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DECISION

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

FILE: B-205439 DATE: July 19, 1982

MATTER OF: Sierra Pacific Airlines

DIGEST:

1. Protest allegations are untimely where they could have been discovered at the time of award but were not raised until more than nine months after award.

2. An aircraft services contract modification which relaxed a relief pilot requirement and removed the risk of late payment by changing the method of payment was not a cardinal change warranting cancellation of the contract and resolicitation of the requirement, where the modification did not change the essential nature of the contract and the record does not indicate that the modification would have attracted a significantly different field of competition than that which competed for the original contract.

3. An agency's failure to notify GAO before renewing a contract which is the subject of a protest pending at GAO, is a procedural deficiency which will not, by itself, affect the legality of the award.

Sierra Pacific Airlines protests the award of contracts to Empire Airways and Aero-Dyne under solicitation No. R1-81-5, issued by the U.S. Forest Service, Department of Agriculture, for smoke jumping and paracargo services. Sierra contends that these awards were improper because Empire was a nonresponsible bidder and Aero-Dyne's bid was nonresponsive. Sierra also protests a subsequent modification to both contracts on the ground that it went beyond the scope of the contracts as originally advertised, and thus was improper. For the reasons discussed below, we deny the protest.

The solicitation, issued November 14, 1980, sought bids on three separate items of aircraft services. Items one and two called for planes to be stationed at Missoula, Montana from June 4, 1981 through September 30 and June 15 through September 30, respectively. Item three required that a plane be stationed at West Yellowstone, Montana from July 1 through September 25. Items one and two provided for 115, and item three 100, guaranteed flight hours. The contract period for all items was one calendar year from the date of award, although the Forest Service reserved the option to extend the contracts for two additional one year periods.

Bids were to be evaluated based on the price per guaranteed flight hour. This method of bidding differed from prior solicitations which called for two prices--the fixed hourly flight rate and a daily availability rate designed to cover the operator's daily costs of providing the aircraft. Under the prior scheme, the ultimate user of the aircraft (i.e. the other federal and state agencies with forest management responsibilities) paid only the flight rate portion while the daily availability would be paid out of the Forest Service's fire management funds. The new scheme of a single payment on an actual flight hour basis was intended to allocate the entire cost to the user based on hours of use, and thereby reduce expenditures of the Forest Service's fire management funds.

Bids were opened December 16, 1980. Four bids were received, two of which offered only on items one and two. Empire was low on items one and two at $2,222 per guaranteed flight hour.

When Empire commenced performance of items one and two in June 1981, users other than the Forest Service were unwilling to pay the significantly higher flight rate and thus were not using the aircraft, and the Forest Service became concerned that it would have to pay the contractors for guaranteed flight hours not used. To avoid this possibility, the Forest Service modified the contracts to provide for the bifurcated payment method used in the past; effective July 1, Empire and Aero-Dyne would

receive one part of their total contract price as a periodic payment for daily availability (to be paid by the Forest Service), and the other part as an hourly flight rate based on actual use (to be paid by the user). It was hoped that the resulting reduction in flight rates to former levels would lead to greater use of the aircraft.

Sierra does not question the necessity for this modification, but contends that it constituted a cardinal change, that is, a change outside the scope of the advertised contracts, which would have significantly altered the competition for those contracts. Sierra points out in this regard that, due to the unpredictability as to when flight hours would be flown, payment solely on a flight hour basis entailed a greater degree of risk for a potential contractor than did payment under the modified method. This risk allegedly caused bidders to figure additional interest costs into their bids (to cover the potential need to borrow operating funds early in the availability period). But for this increased risk factor, Sierra continues, it would have been able to bid on all three items rather than only the first two. Sierra reasons that this risk surely must have affected other potential contractors in a similar way, and thus reduced the number of bidders and increased the bid prices on the original solicitation. It concludes that, in view of the likelihood of receiving greater competition and lower prices, the Forest Service should have canceled the contracts and resolicited these requirements once it determined that the payment method had to be changed.

