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**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Pentec Environmental, Inc.

**File:** B-276874.2

**Date:** June 2, 1997

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Marvin L. Gray, Jr., Esq., and John H. Parnass, Esq., Davis Wright Tremaine LLP, for the protester.

Mark Langstein, Esq., Department of Commerce, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Where a protest is based upon information obtained during a debriefing held more than 1 month after the agency first offered to debrief the protester and the 1-month delay in conducting the debriefing was attributable solely to the protester's repeated requests that the debriefing be delayed so that the protester could obtain and evaluate information under the Freedom of Information Act and so that the protester's employee could attend an unrelated business conference and take a vacation, the protester did not diligently pursue its basis for protest because it could have received the same information forming the basis for protest if it had accepted the agency's offer to conduct the debriefing 1 month earlier.

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### **DECISION**

Pentec Environmental, Inc. protests the Department of Commerce's award of a contract to Marine Research Specialists (MRS) for a follow-on contract to continue studying the biological impact of the 1989 Exxon Valdez oil spill and subsequent cleanup efforts pursuant to solicitation No. 50ABNC700012. Pentec protests that MRS' proposal is nonresponsive to a material term of the solicitation and that the agency improperly evaluated Pentec's proposal.

We dismiss the protest.

Pentec initially alleged that MRS' proposal was nonresponsive in a protest it filed in our Office on April 28, 1997. In that protest Pentec stated that it first became aware of its protest ground on April 14, when it received portions of MRS' proposal from the agency in response to a Freedom of Information Act (FOIA) request. We dismissed Pentec's initial protest on April 30 as untimely under section 21.2(a)(2) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997), which requires that a protest of other than an apparent impropriety in a solicitation be filed not later than

10 calendar days after the basis of protest is known to the protester, because Pentec did not file its protest in our Office until the 14th day after Pentec knew its protest basis.

Pentec does not argue that we improperly dismissed its initial protest as untimely. Instead, Pentec asserts that its initial untimely protest became timely because, on April 28, subsequent to the filing of the initial protest, the agency provided Pentec a debriefing and Pentec refiled its initial protest allegation in a timely manner as part of the current protest (filed in our Office on May 7, 1997) in accord with section 21.2(a)(2) of our Regulations (i.e., within 10 days of the debriefing).<sup>1</sup>

Pentec's initial protest letter mentioned that Pentec expected to be debriefed by the agency on April 28, but contained no detail indicating when the protester requested the debriefing, whether the debriefing was a "required" debriefing,<sup>2</sup> or why the anticipated debriefing was scheduled to take place more than 1 month after Pentec was notified of the award to MRS.<sup>3</sup> If we had been able to determine that Pentec requested its debriefing in a timely manner and that the agency had first offered to debrief Pentec on April 28, we would have dismissed Pentec's initial protest as premature. (Our Office will not consider a protest challenging a procurement conducted on the basis of competitive proposals where a debriefing is requested

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<sup>1</sup>Pentec's current protest repeats verbatim the initial protest allegation that MRS' proposal was nonresponsive and also alleges for the first time that the agency improperly downgraded its proposal in several different categories because the evaluators deemed its statistical support as inferior to MRS'.

<sup>2</sup>Where an unsuccessful offeror requests a debriefing within 3 days after receiving notification of award, the agency is required to debrief the unsuccessful offeror "within, to the maximum extent practicable, 5 days after receipt of the request." 41 U.S.C. § 253b(e) (1994). Under our Regulations, where a debriefing is timely requested and, therefore, is required, a protester is allowed 10 calendar days after the date of the required debriefing to file its protest even though the protester may have known its basis of protest before the debriefing was held. 4 C.F.R. § 21.2(a)(2).

<sup>3</sup>In response to our request, the agency provided a number of documents (i.e., letters and notes of telephone conversations) that were created during the period between the notification of award and the debriefing. The contemporaneous documents show that the agency offered to debrief Pentec as early as March 27, but that Pentec repeatedly requested that the debriefing be delayed so that Pentec could (1) obtain and review MRS' proposal and the agency's evaluation of it under the FOIA; (2) Pentec's vice president/senior biologist could attend an unrelated business conference; and (3) Pentec's vice president/senior biologist could take a vacation.

and required, if the protest is filed before the debriefing date offered to the protester (even if the protest basis is known to the protester before the debriefing). The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.) However, because Pentec's initial protest contained no detailed information from which we could determine whether the debriefing was in fact a required debriefing, we concluded that Pentec's initial protest, which specifically stated that the protest was filed more than 10 days after the protester learned the basis for protest, was untimely.

Pentec's effort to reinstate its initial protest through its current protest must fail because we consider the current protest also to be untimely.<sup>4</sup> Pentec states that the information upon which the current protest is based was learned by Pentec during the April 28 debriefing. However, as noted above, the record shows that the agency offered to debrief Pentec as early as March 27 and that the debriefing was delayed more than 1 month to accommodate Pentec's repeated requests that the debriefing be delayed so that Pentec could obtain and review information under the FOIA and so that a Pentec employee could attend an unrelated business conference and take a vacation. Thus, Pentec could have obtained the information which formed the basis for its current protest more than 1 month earlier simply by allowing the agency to debrief it at the earlier offered date. Instead, Pentec chose to delay the debriefing in order to pursue additional information under the FOIA and for reasons unrelated to the protest. A protester's failure to utilize the most expeditious approach to obtain the information that ultimately forms its basis for protest constitutes a failure to diligently pursue that information; to consider such a protest would be inconsistent with our goal of resolving protests expeditiously without unduly disrupting or delaying the agency's procurement process. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2 for a discussion of a protester's obligation to diligently pursue information that may form its basis for protest through the debriefing process.

The protest is dismissed.

Comptroller General  
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<sup>4</sup>We therefore need not decide whether an initial protest dismissed under these circumstances can be revived based upon a subsequently provided debriefing.