



DIGEST -

(For 30 days? CONG.) - Cont - 387

UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

(30 days) RELEASED

OFFICE OF GENERAL COUNSEL

B-209792.2

November 18, 1983

The Honorable William L. Armstrong
United States Senator
311 Steel Street
Denver, Colorado 80206

Dear Senator Armstrong:

This is in reply to your September 21, 1983, request that we review the allegations of your constituent, Consolidated Maintenance Company (Consolidated), that the Brunswick Naval Air Station, the Naval Facilities Engineering Command and the Small Business Administration (SBA) improperly failed to grant an extension on Consolidated's contract and, instead, incorporated the janitorial services requirement into an existing 8(a) contract.

We are unable to consider this matter on the merits because your constituent's protest was untimely filed, and the allegations regarding disclosure under the Freedom of Information Act (FOIA) and a contract disputes settlement are not for consideration by our Office.

Consolidated was awarded a contract for janitorial maintenance services in 1978. The contract was resolicited in 1982 under invitation for bids (IFB) No. N62472-82-B-2317. Consolidated filed a protest with our Office on November 9, 1982. Consolidated contended that certain provisions in the IFB were improper.

In a mailgram dated December 6, 1982, Consolidated advised our Office that the provisions which it objected to had been satisfactorily revised and that bid opening had been extended from November 15, 1982, to December 16, 1982. It therefore was not feasible to begin the new contract by December 16, 1982, as originally scheduled. Consolidated indicated that the contracting officer at Brunswick Naval Air Station was in favor of extending Consolidated's 1978 contract until the new contract was awarded; however, the Naval Facilities Engineering

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Command preferred that an 8(a) contract be awarded because it was felt that an extension of Consolidated's contract would reward them for protesting and delaying the procurement. Consolidated contended that it should not be punished for filing a legitimate protest.

In a mailgram dated December 17, 1982, Consolidated withdrew its protest, stating that "[a]fter due consideration and review with Department of Navy Personnel we believe it would be in the best interest of all concerned that we withdraw our protest on the referenced contract."

You have forwarded a letter dated August 29, 1983, in which Consolidated indicates that it was the low bidder at the December 16 bid opening, but that all bids were rejected and the janitorial work was added to an existing 8(a) contract. Consolidated protests that the Navy acted with personal animosity and intended to retaliate and punish the company for exercising its right of protest. Consolidated also protests that the SBA's approval of the 8(a) contract amendment violated applicable procedures. Finally, Consolidated protests that the Navy has not released documents requested under the Freedom of Information Act (FOIA) and deceitfully induced Consolidated into a claim settlement regarding amounts due under its prior contract.

With regard to Consolidated's protest against the Navy's failure to extend its contract and to incorporate its janitorial service requirement into an existing 8(a) contract, Consolidated filed a timely December 6, 1982, protest. However, this protest was withdrawn on December 17, 1982. There is no evidence of record that Consolidated withdrew the protest because it was misled by the Navy or because the Navy offered to take corrective action acceptable to Consolidated. To the contrary, it appears that Consolidated withdrew with full knowledge of the December 16 amendment to the 8(a) contract because its December 17 mailgram indicates that the decision to withdraw was made after "due consideration and review with Department of Navy personnel."

✓ Our Office held in Crestwood Furniture Company, B-195109, October 15, 1979, 79-2 CPD 255, that a protest which is refiled after withdrawal, absent evidence that the protester was misled or withdrew because the agency offered to take corrective action, should be treated as an initial protest and must independently satisfy the timeliness requirements of our Bid Protest Procedures.

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Our procedures require that a protest be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(b)(2) (1983). Therefore, Consolidated's protest letter of August 29, 1983, is untimely because it has been refiled more than 10 working days after the bases of protest were known in December 1982. The protest therefore will not be considered by our Office.

Concerning the applicability of our procedures to protests filed by or referred to our Office by a Member of Congress, no protest will be considered on the merits unless it first meets our timeliness rule. The reason for this is to decide an issue while it is still practicable to take effective action if such action is found to be necessary. Moreover, if our Office were to consider an untimely protest on the merits when submitted by a Member of Congress, this would suggest to the procurement community that our timeliness provisions can be circumvented by submitting the protest through a Member of Congress.

With regard to Consolidated's FOIA protest, our Office has no authority under the FOIA to determine what information must be disclosed by government agencies. Consolidated's recourse is to pursue its disclosure rights under the procedures provided by the statute itself. Holmes & Narver Services, Inc., B-208652, June 6, 1983, 83-1 CPD 605.

Finally, Consolidated's allegation that the Navy deceitfully induced it into a claim settlement regarding its prior contract involves the settlement of a dispute under the Contract Disputes Act of 1978, 41 U.S.C. § 601, et seq. (Supp. IV, 1980). This is a matter for the Board of Contract Appeals and not for our Office. See J & J Maintenance, B-208966, October 6, 1982, 82-2 CPD 313.

Sincerely yours,

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel