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

FILE: B-206394 2 DATE: April 13, 1982

MATTER OF: Blakeslee Arpaia Chapman, Inc. and Charles Stokes d/b/a C. Stokes Construction Company--Reconsideration

DIGEST:

Prior decision is affirmed because the protester has not shown any errors of law or fact in decision's conclusion that its protest against the proposed award of a subcontract was untimely since the protest was not filed within 10 working days after the protester learned of the initial adverse agency action taken by the prime contractor. Further, the matter does not present a significant issue within the meaning of GAO's Bid Protest Procedures.

Blakeslee Arpaia Chapman, Inc. and Charles Stokes d/b/a C. Stokes Construction Company (Blakeslee) request reconsideration of our decision in the matter of Blakeslee Arpaia Chapman, Inc. and Charles Stokes d/b/a C. Stokes Construction Company, B-206394, March 8, 1982, 82-1 CPD ___, which dismissed, as untimely, Blakeslee's protest against the proposed award of a contract to Gates Construction Company (Gates) under invitation for bids (IFB) No. AM-81-KBACK2F. The IFB was issued by the National Railroad Passenger Corporation (Amtrak), a prime contractor of the Federal Railroad Administration, Department of Transportation (Transportation), for replacement of the Mystic River Bridge, Mystic, Connecticut, as part of the Northeast Corridor Improvement Project.

Blakeslee contends that the protest should be considered on the merits because (1) the decision's timeliness conclusion is allegedly based upon a "new, apparently unprecedented interpretation of GAO's Bid Protest Procedures, which unfairly penalizes Blakeslee for following the plain instructions of the Procedures" or (2) Blakeslee's protest raises issues significant to procurement practices and procedures.

After considering Blakeslee's contentions, we affirm the prior decision and conclude that the protest does not present a significant issue within the meaning of 4 C.F.R. § 21.2(c) (1981).

The relevant facts are not disputed. By letter dated November 20, 1981, or 1 week after bid opening, Blakeslee protested to Amtrak. This protest was timely filed with Amtrak under our Bid Protest Procedures. See 4 C.F.R. § 21.2(b)(2) (1981). Blakeslee contended that the low bid submitted by Gates was nonresponsive because: (1) Gates failed to submit a subcontracting plan, failed to name the subcontractors in its bid, and failed to describe their work and the associated estimated dollar value of the subcontracts in its bid, as required by the IFB; (2) Gates failed to acknowledge an IFB amendment; and (3) Gates failed to submit with its bid an executed schedule "B," entitled "Affirmative Action Requirements," as required by the IFB.

By letter dated December 10, 1981, Amtrak denied Blakeslee's protest, stating that: (1) Gates agreed to the IFB's subcontracting goals and Gates could submit the details of the subcontracting plan after bid opening; (2) the amendment could only serve to reduce bid prices; and (3) Gates complied with the IFB's requirements regarding schedule "B" because the IFB expressly permitted schedule "B" to be executed after bid opening.

By letter dated December 14, 1981, Blakeslee protested to Transportation and by letter dated January 27, 1982 (received by Blakeslee on February 1, 1982), Transportation essentially affirmed Amtrak's determination and denied Blakeslee's protest.

On February 11, 1982, Blakeslee protested here and asserted that this is the type of subcontract protest which our Office will review under our decision in Optimum Systems Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Assuming that Blakeslee was correct, we stated that we would consider the merits of the protest essentially because Amtrak was acting "for" Transportation. Blakeslee Prestress, Inc., et al., B-190778, April 17, 1978, 78-1 CPD 297.

In the decision, we noted that if a protest is filed initially with the contracting agency any subsequent protest to our Office must be filed within 10 working days of formal notification of initial adverse agency action. 4 C.F.R. § 21.2(a) (1981); Citing Arrowhead Linen Service, B-194496, January 17, 1980, 80-1 CPD 54, we stated that in a subcontract protest situation similar to this one--where there was an initial timely protest filed with the prime contractor--we held that a subsequent protest to our Office must be filed here within 10 working days of notice of the initial adverse action taken by the prime contractor.

We further noted that a protester's continued pursuit of its protest with the contracting agency, despite the initial rejection of its protest, does not extend the time or obviate the necessity for filing a protest with our Office within 10 working days of initial adverse agency action. See, e.g., BKC Incorporated, et al., B-198905, June 10, 1981, 81-1 CPD 474, and decisions cited therein. We concluded that since Amtrak was acting "for" Transportation, Amtrak and Transportation must be considered to be the same "contracting agency" for purposes of this procurement and the timeliness provisions of our Bid Protest Procedures.

Accordingly, we held that since Blakeslee's protest to our Office was not filed here within 10 working days after it received notice of Amtrak's denial of its protest, Blakeslee's protest was untimely and would not be considered on the merits.

On reconsideration, Blakeslee argues that our holding penalizes Blakeslee for appealing Amtrak's adverse action to Transportation. Blakeslee notes that § 21.2(a) of GAO's Bid Protest Procedures encourages protesters to "seek resolution of their complaints initially with the contracting agency." Blakeslee states that our decision incorrectly finds that Amtrak is part of the contracting agency because, in its view, a contracting agency can only be an agency of the Federal Government, and Amtrak is not a Federal agency. Blakeslee concludes that its protest to Transportation was a logical step prior to protesting to GAO.

In our view, Blakeslee has presented no arguments, which were not fully considered in the prior decision, and, again, Blakeslee's arguments fail. First, Blakeslee would have our Office consider the merits of its subcontract award protest essentially because the prime contractor is acting for the Federal agency. If Blakeslee is correct on this point, then the adverse action of the prime contractor, here Amtrak, is considered to be the initial adverse agency action within the meaning of our Bid Protest Procedures. See Kahle Engineering Company, B-198563, October 8, 1980, 80-2 CPD 256, where we stated that if the protester lodged a timely protest initially with the prime contractor, any subsequent protest to our Office must be filed within 10 working days of actual or constructive notice of the initial adverse action by the prime contractor in order to be timely. Therefore, if this protest is the type of subcontract protest that we consider, then the initial adverse agency action was taken by the prime contractor and the subsequent protest here was untimely since it was not filed within 10 working days of notice of Amtrak's denial of Blakeslee's protest.

Alternatively, Blakeslee argues that our Office should consider the merits of the protest because the protest raises issues significant to procurement practices and procedures within the meaning of the exception to our timeliness requirements in 4 C.F.R. § 21.2(c) (1981). Blakeslee states that the IFB contains Amtrak's standard provisions regarding the submission of subcontracting plans for use of small and minority businesses. These provisions allegedly could be involved in similar protests in future Amtrak procurements in connection with this improvement project. Blakeslee also states that the issue is of widespread interest to the procurement community since all potential bidders want to know whether "these standard provisions have any real meaning."

We have held that a protest does not involve a significant issue when the matter has been considered in a prior decision. CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225, and the decision cited therein. Our decisions in Devcon Systems Corporation, 59 Comp. Gen. 614 (1980), 80-2 CPD 46, and Paul N. Howard Company--Reconsideration, 60 Comp. Gen. ___ (B-199145.2, July 17, 1981), 81-2 CPD 42, considered similar issues concerning

subcontracting requirements. Thus, the issue is not significant within the meaning of our Bid Protest Procedures.

Accordingly, since Blakeslee has presented no new evidence warranting modification or reversal of the prior decision, the March 8, 1982, decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States