



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Heroux, Inc.

File: B-237432.2

Date: June 8, 1990

Robert Allen Evers, Esq., and Thomas A. Cocciardi, Esq., Davis Wright Tremaine, for the protester. Mr. R.J. Raab for Colt Industries, an interested party. J.R. Townsend, Esq., Office of the General Counsel, Department of the Navy, for the agency. Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Protest is dismissed as untimely where protester failed to diligently pursue its grounds of protest by waiting 11 weeks to request information about a contract award.
2. Protester unreasonably relied on the bid protest process to provide information concerning protest grounds which were not before the General Accounting Office.

DECISION

Heroux, Inc., protests the award of a contract to the Menasco Aerosystems Division of Colt Industries under request for proposals (RFP) No. N00383-89-R-3688, issued by the Department of the Navy for landing gear shock strut assemblies to be used on Lockheed P-3 Orion aircraft. Based on responses it received to a Freedom of Information Act (FOIA) request sent to the Navy on December 4, 1989, Heroux alleges that: offerors were subject to unequal testing requirements; Menasco failed to submit preaward approval from Lockheed for a proposed change to piston subassemblies; the Navy erred in accepting an ambiguous or contingent offer; and, the contracting officer did not understand the awardee's proposal.

The RFP was issued on July 13 with a closing date of August 24, on a restricted-source basis to the protester and the awardee. Menasco's total evaluated price for the 83 strut assemblies called for in the RFP was approximately

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\$6.75 million, while Heroux's was approximately \$7.79 million. Menasco was awarded a contract on September 15, and Heroux filed its present protest with our Office on February 26, 1990.

The Navy requests that Heroux's present allegations be dismissed as untimely because the protester failed to diligently pursue the grounds of its protest by waiting until December 4--11 weeks after contract award--to submit its FOIA request. Heroux states that it waited to file its FOIA request because, prior to December 4, it was anticipating receipt of relevant information in an agency report responding to an earlier protest it had filed with this Office on October 13, together with an October 27 letter which sought to supplement that protest.

For the reasons set forth below, we dismiss the protest.

Bid protests are serious matters which require effective and equitable procedural standards assuring a fair opportunity to have objections considered consistent with the goal of not unduly disrupting the procurement process. See Amerind Constr. Inc.--Request for Recon., B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. Accordingly, our Bid Protest Regulations, 4 C.F.R. Part 21 (1990), contain strict timeliness requirements for filing protests, and to ensure those long-standing requirements are met, a protester has an affirmative obligation to diligently pursue information that forms the basis for its protest. Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546. Where a protester waits an unreasonable amount of time to file an FOIA request seeking information related to the basis for its protest, the protest must be rejected as untimely. Finkelstein Assocs., Inc., B-237441, Nov. 22, 1989, 89-2 CPD ¶ 497 (5-week delay in filing an FOIA request held to be unreasonable).

In our view, Heroux acted unreasonably in waiting as long as it did to file its FOIA request. Its alleged reliance on receiving relevant information as the result of the protest it filed in October and later tried to supplement is misplaced since that protest was dismissed as untimely on October 26 without any requirement for an agency report. Heroux, Inc., B-237432, Oct. 26, 1989, 89-2 CPD ¶ 388. In addition, we note that, during the relevant time frame, Heroux never sought reconsideration of our first decision, never requested documents pursuant to 4 C.F.R. § 21.3(c), and never inquired about the status of its belated supplemental letter when it did not receive an acknowledgement pursuant to 4 C.F.R. § 21.3(a) indicating that we were

opening a protest case and requiring the submission of an agency report.^{1/}

Moreover, there is an inconsistency in Heroux's position which renders it unpersuasive with regard to its expectation that the agency report it awaited would necessarily contain information related to its present grounds of protest which the propriety of the agency's acceptance of the Menasco proposal: as the protester itself acknowledges in its conference comments, the grounds stated in its protest of October 13 (inequitable RFP terms) and its October 27 follow-up letter (misuse of proprietary data) are completely different from the concerns stated in its present protest.^{2/} Thus, we find that the October filings were simply not relevant to Heroux's pursuit of its present objections; and, since the protester waited 11 weeks from the date of contract award to file its FOIA request in pursuit of its present grounds of protest, we dismiss the protest as untimely. Finkelstein Assocs., Inc., B-237441, supra.

Finally, as to Heroux's suggestion that we should consider its protest under the "significant issue" exception to our timeliness requirements, 4 C.F.R. § 21.2(b), we note that the exception is strictly construed and sparingly used to prevent our rules from becoming meaningless, and that we will invoke it only where a protest raises an issue of first impression that would be of widespread interest to the

^{1/} Heroux seeks to justify not inquiring about the status of its October 27 letter by asserting that it was unfamiliar with the provision in our Regulations for a timely acknowledgement of receipt of a protest, 4 C.F.R. § 21.3 (a), and, therefore, assumed that an agency report would be forthcoming. Since our Regulations were published in the Federal Register and appear in the Code of Federal Regulations, protesters are charged with constructive knowledge of their contents and may not rely on an alleged lack of actual knowledge to avoid filing timely protests. Kaydon Corp.--Request for Recon., B-237062.2, Nov. 21, 1989, 89-2 CPD ¶ 486. Moreover, we question Heroux's alleged lack of familiarity with the protest process after October 27 in light of the protester's prompt telephone inquiry on October 19 about the status of its initial protest.

^{2/} The protester has also acknowledged that the initial protest allegation was untimely, and has "withdrawn" the allegation relating to proprietary data.

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Request for Recon., B-237498.2, Dec. 7, 1989, 89-2 CPD
¶ 528. The resolution of issues that would only concern
whether one proposal was properly evaluated and accepted do
not generally fall within the exception. Id.

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Associate General Counsel