



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Clear Air, Inc.--Reconsideration

**File:** B-242582.2; B-242582.3

**Date:** April 24, 1991

---

Ralph W. Taylor for the protester,  
Tracy N. Gruis, Esq., and Lester Edelman, Esq., Department of  
the Army, for the agency.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

---

### DIGEST

1. Prior dismissal of protest as untimely is affirmed where the initial protest submission indicated on its face that the protest was untimely, and the protester failed to provide evidence in its protest to establish timeliness.
2. A protester is not an interested party to object that award to another offeror would violate a solicitation prohibition against concurrent construction contracts where the protester, whose proposal was excluded from the competitive range, and who did not timely protest this exclusion, would not be in line for award even if this objection were sustained.

---

### DECISION

Clear Air, Inc. requests that we reconsider our decision of January 14, 1991, dismissing as untimely its protest of the rejection of its proposal under request for proposals (RFP) No. DACA67-90-R-0061, issued by the Corps of Engineers, Department of the Army, for construction services for the Refuse Incinerator Plant Completion Project at Fort Lewis, Washington. Clear Air also protests the Corps' selection of Blount, Inc. for award on the basis that such an award violates the RFP prohibition against award to a firm that is currently working on a fixed-price contract at the same work-site.

We affirm the dismissal and dismiss the protest.

By letter of December 13, 1990, the Corps informed Clear Air that its proposal was excluded from the competitive range. On December 14, Clear Air was orally informed that its proposal was so excluded because the firm lacked recent, similar experience. Clear Air filed a protest challenging its exclusion from the competitive range with our Office on January 10, 1991. Specifically, Clear Air protested that it had the technical capability to perform the contract, as shown by its past experience and management plan, and that it was entitled to be equitably treated because it is a small business concern. Clear Air also protested that its offer must be the lowest cost offer; that the agency failed to provide sufficient information to offerors to prepare their proposals about a purported design flaw that it provided to another offeror; and that Clear Air was the only offeror under a prior, canceled solicitation for these services.

We dismissed Clear Air's protest as untimely because Clear Air's initial submission indicated that the firm had learned of the bases for its protest on December 13, but did not protest until January 10, 1991, more than 10 working days after it knew or should have known the bases of its protest. Our Bid Protest Regulations require that protests like Clear Air's be filed within 10 working days after the bases of protest are known. 4 C.F.R. § 21.2(a)(2) (1991).<sup>1/</sup>

Clear Air asserts in its reconsideration request, that while it was informed on December 13 and 14 that its proposal was excluded from the competitive range, it was not until January 3 that it learned the basis of its protest. On that date, from its own independent investigation, it learned who its competitors were and determined on that basis that its proposal, vis-a-vis these firms, should not have been excluded. Clear Air argues that since its protest was filed within 10 working days of January 3, it should be considered timely. We do not agree.

A protester has the obligation to provide information establishing the timeliness of the protest when on its face the protest otherwise appears untimely. Federal Computer Corp.--Recon., B-239842.3, Oct. 17, 1990, 90-2 CPD ¶ 304. In other words, when a protest appears untimely on its face, a protester, who is in possession of facts that would establish timeliness but who does not initially provide these facts to our Office, runs the risk of dismissal and of our refusal to

---

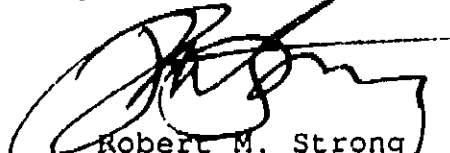
<sup>1/</sup> Clear Air's objections that the RFP sought competition after Clear Air was the only offeror under a prior, canceled solicitation concerns an apparent solicitation impropriety that was untimely protested after the closing date for receipt of proposals. See 4 C.F.R. § 21.2(a)(1).

reconsider the matter when the protester subsequently presents these facts. Global Crane Inst.--Recon., B-218120.2, May 28, 1985, 85-1 CPD ¶ 606.

Here, we are presented with just such a situation. Clear Air's protest, on its face, was untimely since it indicated that Clear Air had learned of the exclusion of its proposal on December 13, yet its protest did not state what facts, if any, Clear Air learned of after that date, which it required to pursue its protest.<sup>2/</sup> Since Clear Air was obligated to furnish a detailed statement of factual and legal grounds available to the protester when the initial protest was filed, see 4 C.F.R. § 21.1(b)(4), Clear Air assumed the risk that its protest would be dismissed. Federal Computer Corp.--Recon., B-239842.3, supra. Consequently, Clear Air is not entitled to consideration of the merits of its prior protest.

Clear Air also protests that award to Blount violates the RFP prohibition against concurrent construction contracts. We dismiss this protest because Clear Air is not an interested party to raise this objection, since Clear Air, on the basis of its proposal's exclusion from the competitive range, would not be in line for award even if this protest was sustained. See TETRA NAV Indus., B-239120; B-239120.2, Aug. 2, 1990, 90-2 CPD ¶ 96. In this regard, there is another firm, other than Blount, in the competitive range, and Clear Air does not challenge that firm's inclusion in the competitive range, nor timely challenge its own exclusion from the competitive range.

Our prior decision is affirmed and the protest is dismissed.



Robert M. Strong  
Associate General Counsel

---

<sup>2/</sup> Clear Air still has not detailed in any depth the additional information, and how it was obtained, on which it bases its protest.