

**March 9, 2001**

**P.S. Protest No. 00-24**

**XTRA LEASE, INC.**

**Solicitation No. NTL 00-001**

**DIGEST**

Protest of award of trailer leasing contract is dismissed as untimely. Protester who learns of award must diligently pursue readily available information relevant to its protest; absent that diligence, protest based on information conveyed to it coincidentally more than ten days after it knew of the award is untimely.

**DECISION**

XTRA Lease, Inc. (XTRA), protests the revision of the delivery schedule of a contract for the lease of truck trailers in connection with its delayed award, contending that the competition should have been reopened instead.

On April 28, 2000, National Mail Transportation Purchasing at Postal Service headquarters issued solicitation NTL 00-001 seeking (as revised by four amendments) 4,406 trailers for lease over a six-year contract term. The trailers of various sizes were to be delivered to numerous postal facilities nationwide on two delivery dates: 1,637 were to be delivered on "delivery date A," September 10, 2000, and 2,769 were to be delivered on "delivery date B," July 1, 2001. Amendment Modification 1, May 15, revised the solicitation provision setting out these dates by adding the following: "These contract/delivery dates in the initial term and any renewal term may be adjusted at the discretion of the Contracting Officer."

The solicitation contemplated a two stage process: In the first stage, offerors were to submit written technical/management proposals which the Postal Service would evaluate to prequalify offerors to participate in the second stage. The second stage was an on-line reverse auction called a competitive bidding event (CBE) in which offerors would submit prices expressed in terms of a daily rental rate per trailer. While the initial solicitation provided for award only in the aggregate for the entire quantity of trailers, it was amended to provide for award e

ither in the aggregate or on the basis of seven individual DN groups. Proposals were due on May 26; the CBE was to be held on June 8.

Solicitation provision K.2, Modification or Withdrawal of Proposals and Acceptance Period, provided that technical proposals could be withdrawn prior to the start of the CBE, but that "after the CBE has begun and the offeror has submitted a price bid, it may not withdraw its proposal prior to expiration of the proposal acceptance period." The acceptance period was established as "60 days after the date of the CBE or a longer period proposed by an offeror."

A preproposal conference was held on May 8. It included the following:

[Q.] When do you anticipate the award?

[Contracting Officer] Contract award should take place within seven days after the competitive bidding event has completed [sic]. Give us a week to do our best value determinations, clean up any loose ends. It should occur about a week after. Sometime before the middle of June the contract should be awarded.<sup>[1]</sup>

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[Q.] In the event that there's appeals and delays on the Postal Service and, you know, it stretches out to 50 days before there's an award made, is the time frame forgetting the trailers in going to be extended? . . . .

[Contracting Officer] . . . . Let me say that we feel as though there's enough time in the schedule to be able to address any unusual occurrences that may come about to ensure ample time in the delivery schedule to allow for the proper delivery. We're sure there's ample time in the schedule to allow you for [sic] enough time to deliver the trailers as required to the various locations, assuming you're awarded a contract.

XTRA submitted its proposal in the first phase of the competition. It took exception to two aspects of the requirement. First, XTRA proposed a revised delivery schedule, offering to provide delivery of 259 trailers to three DN groups on September 10, and the balance due for delivery date A on November 10, and to postpone delivery of all of the quantity due on delivery date B from July 1, 2001, to August 1, 2001. Second, XTRA took exception to the requirement at B.4 of the solicitation that "the supplier will be a preferred supplier with respect to the DN groups to which the supplier's contract is applicable[,] . . . required to provide . . . additional trailers needed within the applicable DN group at the prevailing per trailer, per day rate . . . ."

The contracting officer states that he sought clarification of these two exceptions from XTRA, and that in a discussion on June 5 he advised XTRA that "these [exceptions] would most likely result in a low technical score, and might preclude XTRA from becoming a prequalified supplier." He also states that he advised "that if XTRA opted to withdraw from the procurement, they must do so in writing." XTRA's version of that discussion differs in asserting that it initiated the conversation, that it requested a revision of delivery date A, and that in the absence of the revision (which the contracting officer declined to make) it announced it would have to withdraw its offer. By letter dated June 6, XTRA requested that it be "remove[d] . . . from the bidding process."

