Walsh

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Clifford L. Lee, II, USAR

File: B-237660

Date: May 4, 1990

DIGEST

A member of the U.S. Army Reserve serving a 138 day Temporary Tour of Active Duty in the Washington, D.C. area, after responding to a request by Army Personnel for a legal officer residing in that area, is not entitled to travel expenses and mileage when he declared Columbia, Maryland, as his residence rather than his actual home in Fayetteville, North Carolina, in order to qualify for the selection.

DECISION

Captain Clifford L. Lee, II, USAR, appeals a decision of our Claims Group denying his claim for $4,587 in daily meals and $1,459.50 for mileage in connection with a Temporary Tour of Active Duty performed for 138 days. We uphold that denial on the following basis.

Captain Lee, who was residing in Fayetteville, North Carolina, responded to a request by the United States Army Physical Disability Agency (USAPDA), Washington, D.C., through the U.S. Army Personnel Center, to nominate a Reserve Judge Advocate General Corps officer for temporary duty. USAPDA stipulated that only officers from the Washington area would be considered for the assignment because travel allowances for an officer in a travel status could exceed $10,000 for the 138 day period of duty.

Initially, Captain Lee was advised that he would not be acceptable as a candidate since he resided in North Carolina. He advised the Army Personnel Center that he would relocate to Columbia, Maryland, which is within commuting distance of Silver Spring, and that he would not seek reimbursement for his travel expenses. He furnished a Columbia, Maryland, home address. By orders dated April 9, 1987, addressed to Columbia, Maryland, but mailed to Fayetteville, North Carolina, Captain Lee was ordered to active duty for 138 days. The orders stated that the temporary duty would be at no expense to the

government. He now claims meal expenses and local mileage on the basis that he was misled by the Army into listing his residence as Columbia, Maryland, rather than Fayetteville, North Carolina, and that the Army was fully aware at all times that his actual residence was Fayetteville, North Carolina.

ANALYSIS AND CONCLUSION

Subsection 404(a) of title 37, United States Code, authorizes the payment of certain allowances to members of Reserve components when away from home to perform active duty for short periods. Subparagraph U7150-A1, b of volume 1 of the Joint Federal Travel Regulations, effective January 1, 1987, provides that a member is not entitled to per diem or actual expense allowance for duty when the member commutes daily from home or place from which called to active duty and the permanent duty station or where both are within reasonable commuting distance of each other.

While Captain Lee contends that his actual residence was in Fayetteville, North Carolina, the evidence before us indicates that for the purpose of this tour of duty his residence was located in Columbia, Maryland. The fact that both his original orders and the amendment to them were addressed to a specific street address in Columbia, Maryland, shows that he had indicated to the Army Personnel Center that he was relocating in order to qualify for the assignment. We find nothing in the record that indicates that the Army was aware that his residence was in Fayetteville during this period of duty. The record shows that while he was living in Fayetteville prior to the time the orders were issued April 9, 1987, he intended to change his residence to Columbia prior to the reporting date for active duty April 20, 1987. In these circumstances we must conclude that his residence at the time of the duty was Columbia, Maryland. Accordingly, his claim must be denied.

Milton J. Socolar

Acting Comptroller General
of the United States

J. Maeder

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tracor Flight Services, Inc.--Request for Reconsideration
File: B-238200.2

Date: May 4, 1990

D. M. Wilson, for the protester.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of modification to another offeror's contract made 9 months after award which deleted a requirement that had been in the solicitation will not be considered by the General Accounting Office because modification involves matter of contract administration and it does not appear that the contract was awarded with the intent to modify it or that the modification is beyond the scope of the original contract.

2. Protest to the General Accounting Office of a December 1987 award to another offeror on the basis that the firm was not qualified is dismissed as untimely because the protest was filed more than 10 working days after basis of protest was known or should have been known, and is not for consideration under the "good cause" or "significant issue" exceptions to the timeliness rules.

DECISION

Tracor Flight Services, Inc., requests reconsideration of our dismissal of its protest of the Department of the Air Force issuance of a contract modification under contract No. F61546-88-D-0008 for towing targets used by military pilots for practice in Europe. The contract is held by Corporate Jets, Inc.

We affirm our dismissal of the protest.

The contract, awarded to Corporate Jets in December 1987, required the contractor to tow targets for fighter aerial gunnery training at Decimomannu Air Base, Sardinia, Italy. The solicitation and the contract as awarded required that

the dart-towship aircraft be certified for airworthiness by the Federal Aviation Agency (FAA) and that the contractor use an FAA-approved maintenance plan.

