



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Neal R. Gross and Company, Inc.--Request for
Reconsideration

File: B-229966.2

Date: April 18, 1988

DIGEST

1. Where a protester alleges that it was unfairly excluded from a competition, the time for filing a protest runs from when the protester first learns that the agency made award without soliciting the firm, and not from when the protester subsequently receives a copy of the contract with the awardee indicating that award was made at prices higher than under the protester's prior contracts.

2. A party that has failed to protect its interest in a procurement through the filing of a timely protest is not an interested party for purposes of arguing that the contract was awarded at an unreasonable price.

DECISION

Neal R. Gross and Company, Inc. requests reconsideration of our decision, Neal R. Gross and Company, Inc., B-229966, Mar. 24, 1988, 88-1 CPD ¶ ___, in which we dismissed the firm's protest of the award by the National Mediation Board (NMB) of purchase order No. NMB-88-02 to Ann Riley and Associates. We deny the request.

The agency awarded the purchase order for reporting services based on the results of an oral solicitation under the small purchase procedures authorized by 41 U.S.C. § 253(g) (Supp. III 1985). In its initial protest, Gross said that it learned of the award to Riley in late November 1987. On December 1, Gross filed a request with NMB under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), seeking copies both of the contract with Riley and of the agency's

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determination that the contract price was fair and reasonable. Gross, the prior reporting services contractor, contended in its protest filed here on January 8, 1988, that the agency failed to promote competition to the maximum extent practicable, as required by 41 U.S.C. § 253(g)(4) when small purchase procedures are used, because the agency failed to solicit a rate quote from the firm. Gross also alleged that the agency had awarded the contract to Riley at rates that are not fair and reasonable.

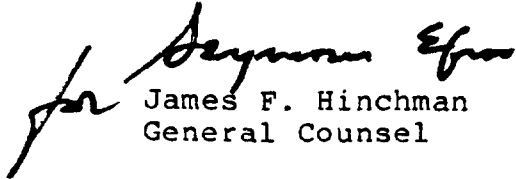
We dismissed Gross' protest because it was not filed within 10 working days of when Gross knew the basis for its protest, as required under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987). Although filed within 10 working days of the receipt by Gross of information pursuant to its FOIA request, the protest was not based on information released pursuant to FOIA. Rather, the principal basis for the protest was the agency's failure to solicit Gross, a circumstance of which Gross was aware prior to filing its FOIA request. In addition, we noted that Gross also knew prior to receiving the information under FOIA that whatever rate Riley had quoted, the rate could not have been lower than the rate of zero dollars per page that Gross says it charged the government under prior contracts.

In its reconsideration request, the protester contends that we failed to consider in our prior decision that Riley could well have quoted a rate of zero dollars per page. Gross says that if this had been the case, there would have been no basis to protest. Gross claims that it had to know the rate quoted by Riley before it had grounds to protest. The protester implies that it was therefore entitled to delay the filing of its protest until receipt of the information it requested under FOIA.

Gross has not provided any basis for us to conclude that our dismissal of its protest was erroneous. First, it was not necessary for Gross to know Riley's rate per page in order to have reason to protest the NMB's failure to include Gross in the competition. Gross knew in late November 1987, that, notwithstanding its status as the incumbent, it had not been solicited for a quote. This was sufficient to provide Gross with knowledge of its principal basis for protest. Second, while Gross arguably may not have had a basis for contending that Riley's rates were unreasonable until it was certain that Riley had quoted a rate higher than zero dollars per page, Gross was not an interested party for purposes of raising that issue. As we said in our prior decision,

Gross' only cognizable interest was that of a potential competitor, 4 C.F.R. § 21.0(a), an interest that Gross failed to protect through the filing of a timely protest.

The request for reconsideration is denied.

for
James F. Hinchman
General Counsel