The CBE was held, as scheduled on June 8. XTRA did not participate. The lowest overall daily rate for the total quantity of trailers was proposed by Transport International Pool (TIP). Award did not occur in mid-June. The contracting officer states that TIP was advised that the

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<sup>1</sup> This advice was consistent with the milestone schedule in the Individual Purchase Plan for the purchase, which contemplated contract award on June 14.

Postal Service had accepted its proposal on September 7.<sup>2</sup> Under the awarded contract, delivery of the initial quantity (those due on delivery date A) was to be completed by November 30.

The other offerors who had participated in the CBE were advised of the award by letters dated September 7. XTRA states that it learned of the contract award from the Postal Service on September 8, and that it learned of the extension of delivery date A to November 30 on September 21 from a Denver, CO, postal representative in the course of a telephone conversation inquiring whether XTRA could provide holiday trailers.

XTRA's protest was received on September 25. It contends that the award to TIP was improper because TIP's proposal failed to meet the solicitation's required delivery dates, because the Postal Service arbitrarily failed to amend the solicitation's delivery schedule as XTRA had requested while intending to relax it subsequently to TIP's advantage, or because the Postal Service failed to amend the delivery schedule when award was delayed.

XTRA explains that the quantity of trailers containing the "unique" features which the Postal Service sought were "not readily available on the commercial market," and that because of market conditions, XTRA could not, in good faith, propose on the total requirement for delivery on delivery date A or agree to the preferred provider provision of the solicitation. Accordingly, it qualified its offer in that respect. It then asserts, as recited above, that it withdrew its offer when the contracting officer declined to extend the first delivery date. XTRA asserts that had the delivery schedule been extended, as it claims it later was for TIP, "prior to the CBE, as it should have been, XTRA would not have been forced to withdraw from the CBE, would have submitted a fully conforming and unqualified technical proposal, and likely would have been able to underbid TIP and receive award . . . ."

XTRA contends that its protest is timely under both the requirements of Purchasing Manual (PM) 3.6.4.c., that it "be received within 15 days after award of the contract," here assumed to be September 8, and extended to the first business day after the 15th day, September 23, a Saturday, per PM 3.6.2.d; and "not later than 10 days after the basis of protest is known or should have been known," here September 21, when XTRA first learned "that Delivery Date A had been relaxed for all DN Groups." It also contends that it has standing, as "an actual or prospective offeror whose direct economic interest would be affected" (PM 3.6.2.a.), despite its withdrawal from the competition because it had participated in the procurement before the withdrawal, citing cases from various non-postal fora "that a protester that . . . withdraws its proposal as a result of violations of the law and without knowledge thereof, can later protest once it acquires that knowledge."

On the merits, XTRA contends that the Postal Service failed to comply with PM 4.2.2.i(1)'s requirement that solicitations be amended when changes in delivery schedules are required

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<sup>2</sup>How the September 7 notification occurred is not clear from the record. In the course of the protest, the contracting officer furnished a copy of an e-mail message dated September 8 informing postal managers that the "contract has been awarded to TIP" that "[t]he effective award date of the contract is Saturday, September 9, and that the first quantity of trailers "will be in place by close-of-business November 30, 2000." The protest file contains a signed postal "Notice of Acceptance" dated September 9, and a copy of Form 7495, Transportation Services Bid or Proposal and Contract for Regular Service, signed on September 12 by both TIP and the Postal Service. These documents recite the annual rate of the contract as in excess of \$16 million.

and improperly accepted TIP's nonconforming technical proposal, which XTRA assumes "indicated a November 30 delivery date";<sup>3</sup> and "improperly denied XTRA's request to amend the solicitation with the intention of later relaxing the specification for TIP" (initial capitals omitted).<sup>4</sup>

The contracting officer's statement includes the following jurisdictional objections:

- XTRA lacks standing because it would not be eligible for award if the protest were sustained. XTRA voluntarily withdrew from the solicitation,<sup>5</sup> knowingly taking itself out of the competition, and "abandoned any direct economic interest it had in the contract award process when it chose to withdraw" (quoting *Federal Data Corp. v. United States*, 911 F.2d 699 (Fed. Cir., 1990)).<sup>6</sup>
- The protest is untimely, since XTRA knew or should have known of TIP's revised delivery schedule at least as of September 10, when it knew that TIP had not delivered its trucks to one of the required delivery points, Los Angeles, where XTRA had

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<sup>3</sup> This aspect of the protest may be summarily resolved since its premise is incorrect. TIP's technical/management proposal took no exception to delivery date A as established in the solicitation.

<sup>4</sup> The protest's allegations include the following:

In this matter, upon information and belief, the Contracting Officer apparently intended to force XTRA from the competition in order to ensure award of the contract to TIP. . . . In June, he declined XTRA's request for an amendment to Delivery Date A . . . , and was informed by XTRA that to decline the request would force XTRA out of the procurement. Scarcely three months later and immediately after award to TIP, he agreed to accept a revised Delivery Date A of November 30. Had this been done by amendment for all offerors in June, . . . XTRA emphatically would not have withdrawn, but would have removed all exceptions to its proposal, underbid TIP, and likely won the award. The Contracting Officer cannot waive the most difficult and material requirement for only one offeror, when all are entitled to compete under the relaxed restrictions.

<sup>5</sup> Characterizing XTRA's contention as that the Postal Service suggested or required that it withdraw from the competition, the contracting officer demurs, asserting, rather, that he did no more than advise XTRA that the exceptions which it had taken to the delivery schedule and preferred provider provision "would most likely result in a low technical score and might preclude [its prequalification]." Further, responding to XTRA's assertion that it had to withdraw its offer because an award might require delivery of more trailers on September 10 than it could provide, the contracting officer contends that such a result would not have been possible under the terms of XTRA's offer.

<sup>6</sup> *Federal Data* involved review of a protest before the General Services Board of Contract Appeals under former 40 U.S.C. § 759, which allowed a protest by an "interested party" which was "an actual or prospective bidder or offeror" "whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Federal Data* had "knowingly taken itself out of the bidding" before filing the amended protest at issue in the suit, which did not seek to reverse the agency's purchase decision, but only sought bid preparation costs.

trailers which TIP's trailers were to replace, and which the Postal Service had not directed XTRA to remove.<sup>7</sup>

On the merits, the contracting officer's statement makes the following contentions, among others:

- XTRA never asked that the solicitation delivery dates be amended, it only took exception to them in its proposal, so the Postal Service never denied a request for an amendment. Further, the delay in the award arose from a need to make a lease-vs.-buy comparison, required by "postal management," when this solicitation was found to conflict with a separately pending proposal to purchase 1,000 trailers. The delay did not arise from any intention to benefit TIP. The decision to proceed with the lease occurred on August 15, and final discussions with TIP were then initiated.
- The delivery schedule was not relaxed for TIP. "The solicitation anticipated that contract award should have been made no later than June 24, 2000[,] providing for a lead time of 78 days from award to delivery. The effective date of award was September 9, 2000[,] with . . . delivery no later than November 30, 2000, a lead time of 82 days. . . . The four additional days would not [have given] an advantage to any awardee, including TIP."
- XTRA cannot show that it was prejudiced by the extension of the delivery date for TIP. XTRA's need for a delay resulted from its intention to manufacture the needed trailers, and it could not have performed even on TIP's eventual schedule.

