



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

Decision

Matter of: Federal Marketing Office--Reconsideration

File: B-249097.3

Date: January 5, 1993

William Grote for the protester,
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Decision dismissing protest as untimely is affirmed where protester's pre-bid opening letters to agency were clearly labeled as requests for clarification and information, respectively, and at a minimum did not contain the expression of dissatisfaction which is required to render them agency-level protests.

DECISION

Federal Marketing Office (FMO) requests reconsideration of our October 20, 1992, dismissal of its protest of several specifications in invitation for bids No. 263-92-B-BL-0065, issued by the Department of Health and Human Services, National Institutes of Health, for binders.

We affirm the dismissal.

The solicitation was issued for the procurement of three different types of binders to be supplied on a brand name or equal basis. Prior to the extended July 23, bid opening, FMO sent the agency three letters. On June 26, FMO filed what it called a request for clarification of various specifications; on July 3, FMO filed a Freedom of Information Act (FOIA) request for information concerning various specifications; and on July 23, an hour before bid opening, FMO filed a letter in which it stated objections to various specifications and asserted its intention to protest to our Office. Shortly after bids were opened, FMO filed its protest with our Office.

In our prior decision, the initial issue we addressed was whether FMO's protest to our Office was timely, which depended on whether FMO's letters to the agency prior to bid opening were agency-level protests or mere requests for clarification and information. Under our Bid Protest

Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening, as here, shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1992). If a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 days of actual or constructive knowledge of adverse agency action, 4 C.F.R. § 21.2(a)(3), which includes the opening of bids despite the pendency of a protest. 4 C.F.R. § 21.0(f). Consequently, FMO's protest to our Office would be timely only if FMO's letters to the agency were agency-level protests.

In our dismissal of FMO's protest, we determined that, notwithstanding the absence of an explicit statement that it was a protest, FMO's July 23 letter was in fact a protest because it conveyed the intent to protest by an expression of dissatisfaction and a request for corrective action. See Mackay Comms.--Recon., B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426. Since we determined FMO's July 23 letter to be a timely agency-level protest of several alleged solicitation improprieties, we found that its protest to our Office, to the extent that it alleged those same improprieties, was timely as well. See 4 C.F.R. § 21.2(a)(3).¹ We did not, however, consider FMO's other two letters to the agency to be protests, but rather mere requests for clarification and information; consequently, we did not consider the issues raised therein.

In its request for reconsideration, FMO asserts that while its June 26 and July 3 letters to the agency did include requests for clarification and information, they also requested that a packaging specification be modified to permit optional packaging. FMO asks that we consider these requests to be agency-level protests of this specification, making its protest of this issue to our Office timely.²

To be regarded as a protest, a written statement need not state explicitly that it is in fact a protest, but must convey the intent to protest by an expression of dissatisfaction and a request for corrective action. Mackay Comms.--Recon., supra. Where a letter merely contains suggestions

¹As to the merits of the protest, we dismissed FMO's allegation that the 1-year option period called for in the solicitation was illegal because the FAR specifically permits the use of options in contracts. FAR § 17.202; WEMS, Inc., B-222553, June 6, 1986, 86-1 CPD ¶ 533. We also dismissed FMO's protest concerning a bar code labeling specification because we found that it was without factual basis.

²FMO did not request reconsideration of our decision on the other issues it raised.

or requests for clarification, it does not constitute a formal protest. Constantine N. Polites & Co.--Recon., B-233935.2, Feb. 17, 1989, 89-1 CPD ¶ 173.

The first paragraph of FMO's June 26 letter states that "the following clarifications are needed before an offer in response to referenced solicitation can be provided" Immediately following this paragraph are five numbered sections, each pertaining to a different specification; the packaging specification is the subject of section number four. In our earlier decision, we found that letter was a mere request for clarification of various specifications, and thus did not constitute a protest.

The protester argues that the last sentence of section number four is a request for corrective action, as it states that "it is requested that the specifications for Items 2, 3, 5, and 6 be changed to permit standard packs of 6 and 12." Even if this is a request for corrective action, which is one prerequisite to a protest, when read as a whole, this section of the letter does not convey an expression of dissatisfaction, another prerequisite to a protest. Mackay Comms.--Recon., supra. The first paragraph of section number four merely states the packaging standards of FMO's supplier; the second paragraph of the section suggests that the specification "may" be restricting competition; and the final paragraph of the section states what FMO asserts to be the packaging specifications used by other agencies. In context, then, the sentence relied on by the protester appears to be simply a request for a specification change as part of the several clarifications requested. In other words, that and the other sentences in the letter seem to be more in the nature of suggested improvements than any clear expressions of dissatisfaction with requests for corrections of allegedly legally flawed specifications. See Constantine N. Polites & Co.--Recon., supra. In short, we continue to view FMO's June 26 letter as the request for clarification that it identified itself to be.

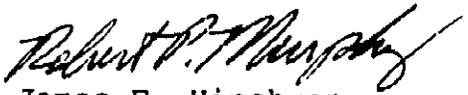
FMO's July 3 letter is captioned "Freedom of Information Request." Unlike all of FMO's other letters, this letter was addressed to the Acting Deputy Director of the Division of Procurement, rather than to the contracting officer, who was the individual designated by the solicitation to receive protests. See also Federal Acquisition Regulation § 52.233-2(a). In our earlier decision, we found this letter to be a mere request for information through the FOIA procedure; there is no basis for us to reconsider our earlier finding.

The protester argues that the letter's third paragraph contains a request for corrective action, as it states that "it is further requested that the specifications on page 8

be modified to permit optional packaging" Again, however, the context of this statement does not convey an expression of dissatisfaction, but rather a statement of what FMO asserts to be the industry's standard packaging. Further, the request is contained in a letter clearly captioned as a FOIA request addressed not to the contracting officer, as a protest would be, but to the Acting Director of the Division of Procurement.

While FMO may have intended these letters to be protests, a protester who fails to clearly set forth its grounds for protest assumes the risk that its protest will not be construed as intended. See ABC Food Serv., Inc.--Recon., B-211679.2, Dec. 20, 1983, 84-1 CPD ¶ 3; Young Patrol Serv.--Recon., B-204198.2, Aug. 24, 1982, 82-2 CPD ¶ 169. Because the letters clearly state that they are requests for clarification and information, respectively, and because neither letter contains the expression of dissatisfaction which is a prerequisite of a protest, we do not consider either of the letters to be a protest of the packaging specification.

The dismissal is affirmed.


James F. Hinchman
General Counsel