

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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97278

FILE: B-181380

DATE: May 27, 1975

MATTER OF: Eastern Microwave Corporation

DIGEST:

1. Request for reconsideration of decision holding protest filed more than 4 months after IFB was issued following cancellation of prior invitation is denied because assumption by protester that it had been determined nonresponsible under prior IFB and therefore did not protest until learning no such determination was made does not constitute "good cause" under 4 C.F.R. § 20.2(b) (1974). Further, fact that agency did not notify protester that another protest had been filed is procedural failure and even with such notification, protester could not have filed timely after such notification.
2. Determination of responsibility of prospective contractor is to be made between bid opening and award and therefore agency has until date of award to determine responsibility.

Eastern Microwave Corporation (Eastern) has requested reconsideration of our decision in the Matter of Eastern Microwave Corporation, B-181380, March 12, 1975, which held untimely the protest of Eastern against the cancellation of solicitation No. N00019-74-B-0019 and the subsequent issuance of solicitation No. N00019-75-B-0003 by the Naval Air Systems Command (NAVAIR).

Eastern has based its request for reconsideration on what it considers the unusual circumstances surrounding the procurement, which it contends affected the filing of its protest in a timely manner.

A review of the sequence of events shows that solicitation N00019-74-B-0019 was canceled on August 7, 1974, and the resolicitation was issued on October 11, 1974, with bid opening on October 24, 1974. Eastern's protest was filed with our Office on February 18, 1975.

Eastern contends that it believed it had been found to be nonresponsible under solicitation -0019 and, therefore, ineligible for award under that solicitation and did not question the cancellation.

On November 15, 1974, after solicitation -0003 was issued and bids were opened, Eastern requested a decision on its qualification and on January 2, 1975, was advised that it had not been found non-responsible under solicitation -0019. However, at this time, Eastern concluded it was too late to protest the cancellation of the prior solicitation and therefore took no action.

In early February 1975 Eastern learned that a protest had been filed with our Office on October 21, 1974, against the cancellation of -0019 by another bidder, Radiation Systems, Incorporated (RSI), which prompted Eastern's February 18, 1975, protest to our Office.

The assumption of Eastern that it had been found to be non-responsible under solicitation -0019, which assumption was later found to be erroneous, does not, in our view, constitute "good cause" under § 20.2(b) of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)) so that the untimeliness of the protest may be waived.

Next, Eastern alleges that it was never notified in a timely manner by NAVAIR of the filing of RSI's protest as required by 4 C.F.R. § 20.3 (1974), which states that after the contracting agency receives advice from our Office that a protest has been filed, it should promptly notify all interested parties. Eastern states that it only learned of the existence of the protest through a trade publication.


While the above appears to be true based on the record, we fail to see how prompt notification by NAVAIR would have led to a timely protest by Eastern. RSI protested to our Office on October 21, 1974, the issuance of IFB -0003 on October 11, 1974, with bid opening set for October 24, 1974. Our Office orally advised NAVAIR of the protest on either October 21 or 22. Assuming NAVAIR promptly sent a letter to Eastern on October 22 or 23, Eastern would not have had sufficient time to file a timely protest, which would have had to have been filed within 5 days of receipt of the new IFB, or the date on which it learned of its basis for protest (4 C.F.R. § 20.2(a) (1974)). 52 Comp. Gen. 792 (1973). Therefore, we do not view this procedural defect by the agency as sufficient for our Office to ignore the untimeliness of the protest.

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Finally, Eastern states that NAVAIR is purposely delaying taking action under IFB -0003 in order to allow RSI to become responsible and is also delaying the submittal of a report to our Office on the RSI protest. The responsibility of a bidder is determined on the evidence available up to the date of award. Therefore, there is no requirement for a determination on RSI's responsibility prior to the making of an award. If any of the bidders feel that the award is being delayed unduly, their remedy is simply not to continue to extend their bid acceptance period.

NAVAIR has not submitted a report to our Office on RSI's protest because if RSI is determined to be responsible and receives the award, it has indicated it will withdraw the protest. Therefore, NAVAIR wishes to settle the matter of RSI's responsibility before issuing a report to our Office.

Based on the foregoing, we find no basis to reverse our prior decision of March 12, 1975, and it is accordingly affirmed.


Deputy Comptroller General
of the United States