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Keith Baker
Proc. II

DECISION

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

FILE: B-187970 DATE: January 27, 1977

MATTER OF: F. J. Gear & Son, Inc.

DIGEST:

1. Protest to GAO of contract award is untimely where filed more than 10 working days after protester's receipt of notification of denial of protest to agency.

2. Untimely protest to GAO may not be considered under "good cause" exception where protester, allegedly following procuring agency's advice, protests wage rate addendum to Department of Labor but fails to pursue with GAO question of unacknowledged amendment's materiality which would have remained unresolved irrespective of action by Department of Labor.

F. J. Gear & Son, Inc. (Gear) protests the award of a contract under Invitation for Bids No. 1900-1428, issued by the National Park Service (Park Service), Department of the Interior.

By letter of September 30, 1976, the Park Service notified Gear that its bid had been found nonresponsive due to Gear's failure to acknowledge receipt of Addendum No. 1 to the solicitation, dated September 9, 1976. Gear appealed to the Park Service, by letter of October 5, 1976, on the grounds that it was unnecessary for Gear to acknowledge the amendment, which contained changes in the wage rates specified in the solicitation. Gear contends that since Article 10 of the Davis-Bacon Act requires contractors to keep apprised of wage rates, the amendment updating applicable wage rates was "voluntary information on the part of the Park Service and not critical to the bidder." By letter of October 12, 1976, the Park Service denied Gear's protest and pointed out that the amendment was material since, without Gear's acknowledgement of the amendment specifying wage rates, Gear would not be bound

to pay those wage rates. (In this connection see 42 Comp. Gen. 410 (1963).) By letter to this Office dated December 1, 1976, received here on December 3, 1976, Gear filed a protest on the same grounds as the protest to the Park Service. In addition, Gear points out that an error was made in the wage rate decision.

Section 20.2(a) of Title 4 of the Code of Federal Regulations provides that where a bid protest is originally filed with the contracting agency, any subsequent protest to this Office will be considered if filed within 10 days of formal notification of or actual or constructive notice of initial adverse agency action, provided the initial protest to the agency was timely filed. Gear's protest to this Office concerning the materiality of the wage rate and rejection of its bid was filed on December 3, 1976, more than 10 days after the initial adverse agency action, and thus was untimely filed. Moreover, its protest concerning the correctness of the wage rate is a matter for review by the Department of Labor (Labor) and not for this Office. Hendry Corporation, B-179871, April 1, 1975, 75-1 CPD 189.

Gear asserts that its protest was filed late with this Office due to oral advice from the Park Service to appeal the "alleged addendum" to Labor. In this connection, 4 C.F.R. 20.2(c) provides that this Office may consider an untimely protest for "good cause shown." Good cause generally refers to some compelling reason, beyond the protester's control, which has prevented him from filing a timely protest. 52 Comp. Gen. 20, 23 (1972).

As indicated above, the correctness of the amended wage rate decision is a matter for resolution by Labor. After the procuring agency rejected Gear's protest involving the materiality of the amendment and bid nonresponsiveness, Gear protested to Labor the correctness of a particular wage rate contained in its supersedeas decision. Labor thereafter reduced the wage rate questioned by the protester. 41 Fed. Reg. 51241 (1976). Gear then appealed to this Office the procuring agency's

rejection of its initial protest concerning the materiality of and its responsiveness to the amendment. We think it is significant that Gear's protest to Labor involved the correctness of only one wage rate while the unacknowledged amendment also changed additional wage rates for classifications of work which affected the responsiveness of its bid. The materiality of the amendment, therefore, is an issue which would remain unresolved irrespective of the protest to Labor. Accordingly, the fact that Gear alleges that it followed the procuring agency's advice in protesting to Labor the correctness of a wage rate does not explain or justify its failure to pursue the merits of the agency's denial of its protest on other grounds. Moreover, our Bid Protest Procedures are published in the Federal Register and the protester, therefore, was on constructive notice of the timeliness requirement for filing protests with this Office. Mr. Scrub Car Wash Systems, Inc., B-186586, July 9, 1976, 76-2 CPD 29.

Accordingly, Gear's protest will not be considered on its merits.

Paul G. Dembling
General Counsel