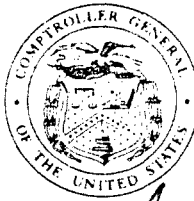


**DECISION**



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

*PL 1* *Hrdell*  
*15448*  
**[Protest of Proposed Award of FAA Contract]**

FILE:

B-199415

DATE: November 18, 1980

MATTER OF:

Carmatek Corporation

DIGEST:

1. Determination whether to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and SBA and will not be reviewed by GAO absent showing of fraud or bad faith on part of Government officials.
2. Protest of agency's failure to provide protester formal notice of its action regarding protester's unsolicited proposal within 60 days as required by agency's procedures is untimely where filed more than 10 days after expiration of 60-day period.
3. Where protest to agency is unanswered and protester waits 8 months to file protest with GAO, protest is not for consideration as protester failed to diligently pursue protest.
4. Allegation that award of contract was to be made to firm that "secretly" wrote RFP is untimely where protester learned basis for allegation more than 10 days before filing protest.
5. Protest alleging that ideas in protester's unsolicited proposal were used in the RFP is untimely where protester received copy of RFP, notice of which was synopsized in Commerce Business Daily, and protest was filed 7 months thereafter.

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Carmatek Corporation (Carmatek) protests the Federal Aviation Administration's (FAA) proposed award of a contract under invitation for bids (IFB) No. DOT-FA-NA-79-7 to Doggett and Hagans Parking System for the management and operation of the Washington National Airport (WNA) Parking System. The FAA utilized a two-step formal advertising method with the first step, the request for technical proposals (RFTP), being issued on November 27, 1979, and synopsisized in the Commerce Business Daily (CBD) on December 4, 1979.

As background, we note that on October 23, 1979, Carmatek submitted an unsolicited proposal to manage and operate the WNA Parking System. On October 29, Carmatek met with representatives of the FAA to discuss Carmatek's proposal. Carmatek submits that the FAA conclusions at the end of this meeting were that (1) Carmatek's proposal was "interesting," (2) both Carmatek and its co-venturer "had the requisite management capability particularly on an individualized basis," but the airport authority "lacked confidence" in its ability since the job was complex and this was its first joint venture, and (3) the FAA would issue a solicitation to the open market rather than as a set-aside for minority businesses or a direct award to Carmatek. As a result, by letter dated October 31, 1979, to the FAA, Carmatek protested FAA's position.

The FAA Deputy Administrator, by letter dated November 23, 1979, advised Carmatek that he affirmed FAA's initial determinations that Carmatek's unsolicited proposal as drafted was not acceptable and that, while the FAA supports the Administration's minority business program, a set-aside for this procurement was not appropriate.

Carmatek states that it never received this letter. However, on November 27, 1979, an RFTP was mailed to Carmatek and the return receipt, No. PO16235533, was signed but not dated by Carmatek's president. The date for receipt of technical proposals was, after two amendments, established as February 25, 1980. Carmatek did not submit a proposal. Carmatek advises that having not received a response from the FAA concerning Carmatek's October 31 letter, it contacted the Department of Transportation's (DOT) Office of Small and Disadvantaged Business Utilization (OSDBU).

Subsequently, Carmatek met with DOT's Office of the Inspector General (IG). On July 1, 1980, Carmatek filed a protest with our Office.

In its protest to our Office, Carmatek requests a ruling on the following, in addition to its contention that the procurement should have been an 8(a) set-aside:

- "1. Failure of FAA to officially and properly respond within the required 60 day time frame to our unsolicited proposal.
- "2. Whether FAA can deny my firm an opportunity to perform on a federal contract because of their 'lack of confidence.'
- "3. Why the FAA letter of 23 November 1979 allegedly in response to our 31 October 1979 letter was received seven (7) months after original mailing but just after the filing of a request for GAO investigation.
- "4. Preparation of the parking RFP by a firm actively participating in the bid process with the said firm being declared the winner of the solicitation.
- "5. Unethical usurpation of a potential contract opportunity by a former FAA employee for his personal benefit immediately upon his retirement from Government service.
- "6. If in fact ideas advanced in our unsolicited proposal were used by WNA in its RFP which was issued over a month after presentation of our proposal."

