

02570

DECISION



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

FILE: B-207602

DATE: May 31, 1982

MATTER OF: Contact International, Inc.

DIGEST:

1. Protest alleging that procuring agency's conduct of negotiations improperly favored the incumbent contractor, filed after the closing date for receipt of final offers, is untimely as alleged improprieties were apparent from either the solicitation itself or agency actions during negotiations and the good cause and significant issues exceptions to the timeliness requirements are not applicable.
2. Mere allegation of improprieties without supporting evidence will not satisfy protester's burden of affirmatively proving its case. Therefore, protest based on unsupported allegation that best and final offer was opened prematurely must be denied.

Contact International, Inc., protests the award of a contract to Foremost Blue Seal, Ltd., for the operation of a Government-owned dairy in Okinawa, under request for proposals No. F62321-81-R-0159 issued by the Air Force. Contact contends that the Air Force conducted negotiations in a manner that favored the incumbent contractor, Foremost. We dismiss the protest as untimely in part and deny it in part.

The solicitation was issued January 15, 1982, and initial proposals were received March 17. The Air Force asked Contact to send a representative to Okinawa to commence negotiations on May 10. Because Contact's intended representative, its president, had a prior commitment, negotiations were postponed originally to May 16, a Sunday, and then to May 17, because overtime pay had not been authorized for the contact negotiator. Contact was furnished a solicitation amendment on May 17 and discussions were conducted on that basis. On May 18, the Air Force indicated certain errors in Contact's pricing

025728

schedule, which Contact corrected. Contact's president then remained in Okinawa and prepared his firm's final offer, which he hand delivered on the amended closing date, May 20. The following day, May 21, the Air Force advised Contact that the incumbent contractor, Foremost, which submitted the lowest priced offer, would receive the award. Contact's protest, dispatched that day, was received at GAO the following Monday, May 24.

Contact contends that the Air Force conducted this procurement in a manner that favored the incumbent contractor because only that firm could mobilize to begin performance of the contract within the time permitted by the RFP; because that firm had the final solicitation amendment for nearly a month while Contact had it for only a few days; because it was difficult for Contact to properly calculate its prices for the changes contained in the solicitation amendment in the time allotted; and because the Air Force refused to disclose to Contact the source of lower priced boiler fuel in Okinawa. According to Contact, these circumstances show that the procurement was in essence a sole-source award to Foremost and that the competition was a sham. Finally, by asserting that Contact's final offer, delivered an hour before Foremost's, was opened prior to the designated time for receipt of final offers, Contact implies that the Air Force may have disclosed Contact's price to Foremost.

The Air Force argues that the protest is untimely, since Contact participated in the allegedly defective negotiations and protested only after it had submitted its final offer. The Air Force points out that our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests of alleged improprieties in negotiated procurements be filed prior to the closing date for receipt of proposals following incorporation of the alleged impropriety. It is the Air Force's view that Contact's allegations are untimely because they were not filed with our Office until after the closing date for receipt of proposals.

Contact contends that its protest should be considered timely filed, arguing that the improprieties could not have been known prior to May 17 when negotiations commenced and that all of the concerns complained of occurred between May 17 and the closing date of May 20. Given the 14 hours time difference between Okinawa and Contact's home office

on the mainland and the difficulty with communications, Contact contends that the impact of events which occurred the 3 preceding days could not have been fully understood by the company prior to the May 20 closing date. Contact urges that even if its protest was untimely these circumstances constitute good cause for considering a protest under the exception to our timeliness rules set forth in our Bid Protest Procedures, 4 C.F.R. § 21.2(c). Contact also contends that because the Air Force showed a preference for the incumbent, the protest raises a significant issue warranting review under our Procedures. Finally, Contact contends that its allegation that the Air Force opened its final offer prematurely was timely filed under any analysis.

We agree that the portion of Contact's protest alleging that its final offer was opened prematurely appears to be timely. However, the protester has the burden of affirmatively proving its case. Plant Facilities and Engineering, Inc., B-201618, April 22, 1981, 81-1 CPD 310. Here, Contact states simply that it was "informed" that its final offer was opened before the time set. Aside from Contact's vague, unsupported allegation, there is no evidence to substantiate this assertion of procedural irregularity. Contact's mere reference to an unidentified source of information is inadequate to satisfy the protester's burden of proof. SAFE Export Corporation, B-205122, March 19, 1982, 82-1 CPD 258. We therefore deny this aspect of Contact's protest.

