DECISION

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

FILE: B-218933 **DATE:** September 19, 1985

MATTER OF: Griffin Galbraith

DIGEST:

1. Protest alleging that fuel oil suppliers were improperly excluded from competing for agency's requirement for heat for family housing units is untimely where protester was aware of agency's determination to satisfy its heating needs through natural gas and did not protest within 10 working days.

2. GAO will not consider the merits of an untimely protest nor invoke "significant issue" exception to timeliness requirements where untimely protest does not raise issue of first impression which would have widespread significance to the procurement community.

3. Where agency determination to convert family housing units from oil to natural gas is not subject to question, protester, an oil supplier, is not an interested party to question the funding of the contract awarded to a natural gas company since protester would not be eligible for any award.

Griffin Galbraith protests the award of contract No. DAKF57-85-C-0019 to Washington Natural Gas (WNG) by the Department of the Army for natural gas service for heating family housing units at Fort Lewis, Washington. Griffin Galbraith, a fuel oil supplier, argues that award to WNG was improper since fuel oil could also be utilized to satisfy the Army's needs. Griffin Galbraith contends that the Army should have conducted a formal competitive procurement before deciding which fuel alternative to use. Also, Griffin Galbraith alleges that the fuel study performed by the Army which determined that the natural gas alternative was more advantageous contained several errors. In addition, Griffin Galbraith contends that the Army has

no authority to enter into this contract because no appropriations have been made available by Congress for this purpose nor has the Army properly advised the appropriate congressional committees concerning this contract. Finally, Griffin Galbraith argues that the contract violates the Anti-Deficiency Act.

We dismiss the protest.

In September 1983, WNG submitted an unsolicited proposal to the Army for the conversion of family housing heating from oil to natural gas at Fort Lewis. Thereafter, the Army conducted a fuel study to determine whether oil or natural gas was the more economical heating alternative. That study indicated that conversion to natural gas would be more economical. In April 1984, the Oil Heat Institute commented on the fuel study and in July 1984 Griffin Galbraith and one other oil supplier submitted proposals to the Army for the continued use of fuel oil. Although the Army revised the fuel study, the determination to convert the furnaces to natural gas never changed and on November 9, 1984, the Army approved the conversion.

A utility services contract was executed with WNG on December 20, 1984. This contract was for a 10-year period and was subject to the approval of the Deputy Army Power Procurement Officer, which was obtained on March 11, 1985. However, further action on the contract was withheld, and on March 18 a meeting was held concerning the proposed Fort Lewis fuel conversion. Griffin Galbraith submitted a written response to that meeting questioning several aspects of the fuel study, and on April 24, 1985, the Army prepared a detailed response to the specific issues which were raised. On May 2, a meeting was held between Army officials and fuel oil representatives, including the protester, and the Army states that at that time it again affirmed the validity of the fuel study and its intention to go forward with the Fort Lewis conversion. Subsequently, a modification to WNG's contract was issued on May 13, 1985, which established the effective date of the contract as May 1, 1985. Under the terms of the contract, WNG is responsible for supplying Fort Lewis with natural gas and is also required to install connecting gas lines to the family housing units.

Griffin Galbraith's protest was filed with our Office on May 20, 1985, and the Army argues that the protest is untimely since the grounds for protest were known at a much earlier date. Griffin Galbraith argues that the protest

should not be dismissed since it was filed within 10 days of the date it was notified of the contract award to WNG.

We find Griffin Galbraith's protest to be untimely. Under our Bid Protest Regulations, a protest must be filed with our Office within 10 working days of the date the protester was aware or should have been aware of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1985). We have recognized that oral notification of the basis for protest is sufficient to start the 10-day period running and that a protester may not delay filing its protest until receipt of the written notification which merely reiterates the basis for protest. Koenig Mechanical Contractors, Inc., B-217571, Apr. 4, 1985, 85-1 CPD ¶ 389.

Here, it appears that Griffin Galbraith was aware of the Army's intention to go forward with the Fort Lewis conversion after meeting with the Army on May 2. The basis for this protest is that Griffin Galbraith was improperly excluded from competing for this requirement. Therefore, once Griffin Galbraith knew that the Army would proceed with the conversion to gas and therefore not consider a proposal submitted by the firm or any other oil supplier, it was required to protest within 10 working days. Morrison-Knudsen Co., B-209609, Mar. 10, 1983, 83-1 CPD ¶ 245. Griffin Galbraith's protest, filed more than 10 days after May 2, was not so filed. We further note that Griffin Galbraith's initial submission filed on May 20 did not question the fuel study relied upon by the Army in making its determination to convert to natural gas. It was not until Griffin Galbraith submitted its comments to the agency report on July 9 that it challenged the accuracy of the Army's fuel study findings. The record shows that the particular issues raised at that time are the same issues that Griffin Galbraith raised previously in its response to the March 18 meeting with the Army. Griffin Galbraith has provided no explanation, and we see nothing in the record, which justifies Griffin Galbraith waiting until July 9 before seeking to dispute specific aspects of the fuel study.

