



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Novitas, Inc.--Request for Reconsideration
File: B-238178.2
Date: February 23, 1990

James D. Himonas, for the protester.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Request for reconsideration of prior dismissal of protest as untimely filed is denied where (1) protest challenged alleged solicitation impropriety but was not filed until after bid opening; (2) even assuming that protester's decision not to file a protest before bid opening was reasonable because contracting agency had led protester to believe that agency concurred in protester's interpretation of challenged solicitation provision, protest was not filed with General Accounting Office within 10 working days after the protester had actual or constructive knowledge of adverse action on initial protest filed with contracting agency; and (3) protest does not warrant invoking the significant issue exception to the timeliness rules.

DECISION

Novitas, Inc., requests reconsideration of our December 29, 1989, dismissal as untimely of its protest under request for proposals (RFP) No. 7FXI-RG-89-6210-B, issued by the General Services Administration (GSA) for Federal Supply Class 62/67-Lighting Accessories.

We deny the request for reconsideration.

As relevant to the protest, the Federal Acquisition Regulation (FAR) calls for offerors to submit sales data in sufficient detail to enable the contracting officer to determine price reasonableness and whether they qualify for waiver of the requirement for certified cost or pricing data. FAR §§ 15.804-3(c) and 15.804-3(h). In accordance with these provisions, the RFP required offerors to indicate

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their total annual sales to both government and non-government customers. Because Novitas submitted only limited information on its non-government sales, GSA rejected its offer on the ground that the information Novitas supplied was insufficient to make the determinations contemplated by FAR §§ 15.804-3(c) and 15.804-3(h). Novitas challenges the agency's position, arguing that total sales volume need not be revealed to meet the FAR requirements.

The requirement for submission of total annual sales volume was explicitly set out in the RFP. Thus, to the extent that Novitas challenges the requirement, the protest concerns an alleged solicitation impropriety which, under our Bid Protest Regulations, was required to be filed before bid opening on May 1, 1989. 4 C.F.R. § 21.2(a)(1) (1989). Since the protest was not filed until well after that date, it clearly is untimely.

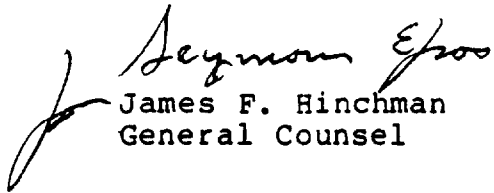
Novitas also states that GSA has accepted offers from the firm over the past several years containing only the limited information which Novitas submitted with its offer under the current RFP, rather than total sales volume. Novitas thus appears to contend that GSA's actions led it to believe that no further information was required, and, as a result, it had no reason to challenge the requirement before bid opening. Even accepting Novitas' characterization of GSA's actions under the prior solicitations, the protest nevertheless is clearly untimely.

The record shows that the protester was aware that its offer had been rejected as early as June 16, when Novitas submitted its first letter to GSA objecting to the agency's interpretation of the sales data requirement. In a letter to Novitas dated August 9, GSA reaffirmed its position that the information submitted was insufficient. Novitas nevertheless continued its discussions on this issue with GSA, and did not file its protest with our Office until December 29.

Under our Bid Protest Regulations, a protest initially filed with a 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. 4 C.F.R. § 21.2(a)(3). Novitas first complained of the rejection of its offer to GSA by letter dated June 16; GSA replied to Novitas by letter dated August 9, affirming its decision to reject the offer. Thus, at the latest, the protester had 10 working days from receipt of that letter to protest the rejection of its bid. Since Novitas did not file its protest in our Office until December 29, the protest was clearly untimely.

In its reconsideration request, Novitas also contends that the protest should be considered under the significant issue exception to our timeliness rules. Whether a protest presents a significant issue is necessarily determined on a case-by-case basis; we will invoke the exception when our consideration of the protest would be in the interest of the procurement system. Custom Programmers Inc., B-235716, Sept. 19, 1989, 89-2 CPD ¶ 245. Here, we do not think that considering a protest against an alleged improper rejection of an offer on the basis that the proposal contained insufficient data to establish the reasonableness of prices offered by one contractor presents an issue of such widespread interest as to justify invoking the exception.

The request for reconsideration is denied.


James F. Hinchman
General Counsel