



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Empire State Medical Scientific and Educational  
Foundation, Inc.

**File:** B-238012.2

**Date:** March 9, 1990

Gerald H. Werfel, Esq. and Bruce J. Moldow, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.  
James F. Trickett, Office of the Secretary, Department of Health and Human Services, for the agency.  
M. Penny Ahearn, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest filed with General Accounting Office more than 10 working days after the protester should have been on notice of the basis of its protest from an oral debriefing is dismissed as untimely, since the 10-day protest filing period is not extended to allow the protester to wait for receipt of written notification confirming the basis for protest.

### DECISION

The Empire State Medical Scientific and Educational Foundation, Inc. (the Foundation), the incumbent contractor, protests the evaluation and rejection of its proposal submitted under request for proposals (RFP) No. HCFA-89-076/PG, issued by the Department of Health and Human Services (HHS) for medical peer review services. The protester disagrees with the agency's evaluation of deficiencies in the firm's proposal.

We dismiss the protest.

HHS awarded a contract under the solicitation to the Island Peer Review Organization on November 30, 1989, and orally notified the protester of its action on that same date. The award decision was based on the technical superiority and substantially lower price offered by the awardee.

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An oral debriefing with the Foundation was then held by the agency on December 7, during which the chairman of the technical evaluation panel read a 3-page, single-spaced statement consisting of the relative strengths of the awardee's proposal and the weaknesses of the protester's proposal. Based on the information provided to the protester at the debriefing, the firm filed a protest (B-238012) with our Office on December 11, alleging that the agency had improperly evaluated the awardee's proposal. At a conference held in our Office on January 25, 1990, concerning that protest, the protester for the first time orally asserted its disagreement with the evaluation of its own proposal, based on its January 18 receipt of a written copy of the debriefing statement as part of the agency report on the firm's protest. The Foundation then filed a second protest with our Office (at issue here) on February 1, 37 working days after the debriefing, alleging that the agency had improperly evaluated the firm's own proposal and raising the possibility that the evaluation was unfair because of the role of the technical evaluation chairman.

HHS contends that this new protest is untimely because it was filed more than 10 working days after the debriefing. The protester disagrees and maintains that the calculation of the time for filing its protest should start only upon its receipt of the written debriefing statement. In this regard, the protester complains that because at the debriefing the agency representative read rapidly through a lengthy statement, the firm was unable to take adequate notes and thus was left without specific knowledge of a basis for protesting the evaluation of its own proposal. Thus, according to the protester, it was justified in waiting until receipt of the written debriefing statement before filing its protest, when it became clear that a basis for protest existed.

HHS disputes the characterization of the debriefing as cursory; according to the agency, the debriefing was thorough, lasting 1-1/2 hours. Further, the chairman of the technical evaluation panel has submitted an affidavit stating that the debriefing statement was read at a normal speed; the protester's attending representatives took notes and were given an opportunity to ask questions; and, finally, the debriefing was concluded only when the protester's representatives stated that they had no further questions.

Our Bid Protest Regulations provide that a protest, to be timely, must be filed in our Office no later than

10 working days after the basis of the protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a) (1989). Generally, a protester is charged with knowledge of a basis of protest if 1) the protester's interests are threatened, and 2) the agency conveys to the protester a position adverse to the protester's interest. See Storage Technology Corp., B-194549, May 9, 1980, 80-1 CPD ¶ 333. A protest based upon information provided to the protester at a debriefing conference normally is untimely when the protest is filed more than 10 working days after the conference. See Systems Eng'g Assocs. Corp., B-231597, Oct. 4, 1988, 88-2 CPD ¶ 315. Also, when a debriefing provides the basis for the protest, the 10-day filing requirement does not allow a protester 10 days from the date of its receipt of written confirmation of the information furnished it through the debriefing. See FLS, Inc., B-212066, July 21, 1983, 83-2 CPD ¶ 109; see also Service Enters., Inc., B-190410, Apr. 4, 1978, 78-1 CPD ¶ 266.

We find that the protester should have been aware of the basis of its protest of the evaluation of its proposal from the information conveyed at the oral debriefing. While the Foundation contends that the debriefing was an equivocal notification that left the firm without specific knowledge of the basis for its protest, it is undisputed that the firm was read the evaluated deficiencies in its proposal at the debriefing, that the debriefing lasted 1-1/2 hours, and that the Foundation took notes and asked questions. Given these circumstances, even if the statement was read quickly, as the protester alleges (and the agency disputes), assuming reasonable attentiveness to the agency's presentation, we see no reason why this oral notification of the firm's evaluated proposal deficiencies should not have been sufficient to put the protester on notice, at a minimum, that its interests were threatened and that the agency's position regarding the merits of various aspects of its proposal was contrary to the protester's. While it may be that without a written copy of the deficiencies the protester was unable to formulate a detailed response to each of the deficiencies, such a detailed response was not required in order to file the protest. Our Regulations provide ample opportunity for the protester to respond to the agency's position; however, as an initial matter it was important for the protester to timely file a protest once it learned that its proposal was evaluated as deficient. See C-Tech, Inc., E-207145, Apr. 28, 1982, 82-1 CPD ¶ 400.

We conclude that the Foundation was on notice of the grounds for its protest here based on oral notification at the debriefing of the deficiencies in its proposal. Accordingly, this protest was required to be filed within

10 working days of the debriefing. As the Foundation waited 37 working days, until receipt of the written statement which merely confirmed the basis for protest, this aspect of the protest is untimely and will not be considered.

With regard to the allegation of unfairness, the Foundation contends that the agency's evaluation of its proposal may have reflected bias against the firm because the chairman of the evaluation panel was responsible for the decision not to renew the Foundation's incumbent contract due to a finding of unacceptable performance. In this respect, the protester states that under the statute establishing peer review, "there is a presumption" that the incumbent contract will be renewed unless the contractor's performance has been unacceptable. The protester further states that the agency had decided not to renew its contract based on an evaluation conducted by the same person who then chaired the evaluation panel.

The record contains a sworn statement by the chairman stating that he was a non-voting member of the technical evaluation panel with a role limited to coordination of the panel's activities; he was not involved in the evaluation itself. While this, of course, does not mean that the chairman, who is the project officer for this contract, could not have influenced the individual evaluators, see, e.g., 52 Comp. Gen. 718 (1973), we are not inclined to view the protester's speculation concerning the effect of the chairman's involvement in the decision not to renew the Foundation's contract as satisfying the heavy evidentiary burden needed to establish bias. See H. David Feltoon, B-232418, Jan. 5, 1989, 89-1 CPD ¶ 10.

The protest is dismissed.

  
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Associate General Counsel