met with representatives of the DOD Office of Inspector General. At that time, Birdsboro stated it first learned of the findings of an Office of Inspector General audit report issued on November 11, 1984, which was concurred in by the DOD Office of the Under Secretary of Defense for Research and Engineering. The report contained a finding that the specifications were restrictive. Also, Birdsboro was advised that the Under Secretary had determined that these restrictions were not to be used again. Birdsboro asserted that on January 29, it discovered that the Office of the Inspector General had advised the Corps to cancel the subject solicitation. Birdsboro also contended that it was at this time that it learned that the Corps did not intend to amend the solicitation to require domestic castings. Birdsboro determined that, based on this information, it had sufficient grounds to protest the solicitation and filed a protest with our Office on January 31, 1985.

We concluded that although the release of the DOD investigation results and information concerning DOD policy may have precipitated Birdsboro's protest, the release of this information did not provide a new timely basis of protest or otherwise excuse Birdsboro from our timeliness rules. In our view, the fact remained that the solicitation provisions to which Birdsboro objected were apparent from the solicitation and Birdsboro did not protest these provisions before the initial closing date for receipt of proposals.

In addition to reasserting that it did not learn of its bases of protest until late January, Birdsboro now advises that prior to the closing date for receipt of initial proposals on October 28, 1984, it was advised by congressional representatives that a DOD official had represented to them that the domestic restrictions which allegedly precluded Birdsboro from competing were only applicable to new turbine procurements such as the Snettisham procurement, that these restrictions would not be contained in future solicitations for rehabilitation and modernization of 360 existing turbine operations and, specifically, that Birdsboro would be permitted to compete for the "Chief Joseph" turbine modernization project worth \$20 million compared to the Snettisham project estimated at \$2 million. Also, Birdsboro was told that, under the Snettisham solicitation, domestic castings would be required and, thus, apparently, Birdsboro was led to believe that it would be eligible for subcontract work

under this contract. As a result, Birdsboro decided it was in Birdsboro's best interest to allow the subject solicitation to proceed.

According to Birdsboro, it was advised shortly after the closing date that the domestic restrictions would apply to all rehabilitation and modernization projects and, thus, Birdsboro would be denied the opportunities promised to compete on upcoming procurements for modernization. Birdsboro also asserts that it was not until December, as previously stated, that it became aware that the Corps did not intend to implement a domestic casting requirement. Birdsboro claims that it based its decision not to file any protest before the closing date on its reasonable reliance on these DOD statements.

With regard to the lack of a requirement that castings be of domestic origin, Birdsboro acknowledged it was aware of this alleged defect from the face of the solicitation, but that, in effect, it relied on repeated DOD assurances made prior to the closing date that domestic castings would be required. The conflict between the solicitation and DOD's representations was apparent prior to the closing date and Birdsboro did not protest this inconsistency before the closing date. Assuming that Birdsboro reasonably had a right to rely on the DOD statements that it would change the request for proposals (RFP) to reflect DOD's policy, in our view, once the agency proceeded with the closing date without taking corrective action on this matter, under our Bid Protest Procedures (now Regulations), Birdsboro had 10 working days from the closing date to protest the failure to amend the RFP. Instead, Birdsboro did not take any action until mid-December when it received further acknowledgment of DOD's position from the Under Secretary, a position Birdsboro admits it was aware of prior to the closing date.

The fact that the Under Secretary confirmed in writing after the closing date that the solicitation should require domestic castings does not provide a new grounds for protest, but further support for a protest ground Birdsboro should have protested, at the latest, within 10 working days of the closing date. It is well settled that the fact that a protester continues to pursue a matter with the agency following initial adverse agency action does not extend the time for protesting to GAO. Trans Air Conditioning, B-214259, Sept. 26, 1984, 84-2 C.P.D. ¶ 359. Thus, Birdsboro's continued dialogue with the agency through January 25 did not alter its responsibility to conform to the filing requirement of section 21 in protesting to our Office.

With regard to the domestic requirements which Birdsboro asserts are restrictive, we find no basis to reverse our prior finding that this issue is untimely. Birdsboro was on notice of the restrictive nature of the specifications prior to the step-one closing date. The information Birdsboro obtained after that closing date, including the DOD Inspector General's report, supports Birdsboro's contention concerning the solicitation provisions, but Birdsboro concedes it knew prior to the closing date that these provisions restricted its participation in the procurement. We further note that DOD never represented it would change these provisions for the Snettisham procurement, but instead advised that other future procurements would not contain these restrictions. Thus, Birdsboro, in its discretion, elected not to protest this issue which it concedes was known to it before the closing date in the expectation that it would receive an opportunity to participate in other procurements, which may still be the case. In any event, we find no basis to consider this untimely protest issue which Birdsboro clearly could have raised timely, but, as a matter of business judgment, did not.

Finally, Birdsboro reiterates its previous argument that this protest should be considered under the "significant issue" exception to our timeliness rules. Birdsboro argues that the Inspector General's findings which Birdsboro states support its protest provide the basis for invoking the significant issue exception. As we stated in our decision, the "significant issue" exception is not applicable to protests which involve a matter which has been considered on the merits in previous decisions. The issue raised here that a solicitation precludes a firm's participation in a procurement is one we previously have considered. The Inspector General's report, while it may support the protester's contention, does not affect our conclusion that the issue is not a significant one under our decisions. See Swintec Corporation--Reconsideration, B-212395.7, July 3, 1984, 84-2 C.P.D. ¶ 12.

Accordingly, since Birdsboro has not raised any new facts or demonstrated any errors of law or fact which would cause us to reverse or modify our decision, our decision is affirmed. Ray Service Company--Request for Reconsideration, B-215959.2, Sept. 11, 1984, 84-2 C.P.D. ¶ 284.

*Harry R. Van Cleve*

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General Counsel