

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

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FILE:B-212889**DATE:** September 26, 1983**MATTER OF:** Western Technologies, Inc.**DIGEST:**

Protest that a procurement was improperly considered as one for Architect-Engineering services rather than for laboratory testing services filed more than 10 days after the basis for protest is known or should have been known is untimely and will not be considered on the merits.

Western Technologies, Inc. (Western) protests the use of the Architect-Engineer (A-E) small business size standard for eligibility under Veterans Administration Medical Center, Albuquerque, New Mexico, project No. 501-051. Western asserts that the project only required laboratory testing, not A-E, services, and that the use of the A-E size standard was inappropriate. We dismiss the protest as untimely.

The project was synopsized in the Commerce Business Daily on May 27, 1983, under section R of that publication-- A-E services. The CBD notice set forth the requirements of a proposed contract for earthwork, field density and structural testing at the construction site for a new VA medical facility, and limited competition to small business testing laboratories within the State of New Mexico whose principals were registered professional engineers. The notice requested interested firms to submit standard forms (SF) 254 and 255 to the VA and indicated that award would be based on "evaluations including recent specialized experience; professional capacity to accomplish the work; professional qualifications of the staff * * * and testing facilities and equipment." In response to the CBD notice, Western submitted the forms indicating its interest in the proposed contract.

SF 254 is a general A-E questionnaire used to determine the qualifications of an A-E firm to be considered for the award of professional A-E contracts pursuant to the procedures specified in the Brooks Act, 41 U.S.C. § 541, et seq. SF 255 is a supplemental form used to determine the

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applicant's qualifications for the award of a specific A-E project. Both indicate that they will be used to select A-E firms for discussions leading to the award of an A-E contract. A-E contracts are awarded on the basis of professional competence and qualifications; the award procedures do not include price competition. Association of Soil and Foundation Engineers, B-208925, January 4, 1983, 83-1 CPD 8. As of May 27, 1983, then, Western was on notice that it was the VA's intention to award an A-E contract for the services required. Western subsequently received a copy of the project specifications and submitted a proposed fee at the agency's request, along with a SF 129, a form that contains data which among other things shows the average annual receipts for the preceding 3 fiscal years and the firm's average number of employees for the prior year.

On August 1, the VA contracting officer communicated to Western her belief that the firm was eligible for the award of the proposed contract as a small business under the size standard for testing laboratories set forth in 13 C.F.R. § 121.3-8(d) (1983). Under that section, a concern bidding on a testing contract is deemed small if its average number of employees does not exceed 500 -- the average number of Western employees for the preceding 4 calendar quarters was 235.

Shortly thereafter, however, the contracting officer informed Western that it would not be eligible for the project because it did not meet the size standard for small business A-E concerns. Under Federal Procurement Regulations (FPR) § 1-1.701-1(b)(2), any concern bidding on a contract for engineering services (other than marine) is classified as small if its average annual receipts for the preceding 3 fiscal years do not exceed \$7.5 million. Here, Western's data revealed annual receipts in excess of \$8 million.

Western now protests that the services being procured were solely laboratory testing services and that the use of A-E criteria to determine eligibility for the project was therefore inappropriate. Western asserts that since neither the CBD notice nor the issued project specifications mentioned engineering services, this circumstance outweighs the fact that the project notice was placed in the A-E section of the CBD publication and required that principals of testing laboratories be registered professional engineers.

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Thus, the thrust of the protest is that the VA could not use A-E size standard criteria to determine eligibility because the VA's original categorization of the procurement as one for A-E services was improper. We will not consider the issue as the protest is untimely.

Our Bid Protest Procedures provide that protests alleging other than solicitation deficiencies shall be filed (received) not later than 10 days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.1(b)(2) (1983). In our view, the firm knew, or should have known, that the VA had originally categorized the procurement as one for A-E services by publication of its notice in the May 27 CBD.

Western certainly became aware of what it now believes is an inappropriate A-E procurement by the time it received a copy of the project specifications, yet it participated in the procurement and submitted its proposed fee and the SF 129 without objection. While it is not precisely clear when Western received the project specifications, they appear to have been received some time prior to August 1, 1983.

Western's protest was not filed until August 30, well after the 10 working day period. Therefore, the firm's present allegation that the use of A-E criteria was improper is clearly untimely and will not be considered. See Harter Corporation, B-210927.2, June 21, 1983, 83-2 CPD 13.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel