



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter Of:** Norfolk Dredging Company--Second Request for Reconsideration

**File:** B-236259.3

**Date:** December 7, 1989

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### DIGEST

Second request for reconsideration of decision dismissing protest as untimely is denied where protester fails to show any error of fact or law in prior decisions.

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### DECISION

Norfolk Dredging Company (NDC) requests reconsideration of our decision, Norfolk Dredging Co.--Reconsideration, B-236259.3, Oct. 31, 1989, 89-2 CPD ¶ \_\_\_\_, denying its request for reconsideration of our dismissal of its protest concerning invitation for bids (IFB) No. DACW65-89-B-0024, issued by the U.S. Army Corps of Engineers for maintenance dredging of the Norfolk Harbor Channel, Elizabeth River and Hampton Roads, Virginia.

We deny the request for reconsideration.

The Army issued the IFB on March 27, 1989. By letter dated April 7, NDC filed a protest with the Army challenging its decision to issue the solicitation as a small business set-aside. Despite NDC's protest, the Army proceeded with the procurement and opened bids on April 27. On July 10, the Army issued a letter denying the agency-level protest, which NDC received on July 14. By letter received in our Office on July 21, NDC protested issuance of the IFB as a small business set-aside. Since NDC's protest was received more than 10 working days after the April 27 bid opening, which constituted initial adverse agency action on the agency-level protest, we dismissed the protest as untimely. See Norfolk Dredging Co., B-236259, Aug. 11, 1989, 89-2 CPD ¶ 134.

In its first request for reconsideration of our decision, NDC argued for the first time that after submitting its agency-level protest, the contracting officer informed NDC that no contract award would be made until NDC's

agency-level protest was resolved. Because of this alleged assurance by the contracting officer, NDC maintained that the July 10 agency letter denying the protest rather than the April 27 bid opening constituted the initial adverse agency action. Accordingly, NDC argued that its protest to our Office was timely since it was filed within 10 working days of receiving the agency's July 10 letter of denial.

We denied the request for reconsideration, stating that, despite its claimed reliance on the contracting officer's alleged assurance that no action would be taken on the procurement until the agency-level protest was resolved, NDC failed to provide our Office with this information when it filed its initial protest in July. Accordingly, on its face the protest was clearly untimely since it was filed more than 10 working days after bid opening. We pointed out that where, as in this case, a protest appears to be untimely, a protester who is in possession of facts that would establish its timeliness, but who does not initially provide those facts to our Office, runs the risk of dismissal and of our refusal to reconsider the matter when the protester ultimately presents them. See World-Wide Sec. Serv., Inc.--Reconsideration, B-225270.2, Mar. 17, 1987, 87-1 CPD ¶ 294. As a result, we found that NDC could not introduce for the first time on reconsideration the information which it relies on to show the timeliness of its protest.

In its second request for reconsideration, NDC argues that our decision is based on a "material misstatement." Specifically, we noted in a footnote to our decision on the initial reconsideration request that the contracting officer denied giving any assurance to NDC that no action would be taken until its agency-level protest was resolved. NDC states it is "inconceivable" that the contracting officer would deny a statement of fact set forth in the agency's decision on the agency-level protest; the statement NDC refers to is: "The IFB has not been awarded pending resolution of this protest." NDC argues that since our decision was based on what it regards as an erroneous fact, it should be overturned.


NDC's current reconsideration request is based on a fundamental misunderstanding of our prior decision. Contrary to NDC's contention, our decision was not based on a finding regarding the assurance the protester states it received from the contracting officer. The information on that issue was included in a footnote simply to ensure that a full picture of the record and the parties' positions was presented. Thus, even accepting, as NDC argues, that the firm received such an assurance, the protest was properly

dismissed since NDC failed to advise us of that information in the initial protest as it was required to do.

NDC argues that it was not required to demonstrate the timeliness of the initial protest since it had no reason to believe the protest would be considered untimely. The point which NDC ignores, however, is that the protest on its face, without the further information first offered on reconsideration, was clearly untimely, and thus NDC was obligated to include in its initial protest the information which it now maintains demonstrates that it was timely.

Finally, while the issue of whether NDC was told that no action would be taken pending resolution of the protest was not essential to our prior decision, we carefully scrutinized the record in connection with the initial protest and reconsideration request to determine the basis for NDC's contention and found no documentation to support it. Even now, in its second request for reconsideration, NDC has not furnished any information, such as a statement from the person to whom the assurance is said to have been given, substantiating its position.

Since NDC has failed to show any error of law or fact in our prior decisions, the request for reconsideration is denied.

  
James F. Hinchman  
General Counsel