

DECISION

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

FILE: B-211686**DATE:** June 8, 1983**MATTER OF:** John H. Green and Associates, Inc.**DIGEST:**

It is not clear that protest against alleged improprieties was timely filed with the procuring agency prior to bid opening. Even if protest was timely filed with procuring agency prior to bid opening, protest to GAO is untimely and not for consideration since it was filed more than 10 days after contracting agency opened bids. Moreover, letter allegedly sent to GAO, but never received in our Office, cannot be considered "filed" for timeliness purposes.

John H. Green and Associates, Inc. (Green), protests the award of a contract for containerized seedlings by the Department of Agriculture, Forest Service (USDA), under invitation for bids (IFB) No. R1-83-10. Green alleges that a provision in the solicitation which categorizes the contract as a service contract is unduly restrictive.

The protest is dismissed.

Green states that letters dated February 25, 1983, protesting the inclusion of the above provision, were mailed to both the procuring activity and to this Office. The procuring activity informally has advised us that it received Green's letter on February 28, 1983. The first correspondence from Green concerning this matter was received in our Office on May 3, 1983. This submission indicates that Green had sent our Office a letter on February 25, 1983, but had received no acknowledgment from us. In fact, the original of the February 25, 1983, letter from Green was never received by our Office.

Section 21.2 of our Bid Protest Procedures, 4 C.F.R. part 21 (1983), provides, in pertinent part, as follows:

"(a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting

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Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered. * * *

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. * * *

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"(3) The term 'filed' * * * means receipt in the contracting agency or in the General Accounting Office as the case may be. * * *

The procuring activity has advised us that bid opening was on February 28, 1983, at 3:00 p.m.

It is not clear whether Green's protest was received by the Forest Service prior to 3 p.m. on February 28. However, even if Green filed a protest with the Forest Service prior to bid opening, the agency's opening of bids on February 28 constituted initial adverse agency action which, in effect, denied Green's protest. Under our Procedures, noted above, Green, thus, was required to file its protest with this Office within 10 working days. Bilsom International, Inc., B-203523, March 8, 1982, 82-1 CPD 206.

However, since we never received the February 25 letter from Green, Green's protest must be considered to have been filed upon receipt of the submission received by our Office on May 3. See Envirotronics, B-202094.2, June 10, 1981, 81-1 CPD 477. Protesters are specifically advised in our Bid Protest Procedures, at 4 C.F.R. § 21.2(b)(3), to transmit protests in the manner which will assure the earliest receipt by our Office. Consequently, except where the protest "was sent by registered or certified mail not later than the fifth day, or by mailgram not later than the third day, prior to the final date for filing a protest" (4 C.F.R. § 21.2(b)(3)), a protester makes use of regular mail at his own risk. A delay or loss in the mails will not

serve as a basis for considering an untimely filed protest. See *Envirotronics*, supra. Thus, Green's protest to this Office is untimely.

for *F. A. Bowley, Jr.*
Harry R. Van Cleve
Acting General Counsel