XTRA responded to the contracting officer's statement in submissions which made the following points:

- Contrary to the contracting officer's assertion, the solicitation did not contemplate award by June 24. XTRA calculates the worst case delivery lead time as 34 days, calculated from August 7 (the 60th day after the CBE) to September 10. Accordingly, XTRA views TIP as having benefited from a 48 day extension in delivery lead time. The contracting officer's misstatement of the extent of the extension is a "misrepresentation of objective facts" which may be "a cynical attempt to take advantage of the 'presumption of correctness'" which ordinarily attaches to the contracting officer's assertions of the fact.
- The contracting officer further undercuts his credibility by representing that XTRA's proposal might have been eligible for consideration, since the solicitation explicitly provided that proposals offering different delivery dates than those specified "will **NOT** be accepted" (quoting J.4.(a)(3), emphasis in original).
- Given the magnitude of the delivery date extension,<sup>8</sup> PM 4.2.1.a and applicable decisions require that the solicitation be amended and recompeted. The original de-

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<sup>7</sup> Alternatively, the contracting officer contends that XTRA should have protested the alleged restrictiveness of the solicitation before the May 26 date for the receipt of proposals, since it knew by that time that it could not meet the delivery requirement. XTRA's response to this contention correctly rebuts it.

<sup>8</sup> XTRA also contends, based on various extensions made to its Los Angeles trailer contract, that the delivery dates for TIP's contract may have further extended to December 30, 2000, or March 31, 2001.

livery schedule was material, and these circumstances necessitate that the requirement be resolicited. XTRA has demonstrated the prejudice to it of the extension, which would also have had a significant impact on all the offerors' prices.

- An offeror who submits a nonconforming offer has standing to protest where it seeks a recompetition in which it could compete (citing cases). *Federal Data* is distinguishable, since there the protester knew of the basis for protest prior to award, but voluntarily withdrew its proposal before it filed its protest. XTRA did not know of the basis for protest when it withdrew, and was involuntarily forced to withdraw because of the contracting officer's insistence on maintaining the delivery schedule (citing cases for the proposition that prospective offerors who did not propose when improper circumstances precluded their proposing). *Information Ventures, Inc., Comp. Gen. Dec. B-232094*, November 4, 1988, 88-2 CPD ¶ 433, is relevant here:

[I]f the agency knows that a potential offeror was excluded from the competitive range for a reason that no longer exists after a subsequent amendment relaxing the solicitation's terms, the offeror should be notified of the changes, especially of any relaxed requirements, since the firm, after the amendment, is potentially fully capable of fulfilling the agency's needs. *We think this principle equally applies where an offeror withdraws from the competition because of a restrictive delivery schedule which is subsequently relaxed, where the agency is aware that the firm's reason for leaving the competition was directly related to the strict delivery requirements which are later . . .* [XTRA's emphasis.]

- The contracting officer's contentions on timeliness lack merit. That TIP's trailers were not in Los Angeles on September 10 did not trigger knowledge of the substantial extension of the delivery schedule; "the ten day period did not commence until the protester has enough . . . information reasonably to be on notice of the 'central' basis for the protest."<sup>9</sup> In this case, XTRA did not know of the delivery date until September 21, when the Postal Service advised it of the date in connection with administration of XTRA's ongoing contract. Alternatively, if "XTRA should have inquired about the relaxation of the delivery date prior to September 21," it need not have done so before September 17, when TIP's Los Angeles trailers had not appeared, since a week of slippage (from September 10) would not have been significant.<sup>10</sup> XTRA also rebuts the contracting officer's suggestion that it should have known of the postponement of the delivery schedule in mid-August.

The awardee, TIP, submitted comments on the contracting officer's statement and on XTRA's response in two rounds of submissions:

- *Federal Data* controls the standing issue; XTRA cannot fit within the exception it asserts because there was no "violation of law which resulted in the withdrawal of its

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<sup>9</sup> Citing *Carl J. and Betty B. Kollenberg*, P.S. Protest No. 97-05, June 4, 1997.

<sup>10</sup> Elsewhere in its comments, XTRA contends that its proposed revised delivery schedule should be understood as providing for 95 days of lead time (measured from the last possible award date, August 10, to November 10), which it views as "of the same order of magnitude as the 82 days afforded TIP.

proposal” since the contracting officer “had no intent to extend the schedule for TIP” when XTRA withdrew.