On September 1, 1988, the Air Force issued modification P00002, which deleted from the contract the requirement that the contractor's aircraft have a valid FAA airworthiness certificate. According to the protester, it learned of this contract modification in January 1989 and when informal inquiries and discussions with the agency proved unsuccessful, it filed a protest with the agency on November 15.

Tracor protested the issuance of modification P00002, arguing that the airworthiness certification requirements had a material impact on its proposed prices. Tracor also argued that modification P00002 contradicted other contract requirements in that the agency continued to require that the aircraft flown under the contract be operated as "public aircraft" and the FAA required that public aircraft flown in international airspace be certified. Thus, Tracor argued that airworthiness certificates were still required and under the contract modification Corporate Jets was performing without this certification. Tracor further alleged that the Air Force was permitting Corporate Jets to perform without the FAA-approved maintenance plan which was required by the solicitation and the contract.

In its response, the agency said that, after award, Corporate Jets pursued FAA certification but that the FAA would not commit as to which FAA office would be responsible for performing the certification. Therefore, the agency had no alternative but to delete this certification requirement. The agency said, however, that it did not relax performance requirements and that the contracting officer had seen evidence that Corporate Jets was following an FAA-approved maintenance plan. Finally, the agency said that it reviewed proposed prices and found no evidence that certification costs were a major cost element in the preparation of proposals. The agency concluded that the issuance of modification P00002 was a valid exercise of contract administration and the agency therefore denied Tracor's protest.

Tracor then filed a protest with our Office in which it essentially reiterated its agency-level protest. We dismissed this protest since it appeared to primarily concern a complaint regarding the performance of an existing contract, which is a contract administration matter generally outside the scope of the bid protest process. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1989).

Tracor has requested that we reconsider our dismissal of its protest, arguing that its original protest was based on both the agency's improper award of the contract to an unqualified offeror, and its issuance of modification P00002, which relieved that contractor of an obligation which had been in the solicitation.

As a general rule, our Office will not review protests based upon contract modifications since modifications involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. § 21.3(m)(1). Even if changes in a contract are significant, in the absence of evidence that a contract was awarded with the intent to modify it, we will not question a contract modification unless it is shown to be beyond the scope of the original contract, so as to require a separate procurement. Theater Aviation Maintenance Servs., B-233539, Mar. 22, 1989, 89-1 CPD ¶ 294. Here, there is no indication that the Air Force awarded the contract to Corporate Jets with an intent to modify it. Indeed, the contract, awarded in December 1987, was not modified until September 1988, 9 months later. Further, the protester has neither alleged nor shown that the modification was beyond the scope of the original contract in that the goods or services to be delivered are different from those covered by the original solicitation, so as to require a separate, new procurement. Shamrock Indus. Inc.; Southern Plastics Eng'g Corp.--Reconsideration, B-225216.2; B-225216.3, Mar. 18, 1987, 87-1 CPD ¶ 302. Therefore, we remain of the opinion that the protested modification is a matter of contract administration and not within our bid protest jurisdiction.

Tracor's assertion that it is now also protesting the award of the original contract to an unqualified offeror is untimely in that this matter should have been protested in 1987 within 10 days of when Tracor was notified of the award. 4 C.F.R. § 21.2(a)(2). While admitting that its protest was not timely filed in conformance with our requirements, Tracor contends that its protest merits consideration under 4 C.F.R. § 21.2(b), which provides for consideration of untimely protests for good cause shown or where a significant issue is raised. In order to invoke the good cause exception, the protester must demonstrate some compelling reason beyond the protester's control which prevents the protester from submitting a timely protest. Philadelphia Maintenance Co., Inc., B-235399, Aug. 11, 1989, 89-2 CPD ¶ 132. Tracor has failed to show any circumstances which prohibited the company from filing a timely protest. Nor do the merits of this case qualify under the significant issue exception to the timeliness rules. We will not invoke the significant issue exception, where, as here, the

protest does not raise an issue of widespread interest to the procurement community or where the issue raised has already been considered in previous decisions. Id. In any event, whether Corporate Jets was qualified to perform the contract involves a matter of affirmative responsibility which is not for our review. 4 C.F.R. § 21.3(m)(5).

Accordingly, the dismissal is affirmed.

James F. Hinchman
General Counsel