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P.L. - 1
Boyle

DECISION



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

20140

FILE: B-203659.2

DATE: November 30, 1981

MATTER OF: Mil-Air Engines & Cylinders, Inc. -
Reconsideration

DIGEST:

Prior decision is affirmed because protester has not shown any errors of law or fact in conclusion that the initial adverse agency action occurs when the agency proceeds with the closing, as scheduled, instead of taking the corrective action suggested by the protester.

Mil-Air Engines & Cylinders, Inc. (Mil-Air), requests reconsideration of the portion of our decision in the matter of Mil-Air Engines & Cylinders, Inc., B-203659, October 26, 1981, 81-2 CPD , which dismissed, as untimely, Mil-Air's basis of protest alleging that the Air Force conducted an improper auction. Mil-Air contends that our conclusion inappropriately penalizes a protester for permitting the procuring agency to rule on a protest filed with the agency. After considering Mil-Air's contention, we affirm the prior decision.

The relevant facts are not disputed. On March 30, 1981, Mil-Air was advised that the Air Force wanted a second best and final offer. On March 31, 1981, Mil-Air protested to the Air Force contending that a second round of best and final offers was unnecessary and that, in view of the two price proposals already submitted, the Air Force was conducting an improper auction.

By amendment dated April 6, 1981, the Air Force requested that second best and final offers be submitted by April 20, 1981. On April 17, 1981, Mil-Air submitted its second best and final offer and renewed its protest of March 31, 1981. Mil-Air also offered to withdraw its protest if it was determined to be the successful offeror.

In the face of Mil-Air's protest, the Air Force proceeded with the closing of the second round of best and final offers on April 20, 1981. On June 5, 1981, the Air Force notified Mil-Air that its protest was denied and on June 12, 1981, Mil-Air protested here.

The October 26, 1981, decision notes that our Bid Protest Procedures provide that when a protest has been filed initially with the contracting agency, as here, any subsequent protest to our Office must be filed within 10 working days of notice of initial adverse agency action in order to be considered timely. 4 C.F.R. § 21.2(a) (1981). The decision points out that where a protest concerns an amendment to an RFP and the protest is filed with the contracting agency prior to the closing date, the initial adverse agency action occurs when the agency proceeds with the closing, as scheduled, without taking the corrective action suggested by the protester. California Computer Products, Inc., B-193611, March 6, 1979, 79-1 CPD 150. See Advance Machine Company, B-201954, February 19, 1981, 81-1 CPD 116. Mil-Air knew that the Air Force was proceeding with the closing as scheduled.

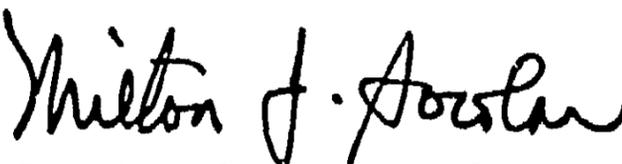
Accordingly, the October 26, 1981, decision concluded that since the initial adverse agency action occurred on April 20, 1981, when the Air Force proceeded with the scheduled closing without canceling or suspending it, this aspect of Mil-Air's protest, which was filed on June 12, 1981, was untimely and would not be considered on the merits.

On reconsideration, Mil-Air argues that the Air Force did not raise timeliness as an issue in this matter. Mil-Air concludes that this is evidence that until June 5, 1981, the Air Force was considering Mil-Air's protest. Mil-Air contends that there was no adverse agency action until June 5, 1981. Mil-Air also suggests that the situations in California Computer Products, Inc., and Advance Machine Company ~~did not involve a formal protest to the agency~~ followed by a formal decision by the agency on the protest and then a protest to our Office.

First, the fact that the Air Force did not argue timeliness and the Air Force formally denied Mil-Air's protest after it went ahead with the scheduled closing does not alter the conclusion that the initial adverse agency action occurred on April 20, when the Air Force went ahead with the scheduled closing.

Second, the only difference between the instant matter and the two decisions cited above is that in these cases the procuring agencies did not issue formal decisions on the protests. The difference is not material. The point is that when an offeror protests to a procuring agency, the initial adverse agency action occurs when the agency proceeds with the scheduled closing instead of taking the corrective action suggested by the protester. The subsequent formal Air Force decision on Mil-Air's protest was not the initial adverse agency action within the meaning of our Bid Protest Procedures. Our Procedures are intended to provide for the expeditious handling of bid protests, which is indispensable to the orderly process of Government procurement and to the protection of protesters and other parties. Informatics, Inc., 58 Comp. Gen. 750 (1979), 79-2 CPD 159, aff'd, B-194322, December 3, 1979, 79-2 CPD 387. Therefore, it is imperative that protests be filed here within 10 working days after the initial adverse agency action.

Since Mil-Air did not protest here within 10 working days of the date of the initial adverse agency action, its protest was untimely under 4 C.F.R. § 21.2(a) (1981). Accordingly, since Mil-Air has presented no evidence warranting modification or reversal of the prior decision, the October 26, 1981, decision is affirmed.

for 
Comptroller General
of the United States