- XTRA cannot establish that it withdrew because of the contracting officer’s actions; the contracting officer has denied that XTRA requested an extension of delivery date A, and that denial is entitled to the presumption of correctness. Instead, XTRA voluntarily withdrew “for reasons of its own,” so it does not fall within the scope of *Information Ventures*, which, in any event, is no longer good law after *Federal Data*.
- XTRA’s protest is also untimely; it is either against the terms of the solicitation (and thus needed to be lodged before May 26) or late in relation to September 10, when XTRA knew that TIP had not delivered trailers to Los Angeles.<sup>11</sup>
- The contracting officer did not intend, prior to the CBE, to extend the delivery schedule for TIP; that contention rests on the false assumption that TIP’s proposal had taken exception to the delivery requirement. Instead, the delay in award arose “only because of events that occurred after the CBE.”
- XTRA has not shown any prejudice from the revision of the delivery date because it has not shown that it could have meet the November 30 delivery date following the September award.
- XTRA’s contention that it likely would have underbid TIP had it participated in the CBE is unsupported, and thus is “too speculative and self serving to warrant sustaining a protest”<sup>12</sup> and “fail[s] to make the requisite showing of prejudice.”<sup>13</sup>
- XTRA’s objections to the preferred provider provision of the solicitation and to delivery date B further demonstrates that it was not prejudiced by the contracting officer’s actions.
- XTRA’s “attack on the good faith of the contracting officer” is premised, baselessly, on the contention that the contracting officer intentionally misled the General Counsel. To the contrary, the contracting officer “has consistently maintained” the intent to award by June 24; there is no basis to waive the contracting officer’s presumption of correctness, and XTRA “cannot[] meet the high standard necessary to prove bad faith.”<sup>14</sup>
- XTRA’s position that the worst-case lead time was only 34 days was unreasonable; it has not provided evidence that its proposal was based on the assumption of

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<sup>11</sup> TIP rebuts XTRA’s contention that the postal specification or delivery schedule were restrictive of competition by noting that nine offerors of the thirteen who proposed participated in the CBE.

<sup>12</sup> Citing *L.A. Systems, Inc.*, Comp. Gen. Dec. B-276349, June 9, 1997, 97-1 CPD ¶ 206.

<sup>13</sup> Citing *Dand Industries*, Comp. Gen. Dec. B-233215, August 23, 1991, 92-1 CPD ¶ 193.

<sup>14</sup> TIP contends that XTRA cannot demonstrate the necessary “virtually irrefutable proof of malice and specific intent to harm the protester” (quoting *Jenkins, Gales & Martinez, Inc.*, P.S. Protest No. 88-54, January 26, 1989).

award on August 7, and it could not reasonably assume such an award given what was said at the pre-proposal conference.

The contracting officer responding to XTRA's comments asserting the accuracy "to the best of [his] recollection" of his previous submissions. The contracting officer notes his factual disagreement with XTRA about whether XTRA requested an amendment of the solicitation, refers to the discussion of delivery dates in the pre-proposal conference, quoted *supra*, as evidence that he "was not [then] anticipating a delay in the delivery schedule as the result of internal policy debates or to favor a particular supplier," but explains that "[i]n early July [he] was asked to study the merits of buying vs. leasing trailers," a study which was not completed until mid-August, delaying the award to September. Accompanying this submission were various documents relating to the lease/purchase analysis (but not any documents indicating when the analysis was ordered), and correspondence in July through September relating to the award.

XTRA commented on the contracting officer's submission and TIP's comments:

- The documents do not preclude the possibility of the contracting officer's knowledge on or before June 5 that the award would have to be postponed for the lease/purchase analysis, and are otherwise incomplete and inconclusive.
- The pre-proposal conference cannot be "understood as a binding commitment" regarding the award and offerors "had no right to rely on it as altering the solicitation. Further, the conference's discussion of award is inconsistent with the contracting officer's current contention that award was contemplated to occur on June 24.
- The contracting officer's September 8 message (discussed in footnote 2, *supra*) was a "pre-award directive" which relaxed the delivery schedule for TIP "in direct violation of the Purchasing Manual."
- TIP's contention that XTRA was not prejudiced by the relaxation because it had also taken exception to delivery date B is incorrect; because the date was well in the future, "it presents no performance difficulty at all," and thus is distinguishable from instances in which "the protester's technical proposal demonstrates that it cannot possibly alter its approach in . . . a new competition."
- TIP's contention that XTRA improperly contemplated a possible 34-day lead-time is rebutted by the affidavit of XTRA's proposal manager that he did.