Sierra further contends that (1) Empire was a nonresponsible bidder since it identified in its bid certain aircraft which it neither owned nor to which it had access; and (2) Aero-Dyne's bid was nonresponsive because it failed to identify its offered aircraft by "N" number as required by the IFB. These latter two allegations are untimely.

Our Bid Protest Procedures require that protests be filed in our Office within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2). While disclosure of information at bid opening and

notice of award to a competitor do not necessarily provide knowledge of the basis of protest, it is incumbent upon a potential protester to diligently seek whatever relevant information is needed to determine whether a basis for protest exists. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172. In no case may a potential protester sit idly by and, after allowing a significant amount of time to pass, decide to seek information that could have been obtained earlier. A protester's failure to diligently pursue the matter by seeking the necessary information within a reasonable time requires rejection of the protest as untimely. Fowler's Refrigeration and Appliance, Inc., B-201389, March 25, 1981, 81-1 CPD 223.

Bids here were opened December 16, and award was made on February 3. The responsiveness of Aero-Dyne's bid and the responsibility of Empire could have been ascertained by Sierra at least as of the time of award. Sierra did not raise these allegations until November 6, however, more than nine months after the awards. In view of this delay, these allegations are untimely raised and not for consideration on the merits.

The Forest Service contends that the modification issue is also untimely. It believes Sierra must have become aware of the contract modifications more than 10 days prior to its September 25 protest to the contracting officer, since Sierra has aircraft stationed at Missoula, Montana and thus comes into daily contact with representatives of Empire and Aero-Dyne. We find that this portion of the protest is timely. Sierra states that it first became aware of the modifications on September 18, during a conversation with Forest Service officials. The record contains no evidence, beyond the Forest Service's speculation, that Sierra learned of the modification at some earlier date. Such speculation is not sufficient to establish the untimeliness of a protest. Marmac Industries, Inc., B-203377.5, January 8, 1982, 82-1 CPD 22. Furthermore, there is no requirement that an unsuccessful bidder monitor a contract to assure that it is not modified. Thus,

Sierra's September 25 protest to the agency was timely. The Forest Service denied this protest on October 27 and Sierra filed its protest in our Office on November 6, fewer than 10 working days later. See 4 C.F.R. § 21.2(a).

Addressing the merits of this remaining issue, the Forest Service argues that modification of the payment method did not have any significant impact on price, quantity, delivery or the original purpose of the contracts, and thus was not beyond the scope of the original contracts. It is the Forest Service's view that this modification was a matter of contract administration within the ambit of the contracting officer. The Forest Service also notes that the modification in fact conferred no benefit on the contractors since Empire already had performed the early, high risk portion of its contracts, and Aero-Dyne was required to install a $1,940 anchor cable in consideration for the change. Further, the contractors received final payment for their unused guaranteed flight hours in late September instead of late August as would have been the case under the original contract. Finally, the Forest Service reports that its fiscal office has discovered a means by which the Forest Service can pay the operators part of the flight rate. Thus, there is no longer a need for the modification, and the option year contracts for Aero-Dyne and Empire will be changed to remove the modification.

As we have stated in prior decisions, protests concerning contract modifications ordinarily will not be appropriate for review by our Office since such matters involve contract administration and thus come under the authority of the contracting agency. Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145. Our Office will review such matters, however, where, as here, it is alleged that the modification went beyond the scope of the contract and should have been the subject of a new procurement, since the modification could be viewed as an attempt by the agency to circumvent procurement statutes. See Webcraft Packaging, Division of Beatrice Foods Co., B-194087, August 14, 1979, 79-2 CPD 120. We review these cases to determine whether the modification so materially altered the contract that the field of

competition for the contract as modified would be significantly different from that obtained for the original contract. Id. In making this determination, we will consider any relevant factors, including the magnitude, quality and effect of the change. Id. Considering these and other relevant factors involved here, we do not believe the change in method of payment was outside the scope of the original contracts.

