



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

Matter of: Adrian Supply Company--Reconsideration

File: B-227022.6

Date: April 29, 1988

### DIGEST

1. Dismissal of protest for failure to file a copy with the contracting agency within 1 working day after filing of protest with the General Accounting Office is affirmed on second reconsideration, since regulations clearly state that the agency must receive a copy of the protest within 1 day, not that a protester must merely transmit the copy.

2. Significant issue exception to the filing deadlines of General Accounting Office Bid Protest Regulations does not apply to the requirement to timely furnish the contracting agency a copy of the protest.

### DECISION

Adrian Supply Company requests a second reconsideration of our dismissal of a protest for failure to file a copy with the contracting agency within 1 working day after filing of the protest with our Office. Adrian Supply Co.--Reconsideration; Western States Electric, Inc., B-227022.3; B-227022.4, Feb. 23, 1988, 88-1 CPD ¶ 184, affirming a prior dismissal by computer notice. We affirm the dismissal.

Adrian's protest concerned request for proposals (RFP) No. F65501-87-R-0018 for transformers and fiberglass enclosures for use at Shemya Air Force Base, Alaska, issued by the Department of the Air Force. We dismissed Adrian's protest because Adrian failed to furnish a copy of the protest to the contracting agency within 1 working day after we received it as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1987). In its first reconsideration request, Adrian claimed that it had transmitted a copy of the protest to the contracting activity on the same day it filed the protest with us. Since the agency informed us that it had not received it 11 working days later, we affirmed our dismissal, stating that the notice requirement in section 21.1(d) of our Bid Protest Regulations requires receipt by, rather than transmission to, the agency within 1 working day of filing.

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Adrian now questions our interpretation of the regulation, stating that the regulation requires only that the protester transmit the protest within 1 day, not that it must ensure delivery. Adrian argues that our statement that the 1-day notice requirement is based on the statutory requirement that the agency file its report within 25 days from when we notify it of a protest is inconsistent with our allowing the Air force to file its report on the first reconsideration after the 25-day period. Adrian states that we are distorting our own regulations in order to deny this protest. The regulation clearly states, however, that the agency "must receive a copy of the protest no later than 1 day after the protest is filed" (emphasis added) with our Office. Our decisions are consistent that the 1-day requirements refers to receipt, not transmittal of the protest, and accordingly Adrian has not demonstrated any prejudice by our Office. See e.g., Discount Machinery & Equipment Inc.--Request for Reconsideration, B-227885.2, Aug. 18, 1987, 87-2 CPD ¶ 176. Further, although Adrian states it received the report after the 25-day period, we allowed Adrian several extensions of the 7-day period for filing its comments on the report due to the late receipt. We have held that we will consider the contents of a late agency report where, as here, its lateness did not prejudice the protester. General Electric Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

Adrian also alleges that we should not have dismissed its protest only on the basis of the agency's statement that it did not receive the protest. Adrian provides no evidence, however, that the agency received the protest on time. As it was Adrian's responsibility to ensure that a copy of a protest filed with our Office is timely received by the contracting agency, the mere assertion that the protest was transmitted is of no consequence. Cf. Atlantic Management Center--Reconsideration, B-228068.3, Sept. 30, 1987, 87-2 CPD ¶ 316.

In its second request for reconsideration, Adrian also disputes our comment in the first reconsideration decision that even if Adrian had timely filed a copy of its protest with the agency, we would have found the protest untimely.

Adrian had originally filed a protest on the procurement contending that the specifications were restrictive. The protest was later withdrawn after the Air Force and Adrian allegedly agreed to a revised specification which removed the restrictions. Those revisions were to be contained in amendment No. 4 to the solicitation, which was issued on April 13, 1987.

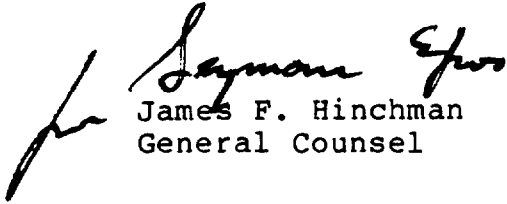
On October 1, 1987, Adrian filed a protest contending first, that amendment No. 4 did not delete all of the restrictive requirements as it and the Air Force had previously agreed, and second, its failure to receive amendment No. 5 denied it an opportunity to participate in the procurement. As of September 3, however, Adrian was on notice, as a result of a telephone call to the agency, that it had not received amendment No. 5. Because its protest was filed on October 1, more than 10 days after the basis of protest on the amendment issue was known, we stated that the protest was untimely, even though we were not dismissing it on that basis. Adrian now contends that the basis of its protest was not the failure to receive amendment No. 5, but rather the Air Force's alleged failure to abide by its agreement. Adrian asserts that it had no reason to protest until all possibility of corrective action by the Air Force had been eliminated.

We find this argument to be disingenuous. Adrian clearly understood, and so asserted in its protest, that amendment No. 4 was to embody its agreement with the Air Force, vis a vis the restrictive nature of the specifications. The time to complain about the alleged continuing restriction in the specification was in April, when the amendment that was supposed to have eliminated the restrictiveness was issued, not 6 months later. A party simply does not have the right to await an eventuality that might never occur, and then to complain months after the basis for the complaint arose.

Finally, inasmuch as the protest was not dismissed on the timeliness issue, but on the basis of Adrian's failure to deliver a copy of the protest to the agency within 1 day of filing it here, Adrian's request that we consider the protest under 4 C.F.R. § 21.2(c), which provides for our consideration of untimely allegations which raise issues significant to the procurement system, cannot be considered, because this exception to our filing deadlines applies only to protests which are untimely filed. There is no equivalent provision for waiving the requirement to timely furnish the agency a copy of the protest. Canvas & Leather Bag Co., Inc., B-227889.2, July 24, 1987, 87-2 CPD ¶ 89. Moreover, the significant issue exception would be inapplicable in any case. In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. The exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Since we have previously considered

the issues here, a protester's failure to receive an amendment, see, e.g., Rocky Mountain Trading Co., B-220718, Jan. 28, 1986, 86-1 CPD ¶ 99; Marino Construction Co., Inc., 61 Comp. Gen. 269, 272 (1982), 82-1 CPD ¶ 167, and the alleged restrictiveness of the specification, see, e.g., Abel Converting, Inc., B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130, the test for applying the significant issue exception has not been met.

Accordingly, our original reconsideration decision is affirmed.

  
James F. Hinchman  
General Counsel