

Morrow



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atrium Building Partnership--Second Request
for Reconsideration
File: B-228958.3
Date: May 18, 1988

DIGEST

Request for reconsideration based on evidence the protester obtained pursuant to a Freedom of Information Act request is dismissed as untimely because the protester failed to diligently pursue the information, which, in any event, does not warrant reversal of our previous decisions.

DECISION

Atrium Building Partnership requests reconsideration of our decision in Atrium Building Partnership--Request for Reconsideration, B-228958.2, Dec. 30, 1987, 87-2 CPD ¶ 645, which denied its request for reconsideration of Atrium Building Partnership, B-228958, Nov. 17, 1987, 67 Comp. Gen. _____, 87-2 CPD ¶ 491. In that decision, we held that the rejection of Atrium's offer under solicitation for offers (SFO) No. 9PEL10-87-10, issued by the General Services Administration (GSA), was proper.

We dismiss the second request for reconsideration as untimely.

In the initial protest, Atrium alleged that GSA improperly applied the solicitation's fire safety criteria to its offer and made several errors in evaluating its offer. After an on-sight inspection, GSA determined that the atrium style interior of Atrium's building did not meet the fire safety standards for fire-rated exits, and the north and south exits which entered the atrium were required to be separated by 1 hour fire-rated walls. GSA Fire Safety Regulations PBS 5900.2B, chapter 14, paragraph 9(d), which was a mandatory term of the SFO, states that offices or other rooms used for human occupancy must not open into an atrium, nor may exit routes pass through an atrium.

We held that Atrium had failed to establish that GSA acted unreasonably in evaluating its offer. Atrium did not dispute GSA's conclusion that the Atrium building did not meet the requirements of the regulations' instead it argued that GSA was required to perform a risk assessment with a fire

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safety professional. However, the fire safety regulations only permit deviation and a risk assessment where there are no other available spaces, which was not the case due to the other competing offers received by GSA. Further, section 12 of the SFO provided that offers which include alternate fire protection features must include a written analysis by a certified fire protection engineer fully describing any exceptions taken to the fire safety requirements. Therefore, we found that the SFO placed the burden on Atrium to demonstrate compliance with the fire safety requirements.

Further, in view of the fact GSA specifically called Atrium's attention to the fire safety deficiency found in its offer and Atrium failed to provide the necessary information in its best and final offer (BAFO), we found that Atrium's offer was technically unacceptable and that GSA properly rejected it.

In its initial request for reconsideration, Atrium contended that our conclusion that Atrium did not dispute GSA's fire safety determination was erroneous since GSA never formally evaluated its building with a certified fire safety professional. However, we found that Atrium was essentially restating the argument that was fully considered in our original decision. We concluded that in light of GSA's on-sight inspection, there was no basis to question GSA's finding, since we were not persuaded that GSA was required to use a certified professional before making the fire safety determination. Further we found that Atrium was required to show in its BAFO how it intended to meet the fire safety requirements which it did not do and therefore its BAFO was technically unacceptable.

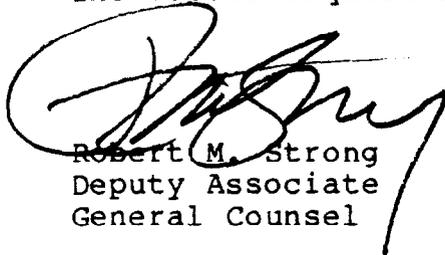
Atrium bases this request for reconsideration on evidence it obtained in connection with a Freedom of Information Act (FOIA) request it filed at GSA on January 20, 1988. Atrium discovered that the GSA Realty Specialist which conducted the on-sight inspection of its building did not have a warrant certificated (Certificate of Contracting Authority, S.F. 1024), which it again argues was required by the GSA Fire Safety Regulations PBS 5900.2B. Also, Atrium advises that the FOIA request revealed that the only inspection conducted by GSA was a market survey which did not identify any fire safety deficiencies in its building. Atrium thus argues that these factors warrant reversal of our earlier decisions.

We find that Atrium's request for reconsideration is untimely. Our Bid Protest Regulations require that protests be filed within 10 days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2 (1987). In order to avoid having its protest dismissed as untimely,

a protester cannot sit idly by while awaiting information that provides the basis for its protest but instead must diligently pursue the information within a reasonable time. American Electro-Coatings Corp., B-225417, Oct. 28, 1986, 86-2 CPD ¶ 487. Atrium's decision to wait until after we rendered our second decision before filing its FOIA request at GSA, in our opinion, was not diligent pursuit of information forming the basis of its request for reconsideration. Although Atrium states that the information was unknown or unavailable, it has not offered any reasons why such a conclusion was warranted, and we are unaware why this information could not have been obtained after the award. Therefore, we find that the information forming the basis for its request for reconsideration is untimely.

In any event, Atrium's argument regarding the contracting authority of the individual who conducted the inspection is without merit. There is no requirement that a contracting officer conduct the inspection, which in this case was conducted by a GSA Realty Specialist. An authorized GSA contracting official signed the lease agreement. Moreover, as noted in our prior decision, a certified fire safety official was not required to make a risk assessment in the circumstances of this particular case.

The second request for reconsideration is dismissed.



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