



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harbour Air, Inc.--Request for
Reconsideration

File: B-235534.3

Date: August 31, 1989

DIGEST

Request that General Accounting Office reconsider dismissal of protest against submission of a below-cost offer as untimely is affirmed where, even if protest is timely, it does not provide a valid basis upon which to challenge an award.

DECISION

Harbour Air, Inc., requests that we reconsider our decision in Harbour Air, Inc., B-235534.2, July 27, 1989, 89-2 CPD ¶ ___, in which we dismissed as untimely the firm's protest concerning the award of a contract to Winchester Aviation, Inc., under request for proposals (RFP) No. DLA600-89-R-0023, issued by the Defense Fuel Supply Center (DFSC), Defense Logistics Agency. We affirm our dismissal.

The RFP contemplated award of a fixed-price contract with economic price adjustment for into-plane fuel delivery at Cherry Capitol Airport, Traverse City, Michigan. Harbour protested that Winchester's award price did not reflect the cost of supplying fuel and thus amounted to a buy-in. DFSC advised our Office that Harbour had initially protested the matter to DFSC, and that on June 27, 1989, a DFSC attorney telephonically informed Harbour's counsel that its protest had been denied and read sections of the contracting officer's letter concerning that determination. According to DFSC, the DFSC attorney also told Harbour's counsel that the contracting officer's letter included a copy of the award sheet from the protested solicitation and explained what the award sheet revealed regarding Harbour's and Winchester's prices. Harbour protested DFSC's denial of its protest to our Office on July 14, stating that it received the agency's June 26 written denial of its protest on June 30. We dismissed the protest as untimely because Harbour had been orally informed of the denial of its

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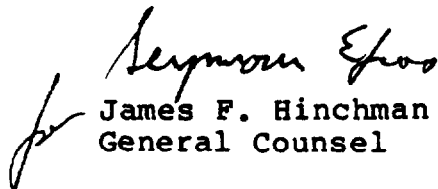
agency-level protest on June 27 and it failed to file its subsequent protest with our Office within 10 working days of that date, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2 (1988).

In requesting reconsideration, Harbour asserts that we erred in finding its protest untimely. Harbour argues that at no point during its June 27 conversation with the DFSC attorney was it informed that its agency-level protest was denied, and therefore its protest was timely filed within 10 working days after it received the agency's written denial of its protest. Harbour further contends that our Office should thoroughly investigate how Winchester can remain viable while selling substantial quantities of fuel at an apparent loss, whether additional costs are improperly being passed on to the government, and whether Winchester is wrongfully charging a Federal User Tax.

Even if we were to agree with Harbour that its protest was timely, it provides no basis to challenge the contract award. As noted in our prior decision, there is nothing illegal or improper in the government's acceptance of a low or below-cost proposal so long as the offeror is judged capable of performing at that price. The regulations require only that the contracting officer take appropriate action to ensure that losses due to below-cost awards are not recovered. Federal Acquisition Regulation § 3.501-2(a).

Whether the awardee can perform the contract at the price offered is a matter of responsibility. Here, the contracting officer has made an affirmative determination of Winchester's responsibility which our Office will not review absent a showing that the determination may have been made fraudulently or in bad faith or that definitive responsibility criteria have not been met. 4 C.F.R. § 21.3(m)(5). Trak Eng'g Inc., B-231791, Oct. 28, 1988, 88-2 CPD ¶ 402. None of these circumstances is alleged or evident here.

Furthermore, the remaining concerns raised by Harbour involve matters of contract administration which our Office will not review pursuant to our bid protest function. 4 C.F.R. § 21.3(m)(1).


James F. Hinchman
General Counsel