



## Decision

**Matter of:** Waterfront Technologies, Inc.--Reconsideration

**File:** B-403638.4

**Date:** June 29, 2011

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Janice H. Kaufmann for the protester.  
Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for reconsideration of decision dismissing protest as untimely is denied where request does not show that our prior decision contains either errors of fact or law or presents information not previously considered that warrants reversal or modification of our decision.

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### DECISION

Waterfront Technologies, Inc. (WTI) requests reconsideration of our Feb. 22, 2011 decision dismissing, as untimely, its protest challenging the award of a contract to Astor & Sanders Corporation (ASC) under request for proposals No. DOL110RP20850, issued by the Department of Labor for information technology services.

We deny the request for reconsideration.

By way of background, WTI filed a protest with our Office on August 23, 2011 challenging the award to ASC. Subsequently, another unsuccessful offeror, Enterprise Solutions Realized, Inc. (ESR), filed a separate protest with the United States Court of Federal Claims (COFC) also challenging the award to ASC. On September 21, we dismissed WTI's protest based on ESR's filing with the COFC. See Bid Protest Regulations, 4 C.F.R. § 21.11(b) (2010) (providing for dismissal of a protest where a protest of the procurement is pending before a court of competent jurisdiction).

The ESR protest was ultimately dismissed by the COFC on October 12. More than 5 weeks later, on November 18, WTI filed a second protest with our Office raising the same issues that it had raised in its August 23 protest. Soon after, the agency

requested dismissal of WTI's second protest. The agency essentially argued that WTI's November 18 protest was untimely because it was based on issues raised in its August 23 protest, yet WTI did not re-file these issues within 10 days of the COFC's dismissal of ESR's protest.<sup>1</sup>

On December 9, based on the then limited record submitted by the parties regarding the timeliness issue, we declined to dismiss the protest "at [that] time" and proceeded with development of the issues. Fax Transmission Sheet from GAO to the Parties, Dec. 9, 2010.

In its report responding to WTI's protest, the agency again requested dismissal of the protest as untimely. In its January 6, 2011 comments submitted in response to that agency report, the intervenor (ASC) also requested dismissal of WTI's protest as untimely, arguing that the protester had not diligently pursued its basis of protest. According to ASC, WTI unreasonably relied on incomplete information about the status of the ESR protest from a commercial online website, "FreeCourtDockets.com" (at <http://www.freecourtdockets.com>) that had not been updated with current docket information regarding the dismissal of the ESR protest. ASC argued that, had WTI diligently sought information from the Court's official online docket, which is available to the public as part of the Public Access to Court Electronic Records database (accessible at <http://www.PACER.gov>), WTI would have known as early as October 12 that ESR's protest at the COFC had been dismissed on that date. In this regard, ASC noted that the PACER online system provides real-time updates to the Court's docket, and on October 12, PACER publicly announced the dismissal of the ESR case. In response to ASC's dismissal request, WTI essentially argued that it did not know, and should not have known, of the PACER online court docket system because it is not represented by counsel, and, according to WTI, PACER is used primarily by attorneys.<sup>2</sup>

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<sup>1</sup> The Court's dismissal of ESR's protest eliminated the barrier to WTI maintaining a protest at our Office. Thus, to the extent WTI wanted to pursue the issues raised in its August 23 protest, it was required to re-file its protest with our Office. In order to be timely, WTI was required to re-file its protest within 10 days of when it knew or should have known (whichever was earlier) of the October 12 dismissal. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

<sup>2</sup> WTI contends that our Office should not have allowed consideration of this subsequent request for dismissal, since our Office had entertained and denied a previous dismissal request submitted by the agency. Our Bid Protest Regulations, however, do not preclude: the filing and consideration of additional requests for dismissal of a protest; our re-examination of the timeliness of a protest; or the dismissal of a protest at any time the record shows that such action is warranted. 4 C.F.R. § 21.5.

Upon further consideration of the timeliness issue, particularly the newly presented information regarding the COFC docket information and retrieval services, our Office found that, under the circumstances, WTI had not utilized the most expeditious approach to gather information about the status of ESR's protest at the COFC. Having failed to diligently pursue information forming the basis of its protest, we dismissed WTI's protest as untimely, concluding that WTI should have known of the COFC's dismissal on or about October 12, yet it filed its protest more than 5 weeks later. Waterfront Technologies, Inc., B-403638.3, Feb. 22, 2011, 2011 CPD ¶ 49. WTI filed its request for our reconsideration of this decision on March 4.

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. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

In its request for reconsideration, the protester essentially repeats arguments it made previously and expresses disagreement with our decision. WTI continues to argue that it should not have known of the COFC's October 12 dismissal of the ESR protest, since it did not have attorney representation and, according to WTI, the PACER system is not commonly known outside the legal community; WTI continues to rely on its use of the FreeCourtDockets.com website to suggest that its pursuit of status information about the ESR protest was reasonable and diligent.

As we explained in our decision dismissing its protest, our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). A protester may not passively await information providing a basis for protest. Rather, a protester has an affirmative obligation to diligently pursue such information, Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3, and a protester's failure to utilize the most expeditious information-gathering approach under the circumstances may constitute a failure to meet its obligation in this regard. *See, e.g., Thomas May Constr. Co.*, B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 (no diligent pursuit where protester waited until after notice of award to file Freedom of Information Act requests seeking information publicly available at bid opening).

