



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Intercomp Company--Reconsideration

File: B-265638.2; B-265639.2

Date: February 22, 1996

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Faegre & Benson, for the protester.

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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration of dismissal of protests based upon contract information discovered by protester more than 2 years after award are denied where protests essentially concern a matter of contract administration and are otherwise untimely.

DECISION

Intercomp Company requests reconsideration of our August 30, 1995, dismissal of its protests of the award of contracts to General Electrodynamics Corporation under request for proposals (RFP) Nos. F41608-92-R-20110 and F41608-92-R-20215, issued by the Department of the Air Force for aircraft weighing systems.

We deny the requests for reconsideration.

We dismissed the protests because of the lengthy period of inaction (i.e., 2 years) by the protester during which time the protester failed to pursue any information to reveal possible bases of protest. The protests were only filed after Intercomp discovered publicly available contract information 2 years after award that contract performance was assertedly not in accordance with the terms of the awardee's proposal. Intercomp states that it first learned its basis of protest when it received the agency's response to a Freedom of Information Act (FOIA) request that the firm had filed in pursuit of information about an unrelated matter concerning a possible leak of the firm's proprietary information by the agency. Based upon the information it received, Intercomp challenged that the agency improperly accepted after award the awardee's analog system, which is different from the digital system described in the awardee's proposal.

The protester argues that its protest is not a matter of contract administration, but rather that the agency's acceptance of a nonconforming product constitutes a contract modification outside the scope of the original contract which is subject to

this office's review. See Ion Track Instruments, Inc., B-238893, July 13, 1990, 90-2 CPD ¶ 31. Despite Intercomp's characterization of its protests, in our view, the protester's challenge that the awardee delivered a nonconforming product during contract performance, and that the agency has apparently allowed this practice, essentially involves a matter of contract administration that we do not review. See section 21.5(a), 60 Fed. Reg. 40,737, 40,742 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.5(a); see Louisville Cooler Mfg. Co., B-243546, June 13, 1991, 91-1 CPD ¶ 568. In any event, as we stated in our prior dismissal decision, to the extent Intercomp's challenge reaches the propriety of the initial award, the protests are untimely filed.

Intercomp generally reiterates the arguments it made in its initial protests regarding timeliness; the request also provides that:

"Intercomp had no reason to suspect it should affirmatively pursue and investigate the facts forming the basis for this protest at the time of contract award. This protest is based on the fact that the awardee supplied a different product than the product it had offered in its bid and a different product from what the Air Force had advertised to buy. That fact only came to light when the Air Force responded to a [FOIA] request made for a reason not related to possible protest." (Emphasis in original.)

As we stated in our dismissal decision, the policy goal underlying our timeliness rules is the expeditious consideration of procurement actions without unduly disrupting the government's procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. Here, the protester states that it did not pursue any information regarding the procurement for more than 19 months after award; during this period, Intercomp failed to show any continued interest in the procurement. Although our timeliness rules are not stated in terms of a maximum time period available for filing a protest of an award action, we cannot permit the timing of the protest process to be governed by the protester's own discretionary act of inquiring about contract award and performance at a time of its own choosing. This is especially apparent here where a substantial period of time has passed since award and contract performance is substantially accomplished, if not completed. To allow the filing of the protests based upon information discovered by chance by the protester 2 years after notice of award, where no interest in the procurement has been shown during that time period, would contravene our longstanding practice of allowing only a reasonable limit on the length of time within which protests must be filed after notice of award. See Technology Management & Analysis Corp., B-256313.3; B-256313.5, May 9, 1994, 94-1 CPD ¶ 299. In measuring timeliness and allowing a reasonable time for the filing of protests, we require that protesters diligently pursue information that may reveal any possible bases of protest. See Adrian Supply Co.--Recon., B-242819.4; B-242819.5, Oct. 9, 1991, 91-2 CPD ¶ 321.

Although the protester here contends that it had no reason to seek information at the time of award that would have given rise to its current protest bases since the agency's acceptance of different equipment than proposed occurred after award, we believe our diligent pursuit rule applies to certain discernable points in time after award where the protester could have timely shown its continued interest in the procurement. For instance, a request by the protester within a reasonable time after award for publicly available information concerning the results of first article testing or delivery orders under the contract would have resulted in the protester's having at a much earlier point in time the information it is now contending gives rise to a valid protest. In light of our interests in minimizing the disruption to the procurement process while giving protesters a reasonable opportunity to present their cases, the protest process cannot be governed by the protester's fortuitous discovery of information after it has failed to show interest in the procurement for an extended period of time.

The requests for reconsideration are denied.

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