As to sources of boiler fuel in Okinawa, we have consistently held that a competitive advantage which a firm might enjoy by virtue of its incumbency on a similar contract is not unfair, so long as it is not the result of preferred treatment or other unfair Government action. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339. Consequently, we do not agree that the Air Force was required to disclose the incumbent's source of boiler fuel simply because it was lower than the Air Force's guaranteed price for supplying it in Okinawa. By disclosing to Contact the fact that less expensive fuels were available, the Air Force provided Contact with useful information that could have resulted in a lower price, but it was up to Contact to arrange for its own source of fuel in that event, if it had not done so in advance of final negotiations.

With respect to the remainder of Contact's contentions, our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1), provide that protests based upon alleged improprieties in a

solicitation which are apparent prior to the closing date for receipt of proposals and, in a negotiated procurement, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals. The Advantech Corporation, B-207793, January 3, 1983, 83-1 CPD 3.

Contact's submission indicates that it first discussed its dissatisfaction with the mobilization period on February 8, when it complained to the Air Force that given the March 17 date for submission of proposals, the 90 day acceptance period required by the solicitation could result in award only a few weeks prior to the July 1 start-up for the new contract. Although the Air Force shortened the bid acceptance period to 60 days, it subsequently requested a further 30 day extension by telex on May 7, which extension Contact initially refused to grant. Nevertheless, Contact's president executed the requested 30 day extension of his firm's bid acceptance upon his arrival in Okinawa on May 16. Although the firm was clearly dissatisfied with both the earlier solicitation requirement for a bid acceptance period that extended into June and the Air Force's renewal of that solicitation requirement on May 7, it chose not to protest until after proposals had been submitted and the award to Foremost announced. Consequently, we believe that Contact's protest of this issue is untimely.

Similarly, Contact knew of the other bases for its protest at least by May 17 when it was furnished the solicitation amendment. If Contact believed that it did not have adequate time to properly revise its pricing to reflect the changes in the specification during the 3 days remaining, it was required to protest the allegedly insufficient response time prior to the final closing date. Institute of Gerontology, University of Michigan, B-205164, March 3, 1982, 82-1 CPD 191. Contact also knew that its competitor had received the amendment earlier on May 17.

In summary, on May 17 Contact's president had full knowledge of any disadvantage his firm suffered by these circumstances and by proceeding to submit his final offer without protest he acquiesced in those circumstances. See Ven-Tel, Inc., B-203397, July 1, 1981, 81-2 CPD 3. We do not believe that, having made this choice, Contact's protest after learning that it was not selected is timely.

Further, we do not believe that there is anything in this case to warrant invoking either of the section 21.2(c) exceptions to the timeliness requirements of our Bid Protest Procedures. The "good cause" exception is limited to circumstances where some compelling reason beyond the protester's control prevents the filing of a timely protest. Kathryn A. Rogerson--Reconsideration, B-205366.2, April 29, 1981, 81-1 CPD 331; 52 Comp. Gen. 20 (1972). We have refused to consider as timely protests of alleged defects in the solicitation which were known to the protester more than a few hours prior to bid opening or receipt of proposals. Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD 149.

Here, the protester was aware of the alleged solicitation defects on May 17, 3 days prior to receipt of final proposals, which would have permitted filing a protest with this Office despite the difficulty of communicating with the mainland. Moreover, Contact could have registered its protest directly with the Air Force in Okinawa, which would have eliminated any problems of communication. Further, we cannot agree that Contact was unable to evaluate events in Okinawa as they occurred since its president was in Okinawa personally conducting the negotiations. Also, at least some of Contact's problems with the negotiation schedule may have resulted from the postponement of negotiations until May 17, which was done for Contact's benefit, not the Air Force's.

Finally, with respect to Contact's allegation that the protest raises a "significant issue," this exception is limited to issues of widespread interest in the procurement community and is exercised sparingly so that timeliness standards do not become meaningless. McCaleb Associates, Inc., B-197209, September 2, 1980, 80-2 CPD 163. In our view, the allegations raised by Contact as set out above do not fall within that exception.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States