

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
GOODYEAR TIRE CENTER)	CAB No. P-407
)	
Under Contract No. OMS-3250-AA-CC)	

For the Protestor: Tracie Roberts, Esquire. For the Government: Anne Cauman and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judges Zoe Bush and Cynthia G. Hawkins-León, concurring.

OPINION AND ORDER ON MOTION TO DISMISS

On April 15, 1994, Goodyear Tire Center (hereinafter "Goodyear" or "protestor")¹ filed a protest against award of a contract for fleet tire service to Truck Tire, Inc. (hereinafter "Truck Tire") under IFB No. OMS-3250-AA-CC. Protestor alleged that at the January 24, 1994, bid opening, Truck Tire's bid was nonresponsive to the solicitation because: (1) the bid did not contain the required attachments, specifically Addendum 1 and Addendum 2; (2) the bid showed "no bid" for Items 1, 6, 19, 20 and 21 through 25 of the schedule; and (3) the bidder failed to sign the "First Source Employment Agreement" and the "Assurance of Compliance." With respect to Truck Tire's "no bid," protestor challenged an "assumption" made that "no bid" on an item means "zero."

Protestor also alleged that after receipt of notice of award on April 2, 1994, it reviewed the total bid package and discovered that with reference to the bid tabulations, the procuring agency did not evaluate Addendum 1 and Addendum 2. Finally, protestor alleged that it was improperly denied a five percent preference as a minority bidder.

On May 23, 1994, the District of Columbia (hereinafter "District") filed a pleading entitled "Motion of the District of Columbia to Dismiss Part of the Protest and Agency Report Concerning the Remainder of the Protest," with accompanying exhibits.² The District argued

¹Goodyear Tire Center is owned and operated by Henderson Tire & Auto, Inc. (Protest, Letterhead).

²Hereinafter, the pleading shall be referred to as "MD/AR, Ex(s). ____." The exhibits include supplemental exhibits submitted by the District at the Board's request on May 27, 1994.

that with respect to the allegations concerning the responsiveness of Truck Tire's bid and denial of the minority preference, the allegations are untimely and should be dismissed because protestor knew, or should have known, at the time of bid opening the bases for its challenges to responsiveness. Further, the District asserts that because Goodyear would not be in line for award if the protest were sustained, it lacks standing to bring the protest. Finally, the District states that while it is true that the original bid tabulation was in error, the error was *de minimus* and had no effect on the relative standing of the bidders. The District asked the Board to deny this ground of the protest.

After review of all of the evidence, we agree with the District that the allegations concerning the responsiveness of Truck Tire's bid are untimely and should be dismissed. Additionally, we believe that Goodyear's allegation concerning the erroneous bid tabulation is untimely and should be dismissed.³

The facts show that on January 24, 1994, the date scheduled for bid opening,⁴ four bids were received and opened. Protestor was present at the bid opening; and at that time, according to the protest letter, the bids were read. Protestor learned the following:

H & H - 'no aggregate totals.'

TRUCK TIRE, INC[.] - 'no attachments. [N]o bids on item numbers 1, 6, 19, 20, and 21 through 25, with the aggregate total being \$192,325.00'

FRIENDS TIRE AND FLEET SERVICE - 'no bids on item numbers 12, 18, and 27, with no total.'

HENDERSON TIRE & AUTO, INC. - 'no charge on item numbers 1, 12, 18, and 27, with total of \$230,725.00.'

(Protest, page 1).⁵

Section 908(b) of the Procurement Practices Act of 1985, D.C. Code § 1-1189.8(b), states:

³Consequently, we need not reach the issues of protestor's standing, or the challenge to the alleged failure to give protestor a five percent minority preference, or the issue of Truck Tire's failure to execute certain attachments.

⁴MD/AR, Ex. 1.

⁵See also MD/AR, Ex. 6.

For a protest pursuant to subsection (a) of this section, the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based. (emphasis added).

See Rule 301.1 of the Board's Rules of Practice.⁶ We have held on innumerable occasions that the 10-working-day filing requirement is jurisdictional and cannot be waived. See, e.g., *Continental Flooring Co.*, CAB No. P-402, April 11, 1994, 7 P.D. 5803; *Interior Systems, Inc.*, CAB No. P-398, January 10, 1994, 6 P.D. 5544; *Bio-Analytical Laboratories, Inc.*, CAB No. P-373, June 17, 1993, 6 P.D. 5215; *Macton Construction, Inc.*, CAB No. P-203, December 19, 1991, 39 DCR 4368 (1992). Nonetheless, we have recently held that where there is a dispute over timeliness, we will generally resolve it in the protestor's favor if there is at least a reasonable degree of evidence to support the protestor's version of the facts. *Potomac Capital Investment Corporation*, CAB No. P-383, January 4, 1994, 6 P.D. 5515 (and cases cited therein). See *Howard Management Group*, B-221889, July 3, 1986, 86-2 CPD ¶ 28; *Conine Rentals, Inc.*, B-194143, June 26, 1979, 79-1 CPD ¶ 456.

Here, Goodyear argued that it did not know definitively at the time of bid opening that Truck Tire's bid was nonresponsive or assume that the award would be made to a nonresponsive bidder. (Protestor's Response, page 3).⁷ Protestor claims that at the time of bid opening, the only information it had was that Truck Tire did not submit the addenda, did not have all of the attachments and did not bid on certain items. (*Id.*, pages 3-4).

In our opinion, the information that protestor states that it had on January 24, 1994, obviously forms the bases for the protest filed on April 15, 1994. In fact, it is clear from the statements made in the protest itself that Goodyear knew or should have known of the bases for its protest at the time of bid opening. The protest was filed almost three months later, far beyond the jurisdictional 10-working-day filing requirement. As a result, the allegations are untimely.

With respect to the errors in bid tabulation, the evidence shows that protestor knew or should have known of the errors at the time of bid opening. According to protestor, its own bid was announced as \$230,725.00. Its bid, however, was \$232,705.00.⁸ At that point, Goodyear knew or should have known that at least one error in bid tabulation had occurred. Again, however, protestor waited almost three months to challenge any error. See *Mounts Engineering*, B-218102, February 21, 1985, 85-1 CPD ¶ 223.

⁶36 DCR 2710 (April 21, 1989).

⁷The pleading is entitled "Protestor's Response to the Motion of the District of Columbia to Dismiss Part of the Protest and Agency Report Concerning the Remainder of the Protest." It was filed on June 17, 1994.


⁸MD/AR, Ex. 9.

Thus, based upon all of the facts and circumstances, the protest is untimely; and it is hereby

ORDERED, that the District's motion to dismiss be, and the same is, **GRANTED**; and it is

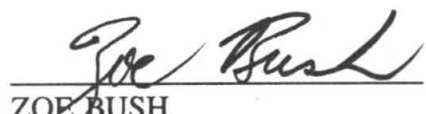
FURTHER ORDERED, that this protest be, and the same is, **DISMISSED**, with prejudice.

DATE: June 30, 1994

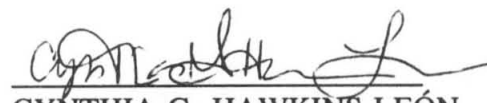


TERRY HART LEE
Administrative Judge

CONCUR:



ZOE BUSH
Chief Administrative Judge



CYNTHIA G. HAWKINS-LEÓN
Administrative Judge