



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Terex, Inc.--Reconsideration

File: B-243989.2

Date: June 24, 1991

Timothy S. Kerr, Esq., and Cliff G. Russell, Esq., Starfield & Payne, for the protester.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of dismissal of protest as untimely is denied where evidence of timeliness, available to the protester at the time the protest was filed, is first presented to General Accounting Office in request for reconsideration.

DECISION

United Terex, Inc. (UTI) requests that we reconsider our decision dated May 14, 1991, summarily dismissing as untimely filed its protest of request for proposals (RFP) No. N00104-90-R-K129, issued by the Navy Ships Parts Control Center for suspension bands.

We deny the request.

On March 19, 2 days before the solicitation closed, UTI filed an agency-level protest against certain RFP specifications. The contracting officer proceeded to accept proposals on the March 21 due date. On April 26, the contracting officer denied UTI's protest; UTI filed its protest of that decision in our Office on May 10. Noting that an agency's acceptance of proposals after the filing of an agency-level protest constitutes adverse agency action on the protest, 4 C.F.R. § 21.0(f) (1991), we found the protest untimely because it was not filed within 10 working days of UTI's actual or constructive knowledge of the adverse agency action. 4 C.F.R. § 21.2(a)(3).

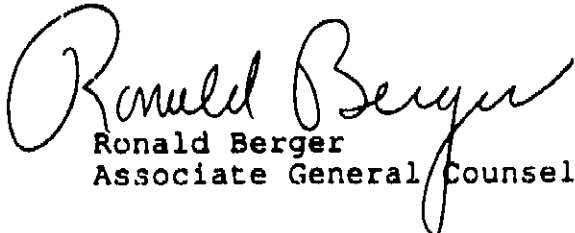
In its reconsideration request, UTI acknowledges the general timeliness rule as set forth in our decision, but asserts that the general rule does not apply in this case. UTI maintains that the contracting officer's representations that he would

consider and decide the protest notwithstanding his acceptance of proposals on the closing date, coupled with the agency's consideration of an earlier protest of the solicitation by UTI under similar circumstances, reasonably indicated to UTI that the agency's acceptance of proposals on the closing date did not constitute adverse agency action.

Under our Regulations, to obtain reconsideration, the requesting party must show that our prior decision was based on errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Information not previously considered means information that was not available to the protester when the initial protest was filed. See Global Crane Inst.--Recon., B-218120.2, May 28, 1985, 85-1 CPD ¶ 606. Consistent with this view, when a protest appears untimely on its face, a protester which is in the possession of facts that would establish its timeliness, but which does not initially provide these facts to our Office, runs the risk of dismissal and of our refusal to reconsider the matter when the protester subsequently presents these facts. 4 C.F.R. § 21.2(b); Rudd Constr. Inc.--Second Recon., B-234936.3, July 28, 1989, 89-2 CPD ¶ 88.

The protest originally submitted to us appeared untimely based on the fact that the agency accepted proposals on the closing date notwithstanding UTI's protest of the RFP requirements, and therefore properly was dismissed. UTI did not argue in its protest that our rule regarding adverse agency action--of which UTI was on constructive notice because it is published in the Federal Register--should not be applied to its protest. Since UTI could have made this argument in its protest, it does not constitute information not previously considered that would warrant our reconsideration of the matter under the above standard. Consequently, UTI is not entitled to consideration of the merits of its protest. 4 C.F.R. § 21.2(b); see Signal Corp.--Recon., B-238507.2, Apr. 25, 1990, 90-1 CPD ¶ 424.

The request for reconsideration is denied.


Ronald Berger
Associate General Counsel