The modification had no effect on the type or amount of work required, the manner in which it was to be performed, or the schedule of performance. The modification merely obviated the possibility that no payments would be made to the operators until the end of the availability period. We question the significance of this risk. Even if no flight hours were required during the availability period, operators under the original contracts would have had to wait no longer than three months before receiving full payment. Although the borrowing of operating funds to cover the entire performance period clearly would increase the cost to the operator, it is also true that operating costs would be substantially reduced if the aircraft remained on the ground for the entire availability period. We further note that there existed some reasonable possibility that a number of flight hours would be flown and that the operators would thus not have to wait until the end of the availability period to receive some payment (this is, in fact, what happened here). These latter two considerations mitigated the risk involved. In our opinion, this actual risk was not so great that its removal can be said to have changed the essential nature of the contracts.

While Sierra maintains that, absent the risk of delayed payment, it would have been able to bid on item three while offering lower prices for all three items, the Forest Service valued this change at only $2,000, as measured by the consideration extracted from Aero-Dyne. Sierra has presented no evidence indicating a different value for the change; it certainly has not shown, as it alleges, that the risk was of such a magnitude that a significant segment of the potential competition was thereby dissuaded from bidding on the procurement.

Sierra cites as support for its protest several prior decisions of our Office declaring certain contract changes to be beyond the scope of the original contract. In each of those cases, however--Webcraft Packaging, Division of Beatrice Foods Co., supra; Lamson Division of Diebold, Inc., B-196029.2, June 30, 1980, 80-1 CPD 447, and American Air Filter Co., Inc., B-188408, February 16, 1978, 78-1 CPD 136--the record established that the work called for under the original contract had been so significantly altered by the change that it effectively created a new contract. In Webcraft, for example, the specification was changed shortly after award to permit use of a commonly available paper instead of a scarce specialty paper in the performance of a printing contract. We found that the field of competition under the changed specification would have been materially different in view of clear evidence that at least nine paper mills could have supplied paper under the changed specification. Again, the change to the Empire and Aero-Dyne contracts has not been shown to have had a similar impact.

Sierra also relies on our decision Dyneteria, Inc., B-178701, July 15, 1975, 75-2 CPD 36, where we found improper a modification increasing the contract price by $137,214 to reflect a post-bid opening change in a Service Contract Act wage determination. It was clear there, however, that such an increase in price would be prejudicial to other bidders since the next low bid was only $58,000 above the awardee's bid. There is no evidence that Sierra or other bidders were similarly prejudiced by the modifications here.

As part of the modification of the Aero-Dyne and Empire contracts, a provision mandating the availability of relief pilots for each aircraft for every day of the availability period was changed to require relief pilots only when requested by the contracting officer. Sierra contends that this change, together with the payment modification, exceeded the scope of the original contracts. We disagree. The impact of this change on the contracts appears to have been negligible. According to the Forest Service, the change was imposed to allow more room for passengers when needed. Since the requirement remained discretionary with the agency, and since there was no basis for predicting whether or when a relief pilot would be required, operators necessarily would have to

be prepared to furnish a relief pilot at all times. This is precisely the basis upon which bids were originally solicited. Thus, we find no reason to conclude that this changed requirement would have had any significant effect on the competition, even when considered jointly with the payment modification. The two changes, in our opinion, did not render the contracts fundamentally different from the awarded contracts.

Sierra finally complains that the Forest Service exercised its contract option and renewed the Empire and Aero-Dyne contracts while Sierra's protest was pending in our Office. Sierra maintains that this renewal was illegal under the ruling in Robert E. Derecktor of R.I., Inc. v. Goldschmidt, 503 F. Supp. 1059 (D.R.I. 1980), since the Forest Service failed to give our Office advance notice of the renewals as required by Federal Procurement Regulations § 1-2.407-8(b)(3). The cited District Court opinion notwithstanding, it is our studied view, as we have indicated in a number of prior decisions, that an agency's failure to notify GAO of an impending award is a mere procedural defect which will not, by itself, affect the legality of an award. Diversified Computer Services, Inc., B-201681, July 7, 1981, 81-2 CPD 13; Starline, Incorporated, 55 Comp. Gen. 1160, 1172 (1976), 76-1 CPD 365. The views of the District Court of Rhode Island, expressed in a matter in no way related to this protest, are not binding on this Office. In view of our conclusion that Sierra's protest is without merit, the question whether the renewals were otherwise proper is academic. Diversified Computer Services, Inc., supra.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States