



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Wilkinson Group--Reconsideration

File: B-243291.2

Date: July 11, 1991

Larry W. Wilkinson for the protester.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Dismissal of protest as untimely is affirmed where basis for protest was filed more than 10 working days after the protester initially received actual or constructive knowledge of initial adverse agency action.
2. Protester's speculation regarding contracting agency's evaluation of proposals and eventual award is premature and thus provides no basis for protest where the agency has not made a determination regarding the acceptability of proposals or award.

DECISION

The Wilkinson Group requests reconsideration of our dismissal of its protest concerning request for proposals (RFP) No. FDA-SW-88-001, issued by the Department of Health and Human Services.

We affirm our prior dismissal.

Wilkinson originally protested to the General Services Administration (GSA) by letter dated November 15, 1990, alleging that not only had the "rumored" awardee submitted its offer after best and final offers (BAFOs) were due but also that the agency was biased in its favor. In addition, Wilkinson argued that the agency should solicit another round of BAFOs since the contracting officer had allowed Wilkinson to modify its proposal after BAFOs, yet had awarded the contract to a different offeror.

By letter dated December 18, the Food and Drug Administration (FDA) responded that no award had been made and that no offer had been accepted after close of business on the date set for

receipt of BAFOs.^{1/} Additionally, the agency stated that negotiations were closed upon receipt of BAFOs and that late, unsolicited modifications, like the protester had submitted, could only be considered if the offer were "an otherwise successful offer." There was no indication in the letter that the agency would reopen BAFOs.

On February 19, 1991, the protester submitted a revised proposal to the agency and again requested that the FDA "consider seriously reopening [BAFOs]," now arguing that the government could take advantage of recent economic changes, for example, reductions in interest rates, if it requested a second round of BAFOs.

On March 5, Wilkinson protested to the agency again, requesting that it reopen BAFOs and alleging improper evaluation of its offer.

Wilkinson protested to our Office on March 13. The protester argued that the agency was biased in favor of one offeror and that the agency should reopen BAFOs to take advantage of the favorable changes in economic factors which had occurred since BAFOs were submitted. The protester also alleged "ineptness of agency in evaluating [solicitation for offers] criteria" as applied to its bid.

We dismissed Wilkinson's protest as untimely because these initial filings from the protester, which included the November 15 agency level protest, indicated that Wilkinson had not filed its protest with our Office within 10 working days of "actual or constructive knowledge of initial adverse agency action," as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1991).

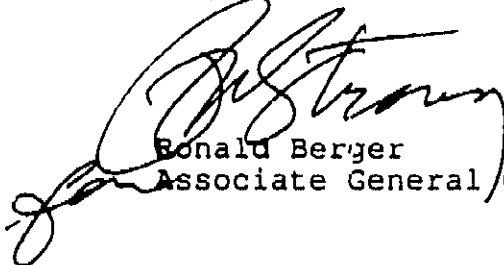
In its reconsideration request, Wilkinson argues that its allegations that the agency should reopen BAFOs and that the agency was "inept" in evaluating its offer are timely. Wilkinson says that these issues were first raised in its March 5 letter to the agency, and since its protest with our Office was filed on March 13, "[t]hese points of protest were made timely and within 10 working days after the basis of protest was determined." Wilkinson further argues that its protest basis concerning bias in favor of another offeror can be addressed when a contract is actually awarded to that offeror.

^{1/} Although Wilkinson protested to the GSA, the protest was answered by the FDA since GSA had delegated authority to FDA to award and administer the contract.

Wilkinson's allegation that the agency should reopen BAFOs, contrary to its assertions, was first raised in its agency-level protest of November 15, 1990, and reiterated on February 19, 1991 and March 5. Although it appears, based on the record before us, that the agency has never directly responded to this protest issue, the agency's delay does not excuse Wilkinson's failure to file a timely protest in our Office. It is the protester's affirmative obligation to diligently pursue the information that forms the basis of its protest. Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546. Thus, a protester may not delay filing a protest with our Office until it eventually receives a decision from the contracting agency. Rather, a protester may wait only a reasonable length of time for a contracting agency's response before filing a protest here. El Paso Builders, Inc.--Recon., B-241509.2, Nov. 19, 1990, 90-2 CPD ¶ 409. In this case, Wilkinson's 4-month wait for an agency response amounts to a failure to diligently pursue its protest. Id.

Wilkinson's concerns of "ineptness" and bias essentially involve the evaluation of proposals. We have been advised by the agency that a contract has not yet been awarded under the solicitation, and that no notices or other communications have been provided to offerors since the receipt of BAFOs. Since the agency has not made a determination as to the acceptability of proposals, Wilkinson's protest on these grounds is premature and will not be considered at this time. Barrett and Blandford Assoc., Inc., B-240723, Sept. 12, 1990, 90-2 CPD ¶ 204. If at the time offerors are notified of evaluation results and/or of award, and Wilkinson finds the results objectionable, then it may file its protest with our Office within 10 working days of notification.

The dismissal is affirmed.


Ronald Berger
Associate General Counsel