Griffin Galbraith argues that even if untimely, its protest should be considered under the significant issue exception to our timeliness rules. See 4 C.F.R. § 21.2(c). We will review an untimely protest under this exception only where it involves a matter of widespread interest or importance to the procurement community that has not been

considered on the merits in a previous decision. McCabe, Hamilton and Renny Co., Ltd., B-217021, Mar. 15, 1985, 85-1 CPD ¶ 312. The exception is strictly construed and sparingly used to prevent our timeliness rules from being rendered meaningless. Dixie Business Machines, Inc., B-208968, Feb. 7, 1983, 83-1 CPD ¶ 128.

Griffin Galbraith contends that 15 other installations are being considered for conversion and that resolution of the issues raised here is necessary in order to permit an orderly treatment of those conversions. Also, Griffin Galbraith argues that the Army's actions here violate the specific requirements of the Competition in Contracting Act of 1984 (CICA), Pub L. No. 98-369, concerning sole-source awards, and points out that we have not previously considered the application of those CICA requirements. Finally, Griffin Galbraith argues that a notice requirement in 10 U.S.C. § 2394 (1982) has not been complied with and this also raises a significant issue.

First, we note that CICA is not applicable here. The substantive provisions of that law apply to solicitations issued on or after April 1, 1985. The contract with WNG was signed on December 20, 1984, and approved on March 11, 1985. Modification 1, dated May 13, 1985, only changed the effective date of the contract. Therefore, the requirements of CICA are not relevant. See Johnson Controls, Inc., B-218316.2, Apr. 10, 1985, 85-1 CPD ¶ 411. Furthermore, the fact that the Army is conducting feasibility studies at other locations for possible conversion does not make this matter one of widespread interest to the procurement community at large. The issue can be timely raised if, indeed, it comes up again. See Manville Building Materials Corp., B-210414, Mar. 15, 1983, 83-1 CPD ¶ 258.

Finally, we point out that 10 U.S.C. § 2394 does not apply to the present procurement. That law provides in relevant part that:

> "(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years--
>
> > "(1) under section 2689 of this title;
> >
> > "(2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and

> the purchase of energy produced from such facilities."

Section 2394(b)(2) does require that certain congressional committees be provided notice of these types of contracts; however, the provision applies to energy production facilities. See B-214876, Sept. 4, 1984. The Army is neither building nor operating any facility which will produce energy and the protester's assertion that this provision is applicable is without merit.

For the above reasons, we see no reason to consider the issues raised by this protest under the significant issue exception.

Griffin Galbraith also questions the Army's funding for this contract. The Army will use Operation and Maintenance funds to pay WNG, and Griffin Galbraith asserts that use of these funds is improper. Griffin Galbraith argues that the contract is for the conversion of the furnaces from oil to natural gas and that this constitutes a construction project for which specific appropriations are required. Since no specific appropriation was made available for this purpose, Griffin Galbraith argues that the Army has no authority to enter into this contract. Also, because no funds are available, Griffin Galbraith contends that an Anti-Deficiency Act violation will occur.

Initially, we note that a conversion contract is not involved here. The contract is only for the provision of natural gas and for building a distribution system at Fort Lewis for the delivery of the gas. The Army indicates that the conversion of the furnaces from oil to gas will be subsequently competed and accomplished at a future date. Consequently, the lack of a specific appropriation for the conversion effort does not indicate a violation of the Anti-Deficiency Act. Moreover, there is no evidence which suggests that the Army's Operation and Maintenance account contains insufficient funds to cover the obligation incurred; we note that 40 U.S.C. § 481(a)(3) (1982) specifically authorizes contracts of up to 10 years for public utility services.

In any event, we find that Griffin Galbraith is not an interested party to raise these issues. While we agree with the protester that it has been adversely affected by the Army's decision to switch from oil to natural gas, since its protest of the Army's determination to do so is untimely and we are not considering it for that reason, we have no basis

to question the Army's determination. Under our Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or failure to award a contract. 4 C.F.R. § 21.0(a); ADB-ALNACO, Inc., B-218541, June 3, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ 633. Since Griffin Galbraith would not be eligible for any award because it is an oil supplier, we find that it is not sufficiently interested to challenge the funding for this contract. Eagle Research Group Inc., B-213725, May 8, 1984, 84-1 CPD ¶ 514.

The protest is dismissed.

for Harry R. Van Cleve
General Counsel