

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

Decision

Matter of: Pioneer Aerospace Corporation

File: B-245911

Date: December 27, 1991

Irving M. Sobolov for the protester,
Major William R. Medsger and Captain Paul A. Debolt,
Department of the Army, for the agency.
Jeanne W. Isrin, Esq., and David Ashen, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Protest filed with General Accounting Office is untimely
where filed more than 10 working days after protester became
aware of initial adverse agency action on agency-level
protest.

DECISION

Pioneer Aerospace Corporation protests the determination of
its nonresponsibility by the Army Materiel Command (AMC),
and the subsequent award of a contract to Mills
Manufacturing Corporation, under invitation for bids (IFB)
No. DAAK01-91-B-0116, issued for a 3-year requirements
contract for cargo parachutes, National Stock Number 1670-
00-872-6109.

We dismiss the protest as untimely.

The solicitation was issued on an unrestricted basis on
April 9, 1991. Three bids were received by the May 30
bid opening. Pioneer submitted the low bid; Mill's bid was
second low. Despite a subsequent satisfactory preaward
survey, the contracting officer concluded that Pioneer was
nonresponsible based on what he considered to be a high
delinquency rate and inconsistent past performance. After
Mills was awarded the contract on August 14, Pioneer
protested the nonresponsibility determination to the
contracting officer. By letter of September 17, the
contracting officer denied the protest. Pioneer then filed
this protest with our Office on September 27, arguing,
essentially, that the facts on which the determination was
based were incorrect, and that the cited deficiencies

resulted from defective specifications or were otherwise excusable.

We dismiss the protest as untimely because it was filed more than 10 working days after the protester received notice of adverse agency action on its agency-level protest of the same issue. Where a protest initially has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1991). The term "adverse agency action" is defined in our Bid Protest Regulations as any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(f); see Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58. Timeliness in such cases thus is measured from the point of actual or constructive knowledge of initial adverse agency action rather than from the receipt of a subsequent formal denial of the agency-level protest. Scopus Optical Indus., B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221.

The record shows that after Pioneer filed its agency-level protest, the head of the contracting activity (HCA), by letter of August 23, wrote to a member of Congress to acknowledge receipt of Pioneer's protest and to advise that the nonresponsibility determination had been based on "inconsistent past performance" and a current delinquency rate of 42 percent. The HCA stated that "because we believe we made the award to Mills in full compliance with procurement regulations, we do not intend to reverse our decision. We anticipate providing Pioneer with our response to their protest by September 20, 1991." By letter dated September 6, Pioneer acknowledged receipt from the member of Congress of a copy of the HCA's August 23 letter. Pioneer's representative wrote that: "To me the message [from the HCA] clearly stated . . . that AMC was going to substantiate their position regardless of our protest and its facts"; he added that, "based on the [HCA's] letter I am taking those steps necessary to appeal their decision, which was apparently decided before any review of our protest took place, to GAO." (Emphasis added.)


In our view, AMC's August 23 letter gave clear notice that the agency would deny Pioneer's protest and constituted initial adverse agency action. Indeed, in its September 6 letter, Pioneer clearly acknowledged its understanding of the agency's intention to deny its protest.

Although Pioneer argues that only when it received the September 17 formal denial of the agency-level protest did it have the complete rationale for the agency's nonresponsibility determination, Pioneer's August 15 agency-level protest makes it clear that Pioneer then was aware of the basis for the nonresponsibility determination. Pioneer stated in its August 15 letter its understanding that the nonresponsibility determination was based on "delinquent Army contracts"; it argued that the determination must have relied on "fallacious" data and that any deficiencies were the result of causes beyond its control. In other words, Pioneer's agency-level protest raised essentially the same grounds which it now raises in its protest to our Office. Where a protester is already reasonably aware of a protest basis, it may not wait until it obtains additional information pertaining to the protest before filing the protest. See Tek-Lite, Inc.--Recon., B-235306.2, July 24, 1989, 89-2 CPD ¶ 76; Sperry Corp., B-225492; B-225492.2, Mar. 25, 1987, 87-1 CPD ¶ 341. In any case, in an October 9 letter to our Office, Pioneer states that as of September 6, it had in its possession HCA's letter, the preaward survey, and the contracting officer's original nonresponsibility determination, the sum of which clearly provided the factual basis for Pioneer's protest arguments. Thus, Pioneer was well aware of the factual basis for its subsequent arguments to our Office no later than September 6.

Since Pioneer learned of the initial adverse agency action no later than September 6, but did not file its protest with our Office until September 27, more than 10 working days later, its protest is untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(3). These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and of resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. Given the paramount interest in maintaining the integrity of the bid protest process, the possibility that Pioneer's bid, if Pioneer were found responsible, would represent a cost savings to the

government, does not provide a sufficient reason to abandon our timeliness requirements. See Spectec Thunderbird Int'l Corp.--Recon., B-242817.2, Apr. 2, 1991, 91-1 CPD ¶ 340.

The protest is dismissed as untimely.



John M. Melody
Assistant General Counsel