## **DISCUSSION**

Because they are jurisdictional, we turn first to the issues involving the protester's standing and the protest's timeliness. With regard to standing, the issue is whether XTRA is an interested party "whose direct economic interest [was] affect by the award of [the] contract." PM 3.6.2.a. The relief which XTRA seeks is the recompetition of the requirement with a relaxed initial delivery schedule consistent with that which TIP was given. It is clear from XTRA's technical proposal and its discussion of the delivery schedule with the contracting officer prior to its decision to withdraw its offer that it viewed the original initial delivery schedule as a barrier to its competition, so that a recompetition on a relaxed schedule would affect its direct



economic interest.<sup>15</sup> This case is thus dissimilar from *Federal Data*, where the protester lacked that interest because its protest did not seek the chance to compete again, and akin to *Information Ventures*, as the protester contends. Accordingly, XTRA has standing to protest.<sup>16</sup>

As all the parties recognize, the timeliness of XTRA's protest is measured by the requirement at PM 3.6.4.d that the protest "be received not later than 10 days after the basis of the protest is known or *should have been known*." (Emphasis added.)<sup>17</sup>

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<sup>15</sup> Cf. *Cardion Electronics*, 58 Comp. Gen. 591 (1979):

Cardion is protesting essentially on the basis that the RFP has been so substantially changed that it should be canceled, and that a new procurement reflecting the changed requirements should be initiated. Cardion's protest, or a protest by any other party similarly situated, involves a direct economic interest, *i.e.*, an opportunity for the party to submit a proposal under the new RFP and compete for an award. . . .

In our view, whether a Cardion proposal under the RFP would have been found unacceptable, or whether Cardion's motivation for not submitting a proposal was its business judgment of the risks involved, are not pertinent to this inquiry. . . .

We see no reason why Cardion is not sufficiently interested to protest that changes in the RFP are so substantial that the RFP should be canceled and a new procurement initiated.

Cardion's protest was denied on the merits, however, as the GAO concluded that the RFP as amended was not fundamentally different in purpose or nature from the original RFP. Further, in *Cardion* the GAO rejected the protester's after-the-fact suggestion that in deciding not to propose, it had detrimentally relied on provisions of the solicitation which were subsequently amended, noting that its "no-bid" message had set out unrelated circumstances as the grounds for its nonparticipation.

<sup>16</sup> XTRA's prior concern about the initial delivery schedule is a necessary condition to its standing. Whether it is a sufficient condition, in light of its further concerns about both delivery date B and the preferred provider provision, a solicitation requirement completely unrelated to any delivery timetable, need not be resolved for the reasons which follow.

<sup>17</sup> Cf. *POVECO, Inc., Grumman Allied Industries, Inc., AM General Corporation*, P.S. Protest No. 85-43, October 30, 1985:

The requirement that a protest be timely filed is jurisdictional; we cannot proceed to a discussion of the merits of any issue which has been untimely raised. Unlike the Comptroller General, we have no authority to waive or disregard the timeliness issue in a particular case. To be considered on its merits, each separate ground for protest must independently meet the timeliness requirement of the [Postal Contracting Manual, a predecessor of the PM]. Finally, as the Comptroller General stated in *Bell and Howell Company*, Comp. Gen. Dec. B-203235.4, January 5, 1982, 82-1 CPD ¶ 10:

[I]t is incumbent upon a potential protester to diligently seek whatever additional relevant information is needed to determine whether a basis for protest exists. *National Council of Senior Citizens, Inc.*, B-196723, February 1, 1980, 80-1 CPD ¶ 87. A potential protester cannot sit idly by and wait for information that it could have obtained much earlier and then ex-

(Footnote continued on next page.)

Here, XTRA knew of the award on September 8, and it then knew (or should have known) that information about the delivery schedule of TIP's contract was relevant to its (potential) claim.<sup>18</sup> However, XTRA took no affirmative steps to inquire concerning that important fact. Instead, it learned of TIP's actual delivery schedule only when so advised by a postal representative in an unrelated context.

