144579

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Rapides Regional Medical Center--
Reconsideration

File: B-242601.2

Date: June 28, 1991

Kenneth O. Ortego, Esq., Gold, Weems, Bruser, Sues & Rundell, for the protester.
William E. Thomas, Esq., Department of Veterans Affairs, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of decision dismissing protest as untimely filed is denied where protester does not show that dismissal was based on errors of fact or law, and does not present information not previously considered which warrants reversal or modification of prior decision.

2. General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO's Bid Protest Regulations, where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

DECISION

Rapides Regional Medical Center (Rapides) requests reconsideration of our decision Rapides Regional Medical Center, B-242601, Feb. 12, 1991, 91-1 CPD ¶ 159. In that decision, we dismissed as untimely Rapides' protest that a joint venture agreement between the Department of Veterans Affairs (VA) Medical Center in Pineville, Louisiana and St. Frances Cabrini Hospital to purchase a linear accelerator for treating cancer patients constituted an improper sole-source award; Rapides argued the requirement should have been negotiated under full and open competition.

We deny the request.

We dismissed the protest based on our determination that it was filed more than 10 working days after the protest basis was known or should have been known. See 4 C.F.R. § 21.2(a)(2) (1991). In this regard, although the protest, filed on February 6, 1991, would have been timely filed based on the date on the first page of the protest submission (January 29), the date on the second and subsequent pages (January 7) indicated that the protest was originally written nearly 1 month before it was filed in our Office, and that the protester thus knew of its basis of protest at the earlier date. In its request for reconsideration, Rapides contends that its protest was timely filed because it was mailed on January 29, which was within 10 working days of when it first learned of the executed joint venture agreement from a January 17 newspaper article.

The agency has submitted correspondence to show that Rapides knew of the basis of its protest months before the date acknowledged by the protester, and no later than November 2, 1990. In correspondence of that date, the president of Rapides stated to the VA that "[r]ecently I was informed that the Veterans Administration/St. Frances Cabrini Hospital Linear Accelerator joint venture had been approved under the Advanced Technology Medical Equipment Acquisition and Sharing Program."1/ The record further indicat that the Memorandum of Understanding (MOU) for the joint venture was actually executed by the parties on August 30, 1990.2/

1/ Under 38 U.S.C. § 5053 (1988), the Secretary of Veterans Affairs may, when he "determines it to be in the best interest of the prevailing standards of the VA medical care program, make arrangements, by contract or other form of agreement," between the VA and other medical institutions for the "mutual use" or "exchange of use" of specialized medical resources (i.e., equipment, space, or personnel) which, because of cost, limited availability, or unusual nature, are either unique in the medical community or are subject to maximum utilization only through mutual use.

2/ The MOU provides for St. Frances Cabrini Hospital to contribute to the VA Medical Center not less than 50 percent of the acquisition and installation cost of the equipment, to be procured by VA, and to install the equipment at St. Frances. (VA is authorized to accept such gifts under 38 U.S.C. § 5101.) The equipment will remain VA property. Additionally, the MOU provides for the equipment's use to be governed by a mutual use sharing agreement, which will be negotiated under 38 U.S.C. § 5053 once the required July 30, 1991, delivery is met.

Our Bid Protest Regulations require protests to be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our Regulations define the term "filed" as receipt of the protest in our Office. 4 C.F.R. § 21.0(g). To determine when a protest was filed in our Office, we rely upon our time-date stamp, unless there is other evidence to show actual earlier receipt. See The Richard-Rogers Group, Inc.--Recon., B-234141.6, Feb. 22, 1989, 89-1 CPD ¶ 194.

Even if Rapides was on notice of VA's arrangement with St. Frances only as of January 17, it remains that its protest of February 6 was untimely filed with our Office; February 6 is more than 10 working days after January 17. It is irrelevant to the protest's timeliness that it may have been mailed within 10 working days of the date the basis of protest was known; the submission must be received by our Office within the required time. The Richard-Rogers Group, Inc.--Recon., B-234141.6, supra. A protester makes use of the mails at its own risk, and a delay in the mails does not serve as a basis for waiving our Regulations and considering an untimely protest. Id.

Moreover, we find the documentation furnished by VA to be persuasive evidence that Rapides in fact was aware of the arrangement in question at least as of November 2, the date of its letter to VA. Rapides actually acknowledges that it knew of a proposed joint venture prior to January 17, but contends that it was given no formal notice of the joint venture agreement (as embodied in the MOU) prior to that date, and argues that it should not be prevented from objecting to the final agreement upon learning of its execution. However, Rapides' use of the word "approve" in its November 2 correspondence indicates that the firm had knowledge that the joint venture was not merely at a proposal stage as of that date. Even if the January 17 article first put Rapides on notice that the arrangement had been finalized, it is clear that Rapides was aware at that fairly early date that VA intended to proceed with its arrangement with St. Frances. We consider this to have been sufficient notice of any alleged impropriety for purposes of measuring timeliness since a protester may not delay filing its protest until receipt of information confirming the existence of protestable issues. See Ahtna, Inc., B-235761.3; B-235761.4, Dec. 1, 1989, 89-2 CPD ¶ 507.

Rapides contends that, even if untimely filed, its protest presents an issue that should be considered under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(b). We will invoke the significant issue exception when, in our judgment, the circumstances of the case are such

that our consideration of the protest would be in the interest of the procurement system. Golden North Van Lines, Inc., 69 Comp. Gen. 610 (1990), 90-2 CPD ¶ 44. In order to prevent the timeliness requirements from becoming meaningless, however, we strictly construe and seldom invoke the exception, limiting it to protests that raise issues of widespread interest to the procurement community, see, e.g., Golden North Van Lines, Inc., 69 Comp. Gen. 610, supra, that have not been considered on the merits in a previous decision. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490.

While we recognize the importance of the matter to the protester, in our view, the propriety of the joint venture here is not an issue of widespread interest to the procurement community. Nor does the protest raise an issue of first impression. We previously have considered whether arrangements under 38 U.S.C. § 5053 are subject to competition requirements. In Veterans Admin., B-195559.2, Nov. 2, 1981, 81-2 CPD ¶ 369, we recognized VA's authority under 38 U.S.C. § 5053 to award sole-source contracts and held that we would not object to such awards once appropriate changes were made to VA regulations removing these types of contract awards from the competition requirements of the federal procurement regulations. The VA regulations currently include this change, approving sharing contracts negotiated under 38 U.S.C. § 5053 for other than full and open competition. 48 C.F.R. § 806.302-5(b). The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 251 et seq., provides no new basis for examining 38 U.S.C. § 5053 arrangements, since it specificall exempts from full and open competition procurement procedures otherwise expressly authorized by statute, such as here. See 41 U.S.C. § 253. Consequently, Rapides' protest does not fall within the narrow significant issue exception for consideration of an untimely protest.

Under our Regulations, to obtain reconsideration, the requesting party must either show that our prior decision may contain 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). Rapides has not met this standard. Accordingly, the request for reconsideration is denied.

Ronald Berger
Associate General Counsel