



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Adrian Supply Co.--Reconsideration

File: B-242819.3

Date: July 17, 1991

Bob Stormberg for the protester.
Millard F. Pippin, Department of the Air Force, for the agency.
Tania L. Calhoun and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The General Accounting Office properly dismissed as untimely a protest of a cancellation of a solicitation where the record indicated that the protester was aware of the agency's intent to cancel and did not file the protest until it received written confirmation of the cancellation.

DECISION

Adrian Supply Co. requests reconsideration of our dismissal of its protest against the cancellation of invitation for bid (IFB) No. F29650-90-B-0039, issued by the Department of the Air Force, Kirtland Air Force Base, New Mexico, for the supply of an electrical substation. We dismissed Adrian's prior protest because it was not timely filed under our Bid Protest Regulations.

We affirm the prior dismissal.

Nine bids were received by the July 24, 1990, bid opening. Six bids were rejected as nonresponsive. Adrian submitted two bids, one of which was found technically unacceptable and rejected as nonresponsive. Adrian's alternate bid, which also had been rejected as nonresponsive, was not considered by the agency. DISCO-Allen Electric Supply was the lowest responsive bidder at \$553,953 and was awarded the contract on January 25, 1991.

Adrian protested the contract award to our Office on February 1, claiming that the contracting officer should have considered Adrian's alternate bid of \$550,666. After further study, the contracting agency considered Adrian's alternate

bid and found it technically acceptable and responsive. By letter dated February 8, the agency informed Adrian that it was terminating DISCO-Allen's contract for convenience and that Adrian would be awarded the contract. This letter cautioned that it was not a commitment by the government and that Adrian should not take any further action until the company received a signed copy of the contract. On the basis of this information, Adrian withdrew its protest on February 11.

At about that time, DISCO-Allen questioned whether a load loss evaluation should have been performed.^{1/} After some evaluation, the agency's technical representatives determined that the solicitation should have called for a load loss evaluation. In addition, the agency found that the stated delivery schedule might not represent its requirements.

There were certain telephonic conversations on February 13 and February 27 between Adrian and the contracting office. The actual content of these conversations is in dispute. The contracting agency asserts it informed Adrian of its intent to cancel the solicitation, while Adrian insists that it was told only that the agency was considering cancellation. On March 5, Adrian sent a letter by facsimile that addressed questions regarding each of the reasons advanced by the agency for canceling the procurement and requested a response "preparatory to refiling" a protest at the General Accounting Office (GAO).

The agency sent a letter by facsimile to Adrian on March 12, responding to the questions and affirming its intent to cancel the solicitation. This letter arrived in Adrian's office on March 12, after Adrian's stated business hours; Adrian asserts that the letter was not received until March 13. Adrian filed a protest with this Office on March 27, 1991, challenging the cancellation of the IFB and claiming that award should be made to Adrian as promised.

We dismissed the protest as untimely because the record, specifically the letter of March 5, showed that Adrian knew its basis of protest on that date, yet did not file a protest until March 27, 16 working days later.^{2/} Under our Bid

1/ The amount of power flowing from a transformer is always less than the amount of power flowing into a transformer. The load loss is the difference between the input power and the output power. A pre-award load loss evaluation was not provided for in the IFB.

2/ The protest did not mention the telephone conversations of February 13 and 27.

Protest Regulations, to be timely a protest must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1991). A protester is charged with knowledge of a basis of protest if (1) the protester's interests are being directly threatened under a then-relevant factual scheme, and (2) the agency conveys to the protester its intent on a position adverse to the protester's interest. Storage Technology Corp., B-194549, May 9, 1980, 80-1 CPD ¶ 333. Under these circumstances, the "intended" nature of the protested action does not otherwise permit the protester to defer filing its protest until the agency has actually taken the proposed action. Id. The March 5 letter demonstrated not only that Adrian had knowledge of the agency's intent to cancel the solicitation and its reasons for doing so, but also that Adrian believed it had "no choice but to refile protest with the GAO in this matter."

Adrian requests that we reverse our dismissal. Adrian contends it became aware of its basis of protest on March 13, upon receipt of written affirmation of the agency's intent to cancel the solicitation. Adrian argues that it had no basis of protest until the solicitation was actually canceled and that the contracting officer's statement of an intent to cancel was insufficient.

As discussed above, we do not believe a protester is entitled to await a formal agency determination when it is specifically apprised of intended agency action adverse to its interests. The documents submitted with the protest indicate that Adrian complained to the agency about the agency's intended action shortly following its receipt of the disputed oral notification. This clearly shows that Adrian was on notice of its basis of protest as early as March 5. See Tribe Fleet, Inc.--Recon., B-239080.2, Apr. 16, 1990, 90-1 CPD ¶ 394. While Adrian contends that the March 5 letter was an attempt to change the agency's position on cancellation encouraged by the contracting officer, it is well-established that such attempts to persuade the agency to change its position do not toll our timeliness requirements. Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ ___, aff'd, B-243555.2, July 3, 1991, 91-2 CPD ¶ ___; American Productivity & Quality Center, B-242703, Jan. 18, 1991, 91-1 CPD ¶ 60.

In its reconsideration request, Adrian relies on the February 13 and 27 telephonic conversations that it asserts indicated equivocation on the agency's part with regard to cancellation. However, Adrian's protest was on its face untimely, as evidenced by the March 5 letter indicating its knowledge of the agency's intent to cancel the solicitation as well as the reasons therefor. There was no indication of any alleged equivocation on the part of the agency in the March 5 letter, on which we based our dismissal of Adrian's protest.

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. Where, as here, a protest appears untimely on its face, a protester who is in possession of facts (e.g., the earlier telephone conversations) that would tend to establish its timeliness, but who 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 the facts. Rudd Constr., Inc.--Second Recon., B-234936.3, July 28, 1989, 89-2 CPD ¶ 88. Since Adrian was obligated to furnish a detailed statement of factual and legal grounds available to the protester when the initial protest was filed, 4 C.F.R. § 21.1(b)(4), Adrian assumed the risk that its protest would be dismissed when it did not mention the telephone conversations in the protest. Our regulations do not permit a piecemeal presentation of evidence, information, or analyses, and where a party raises in its reconsideration request an argument that it could have, but did not, raise at the time of the protest, the argument does not provide a basis for reconsideration. FAA Seattle Venture, Ltd.--Recon., B-234998.4, Oct. 12, 1989, 89-2 CPD ¶ 42; Marine Indus., Ltd.--Recon., B-225722.2, June 24, 1987, 87-1 CPD ¶ 627. Adrian has presented no evidence warranting reversal or modification of our dismissal of its protest.^{3/}

The prior dismissal is affirmed.



Ronald Berger
Associate General Counsel

^{3/} Under the circumstances, we need not resolve the dispute regarding the content of these telephone conversations.