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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209386 **DATE:** March 14, 1983

MATTER OF: Drinkwater Engineering, Inc.

DIGEST:

Untimely protest sent by certified mail less than 5 working days prior to the final date specified for filing a protest with GAO will not be considered on the merits.

Drinkwater Engineering, Inc. (Drinkwater) protests the award of a contract to Timberland-McCullough, Inc., under request for proposals (RFP) No. R6-3-82-92n issued by the Forest Service, Department of Agriculture.

We dismiss the protest as untimely.

The RFP solicited offers for preliminary line surveys in the Gifford Pinchot National Forest, Washington. By letter dated September 13, 1982, the Forest Service notified Drinkwater that the contract had been awarded to Timberland-McCullough for $27,000. Attached to the letter was a copy of the "Price and Proposal Evaluation Summary Sheet." This attachment informed Drinkwater that it had received only 29 out of a possible 100 technical points and that its proposal had been found to be technically unacceptable. The summary sheet also informed Drinkwater that it had offered the lowest price ($22,957.60).

Drinkwater received the Forest Service letter on Saturday, September 18, 1982. On Monday, September 20, Drinkwater telephoned the contracting officer for an explanation of why it had received a low technical score. According to Drinkwater, it was told that it had not been awarded any points under the evaluation criteria for the professional supervisor's qualifications and experience or the qualifications and experience of the party chief. Moreover, Drinkwater was told that the Forest Service had reduced its point score because Drinkwater's example of previous work (submitted with the proposal) had not been found similar in nature to the proposed project. The contracting officer also indicated that Drinkwater's proposal contained other deficiencies.

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Drinkwater immediately filed a formal Freedom of Information Act (FOIA) request with the contracting officer, requesting "copies of evaluation materials that were used to determine that our firm was technically unqualified for the subject survey." By letter dated September 23, 1982, the contracting officer answered Drinkwater's FOIA request by sending the protester a copy of its original offer. In Drinkwater's opinion, this did not respond to its request. Drinkwater therefore renewed its FOIA request and at the same time filed a protest with our Office, arguing that the Forest Service technical evaluation was incorrect and indicating that as the low offeror, it should have received the award. Drinkwater's protest letter was sent by certified mail, postmarked September 28, 1982. Our Office received the letter on October 6, 1982.

In its report to our Office, the Forest Service argues that Drinkwater knew its basis for protest on Saturday, September 18, 1982, when it received the agency's September 13 letter. Since our Bid Protest Procedures require a protest to be filed in our Office not later than 10 working days after the basis for protest is known, the Forest Service maintains that Drinkwater's October 6 protest is untimely and should be dismissed.

In rebuttal, Drinkwater argues that its protest is timely. According to Drinkwater, it mailed the protest letter only 1 working day after it received the Forest Service response to its first FOIA request. Even then, Drinkwater argues it did not know all the specifics of why its proposal had been rejected. It was not until the Forest Service responded to its second FOIA request that Drinkwater believes it had sufficient information to spell out fully the basis for protest. Drinkwater maintains, therefore, that its protest cannot be considered to have been fully formulated until it was able to amplify its original protest letter by the second letter to our Office dated October 13, 1982--a letter which was based on information obtained through Drinkwater's second FOIA request. Thus, in Drinkwater's opinion, its October 6 protest was timely and should be considered on the merits.

We do not agree. Under our Bid Protest Procedures, a protest such as Drinkwater's must be filed (received) in our Office not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1982). We have recognized, however, that a protest filed within 10 days of receipt of

FOIA material and which is based entirely upon that information is timely filed under our Bid Protest Procedures. See Pacificon Productions, Inc., B-196371, July 22, 1980, 80-2 CPD 58.

In our opinion, Drinkwater received sufficient information through the Forest Service September 13 letter and the telephone conversation of September 20 to learn the basis for protest. While Drinkwater may have believed that it needed more details, its protest was not based entirely on the FOIA information it received. Rather, this information merely expanded and clarified the general details Drinkwater already possessed. In this connection, we have held that, where a protester is on notice of a ground for protest, it may not toll the timeliness requirements merely because of an erroneous belief that it needs to obtain additional information under FOIA. Integrity Management International, Inc., B-206450, August 3, 1982, 82-2 CPD 104.

Based on the foregoing, Drinkwater had 10 working days from September 20, 1982, to file a timely protest with our Office. This means that we should have received Drinkwater's protest by October 4, 1982. Since we, in fact, received Drinkwater's protest on October 6, under the general rule, Drinkwater's protest is untimely.

However, as noted above, Drinkwater sent its protest letter by certified mail. Under our Bid Protest Procedures, if a protest is received after the time limits prescribed, it may be considered if it was sent by registered or certified mail not later than the fifth working day prior to the final date specified for filing a protest. 4 C.F.R. § 21.2(b)(3). Since October 4, 1982, was the deadline for filing the protest, the fifth day prior to that date was September 27, 1982. As noted above, the postmark on Drinkwater's certified letter was September 28. Thus, even under this rule, Drinkwater's protest is untimely and, therefore, will not be considered on the merits.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel