Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technology Management & Analysis Corporation--Reconsideration

File: B-256313.6

Date: December 7, 1994

DECISION

Technology Management & Analysis Corporation (TMA) requests reconsideration of our decision in Technology Mgmt. & Analysis Corp., B-256313.3; B-256313.5, May 9, 1994, 94-1 CPD ¶ 299, in which we dismissed its protests against the award of a cost-plus-fixed-fee contract to MKI Systems, Inc. under request for proposals (RFP) No. M67854-93-R-2098.

We deny the request for reconsideration because the protester has not shown that our prior decision contains an error of fact or law.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1994).

In our prior decision, we held that the protester did not diligently pursue relevant information that may have revealed grounds of protest where the protester, after a 9-week period following notice of award, intervened as an interested party in another firm's protest and then filed its own protest following receipt of the agency report submitted in response to the other firm's protest. We stated that our timeliness requirements cannot be governed by the protester's purely discretionary decision of when and whether to intervene in another party's protest. In short, we found that permitting the protester, after a lengthy period of inaction, to "piggyback" on the protest of another party would severely compromise the ability of our Office to expeditiously and fairly resolve protest controversies without unduly delaying or disrupting the competitive procurement process. Accordingly, we dismissed the protests as untimely.

As its principal basis for reconsideration, the protester argues that our prior decision is inconsistent with another recent decision by our Office, Varicon Int'l, Inc.; MVM, Inc., B-255808; B-255808.2, Apr. 6, 1994, 94-1 CPD ¶ 240, in which we considered as timely one allegation advanced by an interested party based on information obtained from an agency report received in response to another firm's protest. We merely note that the Varicon decision only considered the timeliness of the allegation under our Bid Protest Regulations' "10-day rule" (4 C.F.R. § 21.2(a)(2)); we never addressed the question of diligent pursuit or the broader policy question of whether permitting late "piggyback" protests would seriously delay and undermine our bid protest forum and the pending procurement. To the extent the Varicon decision and our earlier decision in this protest by TMA appear inconsistent, we consider the rationale in TMA to be the correct one.

In its protest, TMA argued that the information conveyed to TMA at the debriefing did not provide the firm with a basis to protest and that it was otherwise unaware of any basis to protest until after it had intervened in the other party's protest. As early as January 14, 1994 (when the agency notified unsuccessful offerors of its intent to award the contract to MKI to permit small business size challenges), the protester knew that its proposal was not selected for award by the agency and that the contract would be awarded to MKI. Yet, TMA, under the facts and circumstances of this case, did not file its initial protest until March 28, 1994, almost 2 1/2 months after its first notification of an adverse decision by the agency concerning its proposal. As stated in our prior decision, where a lengthy period of inaction precedes the filing of a protest, our Office looks to see if an "intervening event" subsequently occurred that timely triggered the later-filed protest. See generally Waukesha Engine Div. of Dresser Indus., Inc., B-215265, June 24, 1985, 85-1 CPD ¶ 711. The record here showed no such intervening event.

While the protester argues that it had no basis to protest, a disappointed offeror should take some action to uncover bases of protest following notification of award to another firm on a relatively prompt basis. For example, when a firm receives a notice of award to another firm, it may file a Freedom of Information Act request despite the fact that it then has no present reason to question the award. In other words, diligent pursuit requires some action within a reasonable time after award. We do not think that intervening in another firm's protest after a period of time substantially in excess of that allowed under our

Regulations (and without explanation as to the delay) satisfies our timeliness requirements for diligent pursuit. We therefore find no basis to reverse our prior decision that the protester here failed to diligently uncover bases of protest in a timely manner.

TMA also argues that it should have been considered an interested party eligible to participate in the other firm's protest regardless of whether or not its protests were timely filed. In our initial decision, we stated that TMA, because it failed to timely protest, was not an interested party--our Regulations specifically state that an interested party for "the purpose of participation in a protest means an awardee if the award has been made." 4 C.F.R. § 21.0(b). TMA was not the awardee and therefore was not an interested party eligible to participate in the proceedings. In this regard, the protester argues that our Office should "strike down" our Bid Protest Regulations which restrict participation as interested parties to awardees in protest proceedings.

Under the Competition in Contracting Act, 31 U.S.C. § 3555 (1988), our Office has the authority to issue procedures and regulations governing the conduct of bid protests. The definition of "interested party" as including only the awardee in post award protests enhances the prompt resolution of protests by limiting participation to those firms with the more clearly defined economic stake in the matter. This limitation is appropriate, in our view. We note in this regard that in connection with the enactment of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, we are amending our Regulations. Proposed amended Regulations will be issued for public comment in the near future. Any proposals for modifying the regulatory definition of interested party will be considered during that process.

The request for reconsideration is denied.

Robert P. Murphy
Acting General Counsel