The General Accounting Office's protest decisions discuss a protester's obligation diligently to pursue its protest in various circumstances, including seeking information which would have been evident from review of publicly opened bids or provided in debriefings or in response to formal information requests. (See, e.g., *Thomas May Construction Company*, Comp. Gen. Dec. B-255683, March 23, 1994,, 94-1 CPD ¶ 210 (protester did not diligently pursue basis of protest based on information publicly available at the bid opening when it sought the information under FOIA only after award) and *Ranco Construction, Inc.*, Comp. Gen. Dec. B-281242, January 12, 1999, 99-1 CPD ¶ 11 (protest of bid's nonresponsiveness raised after award untimely, citing *Thomas May*); *Geo-Centers, Inc.*, Comp. Gen. Dec. B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest timely when "protester clearly sought a debriefing within 10 days of learning of the award, and diligently sought more information at each step in the process—at no point allowing more than 10 days to pass before making its next request"); *J&J Maintenance Inc.*, Comp. Gen. Dec. B-223355.2, August 24, 1987, 87-2 CPD ¶ 197 (protest untimely when "protester waited 3 weeks from notice of cancellation of the solicitation to orally request information . . . and then waited an additional 4 weeks before filing a Freedom of Information Act request," distinguishing cases in which FOIA requests were filed "within 1 to 25 days.")

This case is not identical to any of the decisions which our research has disclosed, and the elapsed time between XTRA's notice of the award (September 8) and the filing of its protest (September 25) is shorter than any time period identified in those decisions as indicating an absence of diligence in pursuit of a protest. As in several of those decisions, however, XTRA took no identifiable steps to solicit the information which it required, and it was mere happenstance that it learned when it did of TIP's delivery schedule. Finding XTRA's protest timely in these circumstances would render the requirement that protests be filed

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pect our Office to consider timely a protest based on that information.  
See *Policy Research Incorporated*, B-200386, March 5, 1981, 81-1 CPD  
¶ 172.

*quoted with approval in Tulsa Diamond Manufacturing Corp., et al., On Reconsideration*, P.S. Protest Nos. 85-18, 85-20, 85-23, July 17, 1985, see also *Strapex Corporation*, P.S. Protest No. 85-33, July 11, 1985 ("Delay in seeking or obtaining information relevant to a protest does not extend the time in which a protest may be filed.") [Some citations omitted.]

<sup>18</sup> We reject the contracting officer's suggestion that XTRA should of the basis for its protest as of September 10, delivery date A in the solicitation. Under XTRA's theory that the worst-case lead time was 34 days, delivery would not have been required until mid-October.

within ten days of the date that they “should have been known” a nullity. Accordingly, XTRA’s protest must be dismissed as untimely.<sup>19</sup>

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<sup>19</sup> The following decisions are consistent with this conclusion:

[W]hile it is true that the mere notice of award to a competitor often does not itself provide the basis for protest, it is incumbent upon a potential protester to diligently seek whatever relevant additional information is needed to determine whether a basis for protest exists. Often this information will be sought through a debriefing. Other times it may be through investigatory efforts such as were made here. *In no case, however, may a potential protester sit idly by and decide later to seek information that could have been obtained earlier and then expect to file a protest based on that information.*

Here, we agree with PRI that the notice of award did not itself provide a basis for protest with respect to the issues raised. However, we find no explanation in the record as to why information bearing on the first issue should not have been obtainable shortly after PRI received the notice . . . . *Thus, we can only conclude that PRI learned or should have learned of the basis for protest on the first issue shortly after it initiated its “investigation,” in which event, if it did so learn, the allegation is clearly untimely since it was not filed within the required 10 days. If it did not, then, in the absence of any plausible explanation from the protester, we can only conclude that PRI did not diligently pursue the matter when it could have and is not entitled to have the issue considered.*

*Policy Research Incorporated*, Comp. Gen. Dec. B-200386, 1981 U.S. Comp. Gen. LEXIS 1798, March 5, 1981 (citations omitted, emphasis added).

