DECISION

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

FILE: B-219982.2 DATE: October 17, 1985

MATTER OF: Hartridge Equipment Corporation--Request for Reconsideration

DIGEST:

1. Prior decision dismissing a protest as untimely is affirmed where the request for reconsideration fails to show either errors of fact or of law in the prior decision which warrant its reversal or modification.

2. When a protester continues to pursue an agency-level protest alleging solicitation improprieties for several months after the agency acts adversely to that protest, the protester has effectively made its choice of administrative forum and cannot reasonably complain that the benefit of GAO's review authority is no longer available to it.

Hartridge Equipment Corporation requests reconsideration of our decision in Hartridge Equipment Corp., B-219982, Sept. 11, 1985, 85-2 CPD ¶ ___. In that decision, we dismissed Hartridge's protest because it was not filed within 10 working days after initial adverse agency action on the firm's earlier agency-level protest. We affirm our prior decision.

Background

On December 14, 1984, Hartridge filed a protest with the Army alleging that certain specifications in request for proposals (RFP) No. DAAA09-84-R-0624 exceeded the agency's actual minimum needs, and that others were ambiguous and prevented Hartridge from submitting a proposal. The Army continued to receive proposals until the scheduled December 20 closing date, but did not formally deny Hartridge's protest until July 31, 1985. Hartridge then protested to this Office on August 16.

We dismissed the protest as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985), which provide that if a protest has been filed initially with the contracting agency, any subsequent protest to this Office must be filed (received) within 10 working days of formal notification of, or actual or constructive knowledge of, initial adverse agency action. In our prior decision, we emphasized that "initial adverse agency action" includes the agency's continued receipt of proposals as scheduled without taking the corrective action requested by the protester. 4 C.F.R. § 21.0(e).

Since the proposal closing here occurred as scheduled without the Army taking any action in response to Hartridge's initial protest, any subsequent protest to this Office had to be filed no later than 10 working days after December 20 in order to be timely. In our decision, we pointed out to Hartridge that even though the firm continued to pursue the matter with the Army after December 20, such continued pursuit did not toll our filing requirements. We also pointed out that the firm was not entitled to wait until it received the Army's formal decision of July 31 before coming to this Office once the proposal closing date had passed.

Hartridge now requests reconsideration on the grounds that the particular circumstances of this case distinguish it from the general line of cases that hold that a proposal closing in the face of an agency-level protest constitutes initial adverse agency action. Hartridge asserts that our reliance upon that basic principle is inapplicable here because the Army continued to represent to Hartridge that it was still actively considering the protest and gave no indication that the protest would be denied.

In this regard, Hartridge reminds us (as we recognized in our prior decision) that it telegrammed the Army on January 31, 1985, a little more than 1 month after the proposal closing date, to request the Army to advise the firm of the status of its protest. Hartridge points out that the contracting officer replied by letter of February 11, stating that the issues raised by Hartridge in its December 14 protest were under consideration and that a determination as to the validity of the protest would be reached in the near future.

In addition, Hartridge now informs us for the first time that two congressional inquiries were made to the Army on the firm's behalf between the December 20 closing date

and the July 31 denial of its protest by the agency. Specifically, Hartridge received a letter dated December 21 from a congressman acknowledging receipt of a copy of Hartridge's protest and advising Hartridge that the Army had been asked to keep the congressman apprised of any action taken on the protest. Subsequently, Hartridge received another letter from the congressman (dated January 11) with an attached letter from the Army in which the Army essentially stated that Hartridge's December 14 protest was under current consideration and that no final decision had been reached. A similar letter was received from a senator in April.

Accordingly, Hartridge urges that the December 20 proposal closing did not constitute initial adverse agency action because the Army continued to consider its protest for several months following that event, and never indicated in any of its communications to either Hartridge or those acting on the firm's behalf that the protest was deemed to be without merit. In Hartridge's view, no adverse action occurred until July 31, when the Army finally issued its formal decision on the protest. Since Hartridge's subsequent protest to this Office was filed on August 16, within 10 working days after receipt of that decision, the firm asserts that the protest was timely and, therefore, must now be considered by this Office on the merits.

Hartridge also urges that the Army's actions "lulled" the firm into not filing a protest with this Office earlier because the Army continued to indicate for several months after the proposal closing that the matter was under active review. Essentially, it is Hartridge's position that our requirements for the timely filing of protests work an unduly harsh result in this instance where the firm relied upon the Army's representations to its detriment, thus inadvertently forfeiting its right to file a protest in accordance with those requirements.

Analysis

In order to prevail in a request for reconsideration, the requesting party must show either errors of fact or of law in our prior decision that warrant its reversal or modification. Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13. Hartridge has not met that burden here.

We regard bid protests as serious matters that require effective and equitable procedural standards so that all parties have a fair opportunity to present their cases, and so that protests can be resolved in a reasonably speedy manner without unduly disrupting the government's procurement process. Ikard Manufacturing Co., B-213606.2, May 21, 1984, 84-1 CPD ¶ 533. Therefore, although we recognize that a party which alleges a solicitation impropriety may choose to protest initially to the agency, we require the submission of any subsequent protest to this Office within 10 working days after the agency first acts adversely to the protester's position by, for example, opening bids or continuing to receive proposals as scheduled. 4 C.F.R. §§ 21.0(e), 21.2(a)(3). This strict requirement is necessary so that corrective action, if ultimately recommended, is most practicable and, thus, least burdensome on the conduct of the procurement. See Ray Service Co.--Request for Reconsideration, B-215959.2, Sept. 11, 1984, 84-2 CPD ¶ 284.

We find no merit in Hartridge's assertion that the Army's actions somehow excused the firm's failure to file a timely protest with this Office. We note that the only communication concerning the agency's consideration of the protest that Hartridge received during the 10 working day period after the closing date was the December 21 letter from a congressman stating that he had asked the Army to keep him informed of any action taken on the protest. We fail to see how this "lulled" Hartridge into an unwitting forfeiture of its right to protest to our Office. Certainly, there was no indication from the Army that the proposal closing was not inimical to Hartridge's interest. See Centurial Products, B-216517, Sept. 19, 1985, 64 Comp. Gen. ___, 85-2 CPD ¶ ___. Therefore, the December 20 closing remained the operative event to trigger our filing requirements since it clearly constituted initial adverse agency action. See Central Air Service, Inc., B-213205, Feb. 6, 1984, 84-1 CPD ¶ 147.

We are mindful of the fact that the Army's handling of Hartridge's protest was less than expeditious and resulted in nothing more than a cursory response to the issues raised. Nonetheless, by continuing to pursue the matter at the agency level for several months after the proposal closing occurred, Hartridge effectively made its choice of administrative forum, and the firm cannot reasonably complain because the benefit of our review authority is no longer available to it. See Experimental Pathology Laboratories, Inc., B-211282, July 28, 1983, 83-2 CPD ¶ 136.

Furthermore, given that the solicitation in question was issued more than a year ago, and that the Army has made an award under that solicitation, our review at this point of a protest against the specifications would be inconsistent with the intent of our regulations to provide for expeditious consideration of objections to procurement actions without unduly disrupting the government's procurement process. See International Development Institute, 64 Comp. Gen. 259 (1985), 85-1 CPD ¶ 179. To waive our timeliness rules in Hartridge's sole favor would only serve to compromise the integrity of those rules. See Tracor Applied Sciences--Reconsideration, B-218051.2, Apr. 12, 1985, 85-1 CPD ¶ 422.

Our prior decision is affirmed.

for Seymour Efros
Harry R. Van Cleve
General Counsel