WTI's request for reconsideration fails to demonstrate that our decision dismissing its protest as untimely was in error. Notwithstanding its assertions to the contrary, WTI has not shown that knowledge or use of the PACER system was dependent on WTI retaining counsel. WTI knew that the ESR case was filed with the COFC. Nevertheless, WTI apparently did not contact the COFC for case status information or search the Court's website for such information. Had it done so, it would have

learned from the Court's website (at <http://www.uscfc.uscourts.gov/faq>, under the "Getting Started" instructions) about publicly available online access to the Court's docket, and about using the PACER system to access electronic case files (i.e., including Court rulings); the website also provides an online link and a telephone number (at <http://www.uscfc.uscourts.gov/links>) for, and for information about, the PACER system. Moreover, the COFC website specifically instructs that all case-related inquiries must be directed to the COFC Clerk's Office (both a telephone number and address are provided for the Clerk's Office; users of the site are also advised (under the "Getting Started" terms of the site's Frequently Asked Questions) that the Clerk's Office maintains a free PACER terminal for public use). See COFC Website, at [http://www.uscfc.uscourts.gov/opinions\\_decisions\\_general](http://www.uscfc.uscourts.gov/opinions_decisions_general). Thus, the record demonstrates that information about the PACER system was publicly available to WTI and, moreover, that the COFC docket information was otherwise freely available to WTI from the COFC Clerk's Office. Had WTI utilized these available resources, it is undisputed that WTI would have timely learned of the COFC's dismissal of ESR's protest, and thus its basis for protest.

Notwithstanding WTI's need for current docket information, it instead chose to rely on information provided by the FreeCourtDockets.com website. WTI's reliance and actions in this regard were unreasonable. By its terms, the FreeCourtDockets.com website informs users (at <http://freecourtdockets.com/business-solutions>) that the free docket retrieval tool,<sup>3</sup> which is what WTI used, is limited. In this regard, the website cautions users (at <http://freecourtdockets.com/terms>, at ¶¶ 3 and 12) that the use of the site is at the user's risk, and that the accuracy, completeness, adequacy, reliability and currency of the site's content are not guaranteed.

We also noted in our decision that WTI apparently did not properly obtain the most current information maintained by the FreeCourtDockets.com website. WTI has not refuted this finding. Specifically, the FreeCourtDockets.com website recommends (at <http://freecourtdockets.com/introduction>) that users consult the site's "Help" topics, which provides instruction on use of the site. These instructions (at <http://freecourtdockets.com/help>) repeatedly caution that any docket retrieved will identify when the docket information was last updated, and, related to the fact that real-time tracking of dockets is not yet provided by the site's administrators, the website notes that it is the responsibility of the user to refresh the docket (for which a link is provided) in order to obtain up-to-date information. While WTI asserts that it checked the docket information available for the ESR protest on a weekly basis for approximately 2 months before it filed its protest with our Office, it apparently failed to refresh the docket's content during any of its searches. In accordance with the

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<sup>3</sup> The company which sponsors the FreeCourtDockets.com website also provides (as noted at <http://freecourtdockets.com/business-solutions>) a separate fee-based service utilizing real-time government databases for docket searches. WTI apparently made a business decision not to avail itself of these enhanced services.

site's user instructions, updating the docket was WTI's responsibility, and could have potentially provided WTI with the most current information. Given the availability of information through the COFC, the stated limitations of the FreeCourtDockets.com website, as well as WTI's own apparent failure to properly obtain updated information from the FreeCourtDockets.com website, we properly concluded that WTI had failed to take reasonable steps to obtain the most current information regarding the status of ESR's COFC protest, and failed to diligently pursue its basis for protest with our Office.

In sum, WTI's contention that it was unable to obtain more up-to-date official docket information without retaining an attorney is not supported by the facts. The request for reconsideration, which essentially repeats arguments made during the protest and expresses disagreement with our decision, provides no basis for reconsidering our dismissal of WTI's protest as untimely given the firm's failure to expeditiously and diligently pursue its basis for protest.<sup>4</sup>

The request for reconsideration is denied.

Lynn H. Gibson  
General Counsel

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<sup>4</sup> WTI requests that, even if untimely, we should review its protest under an exception to our timeliness rules. In light of our decision above, regarding the protester's ineffective monitoring of the COFC docket, the firm's lack of knowledge of the PACER docket retrieval system simply does not demonstrate, as WTI suggests, compelling circumstances or the good cause contemplated by our regulations to waive our timeliness rules. 4 C.F.R. § 21.2(c). Further, while the firm suggests the evaluation flaws alleged in its protest are significant, we consider allegations under the "significant issue" exception to our regulations sparingly, so that our timeliness rules do not become meaningless, and we limit such consideration to issues of widespread interest to the procurement community. *Id.*; *Scipar, Inc.*, B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153 at 5. The challenged evaluation actions in this procurement do not involve any question whose resolution would benefit parties other than the protester and thus, do not provide a basis for the significant issue exception to our timeliness rules. *Bell Atlanticom Sys., Inc.*, B-222601.2, June 30, 1986, 86-2 CPD ¶ 19 at 2.