



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

D. McARTHUR

Decision

Matter of: Mantech Technical Services Corporation--
Reconsideration

File: B-244240.5

Date: December 6, 1991

Richard L. Moorhouse, Esq., and Robert G. Bugge, Esq.,
Dunnells, Duvall & Porter, for the protester.
Robert C. Peterson, Esq., Department of the Navy, for the
agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

General Accounting Office (GAO) affirms dismissal of protest as untimely where protester filed protest more than 10 working days after learning the reasons why the agency believed contract was improperly awarded and that its contract had been terminated; in such a case, GAO will review the propriety of the termination, even where agency has not yet announced its intention to resolicit.

DECISION

Mantech Technical Services Corporation requests reconsideration of our August 13, 1991, dismissal of Mantech's protest of the termination of a contract awarded to the protester under request for proposals (RFP) No. N00612-91-R-7001, issued by the Department of the Navy. We dismissed the protest as untimely, based upon our determination that, at the latest, the Navy had informed the protester why it had terminated the contract on June 5, 1991, 13 working days before Mantech filed its protest on June 24.

We affirm our dismissal.

On June 24, 1991, Mantech filed its protest. Mantech stated that its filing was within, "10 (working) days of Mantech's knowledge of the agency's decision not to rescind the termination action and reinstate the contract, and to resolicit the requirement." On July 31, the agency provided a copy of a transcript of a telephone conversation prepared by the contract administrator who had telefaxed the notice of termination to the protester on June 4. According to the

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transcript, the administrator had told the protester why the agency had terminated the contract--that as a result of questions raised by a Mantech representative at the post award conference, the agency had reviewed the terms of the contract and had discovered that the original solicitation was ambiguous as to contract type.¹ The agency asked that our Office dismiss the protest, as untimely filed under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1991), which provide that protests (other than protests against alleged solicitation improprieties) shall be filed not later than 10 working days after the basis of protest is known.

We requested that the protester respond to the agency's motion for dismissal. In its response, the protester contended that the contract administrator had not provided the basis for the agency's decision on June 4, and that the protester therefore had no basis to protest on that date. The protester provided an affidavit, however, admitting that a Mantech vice president spoke with the contracting officer on June 5, at which time the contracting officer explained the reasons for the termination. Specifically, in the affidavit, Mantech's vice president stated that the contracting officer told him that the agency had reviewed the terms of the contract, as a result of the post award conference, and had concluded that the solicitation was indeed unclear as to the contract type. Accordingly, since the protester's submissions showed that the protester knew of its basis for protest, that is the reason for the termination based on an allegedly improper award, no later than June 5, 13 working days before Mantech filed its protest with our Office, we dismissed the protest.

The protester raises several arguments in its request for reconsideration. First, the protester argues that our Office lacks jurisdiction over termination actions, absent an intent on the part of the agency to resolicit; the protester asserts that while the agency advised the protester of the termination at an earlier date, the agency did not announce its intention to resolicit the requirement until June 10. The agency denies this and has submitted an affidavit from the contracting officer, stating that he told the protester of the agency's intention to resolicit the requirement in their June 5 telephone conversation.

¹According to the agency, the protester's representative stated that he understood the contract to be a time and materials contract; the agency had intended to issue fixed-price delivery orders.

We need not resolve the disagreement as to when Mantech was advised of the agency's decision to resolicit. While the protester is correct that as a general rule, our Office will not review an agency's decision to terminate a contract for the convenience of the government, we will review the reasonableness of that decision where the agency's action is based upon a determination that the initial contract was improperly awarded. Republic Realty Servs., Inc., B-242629, May 7, 1991, 91-1 CPD ¶ 446. Once advised that the termination action was based upon an agency determination that the initial award was improper, the protester knew or should have known that our Office would take jurisdiction. Absent any indication that the agency no longer considered the underlying requirement valid, it is then the termination of the protester's contract and not the subsequent resolicitation, additional round of discussions or award to another offeror that forms the basis of the protest. See W.O. Blackstone & Co., Inc., B-242388.2, July 19, 1991, 91-2 CPD ¶ 75; Caldwell Realty, et al., B-236519 et al., Aug. 25, 1989, 89-2 CPD ¶ 181. The protest, filed more than 10 working days after the protester received notice of the termination and an explanation of the agency's actions, is therefore untimely, whether or not the agency specifically discussed its intention of resoliciting.²