Power asserts that it learned of the basis for protest on November 4, during a casual conversation with a representative of On-Line/AAA Power. However, it is the duty of the protester to diligently pursue the information necessary to determine its basis of protest, and if the protester fails to do so in a reasonable time, we will dismiss the protest. Here, the Air Force sent a letter to Power informing the firm of the award to EDP on September 25. Assuming it took 1 week for Power to receive that letter, the protester knew of the award decision by October 2. *There is no indication that Power attempted to obtain any information regarding EDP’s bid until the protest was filed with the agency on November 6. Accordingly, we dismiss the protest because the protester did not diligently pursue the information on which it is based.*

*Power Conversion Systems*, Comp Gen. Dec. B-246654, February 26, 1992, 92-1 CPD ¶ 235 (emphasis added).

South Bend’s submission to our Office indicates that the Air Force announced the award of the contract to American Machine on July 27, 1984. Despite South Bend’s apparent suspicions about the propriety of the procurement process, South Bend has not requested a debriefing from the Air Force and has not otherwise attempted to obtain additional information from the agency since the award announcement. South Bend’s protest to our Office was received on September 10.

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We do not consider South Bend’s protest to be timely. The firm waited more than 1 month after announcement of the award to American Machine before filing a protest with

(Footnote continued on next page.)

We will, however, comment briefly on the omission which gave rise to the protest.

The solicitation was deficient in failing to indicate an assumed date of award and a provision explaining the effect of delay in award beyond that date. As a recent decision has noted:

We understand Purchasing Manual 2.2.5, Delivery or Performance Schedule, and Provision 2-2, Time of Delivery (January 1997), which it discusses, to contemplate the inclusion of an assumed date of award in all solicitations calling for delivery in terms of a calendar date . . . .

*Pitney Bowes Corporation*, P.S. Protest No. 00-16, December 1, 2000.<sup>20</sup>

The amendment of the solicitation allowing the contracting officer to “adjust” the stated delivery dates did not remedy that defect in the solicitation, because the language did not give the Postal Service any right it did not already have under the Changes clause at H.8 of the

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our Office, and without seeking a debriefing or requesting procurement information from the Air Force. *It is clear that South Bend either knew the basis of its protest at the time of award and did not file its protest within 10 days thereafter or failed to diligently pursue the matter within a reasonable time after the award announcement.*

*South Bend Lathe, Inc.*, Comp. Gen. Dec. B-216356, September 24, 1984, 84-2 CPD ¶ 343 (emphasis added).

<sup>20</sup> Alternatively, the solicitation, which was structured in many respects like a transportation services contract, might have included a description of the commencement of the contract term which related to the date of contract award. For example, in *Lyndon Transport, Inc.*, P.S. Protest No. 91-85, February 7, 1992, the solicitation provided:

11. Term of the Contract:

A Contract will be awarded for a term beginning on 19-OCT-91, or a subsequent date as ordered by the contracting officer and ending on 30-JUN-95. The contract will be awarded not less than ten (10) days prior to the term beginning date as stated above.

The similar provision in the solicitation involved in the more recent decision, *Jody Whilden Blumenfeld*, P.S. Protest No. 00-27, January 8, 2001, (not recited in the decision’s text) provided:

10. Term of the Contract:

The contract will be awarded not less than 2 days prior to the term beginning date as stated below, or subsequent date as ordered by the contracting officer.

Contract Term: October 14, 2000 to June 30, 2004

Either formulation accomplishes the same purpose as Provision 2-2, which requires that when, as here, delivery dates are expressed in terms of specific calendar dates, an assumed date of contract award will be included in the solicitation and the Time of Delivery provision will provide that “[e]ach delivery date in the delivery schedule will be extended by the number of calendar days after the above [assumed delivery] date that the contract is in fact awarded.”

solicitation,<sup>21</sup> nor was there any indication that the adjustment was intended to relate to any change in the anticipated date of award.

The protest is dismissed.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

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<sup>21</sup> Among the allowed changes were “changes . . . in . . . [the d]elivery and performance schedule.”