



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: System Automation Corporation

File: B-224166

Date: October 29, 1986

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### DIGEST

1. Protest which was filed initially with, and sustained by, the General Services Administration Board of Contract Appeals (GSBCA) and was reversed by the Court of Appeals on the basis that the GSBCA lacked jurisdiction is untimely when subsequently filed with General Accounting Office within 10 working days of the Court of Appeals decision but almost 1 year after the date on which the protester knew its basis for protest and made an election of forum.

2. Untimely protest will not be considered under the significant issue exception to the bid protest timeliness rules where the issue raised--primarily that of an alleged agency failure to conduct meaningful discussions--has been considered on numerous occasions. The good cause exception is not for application since the untimely filing was due to a deliberate choice on the protester's part and was not the result of some compelling reason beyond the protester's control which prevented the timely filing of a protest.

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### DECISION

System Automation Corporation (SAC) protests the award of a contract to Delta Research Corporation (Delta) for automatic data processing (ADP) software support services under request for proposals (RFP) No. MDA903-85-R-0176 issued by the Defense Supply Service-Washington (DSSW). As a preliminary matter, DSSW requests that we consider whether the protest is properly for consideration by our Office.

We dismiss the protest as untimely.

The contract at issue was awarded to Delta by DSSW on September 30, 1985. SAC filed a protest with the General Services Administration Board of Contract Appeals (GSBCA) on October 10, 1985. At that time, DSSW argued that the

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procurement in question was not covered by the Brooks Act, 40 U.S.C. § 759 (1982), and therefore the protest was not one which fell within the jurisdiction of the GSBICA under the Competition in Contracting Act of 1984 (CICA).

The GSBICA determined that it did have jurisdiction, and by decision of December 17, 1985, System Automation Corporation, GSBICA No. 8204-P, 86-1 BCA ¶ 18,654, the board granted SAC's protest and ordered that Delta's contract be terminated for convenience. Essentially, the basis for the board's decision was that DSSW failed to conduct meaningful discussions with SAC.

DSSW appealed this decision to the Court of Appeals for the Federal Circuit. While this appeal was pending, the same court decided in a different case that the GSBICA did not have jurisdiction over procurements, such as this, which were not conducted under the Brooks Act. See Electronic Data Systems Federal Corp. v. General Services Administration Board of Contract Appeals, 792 F.2d 1569 (Fed. Cir. 1986). On September 3, 1986, in response to motions by DSSW and Delta, the court reversed the GSBICA holding as to its jurisdiction to decide SAC's protest. On September 17, 1986, SAC then filed its protest with our Office. On September 19, 1986, DSSW issued Delta a notice to proceed.

DSSW and Delta contend that SAC's protest to us should be dismissed. They argue that under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986), which require that protests be filed not later than 10 working days after the basis of protest is known or should have been known, SAC's protest should be dismissed as untimely. DSSW cites Coastal Industries, Inc.--Reconsideration, B-223158.2, June 30, 1986, 86-2 C.P.D. ¶ 20, in which our Office dismissed as untimely a protest which was timely filed with GSBICA and subsequently refiled in our Office after the GSBICA had dismissed the protest for lack of jurisdiction. As an additional reason for dismissing the protest, DSSW and Delta argue that, under CICA, once a protester elects to file with the GSBICA, it has made a final election which the protester may not subsequently change by filing here. See 31 U.S.C. § 3552 (Supp. III 1985). We agree that the protest is untimely under our holding in Coastal, B-223158.2, supra.

SAC asserts that Coastal is distinguishable because, unlike the present case, the GSBICA never took jurisdiction over Coastal's protest. We do not find this distinction significant. SAC has not cited, nor are we aware of, any authority for the proposition that by taking jurisdiction the GSBICA tolled the running of our filing requirements. On the

contrary, 31 U.S.C. § 3552 which provides that a protester who has protested to the GSBICA under 40 U.S.C. § 759(h) may not protest to us with respect to that procurement, requires the opposite result. Since CICA contemplates the protester making a final election between this Office and the GSBICA when both forums are available, it would be inconsistent to permit a protester to utilize an initial filing with the GSBICA as a means of preserving his right to be heard here when it later protests in an untimely manner under our Bid Protest Regulations.

SAC also contends that the protest should be considered timely under Empire Realty Co., Inc., B-222572, May 22, 1986, 86-1 C.P.D. ¶ 481, in which we held that where we and another agency had concurrent jurisdiction over a category of bid protests and the other agency no longer exercised jurisdiction because of a change in law, we would consider a protest which had originally been timely filed with the other agency. SAC contends that our decision in Empire, B-222572, supra, recognizes that it would be unfair to penalize a protester for following regulations and case law which appeared to establish a viable forum, when that forum subsequently was determined to be unavailable.

The holding in Empire concerned a discrete category of protests which, prior to CICA, were not within our bid protest jurisdiction, as a result of which the Department of Housing and Urban Development Board of Contract Appeals (HUDBCA) provided a protest forum. The decision in Empire indicated that our Office would accept as timely a protest referral from the HUDBCA, where the protest had initially been timely filed there. This decision remedied the situation where prior practice had dictated filing with the HUDBCA, protesters were familiar with that procedure, and HUD had not promulgated regulations indicating that because CICA had extended our jurisdiction to the category of protests in question, the HUDBCA was no longer exercising jurisdiction. In our view, this rationale may not be extended here, where the protester freely elected the GSBICA with knowledge of our availability as a protest forum.


SAC argues that even if its protest is untimely, it should be considered under the significant issue or good cause exception to our timeliness rules. 4 C.F.R. § 21.2(c). We do not agree. In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. The exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Emerson Electric Co.--Reconsideration, B-220517.2, Nov. 26, 1985, 85-2 C.P.D. ¶ 607. Here, the issue of whether or not

the agency conducted meaningful discussions has been considered frequently by our Office. See Cosmos Engineers, Inc., B-220000.3, Feb. 24, 1986, 86-1 C.P.D. ¶ 186. Similarly, the ancillary issues raised by the protester do not present novel matters, and their impact on the procurement appears to have been minimal.

The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a protest. Engineering and Professional Services, B-219657 et al., Dec. 3, 1985, 85-2 C.P.D. ¶ 621. Here, it is clear that SAC's untimely filing resulted directly from SAC's voluntary election to file before the GSBCA.

Finally, SAC asserts that the Court of Appeals has indicated an interest in a decision by our Office. This is based on a footnote in the court's decision which indicates that the court is "aware of no reason which would preclude [SAC] from filing a new protest" with the General Accounting Office. We find that this is not an expression of interest in a decision from our Office by the court. Moreover, our regulations provide that: "The General Accounting Office will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office." 4 C.F.R. § 21.3(f)(11). Here, the matter has been resolved by the court; the protest is no longer before a court of competent jurisdiction, and the regulation is inapplicable.

The protest is dismissed.

  
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General Counsel