



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Airborne Freight Corporation--Reconsideration

File: B-242592.2; B-242592.3

Date: May 30, 1991

Robert P. Silverberg, Esq., Condon & Forsyth, for the protester.
Sarah S. Prosser, Esq., for Federal Express Corporation, an interested party.
Stuart Young, Esq., and Michell Harrell, Esq., General Services Administration, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Prior decision dismissing protest as untimely is affirmed where protester failed to diligently pursue information reasonably expected to establish basis for protest.
2. Protest based on protester's belief that awardee will not perform as contractually required concerns a matter of contract administration which is not for consideration under our Bid Protest Regulations.

DECISION

Airborne Freight Corporation requests reconsideration of our January 15, 1991, dismissal of its protest against the award of a contract to Federal Express Corporation by the General Services Administration, (GSA), under solicitation No. GS-00F-1330. We summarily dismissed the protest as untimely because Airborne failed to diligently pursue the information which formed the basis for its protest.

We affirm our prior dismissal.

The protested solicitation contemplated a fixed-price requirements contract for small package express transportation services within and/or between the contiguous United States, Alaska, Hawaii, and Puerto Rico. After receiving a notice of intent to solicit, before the solicitation was issued, Airborne asked GSA to amend the intended solicitation language to require that all shipments be delivered before noon on the

next business day. GSA declined to add this requirement and issued the solicitation on June 27, 1990.^{1/} GSA awarded the contract to Federal Express on November 16, 1990.

During a debriefing on November 19, GSA provided Airborne with the rates that Federal Express had proposed. On January 4, 1991, Airborne made a "test call" to Federal Express, which Airborne asserts first established its basis for protest. Airborne states that it determined from the call that Federal Express intends to impose an additional charge for before-noon, next-day deliveries.

Airborne's protest of the November 16, 1990, contract award was initially filed in our Office on January 11, 1991. That protest was based on the assertion that Federal Express did not intend to provide before-noon, next-day delivery at the rates in its proposal and, therefore, that GSA's evaluation of the proposal was improper. On January 15, we dismissed Airborne's protest as untimely filed.

Airborne requests reconsideration of our decision on the basis that we misunderstood its protest and erroneously concluded that it failed to diligently pursue information related to the matter. To ensure that we had an adequate record before us, we requested that GSA provide a complete agency report on the procurement. Based on the record before us, we affirm our prior dismissal.

The record indicates that as of November 19, 1990, when Airborne reviewed Federal Express's proposed rates, Airborne questioned whether Federal Express could provide before-noon, next-day delivery at the prices offered. In its protest submissions, Airborne states that "in mid-December, 1990," or "during the month of December 1990," it obtained information from its government customers that Federal Express "was shifting position on its commitment to morning delivery." Airborne states that its efforts to pursue the matter with GSA

^{1/} Although GSA declined to revise the solicitation as Airborne requested, the solicitation did require offerors to comply with the "Private Express Statutes," codified at 39 U.S.C. § 601 (1988). See also 39 C.F.R. Chapter 1, Parts 310 and 320. This legislation generally prohibits companies from delivering letters in competition with the U.S. Postal Service, but makes an exception for delivery of "urgent" letters.

were unsuccessful.^{2/} Nonetheless, Airborne waited until January 4, 1991, before making its "test call" to Federal Express. Further, it was not until January 23, 1991, that Airborne sought information from the government under the Freedom of Information Act.

Our Bid Protest Regulations require that protests be filed not later than 10 days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2 (1991). Protesters have a duty to diligently pursue information reasonably expected to establish whether a basis for protest exists. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86. Where protesters fail to meet their obligation in this regard, we will dismiss their protests as untimely.

In order for Airborne's January 11, 1991, protest to have been timely filed, that protest had to have been based on information obtained on or after December 27, 1990.^{3/} Based on the record as discussed above, we conclude that Airborne knew or should have known of its basis for protest substantially before December 27, 1990. Accordingly, its protest was properly dismissed as untimely.^{4/}

In any event, Airborne's protest involves a matter of contract administration. Airborne's allegations are based on the premise that Federal Express intends to perform the contract in a manner that is inconsistent with the terms of the solicitation on which proposals were evaluated--specifically, Airborne contends that Federal Express intends to comply with the requirements of the Private Express Statutes only upon the imposition of an additional charge to the government. Both GSA and Federal Express respond that Federal Express is

2/ The record contains a dispute regarding whether Airborne requested a copy of the Federal Express contract at the debriefing and at various times thereafter. We need not resolve this dispute since, as Airborne points out in its request for reconsideration, its protest does not challenge the content of the Federal Express contract, but rather whether Federal Express intended to meet its contractual obligations.

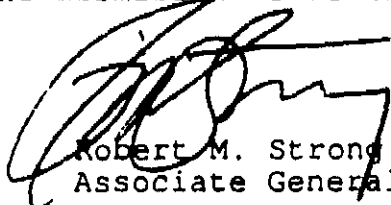
3/ December 27, 1990, is the 10th working day preceding January 11, 1991, the date Airborne filed its protest.

4/ Following the submission of its request for reconsideration, Airborne submitted supplemental allegations that GSA's evaluation of proposals was improper. For the reasons discussed above, we also dismiss these allegations as untimely.

currently bound to comply with the requirements of the Private Express Statutes and will continue to perform the contract consistent with those requirements. No changes or modifications to the contract have been made or proposed.

Our Office considers bid protest challenges to the award or proposed award of contracts and generally does not exercise jurisdiction to review matters of contract administration, 4 C.F.R. § 21.3(m)(1). Such matters are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Claims Court. Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228. Although there are some exceptions to this general rule, those exceptions concern situations where contract modifications have actually been issued or proposed. See, e.g., CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364 (allegation that contract modification improperly exceeded the scope of the contract and should have been the subject of a new procurement). Airborne has not alleged that Federal Express's current contract performance is inconsistent with the provisions of the solicitation. Rather it asserts that Federal Express intends to perform improperly at some time in the future. Since no contract modification has occurred, there is no basis to view the matter as anything other than the kind of contract administration issue which is not for consideration under our Bid Protest Regulations.

The dismissal is affirmed.



Robert M. Strong
Associate General Counsel