Second, the protester argues that its telephone conversations with the agency on June 4 and 5 constituted a timely oral protest to the agency that the agency denied on June 10, and that was then timely protested to our Office. The Federal Acquisition Regulation (FAR) § 33.101 (FAC 90-3) does not provide for oral protests to the agency or our Office. See also K-II Constr., Inc., 65 Comp. Gen. 422 (1986), 86-1 CPD ¶ 270. Thus, even assuming we could construe Mantech's conversations with agency personnel as a protest, the oral complaint to the contracting agency did not constitute a protest such that a subsequent protest to our Office would be timely. The requirement for a written protest serves to preclude exactly the sort of controversy that the protester now argues exists, concerning what issues were protested at what time and to what issues the agency was obligated to respond. Accordingly, under the FAR and our Bid Protest Regulations, the protester was here obligated to file its protest in writing with the agency or with our Office no later than June 19, 10 working days after

²In fact, Mantech has filed a separate protest of the resolicitation for an interim contract award.

it knew of its basis of protest. 4 C.F.R. §§ 21.1(b), 21.2(a)(2) and (a)(3). This, the protester acknowledges, it did not do.

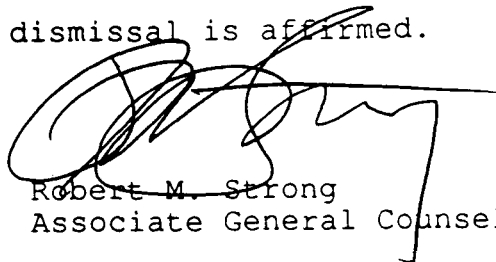
Third, the protester argues that our initial docketing of the protest effectively resolved the timeliness issue in its favor, and that it was procedural error to consider the agency's August 9 letter in which the Navy argued that Mantech's own submissions had established the untimeliness of the protest. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1991), we retain the discretion to dismiss a protest at any time that we obtain information, from the agency or other source, that such action is proper. Here, while the initial protest contained no information raising the question of the timeliness of the protest, the agency's motion for dismissal and the protester's submissions in response to the agency's motion for dismissal, demonstrated that Mantech's protest was untimely. While it is true that our Office will resolve doubts as to timeliness in the protester's favor where there is doubt as to when the protester first became aware of its basis to protest, the record here clearly shows that Mantech received the notice of termination on June 4 and learned the reasons for that action the next day. Thus, there is no doubt, based on the record, that the protest is untimely.

The protester also argues that the termination notice received on June 4 did not constitute final agency action. In this connection, the protester cites Liebert Corp., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶ 413. In that decision, the protester knew its basis of protest against award, but delayed filing a protest because the agency canceled the orders and reasonably conveyed to the firm that the agency would not act contrary to the protester's interest while the matter was investigated. Here, there are no facts like those in Liebert Corp. which reasonably support Mantech's decision to delay filing a protest in the face of receipt of a termination notice and the reason for the action. Mantech's decision to continue to pursue the matter with the agency did not alter, in our view, Mantech's responsibility to conform to the filing requirements of our Regulations. See Skyline Indus., Inc., B-244542, July 18, 1991, 91-2 CPD ¶ 73.

In its request for reconsideration, the protester contends that the agency's desire to avoid litigation before our Office concerning protests by two unsuccessful offerors under the subject procurement constituted an additional and improper motivation for the termination action. Where, however, the protester has failed to file a timely protest against the agency's determination that the solicitation

contained defects and that the original award was therefore improper, the fact that additional reasons for terminating the award may or may not exist is immaterial.

The dismissal is affirmed.

A handwritten signature in black ink, appearing to be "R. M. Strong", written over the typed name.

Robert M. Strong
Associate General Counsel