

**DECISION**



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

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**FILE:** B-217580 **DATE:** April 26, 1985  
**MATTER OF:** Stalker Brothers Inc.

**DIGEST:**

1. Protest against use of small purchase procedures for construction work is dismissed as untimely since it was not filed within 10 working days after protester knew the protest basis.
2. GAO will not consider an untimely protest under either the good cause exception or the significant issue exception to the timeliness rules of our Bid Protest Procedures where there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of the protest, and the protest does not present an issue of widespread interest to the procurement community.
3. Protester has failed to sustain its burden of proving the contracting agency disclosed the protester's price quote to other firms where the allegation is based only on speculation and is disputed by the agency.

Stalker Brothers Inc. protests the award of a contract for the construction of pit toilets at the C&O Canal Historical Park to Sam Gonzales, Inc., under the National Park Service solicitation No. PX 3000-4-2655.

We dismiss the protest in part and deny it in part.

In September 1984, the Park Service, anticipating that the cost of performing the desired construction would be less than \$25,000, orally solicited quotations from three firms pursuant to the small purchase procedures contained in the Federal Acquisition Regulation (FAR), 41 C.F.R. part 13 (1984). The three firms responded with written price quotations and drawings of the construction details for the pit toilets. The Park Service later requested offerors to consider a construction change and submit revised proposals.

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The Park Service reviewed the revised proposals and, on September 26, awarded a purchase order to Gonzales based on Gonzales' low quote.

Stalker Brothers learned of the contract award to Gonzales on November 13, when it called the Park Service to determine the status of the procurement. On November 15 and 28 and December 31, Stalker Brothers submitted Freedom of Information Act (FOIA) requests to the Park Service asking for Gonzales' bid, the criteria used by the Park Service to evaluate proposals, and the evaluation forms the Park Service used. The Park Service responded to the FOIA request on January 7, 1985. We received Stalker Brothers' protest on January 14.

Stalker Brothers first protests the procedures used by the Park Service to solicit quotations and award the contract to Gonzales. Specifically, Stalker Brothers protests that the quotations were solicited orally, written specifications were not provided, sealed bids were not requested, a common closing date was not specified, and bids were not opened publicly. Stalker Brothers also alleges the Park Service disclosed its price quotation and submission to Gonzales. As evidence to support this allegation, Stalker Brothers submits that the difference between its and Gonzales' price quotes was 0.78 percent, and Gonzales' quote clearly shows that Gonzales changed its overhead rate by 1 percent (from 22 percent to 21 percent), allegedly to undercut Stalker Brothers' price. Finally, Stalker Brothers questions whether Gonzales' quotation includes the construction change Stalker Brothers was required to make.

The Park Service argues that since Stalker Brothers did not protest within 10 days of November 13, the date Stalker Brothers was informed of the contract award to Gonzales, the protest should be dismissed as untimely. The Park Service relies on our Bid Protest Procedures, which provide that a protest must be filed within 10 working days of the date the protester knows or should know the basis of its protest. 4 C.F.R. § 21.2(b)(2) (1984). <sup>1/</sup>

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<sup>1/</sup> Generally, to be timely, a protest against the procedures used in a solicitation must be filed before responses to the solicitation are due. 4 C.F.R. § 21.2(b)(1). Here, however, since the Park Service did not set a common due date for the submission of quotations, we have used our alternate timeliness rule at 4 C.F.R. § 21.2(b)(2).

The Park Service also alleges that it properly used the small purchase procedures, which involve the procedural elements to which the protester specifically objects, to award the contract because the cost of the contract is less than \$25,000. Finally, the Park Service asserts that Gonzales' quotation included the required construction change and denies that it disclosed Stalker Brothers' proposed price to Gonzales.

In response, Stalker Brothers states that it did not feel justified in submitting a protest until it received information pursuant to its FOIA request and points out that it protested within 3 days of receiving this information. Alternatively, Stalker Brothers requests that we consider its protest pursuant to the timeliness exceptions in our procedures where good cause is shown or the protest raises an issue significant to the procurement community. See 4 C.F.R. § 21.2(c).

A protest filed within 10 days of receipt of FOIA material, and which is based entirely upon that information, is timely filed under our Bid Protest Procedures. Where, however, a protest incorporates multiple bases, each individual basis must independently satisfy our timeliness standards. Tracor Jitco Inc., B-208476, Jan. 31, 1983, 83-1 C.P.D. ¶ 98. The basis for Stalker Brothers' protest against the procedures used to solicit quotations arose in September, well before the firm submitted its FOIA request. Consequently, since Stalker Brothers did not submit its protest against the procedures until January 1985, more than 3 months after the basis for complaint arose, this aspect of Stalker Brothers' protest is clearly untimely.

Nor will we, as Stalker Brothers requests, review this protest basis pursuant to the noted exceptions to our timeliness rules. The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. Morrison-Knudsen Co., B-209609, Mar. 10, 1983, 83-1 C.P.D. ¶ 245. We have no reason to believe that situation existed here. The significant issue exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community and is sparingly used so that our timeliness standards do not become meaningless. Where the merits of a protest involve issues we have previously considered, the issues are not

significant; we have considered the propriety of the small purchase procedures in prior decisions. See, e.g., Dictaphone Corp., B-191383, May 8, 1978, 78-1 C.P.D. ¶ 343. In any event, Stalker Brothers participated without objection in the solicitation until the contract was awarded to Gonzales and thereby must be deemed to have accepted the terms of the procurement. See Jordan Panel Systems Corp., B-209469, Dec. 8, 1982, 82-2 C.P.D. ¶ 523.

We will consider Stalker Brothers' protest that the agency disclosed its price quotation and that Gonzales did not consider the construction change, since these matters are based solely on information obtained under the FOIA and were protested 3 days after the information was received. We find no merit to the protest on these issues, however.

Stalker Brothers protests that the Park Service disclosed its quote to Gonzales, evidenced by the fact that Gonzales at some point allegedly decreased the amount it charged for overhead by 1 percent, and the Gonzales quote was only 0.78 percent lower than Stalker Brothers' quote. We have reviewed Gonzales' quote and it is not apparent that Gonzales changed its overhead rate from 22 percent to 21 percent. Also, the agency flatly denies that it disclosed Stalker Brothers' quote to Gonzales. Absent any evidence of the actual disclosure to Gonzales of Stalker Brothers' quote, so that Stalker Brothers' allegation is based on inference and speculation only, the firm has not met its burden of proof. Consequently, we deny this protest basis. John Crane-Houdaille, Inc., B-212829, Jan. 20, 1984, 84-1 C.P.D. ¶ 89.

Finally, we have reviewed the drawings submitted by Gonzales and we are convinced that these drawings demonstrate that Gonzales included the construction change in its quotation. Accordingly, this basis of Stalker Brothers' protest is denied.

In its comments on the agency report, Stalker Brothers also raises the protest ground that the Park Service violated procurement procedures because it did not formally notify Stalker Brothers that a contract award had been made to Gonzales. However, since Stalker Brothers knew of the contract award to Gonzales on November 11, but did not

protest the matter until March 1985, this issue is dismissed as untimely. In any event, the allegation concerns a procedural irregularity that would not affect the contract award to Gonzales. E.S. Edwards & Son, Inc; Koch Corp., B-212304, B-212304.3, June 18, 1984, 84-1 C.P.D. ¶ 631.

The protest is dismissed in part and denied in part.

*for*   
Harry R. Van Cleave  
General Counsel