With respect to the 8(a) set-aside issue, section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with any Government agency with procuring authority and

to arrange the performance of such contracts by letting subcontracts to small businesses or other concerns. The contracting officer of the procuring agency is authorized "in his discretion" to let the contract to SBA. (In light of that discretionary authority, we do not review agency determinations to set aside or not to set aside contracts for noncompetitive section 8(a) award, unless there is a showing of fraud or bad faith on the part of Government officials.) Thus, agency decisions not to enter into section 8(a) contracts generally are not matters for legal review by this Office under our bid protest function. Arcata Associates, Inc., B-195449, September 27, 1979, 79-2 CPD 228; American Laundry, 58 Comp. Gen. 672 (1979), 79-2 CPD 49; Multi-Mac Service Corporation, B-190360, October 21, 1977, 77-2 CPD 318. Neither fraud nor bad faith on the part of any Government officials has been alleged concerning this determination.

The remainder of our decision will be directed at Carmatek's six arguments to the extent they are not related to the 8(a) set-aside issue. Our Bid Protest Procedures, 4 C.F.R. part 20 (1980), insofar as relevant here, provide that protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier; and, where the protest is initially filed with the agency, to be timely, any subsequent protest to our Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. §§ 20.2(a) and (b)(2) (1980).

(The first point is clearly untimely since Carmatek knew or should have known that it had not received an official response to its unsolicited proposal within 60 days on December 23, 1979, and its protest was not filed until July 1, 1980.

The second argument (whether an award can be denied because of lack of confidence) involves a matter which was protested to FAA by letter of October 31, 1979. Although FAA says it responded to the protest by letter of November 23, 1979, Carmatek denies that it received the letter until July 1980. We have held that where a protest is filed with an agency and more than 4 months

(elapses without any response, the protest to our Office is untimely because the protest has not been diligently pursued.) Wyatt Lumber Company, B-196705, February 7, 1980, 80-1 CPD 108. We find that rule applicable here because more than 8 months elapsed without a response before the protest was filed.

As to the third point, the record indicates that FAA's November 23, 1979, letter of response to Carmatek's protest was incorrectly addressed and returned to FAA. The letter was forwarded to Carmatek on July 3, 1980, with a note to the effect that FAA did not know why it was not returned sooner. There is no other evidence in the record bearing on this point.

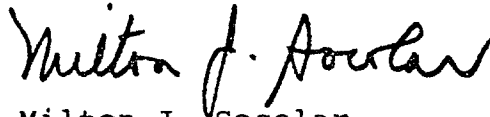
In a letter<sup>1</sup> to our Office, received on August 12, 1980, Carmatek discussed the fourth point, that is, the contract was going to be awarded to a firm which "secretly" wrote the RFP. Parenthetically, we note that the FAA denies the validity of this allegation. Carmatek's letter also states that Carmatek learned of this the latter part of June. Since this matter was not protested here until August 12, it is clearly untimely.

The fifth point relates to what Carmatek contends is unethical conduct by a former FAA employee which affects Carmatek's ability to compete on the parking contract at Dulles, not National, Airport. Since there does not appear to be an ongoing procurement for the Dulles concession and the allegation appears otherwise speculative, we see no basis to consider this matter.

As to the final point, FAA denies that any ideas in Carmatek's unsolicited proposal were used in the subject RFP. In any event, notice of the issuance of the RFP appeared in the CBD on December 4, 1979, and Carmatek received a copy of the RFP, although the date of receipt is unknown. Since the CBD publication amounted to constructive notice of the procurement, Carmatek's protest to us on July 1, 1980, was clearly untimely. Delphi Industries, Inc., 58 Comp. Gen. 248 (1979), 79-1 CPD 67.

Finally, while we recognize that Carmatek pursued its complaints concerning this procurement with other offices in DOT, our Bid Protest Procedures contemplate pursuit of protests in a timely manner with appropriate procurement officials of the agency or our Office. Therefore, the fact that Carmatek contacted DOT's OSD BU and IG does not alter our conclusion that certain aspects of the protest are untimely.

Accordingly, the protest is dismissed.

A handwritten signature in black ink, reading "Milton J. Socolar". The signature is written in a cursive, flowing style.

Milton J. Socolar  
General Counsel