

B. Timmerman



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Oak Ridge Associated Universities--
Reconsideration

File: B-238411.2

Date: May 31, 1990

Donald L. Hagenruber, Esq., for the protester.
Barbara Timmerman, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

When a protester has sufficient information upon which to
base a protest, it must file a protest within 10 working
days and not wait until it obtains all of the information to
which it believes it is entitled under the Freedom of
Information Act; therefore, the agency's failure to promptly
provide the information sought does not constitute good
cause under the Bid Protest Regulations to warrant
consideration of an untimely protest.

DECISION

Oak Ridge Associated Universities requests reconsideration
of our decision Oak Ridge Associated Univs., B-238411,
Feb. 14, 1990, 90-1 CPD ¶ ____, dismissing its protest
against the award of a contract to Southeastern Center for
Electrical Engineering Education under request for proposals
(RFP) No. F49620-89-R-0002, issued by the Air Force for the
administration of a laboratory graduate fellowship program.

The decision is affirmed.

The RFP was issued on March 28, 1989. By letter of July 25,
the agency informed the protester, one of five offerors,
that award had been made to Southeastern. Oak Ridge then
requested, pursuant to the Freedom of Information Act
(FOIA), all documentation concerning Southeastern's
proposal. The Air Force replied by letter dated
September 26, providing at that time and shortly thereafter
those portions of Southeastern's proposal that it determined
were releasable under FOIA. On November 22, Oak Ridge
appealed the agency's decision not to release Southeastern's

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proposal in full. It stated in that appeal that the Southeastern materials it had received seemed in general "nonresponsive" to the solicitation because they did not contain specific information requested by the RFP. According to the protester, the Air Force replied by letter dated January 22, 1990, advising Oak Ridge that its appeal had been forwarded to another office for decision.

On January 25, Oak Ridge protested to our Office that Southeastern's proposal was not acceptable under the RFP because it did not contain specific information required by the solicitation. We dismissed that protest as untimely because it was filed more than 10 working days after Oak Ridge was aware of the basis of its protest. We found that by November 22, at the latest, Oak Ridge was aware of the basis of its protest since it indicated in its letter of that date that it believed Southeastern's proposal was deficient. Oak Ridge's protest filed with our Office more than 2 months later was therefore untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989).

In its request for reconsideration Oak Ridge questions our use of November 22, the date of its appeal letter, as the date by which it should have filed its protest. Oak Ridge states that it did not receive any relevant information from the Air Force after September 26 when the agency released a portion of the information it requested. The protester asserts that it still does not have sufficient information and suggests that the Air Force has purposely delayed the release of further information to prevent it from developing its protest.

Oak Ridge has not provided any basis for us to conclude that our dismissal of its protest was erroneous. First, the protester has incorrectly interpreted our decision as stating that its protest had to be filed by November 22. We stated in the decision that by November 22--at the latest--Oak Ridge was aware of the basis of its protest. This is because its appeal letter of that date specifically indicated that it believed the awardee's proposal was deficient. Oak Ridge may have been aware of the basis of its protest on September 26, when it received some of the information it requested under FOIA, in which case it was required to file its protest within 10 working days of that date. In our decision, we used November 22 as the date the time period started simply because Oak Ridge's November 22 letter was hard evidence that at least by that date, if not earlier, it was aware of its protest basis. Although Oak Ridge states it still does not know for certain whether its assertions concerning Southeastern's proposal are true, a

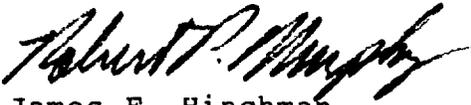
protester may not wait until it obtains additional information under FOIA pertaining to the protest before filing if it is already reasonably aware of the protest basis. Sperry Corp., B-225492; B-225492.2, Mar. 25, 1987, 87-1 CPD ¶ 341.

Finally, Oak Ridge argues that even if its protest is untimely we should consider it under the significant issue exception in our Regulations which states that where the protest raises issues significant to the procurement system, we may consider it even if untimely. See 4 C.F.R. § 21.2(b). Oak Ridge asserts the agency's use of the FOIA process to willfully delay the release of documents raises its case to significant issue status.

Oak Ridge's protest concerns the alleged deficiency of the awardee's proposal; the release of documents relates only to the timeliness of its protest. The significant issue exception generally is limited to those untimely protests where the issue raised is one of widespread interest to the procurement community that has not been considered on the merits in previous decisions. Athna, Inc., B-235761.3; B-235761.4, Dec. 1, 1989, 89-2 CPD ¶ 507. We have considered numerous protests concerning the issue Oak Ridge raises, the propriety of an agency's technical evaluation of an offeror's proposal. See, e.g., Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93; Magnavox Advanced Prods. and Sys. Co., B-236168, Nov. 14, 1989, 69 Comp. Gen. ____, 89-2 CPD ¶ 458.

The real question presented by Oak Ridge is whether the agency's handling of the FOIA request constitutes good cause under 4 C.F.R. § 21.2(b). We think it does not. The good cause exception to our timeliness requirements is limited to circumstances where some compelling reason beyond a protester's control prevented it from filing a timely protest. Farinelli Constr. Co., Inc.--Request for Recon., B-234636.2, Mar. 29, 1989, 89-1 CPD ¶ 329. As we stated above, Oak Ridge knew the basis of its protest when it received the agency's response to its initial FOIA request. There is no indication in the record that Oak Ridge was in any way prevented from filing a timely protest with our Office after it received that information. Thus, the good cause exception does not apply here.

In sum, we remain of the view that the protester had sufficient information upon which to base a protest when it received the Air Forces' initial response to its August 8 FOIA request. Therefore, the decision is affirmed.



for
James F. Hinchman
General Counsel